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CASES ARGUED AND DETERMINED

IN THE

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

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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 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.....Brattleboro, Vt.

THIRD CIRCUIT.

Hon. WILLIAM H. MOODY, Circuit Justice.....Washington, D. C.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburgh, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. WILLIAM M. LANNING, District Judge, New Jersey.....Trenton, N. J.

[1] Resigned January 1, 1907.

[2] Appointed to succeed Edward B. Thomas.

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.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
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Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
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. EUGENE D. SAUNDERS, District Judge, E. D. Louisiana [4].....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. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
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 [5].....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] Appointed February 20, 1907, to succeed Judge Parlange.
[5] Died December 22, 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.
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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. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
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.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

* Resigned March 31, 1907.

CASES REPORTED.

CASES ON REHEARING.

CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED.

†

CASES

ARGUED AND DETERMINED

IN THE

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

ROGERS et al. v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court of Appeals, Third Circuit. November 30, 1906.)

No. 32.

1. PLEADING—MATTERS OF FACT OR CONCLUSIONS—ALLEGATIONS OF AUTHORITY OF AGENT.

In an action against a corporation for fraud arising out of transactions between plaintiffs and an individual, allegations in the declaration that all of such person's negotiations, contracts, transactions and acts complained of were carried on, executed, performed, and done by him in pursuance of authority conferred on him by defendant, as its agent, and with its knowledge and consent in furtherance of a fraudulent scheme of defendant, are sufficient on demurrer to charge defendants with responsibility for such acts, without setting out evidence of such person's authority or agency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 26.]

2. FRAUD—PLEADING—ALLEGATIONS OF DAMAGE.

The declaration in an action for fraud and deceit alleged that plaintiffs held options for the purchase of phosphate lands and phosphate deposits which were worth $150,000, and that defendant, in pursuance of a fraudulent scheme to prevent plaintiffs from selling the options to others, and to the end that they might expire and enable it to purchase the property from the owners, by means of false and fraudulent representations of its desire and intention to purchase the options, induced plaintiffs to enter into a contract giving it the exclusive right to do so for a stated time, whereby plaintiffs were prevented from selling the options to others, by which sale they would have received a profit of $150,000, and were deprived of their rights thereunder, to their damage in the sum of $150,000. *Held*, that such declaration was sufficient on demurrer to show that plaintiffs were damaged by the alleged fraud, and that it was unnecessary to allege that they could and would have sold the options to others and derived a profit therefrom.

3. SAME—GROUNDS OF ACTION—FALSE REPRESENTATION AS TO INTENT.

There is a prima facie presumption of fairness and honesty in the dealings of mankind, and where one man makes a promise to another as an inducement for a change of position on the part of the latter he impliedly, if not expressly, avers that he has an existing intent to fulfill his promise, and such implied averment of an existing intent is of matter of fact, and, if false and fraudulent, is a fraudulent representation, which

may, if acted on, furnish the basis for an action ex delicto in the nature of deceit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 14.]

4. SAME.

The declaration in an action for fraud and deceit construed on demurrer, and *held* to state a cause of action.

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

Horace L. Cheyney, for plaintiffs in error.

Frederic J. Faulks, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This writ of error was taken by George H. Rogers and John G. Gray to reverse a judgment of the circuit court of the United States for the district of New Jersey on a demurrer to an amended declaration in an action brought by them against the Virginia-Carolina Chemical Company. The declaration is in case for an alleged tort. It alleges in substance, among other things, that the plaintiffs in 1901 "by the outlay of large sums of money and after great labor procured options for the purchase of certain lands, containing deposits of phosphate rock, and for the purchase of phosphate rock deposited upon certain other lands situate in the State of Tennessee"; that the options were all obtained in June, 1901, and "by the terms thereof remained in force for periods of from 60 to 100 days, with provision for extension thereof for such further time as might be necessary to complete the examination of the properties and consummate the transaction, provided the periods of time mentioned in said options should be insufficient to complete the investigation of said properties in Tennessee upon which the plaintiffs held similar options"; that "the property covered by said options contained some of the richest deposits of phosphate rock in the Tennessee phosphate fields"; that the options were worth $150,000; that "after said options were obtained, the plaintiffs entered into negotiations for the sale of the same and of the rights conveyed thereunder, with the officers of several railroads whose lines ran through said phosphate fields or could be extended thereto, and with other persons likely to purchase the same"; that among the other persons to whom the options were offered for sale was one of the directors of the defendant; that after several interviews with that director the latter referred the plaintiffs to Charles S. Bryan, a broker of New York, "for the purpose of enabling the said Bryan to thereafter carry on and complete the negotiations for the purchase of said properties and rights covered by the said options on behalf of the party represented by the said director"; that Bryan during all of the negotiations and transactions thereafter mentioned in the declaration was the agent of the defendant, authorized and empowered by it to negotiate "for the purchase of the rights of the plaintiffs under said options and to enter into all agreements and to do all things that might be necessary for that purpose, and all of the negotiations, contracts, transactions and acts" of Bryan thereafter re-

ferred to in the declaration were "carried on, executed, performed and done by him in pursuance of said authority and as agent for and on behalf of" the defendant, and "with its knowledge and consent"; that thereafter further negotiations were carried on between the plaintiffs and Bryan and a contract was entered into July 30, 1901, between the plaintiffs and Bryan, a copy of which was attached to the declaration, marked Exhibit A and made part thereof, whereby it was agreed, among other things, that Bryan "should examine the lands mentioned in said options with engineers and experts, to estimate to his satisfaction the quantity and quality of the phosphate rock thereon with a view to purchasing said lands, properties and mining rights, and that in no event should the said plaintiffs exercise any of the options for the purchase of properties mentioned in any of the schedules attached to said contract within ninety days from the date thereof, except with the consent of said Bryan"; that the contract also provided that, "if the said plaintiffs should at any time prior to January 1st, 1902, acquire any options of any other property they would execute with Bryan a similar agreement with respect to such properties"; that the contract also provided that upon the completion of the purchase of any of the lands covered by the options by Bryan, either directly from the owners of the property or by an assignment of the options from the plaintiffs, the latter should receive as commissions from Bryan certain rates or amounts per ton, as therein provided, on all phosphate rock on the property purchased as the same should be estimated by the engineers of Bryan; that prior to the execution of the contract of July 30, 1901, Bryan, acting as agent for and on behalf of the defendant, in order to secure the execution of that contract by the plaintiffs, and for the purpose of securing control over the options for the defendant until the expiration of the same and for the purpose of preventing the plaintiffs from offering the said options to persons other than the defendant, falsely and fraudulently and with intent to deceive the plaintiffs represented to them that, if they would execute the contract, then Bryan "as agent of the defendant would purchase the said lands and mining rights covered by said options, if the examination of said properties by his engineers should show that the said lands contained valuable deposits of phosphate rock, and would pay to the plaintiffs the commissions upon the purchase price thereof as set forth in said contract, if any of said properties should be purchased by said defendant company either directly or indirectly, and the plaintiffs relying upon the said representations of the said Bryan executed the said contract"; that "thereafter in accordance with the said agreement an examination was made of the properties covered by said options by the engineer of the said defendant company, and by its instructions, and said engineer by his report estimated the amount of phosphate rock deposited upon" certain lands mentioned in the declaration at 1,161,055 tons; that the estimate of the engineer as reported by him as to these lands was "not a true report of the amount of phosphate rock thereon and was made by said engineer in bad faith, and that according to the actual surveys and examination of said engineer and a proper estimate based thereon" the amount of phosphate rock thereon was 1,310,497 tons; that "the said surveys and examination showed

that the said lands contained valuable deposits of phosphate rock and said lands actually contained deposits of phosphate rock of great value"; that thereafter, October 25, 1901, Bryan acting for and on behalf of the defendant notified the plaintiffs that he did not care to purchase any of the properties mentioned in the contract of July 30, 1901; that "it was then impossible for the plaintiffs to renew said options"; that the defendant in advising the plaintiffs through Bryan that it did not care to purchase any of the properties covered by the options under the contract of July 30, 1901, did not act in good faith, but "knowing that the said options held by the plaintiffs would expire at once upon the refusal of the defendant to complete the purchase of said properties and that it would be impossible for the plaintiffs to renew such options", in bad faith declined to make said purchases, "and with the intention to deprive and defraud the plaintiffs of their commissions upon the purchase price of said properties under said contract and of their rights under said options, and with the purpose and intention of negotiating directly with the owners of said properties for the purchase thereof after the expiration of the options held by the plaintiffs"; that thereafter the defendant by its officers and agents entered into negotiations for the purchase of the properties theretofore mentioned in the declaration, excepting the Lockridge property which had already been purchased by it, upon the basis of the investigation and examination made by its engineer under the contract of July 30, 1901, and thereafter purchased a number of them, specified in the declaration; that "if the defendant had acted in good faith with the plaintiffs under said contract, in purchasing said properties and mining rights, the plaintiffs would have received as compensation or commission the sum of $91,734.99 upon the purchase of the properties of the International Phosphate Company, the Howard Phosphate Company and the Ridley Phosphate Company, being seven cents per ton upon 1,310,497 tons of phosphate rock contained in said properties, and the said plaintiffs would also have received the sum of $2,700 commission upon the sale of the said Lockridge property, being seven and one-half per cent. upon the purchase price of $36,000, and the plaintiffs would also have received the sum of $3,525, being commission at the rate of seven and one-half per cent. upon $47,000, the purchase price of the said Harlan property, a total of $97,959.99"; that "the fraudulent acts and misrepresentations of the defendant company and of the said Bryan, its agent, heretofore fully set forth, deprived the plaintiffs of their rights under said options of a value of $150,000, and prevented the plaintiffs from selling to persons other than the defendant the properties and mining rights hereinbefore particularly mentioned and the other properties set forth in the schedules A, B and C attached to said contract marked Exhibit 'A,' and that if the same had been sold by the plaintiffs to persons other than the defendant, they would have received a profit of $150,000 and upwards"; that "the defendant in all of the acts, negotiations, transactions and representations heretofore mentioned, done, conducted, carried on, executed and made by it and by its agent, the said Bryan, on its behalf, with the plaintiffs, did not act in good faith with the plaintiffs, but that the said acts, negotiations, contracts, transactions and representations were done, conducted, car-

ried on, executed and made in furtherance of a fraudulent scheme of the said defendant company to obtain control of the said options held by the plaintiffs during the entire existence of the same, to prevent the plaintiffs from negotiating and selling their rights under said options and the said properties and mining rights to persons other than the defendant, and to enable defendant to purchase said lands and mining rights directly from the owners thereof after the expiration of said options, without paying any commissions to the plaintiffs upon the purchase price of the said properties and rights covered by the said options as provided for in the contract heretofore mentioned, executed on July 30th, 1901, and that in consequence of said fraudulent scheme and of the fraudulent acts and misrepresentations of the defendant and its agents made in furtherance thereof and for the purpose of carrying out said fraudulent scheme, the plaintiffs have been damaged in the sum of one hundred and fifty thousand dollars ($150,000), wherefore they bring their suit." The agreement of July 30, 1901, as shown in Exhibit A attached to and made a part of the declaration is as follows:

"Exhibit 'A.'

Agreement made and entered into this 30th day of July, 1901, by and between George H. Rogers and John G. Gray, parties of the first part, hereinafter called Rogers and Gray, and Chas. T. Bryan, party of the second part, hereinafter called Bryan. Whereas, Rogers and Gray are the owners of certain options on phosphate lands, plants and property described in schedules 'A' and 'B' hereunto annexed, and also own or control options on certain phosphate lands in Maury, Hickman and Lewis Counties in the State of Tennessee, described in schedule 'C' hereunto annexed, and whereas Bryan is desirous of examining said lands with engineers and experts to estimate to his satisfaction the quality or value of the phosphate rock thereon and the property included in said options with a view of determining if he will purchase such lands and properties or any of them. Now it is agreed by and between the parties hereto in consideration of the promises herein made the one to the other as follows:

1st. Rogers and Gray agree they will afford to Bryan and his engineers and experts every opportunity that it may be possible for them to afford or reasonably obtain to make a full examination of all the properties covered by said options as said Bryan shall desire, and that in no event shall Rogers and Gray exercise any of the options mentioned in any of the schedules hereunto annexed within ninety days from date hereof, except such options covering properties as Bryan may before the expiration of ninety days notify them that he does not care either to attempt to negotiate the purchase of directly or take under any Rogers and Gray option covering the same.

(2) Second. That if at any time hereafter the said Bryan shall agree with the owner or owners of any one or more of the properties covered by said options to purchase any of the properties referred to therein either directly or indirectly, Rogers and Gray agree that in such event on request of Bryan they will release such owner or owners of said property from any obligation to them whatsoever arising by reason of said Rogers and Gray having from such owner or owners an option on that parcel of property. Upon the completion of the purchase of any parcel of property covered by any of said options Bryan shall pay to Rogers and Gray a sum which shall be equal to seven (7) cents per ton on all phosphate rock on said property purchased as the same shall be estimated to exist thereon by Bryan's engineers, provided said property shall be one of those enumerated in schedule 'A,' and if such property be one of those specified in 'B' or 'C' the said Bryan shall pay to Rogers and Gray (7½) seven and one-half per cent. on such price as Bryan may agree to pay to the owners thereof, and it is agreed by the said Bryan that he will not take any options upon or purchase or become interested directly or indirectly in any phosphate lands whatsoever within the State of Tennessee before De-

cember 31st, 1901, other than those which he may elect to purchase under this agreement, or such as may before such date be submitted by said Rogers and Gray or on which they shall receive such compensation and commissions. And said Bryan further agrees that he will by competent engineer or engineers selected by him investigate each of the properties referred to in said options with all reasonable diligence and if said Bryan shall not wish to acquire any property investigated he will so notify said Rogers and Gray on reaching that conclusion and they shall be at liberty to deal with said property and any option they hold thereon as if this contract had not been made. And it is further agreed between the parties hereto that if at any time within ninety days from the date hereof Bryan shall elect to take an assignment of any of the options mentioned in any of the schedules hereunto annexed instead of dealing independently of such options with the owners of the property covered by any such options, the said Rogers and Gray agree that they will assign to the said Bryan any such option he may elect to ask to be assigned to him as aforesaid, it being understood that in the event of such an assignment of the option if the said Bryan shall thereafter elect to exercise the same, the compensation of said Rogers and Gray upon the purchase by Bryan of the property covered by such assigned option shall be as hereinabove set forth as in the case of a purchase by Bryan of the property directly from the owner. And it is agreed that if the said Rogers and Gray shall at any time prior to January 1, 1902, acquire any options on any other property they will execute with Bryan at his election a similar agreement with respect to any such properties covered by such options as this agreement. The terms and conditions of this agreement shall be binding upon the executors, administrators and assigns of all parties hereto.

In Witness Whereof the parties hereto have hereunto set their hands and seals this day and year first above written.

Geo. H. Rogers [Seal.]
John G. Gray [Seal.]
Chas. S. Bryan [Seal.]

In the presence of
R. H. Wright,
R. Oakley,
Willard Saulsbury.

Schedule 'A.'

International Phosphate Co.
Howard " "
Central " "
Central " "
Blue Grass " "
Summer Co. " "
Ridley " "
Jackson " "
H. G. Kitrell " "

Schedule 'B.'

Carpenter & Wilson
A. B. Harlan
Bethel Howard 2 tracts
R. J. Bryan

Schedule 'C.'

Hughes & Aiken
Lockridge
Bear Creek
Brownlow & Estes
Estes Bend
Porter Heirs
Hensley
S. C. Long
Bailey
Stockard
Walker
P. C. Kitrell
Hensley Heirs."

In addition to the foregoing averments the declaration sets forth a number of acts and practices on the part of the defendant, to which it is unnecessary particularly to refer, connected with its alleged fraudulent scheme to control the options held by the plaintiffs and deprive them of all beneficial enjoyment of their rights thereunder.

It is not necessary to consider seriatim all the assignments of error. The substantial questions raised by them are only three, namely: First, whether a case of actionable fraud is set forth in the amended

declaration; second, whether it appears therein that the plaintiffs suffered damage by reason of the acts, matters and things set forth and complained of; and, third, whether it appears from the declaration that Bryan, so far as concerned or participating in such acts, matters and things, was an agent of the defendant and acting in that capacity. It will be convenient to consider these points in their reverse order. The amended declaration, before stating the matters complained of, sets forth:

"For that the said Charles S. Bryan during all of the negotiations and transactions hereinafter mentioned was the agent of the Virginia-Carolina Chemical Company, authorized and empowered by said defendant to negotiate for the purchase of the rights of the plaintiffs under said options and to enter into all agreements and to do all things that might be necessary for that purpose, and all of the negotiations, contracts, transactions and acts of the said Charles S. Bryan hereinafter referred to were carried on, executed, performed and done by him in pursuance of said authority and as agent for and on behalf of the Virginia-Carolina Chemical Company, the defendant, and with its knowledge and consent."

Here it is expressly averred that all of Bryan's negotiations, contracts, transactions and acts, complained of, were carried on, executed, performed and done by him in pursuance of authority conferred on him by the defendant and with its knowledge and consent. It was not necessary, and would have been improper, to set forth the mere evidence of Bryan's authority or agency. Such authority and agency are averred as matters of fact, the truth of which is admitted by the demurrer. The contention on the part of the defendant that it does not appear that Bryan was authorized by it to commit a fraud on the plaintiffs fails for two reasons. First, if any negotiation, contract, transaction or act, entered into or done by him as agent, appears to have been fraudulent, its fraudulent nature cannot except or exclude it from the admission by the demurrer that it, including its fraudulent nature, was done pursuant to the authority of the defendant. Second, the amended declaration sets forth in its concluding paragraph that all the acts, negotiations, transactions and representations, thereinbefore mentioned, done, conducted and made by the defendant and Bryan, its agent, were "done, conducted, carried on, executed and made in furtherance of a fraudulent scheme of the said defendant company to obtain control of the said options" etc. Whether or not actionable fraud has been alleged will be considered later. But if it has been alleged, there can be no question that agency on the part of Bryan has been sufficiently averred.

The next question is whether it appears from the amended declaration that the plaintiffs suffered damage by reason of the acts, matters and things set forth and complained of. It is alleged that the options held and owned by the plaintiffs for the purchase of lands containing phosphate rock, and for the purchase of phosphate rock in other lands, in Tennessee, were of the value of $150,000. It is further alleged:

"That the fraudulent acts and misrepresentations of the defendant company and of the said Bryan, its agent, heretofore fully set forth, deprived the plaintiffs of their rights under said options of a value of $150,000, and prevented the plaintiffs from selling to persons other than the defendant the

properties and mining rights hereinbefore particularly mentioned and the other properties set forth in the schedules A, B and C attached to said contract, marked exhibit 'A,' and that if the same had been sold by the plaintiffs to persons other than the defendant, they would have received a profit of $150,000 and upwards."

And further:

"That in consequence of said fraudulent scheme and of the fraudulent acts and misrepresentations of the defendant and its agents made in furtherance thereof and for the purpose of carrying out said fraudulent scheme, the plaintiffs have been damaged in the sum of one hundred and fifty thousand dollars ($150,000), wherefore they bring their suit."

If the foregoing averments, germane to the subject of damages, be considered alone, the demurrer admits that the plaintiffs owned and held options worth $150,000; that they were deprived by the defendant of their rights under them of the value of $150,000; and that they had consequently suffered damage to the amount of $150,000. It is urged on the part of the defendant that the declaration is fatally defective in omitting to allege that, "but for the fraud of the defendant the plaintiffs could and would have sold their options to another or others and derived a profit therefrom." But such an allegation clearly would have been unnecessary. This is not the case of excuse for the nonperformance of a condition precedent, where frequently it is necessary to the right of recovery to aver willingness and ability to perform on the part of the plaintiff and prevention or waiver on the part of the defendant. The suggested averment at most would have presented only matter of evidence. It is true that counsel for the plaintiffs stated in their brief and during the argument in this court that it was not possible for the plaintiffs to aver with certainty that except for the fraud of the defendant they could have sold to others the property covered by the options. But this statement in no sense is part of the record and in the consideration of the case on demurrer we are strictly confined to the record. So far as the record is concerned the options may have been valuable to the plaintiffs by reason of their ability to sell to others, or by reason of their ability to purchase for themselves, but whether their value depended on the former consideration or on the latter is wholly unimportant for the purposes of the present decision in view of the positive averment of their value and loss to the plaintiffs. The declaration alleges, as has already appeared, that all the options held and owned by the plaintiffs were executed in June, 1901, and by their terms were to remain in force for "periods of from 60 to 100 days, with provision for extension thereof for such further time as might be necessary to complete the examination of the properties and consummate the transaction, provided the periods of time mentioned in said options should be insufficient to complete the investigation of said properties in Tennessee upon which the plaintiffs held similar options." Unless renewed or extended, all of these options must have expired prior to October 9, 1901, that day next following the period of 100 days after the last day of June in that year. The declaration alleges that on October 25, 1901, Bryan "acting for and on behalf of the defendant company, notified the plaintiffs that he did not care to purchase any of the

properties" mentioned in the contract of July 30, 1901, and that "it was then impossible for the plaintiffs to renew said options." It is urged by the defendant that, in the absence of any specific allegation of an extension or renewal of the options or that they were still in force, they must be treated as having expired before the plaintiffs were notified by Bryan as above mentioned, and, further, that if it can be gathered from the declaration that the options had been extended or renewed and did not expire until after the above notification, the plaintiffs were not damaged as they could after such notification have exercised the options. Much stress was laid by the defendant on the provision in the options for their extension "for such further time as might be necessary to complete the examination of the properties and consummate the transaction." These considerations do not strike us as entitled to weight. We cannot on this writ of error discharge the function of a jury. It is not for us to weigh the probability or improbability of the truth of statements of fact in the declaration. Of course, if it appears from the declaration that a statement of fact cannot possibly be true, it must be rejected. But such a statement, if there be a possibility of its truth, must on demurrer and subject to the requirement of reasonable and practicable particularity be accepted as true. If the options held and owned by the plaintiffs expired prior to October 9, 1901, and, consequently, before they received the notification from Bryan, it would not necessarily follow that the plaintiffs had not through fraud on the part of the defendant been deprived of their rights under the options and prevented from selling to other persons the properties and mining rights covered by them as expressly alleged in the declaration. Nor, if the options had been so extended or renewed as to be in force on and after October 9, 1901, and until and even after the date of the notification from Bryan, would it necessarily follow that the plaintiffs had not, through fraud on the part of the defendant, been deprived and prevented as above mentioned. Notwithstanding such extension or renewal, it is possible that the options remained in force for only such a short period after the notification from Bryan that it was practically impossible for the plaintiffs to exercise their rights under them after such notification; for the beneficial exercise of those rights may have involved the finding of purchasers as well as the completion of the "examination of the properties," in order to "consummate the transaction," and the conditions and limitations of such extension or renewal of options are not set forth in the declaration. But it is unnecessary to elaborate this particular branch of the discussion. The declaration alleges that the plaintiffs by the acts or conduct of the defendant were deprived of and prevented from exercising their rights under their options, and that on the receipt of the notification from Bryan October 25, 1901, "it was then impossible for the plaintiffs to renew said options." It is a mistake to assume that it was incumbent on the plaintiffs to set out in the declaration mere matter of evidence for the purpose of explaining why the options were or were not in force, or potentially beneficial to the plaintiffs, at any particular time. The declaration is in case for the recovery of damages resulting from an alleged tort, consisting of acts and conduct on the part of the de-

fendant claimed to have been fraudulent. Although it refers to the contract of July 30, 1901, it is not based on that contract. It is true that it is alleged in the declaration that, if the defendant had acted in good faith toward the plaintiffs under that contract the latter would have received the sum of $97,959.99 by way of commission, at the rates specified in the contract, on the purchase or sale of certain properties mentioned therein. But these properties do not include all the phosphate lands and rights in phosphate lands referred to in the contract, or covered by the options of which the plaintiffs claim they were wrongfully deprived through fraud on the part of the defendant. While the amount which could have been realized under the contract of July 30, 1901, might under certain aspects of the case be evidence of the value of options held and owned by the plaintiffs, the statement on that subject in the declaration was wholly unnecessary and must be rejected as surplusage. It cannot, however, vitiate the pleading or render insufficient the other allegations of damage already discussed.

We now come to the principal and most difficult question in the case, namely, whether actionable fraud is set forth in the amended declaration. The contract of July 30, 1901, recites that "Bryan is desirous of examining said lands with engineers and experts to estimate to his satisfaction the quality or value of the phosphate rock thereon and the property included in said options with a view of determining if he will purchase such lands and properties or any of them." After reciting the above desire on the part of Bryan and the ownership by the plaintiffs of the options mentioned in the schedules, the contract provides not only that the plaintiffs "will afford to Bryan and his engineers and experts every opportunity that it may be possible for them to afford or reasonably obtain to make a full examination of all the properties covered by said options as said Bryan shall desire," but that in no event should the plaintiffs "exercise any of the options mentioned in any of the schedules hereunto annexed within ninety days from date hereof, except such options covering properties as Bryan may before the expiration of ninety days notify them that he does not care either to attempt to negotiate the purchase of directly or take under any Rogers and Gray option covering the same." The contract further provides for the payment by Bryan to the plaintiffs of commissions on the amount of the purchase price, if he should agree with the owner or owners of any one or more of the properties covered by the options to purchase the same either directly or indirectly, and should complete the purchase. It further provides that Bryan would "by competent engineer or engineers selected by him investigate each of the properties referred to in said options with all reasonable diligence", and if he should not "wish to acquire any property investigated" he would so notify the plaintiffs "on reaching that conclusion and they shall be at liberty to deal with said property and any option they hold thereon as if this contract had not been made." It further provides that if at any time within ninety days from the date thereof Bryan should elect to take an assignment of any of the options mentioned in the schedules the plaintiffs would assign to him any such option he should so elect, "it being understood that in the event of such an as-

signment of the option if the said Bryan shall thereafter elect to exercise the same" the compensation of the plaintiffs upon the purchase by him of the property covered by such assigned option should be the same as if Bryan purchased the property directly from the owner. And it further provides that if the plaintiffs should prior to January 1, 1902, acquire any options on other property they would at Bryan's election enter with him into "a similar agreement with respect to any such properties covered by such options as this agreement." It is difficult to conceive of a more improvident contract so far as the plaintiffs are concerned than that of July 30, 1901. By it they debarred themselves from the exercise of any of the options referred to in its schedules for a period not expiring until after the determination of all of them unless renewed or extended in point of time beyond their original limitation or except in so far as Bryan within that period should notify them that he did not care to negotiate the purchase of property covered by one or more of them. They bound themselves at the election of Bryan within ninety days to assign to him any of the options mentioned in the schedules, and to enter into a similar agreement with him touching any options which thereafter and until January 1, 1902, should be acquired by them. On the other hand, Bryan by the contract of July 30, 1901, practically bound himself to nothing which could or would be of advantage or benefit to the plaintiffs. By it he did not agree to purchase at any time the property covered by any of the options or to take an assignment of any of them; nor by it did he definitely undertake to notify the plaintiffs within the specified period of ninety days of any unwillingness on his part, after investigation by the engineer or engineers, to acquire property so investigated. It is true that by the contract he agreed to investigate the properties covered by the options with "all reasonable diligence" but, if he should not wish to acquire any property investigated, he was under an obligation so to notify the plaintiffs only "on reaching that conclusion." The mental act of reaching a conclusion might or might not occur prior to the expiration of the specified period of ninety days, and might well be impossible to establish by evidence. Even in case of an assignment to Bryan of any of the options he was obliged to pay compensation to the plaintiffs only if he should, after such assignment, "elect to exercise the same." Nor is there any provision in the contract requiring Bryan to acquire for himself or others any property covered by options or to take an assignment of any options or to pay any commissions or compensation to the plaintiffs, even if investigation by engineers should disclose that the property covered by such options was extremely valuable by reason of the presence of phosphate rock. In such case he could be bound only by his election to take such property, or an assignment of options and to exercise the same. The amended declaration does not disclose any breach of the contract of July 30, 1901, or any ground on which an action ex contractu could be sustained. It does not seek a recovery on the contract, nor its rescission on the ground of fraud. Nor does it otherwise attack the validity of the contract or aim at the doing of anything inconsistent with its terms. The declaration in question is purely ex delicto. The contract of July 30, 1901, is disclosed as an instrument employed in the successful accomplishment of a dishonest and

over-reaching scheme to the pecuniary injury of the plaintiffs. The contract appears only as an incident, though a necessary incident, to the commission of the fraud claimed to be charged against the defendant. It appears from the declaration that the defendant before and at the time Bryan and the plaintiffs entered into the contract, had an evil, wrongful and dishonest intent, for its own selfish ends, to deprive the plaintiffs of their options. It alleges that Bryan as agent and on behalf of the defendant, in order to secure the execution of the contract and for the purpose of securing control of the options and preventing the plaintiffs from disposing of them to persons other than the defendant, "falsely and fraudulently and with intent to deceive the plaintiffs represented to them that if they would execute said contract then the said Bryan, as agent of the defendant, would purchase the said lands and mining rights covered by said options, if the examination of said properties by his engineers should show that the said lands contained valuable deposits of phosphate rock, and would pay to the plaintiffs the commissions upon the purchase price thereof as set forth in said contract, if any of said properties should be purchased by said defendant company, either directly or indirectly." It further alleges that "the plaintiffs relying upon the said representations of the said Bryan executed the said contract". It further alleges in its concluding paragraph that the above representation by Bryan was "made in furtherance of a fraudulent scheme of the said defendant company to obtain control of the said options held by the plaintiffs during the entire existence of the same, to prevent the plaintiffs from negotiating and selling their rights under said options and the said properties and mining rights to persons other than the defendant, and to enable defendant to purchase said lands and mining rights directly from the owners thereof after the expiration of said options, without paying any commissions to the plaintiffs upon the purchase price of the said properties and rights covered by the said options as provided for in the contract heretofore mentioned, executed on July 30th, 1901." It appears from the declaration that on or prior to September 4, 1901, the engineer of the defendant examined and surveyed the property covered by the options held by the plaintiffs and estimated the amount of phosphate rock thereon pursuant to the contract of July 30, 1901, and that the "said surveys and examination showed that the said lands contained valuable deposits of phosphate rock and said lands actually contained deposits of phosphate rock of great value." On behalf of the defendant attention is called to the fact that while both the contract and the representation, on the strength of which it was entered into by the plaintiffs, refer to an examination and investigation of the property by Bryan's engineers, the only averment in the declaration touching the examination of the property states that it was made by the engineer of the defendant, and it is urged that it does not appear that the defendant's engineer was Bryan's engineer. Even were it material to consider this point in deciding the case on demurrer, it would be enough to say that the objection is without color or is at least hypercritical in view of the statement that all of the negotiations, contracts, transactions and acts of Bryan referred to in the declaration were carried on, executed and done by him "as agent for and on behalf of" the defendant. As-

suming that it is essential to the maintenance of this action of tort in the nature of deceit that there should have been a mala fide, deceitful and false representation, express or implied, on the part of the defendant of existing or past matter of fact, we think the amended declaration discloses such a representation, and that it was acted upon by the plaintiffs to their prejudice. The demurrer admits that the defendant through Bryan as its agent, in order to secure the execution by the plaintiffs of the contract of July 30, 1901, and for the purpose of depriving them of their options, and with intent to deceive them, falsely represented to them that, if they would execute the same, the defendant through Bryan would purchase the lands and mining rights covered by the options and pay the plaintiffs commissions if it were shown that such lands contained valuable deposits of phosphate rock. There is a prima facie presumption of fairness and honesty in the dealings of mankind, and, where one man makes a promise to another as an inducement for a change of position or other action on the part of the latter, he, if not expressly, impliedly avers that he has an existing intent to fulfill his promise, and such implied averment of existing intent is of matter of fact and, if false and fraudulent, is a fraudulent representation, which may or may not, according to circumstances, furnish the basis for an action ex delicto. The defendant, then, through Bryan falsely and fraudulently averred that in point of fact it had an existing intention to take the property covered by the options and pay commissions to the plaintiffs if there were valuable deposits of rock thereon; and upon this misrepresentation the plaintiffs relied in executing the contract of July 30, 1901. Yet it appears from the declaration, and is admitted by the demurrer, that the defendant in making the representation as an inducement to the execution of the contract, did not in fact have such an intent, but, on the other hand, had a precisely opposite intent; and that, with the exception of the Lockridge property, it never purchased any lands or mining rights under the contract with the plaintiffs. The inquiry at this point is not whether the representation made by the defendant would or could be material or admissible in an action founded on the contract. Doubtless it would be held incompetent as tending to add to or vary the terms of a written instrument. Nor is the point whether a fraudulent oral or parol representation, going merely to the consideration, and not to the execution, of the contract of July 30, 1901, as a sealed instrument, would be admissible in an action on that contract. The general rule is that "in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed." Hartshorn v. Day, 19 How. 211, 222, 15 L. Ed. 605. But the inquiry is whether such a false and fraudulent averment of intent as was involved in the representation in question is not sufficient, other requisites existing, to support an action ex delicto in the nature of deceit. It went to the whole benefit or advantage to be expected or derived by the plaintiffs from their negotiations with the defendant with respect to the options. And such false representation, according to the case admitted by the demurrer, was part and parcel of a deceitful and fraudulent scheme or course of conduct on

the part of the defendant, including such representation as only one of its factors, contrived and practiced in the successful accomplishment of an evil and dishonest design wrongfully to deprive the plaintiffs of their rights under their options. The plaintiffs can have no remedy for the injury sustained by them in an action on the contract. If on the case as now presented they are not entitled to recover in an action ex delicto they are remediless. But we are not aware of any rule of law which can operate to bar the plaintiffs from redress in such a case. We think, on the contrary, that on well-settled principles they are, on the showing made by the amended declaration, entitled to recover, if sufficient particularity of averment has been observed in that pleading. In Edgington v. Fitzmaurice, 29 L. R. Ch. Div. 459, it was held that a false representation of the intention of the defendant in doing a particular act may be a fraudulent representation of fact on which, if the plaintiff was misled by it, an action of deceit may be maintained. There was a misstatement in the prospectus of a company of the objects or purposes for which money was to be raised by an issue of debentures. The court held, on dismissing an appeal from Denman, J., that an action of deceit would lie. Bowen, L. J., said:

"This is an action for deceit, in which the Plaintiff complains that he was induced to take certain debentures by the misrepresentations of the Defendants, and that he sustained damage thereby. * * * But when we come to the third alleged misstatement I feel that the Plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develope the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

The other judges sitting in the case took the same view. In Johnson v. Monell, *41 N. Y. 655, it was held that it is not necessary, in order to establish fraud in the purchase of goods, that the purchaser should have made false statements concerning his pecuniary ability and have obtained credit accordingly; but that fraud may consist in the purchase with intent not to pay; and this intent may be proved by facts and circumstances as well as by affirmative declarations by the purchaser as to his pecuniary condition. The court through Peckham, J., said:

"There is no principle that will sanction a fraud in the purchase of goods, although the fraudulent purchaser was enabled to contract for and obtain possession of them without any false statement to the vendor. To my mind there seems to be an absurdity in holding that such false statement is the only evidence that can establish the fraud. That is the simple principle upon which alone such a decision can be based, and there is no such principle in the law. To establish such a fraud a party is no more confined to any particular kind or character of evidence than he is in any other case. He must prove the fraud to the satisfaction of the jury, by any competent evidence, and if he fail to make out a case sufficient to go to the jury without evidence of false representation at the time of the purchase, then he must give that evidence or be nonsuited. To avoid the sale as fraudulent the jury must be sat-

isfied, by the proof, that the purchaser intended, by the purchase, to defraud the vendor; that he never intended to pay for the goods. That proof will differ necessarily in practice as much as the conduct of men varies. To hold that affirmative misrepresentation is indispensable to avoid a sale is to declare that that is the only mode in which a fraudulent purchase can be made, that all others are honest and legal."

In Stewart v. Emerson, 52 N. H. 301, the court held that, when one intending not to pay for goods induces their sale on credit by fraudulently representing or causing the owner to believe that he intends to pay for them or by fraudulently concealing the intent not to pay, a debt is created by fraud. In the course of a forcible and elaborate opinion Doe, J., said:

"The substance of a contract is a mutual understanding, existing in fact or in contemplation of law. A contract of sale, from B to A, completely performed, is their mutual understanding, executed by the delivery of the goods and the payment of the price. The understanding is, that A is to acquire the possession and ownership of B's goods, and to pay for them. Without a mutual understanding that A is to pay for them, there is no sale. If both parties understand there is to be no payment, the transaction is a gift, and not a sale. If B understands there is to be payment, and A understands there is to be no payment, it is neither a sale nor a gift, and the title does not pass, because there is no mutual understanding, unless a case of estoppel can be made out by one party against the other. When A so conducts as to intentionally cause B to understand that A is a purchaser, or, in other words, that the transaction is a sale, he necessarily causes B to understand he intends to pay, because a sale or purchase necessarily implies payment or an intent to pay. If he acts in bad faith, intending never to pay, and, therefore, the understanding is in fact not mutual, still B could maintain an action on the contract, because A would be estopped to deny that his understanding and intent were what he induced B to understand they were. Having, by his words or conduct, wilfully caused B to believe the existence of a certain state of facts, and induced him to act on that belief so as to alter his previous position by parting with his goods, A is concluded from averring against him a different state of things as existing at the same time. Davis v. Handy, 37 N. H. 65, 75. This estoppel B may set up against A. But he is not obliged to set it up. He may take the ground that, there being in fact no mutual understanding, no meeting or agreement of minds, no harmony of intention, no joint assent to the same thing, there was no contract. And when he takes that ground, it may be said that the validity of the sale is affected by the mere mental state of the parties, or it may be said that there was no sale to be affected by the mental state of the parties. In this analysis, the entire contract falls to pieces and disappears, and the transaction, resolved into its original and real elements, becomes a wrongful and fraudulent conversion of B's goods by A. And when B may allege that the contract or the debt was created by the fraud of A, he may sustain his allegation by proof of facts which would show that by reason of A's fraud there would have been no contract and no debt, if B had chosen to take that ground. The intent to commit a fraud is not the commission of a fraud; but when A, in the assumed character of a buyer, animo furandi, obtains goods of B on credit by the concealment of such a material fact as an intent not to pay—a fact peculiarly within his own knowledge, and impossible to be discovered by B—the fraudulent part of the transaction cannot be reduced to the fact concealed, the intent not to pay. The concealment of that fact is fraudulent. B has lost his goods: that is a serious part of the business. * * * The fraudulent part of all this cannot be called a mere intention or state of the mind. The condition of both parties is substantially changed by means of the fraudulent concealment. B has lost his goods, and A has obtained them without any valuable consideration. * * * An intent to commit a fraud is not a fraud committed—but the question is, whether obtaining goods and credit under color of a pretended purchase by concealing an intent not to pay for

them is a fraud committed, or whether in such an affair there is nothing fraudulent but an unexecuted intent to commit a fraud. If the intent not to pay were the only fraudulent intent, it might be claimed that the only intended fraud would not be committed till the time of payment arrived. But the fraudulent design of which B complains is the intent of A to get goods without payment, and by fraudulent concealment. That intent is executed the moment A gets the goods. No overt act remains to be done by him to complete the artifice practiced upon B. * * * But the fraudulent design is not merely negative—not to pay at a future time; it is also affirmative—to obtain the goods and the credit by the concealment of the material fact of the intention not to pay. This concealment is not a mere fraudulent intent: it is the execution of a fraudulent intent and the commission of a fraud, if a fraud can be committed by the concealment of a material fact. * * * What principle of law requires a false and fraudulent representation to be expressed, or forbids it to be fairly inferred from the act of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as the means of converting another's goods to his own use without compensation, under the false pretense of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is of course concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud. A man obtains goods on credit by fraudulently representing (that is, fraudulently causing their owner to understand) that he intends to pay for them; or, he obtains them by fraudulently concealing his intent not to pay for them; if he obtains them in either way, he obtains them in both ways."

In Pennsylvania possibly more than in any other state there has been a judicial inclination to uphold a purchase of property as not being fraudulent, notwithstanding an intention at the time of the purchase on the part of the purchaser never to pay. The unsoundness and impropriety of such a course have, however, met with severe condemnation at the hands of the Supreme Court of that state. In Bughman v. Bank, 159 Pa. 94, 28 Atl. 209, the court through Mitchell, J., said:

"In Smith v. Smith, 21 Pa. 367 [60 Am. Dec. 51], it was held that even an intention by an insolvent buyer at the time of the purchase not to pay, will not amount to a fraud, unless some false representation, trick, or artifice, or conduct which involves a false representation, be added. The law as thus declared was not in harmony with that of a majority of other states, nor with sound policy or the principles of business honesty. It was moreover a departure from the previous decision of this court in Mackinley v. McGregor, 3 Whart. (Pa.) 369, where it was expressly held (page 396 [31 Am. Dec. 522]) that whatever may be the limitation of the right of the vendor as against other persons into whose hands the goods may have come, 'it is certain as a general principle that when a person purchases goods with a preconceived design of not paying for them, it is a fraud, and the property in the goods does not pass to the vendee.' This seems to us much the sounder doctrine. * * * A purchase with a present intent not to pay is a rank fraud in morals, and should be so pronounced in law. The departure that was made in Smith v. Smith is therefore much to be regretted. It was not made by a unanimous court, nor has it ever received the unmixed approbation of the bench or the bar. But it has been expressly followed in several cases, and has remained in the books without being overruled, for forty years, and recognizing that the subject is one on which legal minds have always been apt to differ, we do not think it wise now, notwithstanding our own clear convictions on the princi-

ple, to unsettle the law by another change. We will, therefore, stand on the authority of Smith v. Smith and its kindred cases, but we will not go a step beyond what they require. Any additional circumstance which tends to show trick, artifice, false representation, or, in the language of Smith v. Smith itself, 'conduct which reasonably involves a false representation,' will be sufficient to take the case out of the rule of those authorities."

Ayres v. French, 41 Conn. 142, is an instructive case in this connection. It was decided on demurrer to a declaration in trover, the second count of which set forth a fraudulent procurement and conversion of shares of corporate stock belonging to the plaintiff. That count, together with the others, was held sufficient, the Supreme Court of Errors through Park, C. J., among other things, saying:

"The ground of complaint set forth in this count is the conversion of the property by the defendant. The remaining allegations contain merely a statement of the means employed by the defendant to obtain possession of the property, in order that he might carry into execution his preconceived intention to convert it to his own use. The count sets forth all the facts and circumstances with great particularity, but the substance of it is that the defendant, knowing the pecuniary condition of the plaintiff, devised the scheme therein stated to obtain the stock of the plaintiff, and then convert it to his own use; which scheme was successfully carried out and the conversion accomplished. The count contains all the essential averments of an action of trover, aggravated by the deception used to obtain possession of the property. It states that the stock belonged to the plaintiff; that it was placed in the hands of the defendant as collateral security for certain indorsements made by the defendant for the benefit of the plaintiff; that the obligations on which the indorsements were made were paid and satisfied by the plaintiff, and the defendant had no longer a right to retain the stock; and that the stock was afterwards demanded, and the defendant refused to deliver it, and disposed of and converted the same to his own use. These allegations certainly are sufficient to sustain an action of tort, if we are right in the views we have expressed in relation to the first count in this declaration. But the defendant claims that nothing appears in this count but a breach of contract. He insists that to constitute fraud a party must make a false statement as to some material existing fact, knowing it to be false. This is not necessary in all cases of fraud. If a vendor intentionally conceals from the vendee a material latent defect in a horse which he is selling, and the sale is made; or if he should say that the horse was sound so far as he knew, when he knew him to be unsound, and the unsoundness consisted in a latent defect which impaired his value, he would be guilty of fraud. 1 Swift's Digest, 554. So if a man purchases goods with a preconceived design not to pay for them, he is likewise guilty of fraud. * * * It is alleged in this count that the defendant, in order to induce the plaintiff to give up his claim against the corporation and take stock in lieu thereof, informed the plaintiff that he would indorse his paper without further compensation and without security, intending at the same time not to do it, but to demand security when the time should come, in order to compel the plaintiff to put his stock into his hands; and intending further, when this should be done, to appropriate the stock to his own use. It is alleged that the defendant was successful in his scheme of depriving the plaintiff of his property and in converting the same. The contract is not set out as the basis of recovery, but as the means whereby the defendant accomplished his original purpose to convert the property. It is the dishonesty in making the false promises in furtherance of his scheme of fraud, that is the basis of the action, in connection with the conversion of the property. * * * It would seem that if a man is guilty of fraud in the purchase of goods when he has a secret intention not to pay for them, much more is he guilty of fraud if, after he devises a scheme for getting possession of the property of another without buying it, and appropriating it to his own use, he goes deliberately at work to carry his scheme into execution by making promises with the intention at the time not to fulfill them, and breaks them

as often as they are made in accordance with his original intention, and so goes on to the consummation of his plan. Where lies the fraud in buying goods with an intention not to pay for them? It lies in the fact that the fraudulent purchaser gives the seller to understand that his intention is to pay for them. His deceit therefore is in his statement with regard to his intention. Here the defendant promised the plaintiff that he would indorse his paper without further compensation and without security. It is charged that that promise was made with the intention not to fulfill it. The defendant further promised the plaintiff that the property should be returned when he was saved harmless from his indorsements. It is charged that that promise was made with no intention to keep it, but with the intention to convert the property to his own use. We have no hesitation in saying that an actionable fraud is charged in this count."

In Dowd v. Tucker, 41 Conn. 197, a bill had been filed to compel the conveyance of certain real estate which a testatrix had intended to devise to the petitioner by a codicil to her will and which she was dissuaded from so devising by the respondent, to whom all of her property, in the absence of such a codicil, would go under her will. Park, C. J., here also delivering the opinion of the court, said:

"This case is clearly one of fraud. We have held on the present circuit [Ayres v. French, 41 Conn. 142] in accordance with numerous decisions, that whosoever buys personal property with a preconceived intention not to pay for it, is guilty of fraud. This case is similar in principle. It matters but little whether the property is real or personal estate. Whosoever buys real estate with a preconceived secret intention not to pay for it, but to cheat the grantor out of it, is as much guilty of fraud as he would be if the property was personal estate. Apply this principle to the case we have in hand. The property in controversy belonged to Frances M. Hayden, and while it was yet hers to be disposed of as she pleased, she informed the respondent that she desired to give it to the petitioner if he was willing, and asked him if he was willing, again expressing her desire to give it. A codicil to her will had been at this time prepared and lay before her ready to be executed. The respondent knew by the inquiry and by the preparation what her purpose was. She had previously, by a duly executed will, given all her property to the respondent. He knew now that she had changed her mind, and was about to give the real estate in question in legal form to the petitioner, but that she desired his consent to the change, if it could be obtained. He immediately resorted to deception. He substantially expressed his entire assent to the change, but suggested the mode in which it would best be accomplished in her weak condition. He said in effect, let me take the property, as you have already willed it to me, and when it comes into my hands I will deed it to the petitioner, and in that way your present desire with regard to the disposition of the property will be carried out, as much as it would be by executing the codicil; therefore in your weak condition do not trouble yourself about it. She was satisfied that the petitioner would have the property in the way proposed, and so expressed herself, and consequently the codicil was left unexecuted; or, in other words, she let him have the property on his promise to convey it to the petitioner. * * * It is the case of one obtaining the conveyance of property by a promise, which he has no intention at the time to fulfill."

In Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738, a bill was brought to compel the defendant to convey to the complainant certain lands which had been bought by the former at a tax sale. The complainant, having a right to redeem, allowed the time for redemption to expire without exercising his right, on the strength of an oral agreement by the defendant to assign to him the certificate of sale on receiving from him the amount of the bid at the tax sale together with interest and the expense of the acknowledgement. This undertaking

the defendant refused to observe. It was objected by him that the agreement was a parol contract relating to land and therefore void under the statute of frauds. The court, through Cooley, J., said:

"We do not think this case is to be put on the ground of specific performance solely. The facts charged and established show that complainant, relying upon the promise of defendant to assign, neglected to exercise his legal right to redeem, and defendant was thereby enabled to obtain a deed of the lands. It sufficiently appears that complainant would have made the redemption but for the assurances thus made to him, and a fraud has thus been perpetrated upon him, against which he is entitled to relief. It is a matter of no moment whether the fraud was perpetrated by means of a promise upon which he relied, and which the defendant did not intend to keep, or by untrue statements as to existing facts. And it is not necessary for us to decide, in this view of the case, whether the agreement to assign the certificate was or was not void under the statute of frauds."

The doctrine of Laing v. McKee was approved in Wilson v. Eggleston, 27 Mich. 257. Butler v. Watkins, 13 Wall. 456, 20 L. Ed. 629, strongly supports the contention of the plaintiffs, although the points decided did not arise on demurrer. Butler held one or more patents for a machine for fastening bales of cotton, known as the "Butler Cotton-tie," and had negotiations with Watkins, the general manager of an English manufacturing company, looking to an arrangement by which the company should manufacture cotton-ties under Butler's patent or patents during the year 1868, the latter to receive a share of the proceeds of sale. The negotiations were not brought to a definite conclusion, but were protracted in bad faith and deceitfully by Watkins and the company, as was alleged in the complaint, until it was too late for Butler to make any other arrangement for the manufacture and sale of cotton-ties during that year, whereby the plaintiff suffered damage through having his cotton-ties kept during that time out of the market. It was further alleged that the doings of Watkins and the company were the purpose of gaining control of the Butler cotton-tie for 1868 in order to keep it out of the market, and by that means to promote the sale of certain other cotton-ties in which Watkins and the company were largely interested. Butler sued to recover for the fraud practiced against him. The court through Mr. Justice Strong said:

"It is quite true that the suit was not brought upon any contract. The theory of the plaintiff was that no agreement had ever been made, and that the defendants had never intended making one, though all the while during the negotiation, deceptively and fraudulently holding out to the plaintiff a profession of intention to conclude an agreement, and that this was done with the purpose of keeping the plaintiff's 'cotton-tie' out of the market. * * * It does not follow, because the corporation never authorized or sanctioned a contract, that they may not be responsible for such a fraud as was alleged in the petition. We have not all the evidence before us, but it does appear that some evidence was given tending to show that the acts and conduct of the defendants (Watkins and the corporation), were deceitful and fraudulent, designed to mislead, and done for the purpose of keeping the plaintiff's cotton-tie out of the market, in order that they might secure heavy sales of the Beard tie, in which they were largely interested. If the evidence did establish or tended to establish such deceit and fraud, for such a purpose, and if the plaintiff was injured thereby, as his petition alleged, it was erroneous to charge the jury that the suit could not be maintained. Competition in efforts to secure the market is doubtless lawful. A manufacturer may by

superior energy, or enterprise, supply all the buyers of a particular article, and thus leave no market for similar articles manufactured by others. But he may not fraudulently or by deceitful representations induce another to withhold from sale his products without being answerable for the injury occasioned by the fraud. Whether negotiations for a purchase never concluded were in fact fraudulent; whether they were commenced and continued solely with the purpose of dishonestly inducing the plaintiff to forego offering his goods until the market had been supplied, and whether such was the consequence of the defendants' fraudulent conduct, were questions of fact which should have been submitted to the jury on the evidence. If answered affirmatively, the action was sustainable. In order to maintain an action for fraud it is sufficient to show that the defendant was guilty of deceit, with a design to deprive the plaintiff of some profit or advantage, and to acquire it for himself, whenever loss or damage has resulted from the deceit."

Here the demurrer admits that the plaintiffs, relying upon a false representation by the defendant, were thereby induced to enter into the contract of July 30, 1901, by which they placed themselves at its mercy, and that both the representation and contract were resorted to by the defendant as means whereby the plaintiffs should be wrongfully deprived of their rights under their options. When entering into that contract, the defendant had no intention fairly to exercise the election thereby conferred upon it to effect the purchase or sale of phosphate lands and rights under the plaintiffs' options, but had a directly contrary purpose; and in order to effectuate that evil design resorted to the oral or parol undertaking involving a false representation of its then existing intention. As before stated, the plaintiffs in their amended declaration do not proceed on the contract, but for the tort, and it cannot avail the defendant that the false representation cannot be treated as part of the contract. If fraud has been alleged with sufficient particularity, we do not doubt that, whatever may be its final outcome, the case as made by the declaration discloses justiciable and actionable fraud. On the alleged insufficiency of the declaration in point of particularity we have but little to say. While the allegations of fraud in some respects are not as formal as may be desirable we regard them as sufficient. It is true that the mere use of adjectives importing fraud or deceit cannot be permitted to supply the place of the essential facts constituting the fraud or deceit relied on. But an impracticable standard of particularity is no more required in allegations of fraud than in an indictment. Mere matter of evidence is not required to be stated. In the amended declaration all the facts constituting the fraud are, though somewhat informally, plainly alleged, and the defendant is fully advised of the case it is called on to meet.

We think there was error in sustaining the demurrer to the amended declaration. The judgment below is, therefore, reversed, with costs in this court, and with directions to the court below to enter a judgment overruling the demurrer and requiring the defendant to answer over.

JAYNE et al. v. LODER.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 34, March Term, 1906.

1. NEW TRIAL—GROUNDS—SUBMISSION OF INCOMPETENT EVIDENCE OF DAMAGES —REMISSION OF EXCESS OF RECOVERY.

Where a plaintiff's claim for damages for a tort was submitted to the jury on incompetent evidence as to certain of the items claimed, and a verdict was returned for plaintiff for less than the total amount claimed, the error cannot be rectified by requiring a remittitur of the amount of the items so erroneously submitted, since the court cannot know whether, or to what extent, such items entered into the verdict, and the only remedy is by the granting of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 328.]

2. MONOPOLIES—SHERMAN ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—MANUFACTURERS OF PROPRIETARY MEDICINES.

The manufacturer of a proprietary medicine may sell or withhold from selling as he pleases, fixing the prices, and naming the terms at and upon which alone he will do so, and refusing to sell to those who will not comply, and, so far as this is confined to his own goods, and pursued by independent and individual action, it is within his rights; but when two or more combine and agree that neither will sell to any one who cuts the prices of any of the others, this concerted policy, by which it is sought, not only to maintain by each the price of his own medicine, which alone he is interested in or has the right to control, but also the prices on those of all who are thus banded together, is a direct interference with and restraint upon the freedom of trade, and when it affects interstate commerce is clearly a combination and conspiracy in restraint of such trade, in violation of the anti-trust law of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

3. SAME—COMBINATION OF ASSOCIATIONS IN DRUG TRADE.

Three national associations of persons interested in the drug trade—the Proprietors' Association of America, composed of manufacturers of proprietary medicines, the National Wholesale Druggists' Association, and the National Association of Retail Druggists—joined in the adoption of a so-called "tripartite agreement," the purpose of which was to maintain the retail prices of patent or proprietary medicines, and which provided that wholesalers should refrain from selling such medicines at any price to "aggressive cutters" of prices or brokers; an aggressive cutter being defined as a dealer who was so designated by 75 per cent. of the local trade at any given place. Pursuant to such concerted plan, to which all were bound and to carry it into effect, proprietors thereafter sold only at fixed and uniform prices to those wholesalers who agreed to maintain prices, and not to sell to aggressive cutters or brokers, in accordance with a list furnished by a committee of the wholesalers' association, while the list of aggressive cutters was furnished by the secretary of the retailers' association. If a wholesaler violated such agreement, and sold to an aggressive cutter, he was at once reported, and his name added to that list, and notice of the fact sent to all retailers who were members, with a suggestion that they act for the protection of their interest. If he was reinstated, a second notice of that fact was sent. *Held*, that such concerted plan and action constituted a combination and conspiracy in restraint of interstate commerce, in violation of the anti-trust law of July 2, 1890 (26 Stat. 209. c. 647 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

4. SAME—ACTION FOR DAMAGES—JOINDER OF MEMBERS OF SEPARATE COMBINATIONS.

National associations of manufacturers of proprietary medicines, wholesale druggists and retail druggists, respectively, entered into a tripartite agreement for the purpose of maintaining prices of proprietary medicines, which constituted a combination and conspiracy in restraint of interstate commerce, in violation of the anti-trust law of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), and adopted definite plans and methods for carrying it into effect by preventing retailers who cut prices from obtaining such medicines. Subsequently, to forward the same general purpose, the retailers' association proposed further plans and methods far more drastic, under which such price cutters were prevented from obtaining any druggists' supplies. These plans were not adopted by the other associations, but were assented to by some of their members individually upon direct appeal but not by others. *Held*, that the two combinations were separate and distinct, and that a party to the first, who did not become a party to the second, was not bound thereby, and could not be joined as a defendant in an action for damages under the statute with other defendants, who were parties only to the second agreement, nor was the latter admissible in evidence against him.

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

For opinion below, see 142 Fed. 1010.

W. Horace Hepburn, Irving P. Wanger, and John G. Johnson, for plaintiffs in error.

Henry J. Scott, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. This case was an involved and tedious one, and the reluctance of counsel to retry it is not to be wondered at. The suggestion at bar, however, that there should be no reversal unless it could be without a venire, was not put in shape to be acted upon; and as material error has been assigned which cannot be passed by, nothwithstanding the painstaking care with which the case was considered and the correctness with which, in the main, it was disposed of, it must nevertheless go back and be tried over.

The error which lies on the surface is the attempt of the court, by a reduction of the verdict, to eliminate items of damage with regard to which there was admittedly no sufficient evidence. The damages claimed by the plaintiff were $34,416.72, made up as follows: Compensation for extra time and labor, covering a period of 4 years, $20,000; 8 per cent. increased cost on $96,000 worth of proprietary medicines purchased, $7,680; extra clerk hire for 4 years, $4,000; interest for 4 years on $10,000 increased capital required, $2,700; loss of profits on sales in June and July, 1904, $36.72. The jury gave a verdict somewhat less than this, for $20,738, which the court, on a rule for a new trial, still further reduced to $10,880.52, to which extent alone it was figured there was evidence to sustain it. Loder v. Jayne (C. C.) 142 Fed. 1010. It is not necessary to follow the steps by which this result was reached, or the reasoning by which it was sought to be justified. It is sufficient to note that the evidence with regard to the first and fourth items of claim was held to be insufficient, and that the item of clerk hire

was found to be substantiated to the amount of but $3,164. Putting this and the remaining two items together, the verdict was allowed to stand for the aggregate; all above that being required to be released.

The error which was so committed is manifest. The admission of incompetent evidence could not be cured in any such way. The verdict rendered is based on the whole of it, good and bad, and there is no means of knowing by what items the jury were influenced, or how far the items which are now allowed were accepted by them, or entered into their calculations. As it stands, the verdict is judge made; the only virtue in it being that it is within the amount assessed by the jury. But that coincidence does no help it, the amount so found being the result of evidence improperly submitted for their consideration, the only remedy for which was to grant a new trial. Jacoby v. Johnson, 120 Fed. 487, 56 C. C. A. 637. See, also, Watt v. Watt, L. R. App. Cases (1905) 115.

More important, however, is the question which is raised, whether the defendants are in any respect liable. The action is for damages, under the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Sherman Anti-Trust Law," the defendants being charged with having entered into an unlawful combination injurious to the plaintiff, within its terms. The sections which obtain are given in the margin.[1] The drug trade is the one affected; the plaintiff being a retail dealer doing business in Philadelphia, and the defendants variously engaged as wholesale or retail druggists or manufacturers of patent medicines and pharmaceutical supplies. The plaintiff is the subject of trade animosity because he does not maintain the price of medicines, as the defendants think he ought to, and as they have agreed among themselves that they shall be. He is what is known as an "aggressive cutter," against whom and others similarly actuated the acts complained of are directed.

That which is charged to be a combination in violation of the act consists primarily in what is known as the "Tripartite Plan," so called

"1. Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides, or is found, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

because of its being entered into by the three affiliated associations in the drug trade—the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists—of one or the other of which the defendants are members. The purpose was to maintain the retail prices of patent or proprietary medicines by combined action, which was recognized as necessary to accomplish it. These medicines, being compounded according to secret formulas by those who originate them, are made popular by extensive advertising, and are supposed to be retailed to the consumer at uniform prices, fixed by the proprietors and named on the package. In some parts of the country this is carried out, but in others, and particularly in the large cities, where competition is keen, there has for a long time been a cutting of prices by the retailer, which has reacted on the jobber or wholesaler, as well as the proprietary, demoralizing all branches of the trade. This condition was the subject of extended discussion and animadversion for a number of years at various meetings of the several associations involved; different means for remedying it being proposed. The plan finally formulated was adopted upon an overture from the retailers at the annual meeting of the wholesalers at Chicago in September, 1900, in which the proprietors as associate members participated. It seems to have had its inception in a resolution passed at the preceding annual meeting of the wholesalers, in conformity to which the chairman of the proprietary committee and the chairman of the executive committee of the retailers sent out in March, 1900, a confidential circular, in the joint names of the two associations, to various patent medicine proprietors, urging them for the future to confine their best price sales to a uniform list of jobbers to be selected as wholesale agents. A number of prominent proprietors, who had already agreed to the proposed policy, was given, and in order to make it effective it was urged that each should send out to his wholesale distributing agents a printed price list, giving the regular rebates on goods when ordered in certain quantities, to be restricted, however, to those who did not divide quantities with others, or quote or sell these preparations, either directly or indirectly, or permit them to be disposed of in any way, at less than the prices stated. Favorable responses were received to these circulars, but at the suggestion of members of the retail trade, as well as in pursuance of views expressed by a large percentage of the jobbers, it was decided that the selection of the list of wholesale agents, to whom alone best price sales should be made, should be subject to certain conditions: (1) That jobbers through their salesmen should refrain from running down proprietary goods, and should sell whatever was called for by the customer without reference to any particular article happening to pay a higher profit; (2) that they ask no further discounts than already allowed; (3) that each jobber discontinue his so-called nonsecret department (referring to substitute preparations offered in place of proprietary medicines called for); and (4) that they refrain from selling proprietary preparations at any price, either directly or indirectly, to aggressive cutters or brokers; an aggressive cutter being defined as a dealer who was so designated by 75 per cent. of the local trade at any given place. The plan so recommended was adopted, not only, as already

stated, by the National Wholesalers' Association, but by the proprietors and retailers as well, and became the so-called "Tripartite Agreement" in suit. To be successful, it required the adherence and concerted action of the members of each association, and this was secured by direct appeal and individual assent. As the result of it, the proprietors sold only, thereafter, at uniform and fixed prices, to those wholesalers and jobbers who agreed to maintain prices and not sell to aggressive cutters and brokers; the recognized list of such jobbers being furnished to the proprietors by the chairman of the proprietary committee of the wholesalers, and the list of aggressive cutters, as reported by local associations of retailers, whose organizers investigated the matter, being made up and sent out to jobbers and proprietors by the secretary of the national retailers. If a wholesaler failed to regard this list, and sold to an aggressive cutter, he was promptly reported, and his name added to it. A pink slip was also sent out to all retail druggists who were members of the retailers' association, calling attention to the fact, and insinuating that such individual action be taken by each, protective of his own interest, as might seem advisable; a cessation of dealing being plainly intimated. And this was followed, in case of a correction of his ways by the wholesaler and his reinstatement, by a yellow slip, announcing that he was entitled to the same favorable consideration as before.

Notwithstanding, however, the seemingly drastic character of these provisions, the aggressive cutter having still a certain margin on which to trade if not thrive, at the annual convention of the National Retailers' Association at Cleveland in 1902, it was resolved:

"That * * * the secretary be instructed to request all manufacturers of chemicals, pharmaceuticals, plasters, dressing, and like products, handled by the drug trade, to desist from selling to aggressive cutters, or suppliers of cutters, when solicited to do so by the respective local associations; and that the retail druggists shall be made acquainted with the responses to such requests, in such manner as the executive committee may deem best."

This is the so-called "Resolution C," to be referred to more fully by that name as we proceed. Under the date of November 6 following, the national secretary accordingly addressed a circular letter to each of the manufacturers indicated, propounding the question whether, when specifically requested by local associations of retail druggists throughout the country affiliated with the National Retail Association, they would refuse all sales to those parties whom the various manufacturers of proprietaries had designated as aggressive cutters. To this appeal a large majority of the manufacturers made favorable reply; but, others having failed to do so, a second circular was issued, May 1, 1903, again calling attention to the matter, and notifying the parties addressed that there would be published in the official paper of the national association, called "Notes," a list of those who acquiesced and those who did not, requesting definite answer, as before. "It is believed," as it is significantly said in closing, "that a little reflection will convince you of the desirability of co-operating with the secretary of the N. A. R. D.[2] in the discharge of the important duty

[2]National Association of Retail Druggists.

that has been laid upon him." The second circular brought in a large number not secured by the first; the names of several of the defendants being found in the published list. The resolution under which this action was taken did not suggest the specific use which was expected to be made of the information conveyed by the publication, but several who had given in their adherence to the plan having fallen by the way, an honor roll was proposed later on, which should contain the names of those wholesale druggists and jobbers who refused, in the words of the committee, "to have any business dealings whatever with unfair price-demoralizers"; to be made up according as favorable response was made to the circular, and to be published the same as the other in the N. A. R. D. "Notes." In this connection, in the issue of January 22, 1904, the following assurance was given, anticipating, somewhat, the argument of counsel here:

"There is no federal or state law that can possibly be construed in such a way as to compel any jobber to sell goods he has bought and paid for to any person or persons he does not want to. This is a free country, * * * where freedom of trade within its borders is guarantied by constitutional provisions; and each wholesaler has an unalienable right to frame for himself a selling policy, in accord with his own ideas of what is best for his individual interest and the trade at large, and then to adopt and put this policy into effect."

There were other and further suggestions, from time to time, for concerted action against price cutters, in line with what has been so referred to—such as requiring salesmen to have cards of identification and regularity; providing for the advancing and making uniform the prices for prescriptions; having proprietors refuse to patronize newspapers where cut prices were advertised; and doing away with the necessity for a special request from local retail associations, in order to have wholesalers refuse to sell to aggressive cutters—all, except, perhaps, the last, emanating from and being advocated by the National Retailers' Association. But it is not necessary to follow the matter further. Sufficient has been given to show the character of the combination in restraint of trade which is charged, and the only question is as to the law which is to be applied. It is contended, on the one hand, that no unlawful combination is made out, the manufacturers of proprietary goods having the right to decide, each for himself, as was done, to whom and upon what terms and conditions he would sell, or whether he would sell at all; it making no difference, provided his policy in this regard was individual, whether it coincided with a similar policy, adopted by others of the same class or not, nor that the action so taken was to that extent concerted. The tripartite agreement, to which alone the proprietors subscribed, was not, according to this, unlawful; and as to anything after that to which they did not agree, or which they did not recognize or subscribe to, such as the so-called "Resolution C," with its honor roll and white list, got up by the secretary of the retailers on his own motion, under it, they are not answerable; and these were therefore improperly admitted in evidence against them. It is argued, on the other hand, that the combination and conspiracy for which action is brought is not to be limited to the tripartite agreement, or the sale of proprietary medicines to which it related, which was, however, unquestionably, an unlawful restraint of trade, within

the meaning of the act. But that it is to be taken as extending to everything which was done concertedly to carry out the pervading idea, to which the defendants individually and collectively subscribed, which was to cripple and drive out of business, by coercive measures, such cutters of prices as 75 per cent. of the local trade at any given place declared obnoxious. This, it is claimed, was the real conspiracy, of which the various steps taken were merely manifestations or overt acts, including "Resolution C," the "Roll of Honor List," etc.; all of which were therefore admissible against the defendants generally.

Both contentions are right to a certain extent; neither can be sustained in its entirety. Undoubtedly the originator and compounder of a proprietary medicine may shape his own policy, and sell or withhold from selling, as he pleases, according to supposed self-interest or whim; fixing the prices and naming the terms and conditions at and upon which alone he will do so, refusing to those who will not comply. And so far as this is confined to his own goods, and pursued by independent and individual action, it cannot be challenged. It is quite a different matter, however, when two or more combine and agree that neither will sell to any one who cuts the prices of any of the others. This concerted policy, by which it is sought not only to maintain by each the price of his own medicines, which alone he is interested in or has the right to control, but also the prices on those of all who are thus banded together, is manifestly a direct interference with and restraint upon the freedom of trade, which in commerce between the states it was the object of the act of Congress to preserve. As in every conspiracy, it is the joining together of a number that counts, and that the individual has to fear. It is true that a common plan or policy does not necessarily mean a combined one. The individual manufacturer or proprietor may be persuaded, for example, that the retailer or jobber who cuts the medicines of his neighbor to-day will likely cut his medicines to-morrow, and so decide not to sell him; and it will not make out a conspiracy that others are of the same mind. If that was all there was to the present case, it would be easily disposed of. But, unfortunately for the defendants, it is not. The policy adopted and pursued with respect to aggressive cutters and those who sold to them was not that of the proprietors only, acting independently, each with regard to his own, according to what seemed to him good. The arrangement was tripartite, in which all the affiliated associations of the drug trade were involved—proprietors, wholesale distributing agents or jobbers, and retailers, the latter, if anything dominating it—evolved after extended agitation, discussion, and conference, to which the members were individually and collectively bound, disciplinary and coercive measures being provided against any who proved recalcitrant. Let a patent medicine man or wholesaler disregard its terms, and he was quickly given to understand that, if he catered to the aggressive cutter, he could not expect the custom of the organized retailer, between whom it did not usually take him long to decide. He became, if he persisted, an unfair trader, to be treated accordingly, until he repented and was reinstated, after acknowledging the error of his ways, and agreeing to transgress no more. Against this discipline, and with this rod held over them, it is needless to say that

there were few who went astray, and still fewer who held out. There was, perhaps, a murmur here and there, a question raised as to whether they might not overstep the law, and a recognition that they were close to the line; but it was met by assurances such as that quoted above, or by suggestions of escape by individual action, which can hardly be expected to deceive. Nor did, indeed, the individual proprietor control his own prices, nor determine to whom his goods should go. This was done for him in the cities by the local associations of retail druggists, into whose hands he thus committed himself. The prices which should there prevail were of their naming, and aggressive cutters were those who did not maintain them, who were ferreted out, and reported by the retailers' agents. All this and more was part and parcel of the tripartite plan, to which the proprietary, as well as the wholesaler, bound himself when he entered into it.

If co-operation and concerted action such as this does not make out a combination and conspiracy in restraint of trade, it is difficult to see what would be effective to do so. The combination is clear, and has been demonstrated; so, also, is the restraint of trade. That indeed was the avowed purpose of it, which was not simply to put the aggressive cutter out of business, but to maintain prices to the consumer, by this means, as they would not be maintained if left to themselves. It seems incredible, except as the trade in patent medicines is known to be immense, but it is confidently asserted, by those having the right to speak, that the cost to the country of the tripartite agreement amounted to $90,000,000 in six years. The general public have thus as usual, been made to foot the bill. That this constitutes in law, as in fact, an unlawful combination in restraint of trade, within the meaning of the act, there can be no doubt. Whatever may be decided elsewhere, the question is set at rest by Addyston Pipe Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and Montague v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, which control. In the former there was a combination among certain manufacturers of cast-iron pipe, controlling two-thirds of the business in states of the South and West, by which they agreed to advance the prices to the consumer by abolishing competition between themselves, parceling out the territory, and fixing the prices at which sales should be made therein, going through the form of bidding against each other at times as a blind; the prices and the successful bidder in each case being pre-arranged. It was sought to defend this action, because the restraint was only partial, not extending to the whole United States; also, that the monopoly secured was not complete, being tempered by fear of competition from others not in the arrangement, and affecting only a modicum of the price; and again, that the prices fixed were reasonable, and within those which were being continually and unrestrainedly made, simply doing away with ruinous competition, to which the parties had a right. But these and other arguments were put aside, and the case declared to be one prohibited by the act. "It is the effect of the combination," says the court, "in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealings in the commodity, that is to be regarded." So in Montague v. Lowry, by an agreement between eastern manufactur-

ers of tiles and certain dealers in San Francisco and vicinity, an association was formed whose by-laws provided that no manufacturer should sell to any dealer not a member, nor should any dealer sell to the same except at certain list prices, which were 50 per cent. higher than those at which sales were made to other members; membership also being confined to those who carried an average stock of not less than $3,000 and who were acceptable. The plaintiffs were dealers in San Francisco, where they had built up a business, but were not members of the association, and were not eligible; and after its formation they found themselves unable to buy to advantage, being restricted to dealing with San Francisco parties, to whom they were compelled to pay the extra prices listed. On a suit against the association for damages under the act, a verdict for the plaintiff was sustained; the case being held to be clear. It is useless, in the face of these authorities, to urge upon us the decision in Park v. National Druggists' Association, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, where a different conclusion has apparently been reached. It is to be noted, however, with regard to that case, that the agreement there, as viewed by the majority of the court, was merely to sell to all wholesale distributing agents at uniform rebate prices, so that the small dealer, with limited capital, was put on a par with the large ones, whose capital was more ample, thus tending to fairness and equality, on which stress is laid. There was, however, the further provision (to say nothing of other restrictions) that until a wholesaler agreed to the plan he could not buy of any member of the association whatever, in view of which three of the judges dissented; the case being still further weakened as an authority by the failure of the majority to altogether agree in their reasoning. At the best, therefore, it is near the line, and in no event can it be taken, contrary to the cases cited, as giving the law here.

So far, then, as the present case was kept within the limits indicated by these observations, it was correctly disposed of, and is to be sustained; but outside of them not. Unfortunately it did not stop with the tripartite agreement and the action taken under it, but went on to Resolution C, with its honor roll and white list. It is urged that these were merely further steps in the general combination and conspiracy, to get rid of the aggressive cutter, on which all were determined, and for which, therefore, by whomsoever taken all were bound. But this fails to note several things. Speaking broadly, no doubt there was a general purpose, or conspiracy, if you will, to drive the plaintiff and others like him out of business, to which in entering into the tripartite agreement the parties committed themselves. At the same time, however, there was a selection of methods. Not only was a general policy declared for, but a definite line of action under it, adopted after extended consideration and conference, which could not be varied from at will. In accepting the tripartite plan, they did not necessarily agree to anything and everything which might be done in its name, and particularly not to Resolution C, which was recognized as a new and decidedly advanced step, expected to work a radical change. As already stated, this project emanated from the National Retail Druggists' Association, in annual convention assembled at Cleveland in 1902. But even among the retailers there were those who doubted the propriety,

as well as the legality, of it; as witness the remarks of the president, at the annual meeting just before that, at which, having been proposed, it was promptly voted down. Nor was it ever adopted by the proprietors or the wholesalers as a body; the only assent given to it being individual, and by no means by all. This was secured by direct appeal, and the circulars sent out were addressed to "Manufacturers and Dealers in Non-tripartite Goods"; showing that a different class was intended to be reached.

No connection, except the most general one, is thus established between the tripartite agreement and Resolution C, and they are not to be taken as one and the same plan. They may not differ much in principle, but they do decidedly in results; pressure being put upon the aggressive cutter as it had not been by any means before. By the one, he was merely deprived of patent medicines, as to which, right or wrong, the proprietor might feel that he had a certain freedom to sell or withhold, the same as is argued here; but by the other, he was cut off from the most ordinary druggists' supplies, even toothbrushes and sponges being denied. A retailer cannot do much, it is true, without proprietary goods on his shelves; but without drugs and pharmaceuticals he cannot put up a single prescription, and might as well go out of business; and that, indeed, was what Resolution C was designed to bring about. This was an excursion into a new field, and to whatever else short of that the proprietor or wholesaler was committed, he might not care to go that far. He was at least entitled to have it distinctly presented for his acceptance before being bound, and his assent is not to be implied simply because he had agreed to what had gone before. He did not put himself indiscriminately and to all lengths into the hands of his associates. The trade recognized that this was the case, and that there were classes among the wholesalers, as shown by the publication called "Notes," of May 21, 1904, where those operating under the tripartite agreement are set apart from those operating under Resolution C. This may not be conclusive, but it is significant, and confirms, as it corresponds, with our own views.

As distinguished by parties, also, the combination was new. No doubt there were many who had agreed to the tripartite plan, who also agreed to Resolution C. But there were some who did not, who are defendants here, as well as some who agreed to the resolution alone. They divide on these lines, and cannot be brought together as one, so far as anything has been shown; and neither, as the result, can a joint action be maintained. As the case stands, however, all are made liable without distinction, for all that has been done, both under the tripartite agreement, as well as Resolution C; both being put in evidence against them all. It may be that a person who joins a conspiracy at an advanced stage of it makes himself party to what has been done in pursuance of it before. 3 Greenl. Ev. § 93, Lewis Ed. 8 Cyc. 658. But this must be with knowledge, and in promotion of the common cause. And even though, upon this basis, those wholesalers, who, with knowledge of the existing purpose to drive aggressive cutters out of business, lent themselves to this design, by denying him their goods as called for by Resolution C, could be held for the damages resulting from the whole scheme, still, as already pointed out, there is too wide

a divergence between the original tripartite plan and this later extreme development of it to make those who merely agreed to the one committed irretrievably and without question to both.

Upon the whole case, therefore, we reach the conclusion that Resolution C was inadmissible to charge those who had not assented to it, and should not have been received in evidence, nor anything done under it. The wrong which was committed by its adoption and enforcement was separate and distinct from that which resulted from entering into and carrying out the tripartite plan, as were also the damages experienced therefrom. The plaintiff in this respect pressed his case too far. He had a good one against some of the defendants under the tripartite agreement, and another against others under Resolution C, and against some, no doubt, upon both, but not against all; and there was the mistake. A joint tort being charged, not only had it to be proved as laid (Howard v. Union Traction Co., 195 Pa. 391, 45 Atl. 1076; Wiest v. Traction Co., 200 Pa. 149, 49 Atl. 891, 58 L. R. A. 666; Rowland v. Philadelphia, 202 Pa. 50, 51 Atl. 589), but the defendants had all to be liable for all that was resolved upon or done. This, in the view we take of it, was not the case, and the judgment must therefore also be reversed upon this ground.

This reversal is general, and applies to all the defendants, which renders it unnecessary to consider the special argument which was made for some. It will be for the trial judge, when the case comes up again, to determine, in the light of what has been said, how far they and others can be held.

Judgment reversed, and a new trial awarded.

KENTUCKY DISTILLERIES & WAREHOUSE CO. v. BLANTON.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1906.)

No. 1,463.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—SALE OF REAL PROPERTY BY ASSIGNEE—KENTUCKY STATUTES.

   Ky. St. 1903, §§ 87, 96, 2356, contain no provisions abridging the common-law power of an assignee for the benefit of creditors to sell real estate at private sale when such power is given by the deed of assignment, the effect of the amendments incorporated in said sections 87 and 96, relating to assignments, by Act March 16, 1898 (Acts 1898, p. 104, c. 42), being to repeal the limitation contained in the original section 87, requiring real property to be sold by an assignee at public sale.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, §§ 775–777.]

2. SAME—NECESSITY OF APPRAISAL.

   The provisions of Ky. St. 1903, § 2362 et seq., requiring real property to be appraised before being sold under an order or judgment of a court other than an execution, have no application to a private sale by an assignee for the benefit of creditors under power given him by the deed of assignment.

3. SAME—CONTRACT BY ASSIGNEE FOR SALE OF PROPERTY—CONSTRUCTION.

   An agreement by an assignee for the benefit of creditors of an insolvent corporation, made in a contract for the sale of property, that he will deliver to the purchaser certificates for at least 90 per cent. of the capital

stock of the corporation, is complied with by the delivery or tender of 90 per cent. of the certificates of stock outstanding, although the articles of incorporation state the amount of capital stock at a larger amount than that actually issued.

4. VENDOR AND PURCHASER—CONTRACT OF SALE—WAIVER OF STIPULATIONS FOR TIME.

The failure of a vendor to deliver an abstract of title to the purchaser within the time stipulated for in the contract is waived by its acceptance when delivered and its retention by the purchaser without any objection on that ground.

5. SPECIFIC PERFORMANCE—CONDITIONS PRECEDENT TO SUIT—TENDER OF PERFORMANCE.

It is not essential that a literal and precise tender of performance by a vendor should precede his filing of a bill in equity for specific performance of the contract, the legal effect of which is to submit himself to do everything which may be required of him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 249–256.]

6. SAME.

The rule is that when time is not of the essence of a contract for the sale of real estate or delay has been the fault of the defendant, and there has been no element of fraud in the bargain, the vendor may, if he can, clear away defects in his title before final decree in a suit by him for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 243.]

7. SAME—DEFENSES.

Facts considered, and *held* not to show such defects in the title of a vendor, who contracted for a sale of property which had been conveyed to him as assignee for the benefit of creditors, or such delay on his part in performance as to defeat his right to a specific performance.

8. SAME—CONTRACTS ENFORCEABLE—WANT OF MUTUALITY.

A contract by the assignee for the benefit of creditors of an insolvent corporation for the sale of assigned real estate is not so lacking in mutuality as to defeat his right to enforce specific performance, because, as a part of the contract, although relatively unimportant, he agreed to obtain the resignations of the directors of the corporation and place the purchaser in position to secure the election of a board in its own interest, which agreement he could not be compelled to perform, when he in fact complied therewith prior to the entry of the decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 89–99.]

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

For opinion below, see 120 Fed. 318.

This is a bill to compel specific performance of a contract for the sale and purchase of the Edgewater Distillery Plant, located in Harrison county, Ky., and certain personal property connected with its operation and business. Preliminary negotiations resulted in a contract bearing date of April 6, 1899. The vendor in the agreement is J. I. Blanton, as assignee under a deed of general assignment made by the T. J. Megibben Company, a corporation organized under the laws of Kentucky. The vendee is the appellant, the Kentucky Distilleries Company, a corporation of New Jersey.

The important provisions of the agreement so far as now necessary to be stated are as follows: (1) The vendor should within 10 days deliver "a complete merchantable abstract of title" to all of the real estate. (2) The vendor within 10 days also to report the sale to the Harrison county court and procure an approval by that court. (3) The vendor agreed to deliver deeds in accordance with the terms of the sale to the vendee within 10 days after such

confirmation; but the vendee was bound to deliver forms of deeds required to the vendor for execution within three days after notice of such confirmation. (4) The contract required that at time of delivery of deeds the property should be "free and clear of all liens, charges, encumbrances, taxes and assessments whatsoever." (5) The consideration to be paid was $40,000, payable in cash on delivery of one deed for the real estate and another for the movables, brands, trade-names, good will, accounts for storage, etc. (6) Without further consideration the vendor agreed to deliver to the vendee 90 per cent. of the certificates of the capital stock of the T. J. Megibben Company, and to procure the resignation of the officers and directors of that corporation, and a meeting of the old board to select the nominees of the purchasing company.

At the March term of the Harrison county court, 1899, Blanton had been, by a regular order of the court, directed to sell all of the assigned estate, either publicly or privately, as he deemed best, the sale, if public, upon terms named, and, if private, to be reported to the court for its approval. The contract of sale bears date of April 6, 1899, but was not in fact signed and delivered for some ten days later. Blanton reported his sale April 22, 1899, which was within the time fixed by the contract. It was confirmed on May 29th, a date as early as feasible under the statute and the practice of the court. On the same day an abstract of title and order of confirmation were sent to Mr. Charles H. Stoll, at Lexington, the counsel for the company and the company's agent most concerned in this sale. No objection was then or ever made that the abstract had not been sooner sent. It was received and retained without objection to the time of its delivery either then or later. This abstract and the proceedings of the county court were sent to Messrs. Pirtle & Trabue for examination and an opinion upon the title. On June 23d, nearly a month later, Pirtle & Trabue wrote the counsel for the assignee that in order to perfect the title four things should be done, namely: (a) The confirmation should be set aside, the property appraised, a resale had, and a new report of sale made within 10 days after such sale; (b) revenue stamps should be affixed to certain deeds; (c) certain liens mentioned should be satisfied and released of record; and (d) the assignor, the T. J. Megibben Company, should join the assignee in his deeds to perfect the record title. The next day, in a personal interview, the vendee's counsel concluded that a resale was not essential, but that an appraisement was important before confirmation. The steps pointed out were at once taken by the vendor, the former confirmation set aside, an appraisement had, and a new report of sale made and approval asked. This report was confirmed July 24, 1899. This result was again reported to Mr. Stoll and inquiry made as to when it would suit to close the matter. Mr. Stoll was then off on his summer vacation, and, under date of July 31st, replied that he was sending the papers to Pirtle & Trabue "for their opinion. Upon its return, if satisfactory, a deed will be prepared and I will be ready for settlement with you." The contract provided that the delivery of the deeds should be at Louisville, at Mr. Stoll's office, upon notice to him of their readiness for delivery. But in his letter Mr. Stoll notified Mr. Blanton that it would be unnecessary for him to go to Louisville, "as arrangements will be made to settle there [meaning Mr. Blanton's home, Cynthiana] upon the execution of the deed." Under date of August 2d, Pirtle & Trabue advised Stoll that the second confirmation was premature and should be set aside, and the report of sale lie over to the August term. They also suggested that the statutory provisions in respect to appraisements might require the sale to be set aside and an appraisement made, and a contract of sale executed in reference to the appraisement and reported and confirmed. But this seems to have been a mere fugitive suggestion; for they conclude their opinion to Stoll by saying: "We are not disposed to hold that the direction that the report of sale shall be filed within 10 days after sale is mandatory, but we have no question that the report of sale should lie over to the August term." Stoll inclosed this letter to Blanton and advised him that he had directed Pirtle & Trabue to correspond directly with him. Thereupon Blanton's attorneys, Messrs. Blanton & Berry, wrote to Pirtle & Trabue, saying, among other things, that they thought no appraisement necessary, and

that, if the whole matter was to be done over again and a new contract of sale made, it would result in great delay. They expressed a willingness to do this if they insisted. A copy of this letter was sent to Stoll. They also stated that the order of confirmation had, by mistake, been entered prematurely, and would be set aside as suggested. Under date of August 22d, Pirtle & Trabue replied, saying: "We think after the order of confirmation of the sale has been entered at the August term of the court that the objections heretofore made will be cured. We think we have expressed this opinion heretofore when we stated that it would not be necessary to begin over again in this matter. We should like to have the order entered on the 28th day of August approving and confirming the sale. The above opinion is given upon the assumption that the last report of sale shows that the appraisement was made prior to reporting the sale. We should like to see the last report of sale. As soon as we hear from you that the order confirming the sale has been made we will prepare a deed and send it to you." August 29th copies of order setting aside former confirmation and of the new order of August 28th confirming it were sent by Blanton, with an inquiry whether any other orders were necessary. To this Pirtle & Trabue replied, under date of August 30th, as follows: "We have received your letter of the 29th inst., inclosing copy of order setting aside the previous confirmation of sale and continuing the case to the August term, and the order entered August 29th confirming the sale ordering the deed, etc. These orders seem to us all that is necessary. We will at once prepare a deed and send it to Mr. C. H. Stoll for his approval with the request that upon approving same he forward it to you for execution, and he will then arrange for the delivery of the deed and the payment of the money."

Up to this time the Kentucky Company had manifested an earnest desire to straighten out the title and bring the trade to a conclusion. For reasons not shown, there occurred, just about the time of this opinion by Pirtle & Trabue, a change of mind as to the desirability of the property. A change of counsel occurred for reasons which may be conjectured, and the question of the sufficiency of the title was submitted to a Mr. Austrian, of Chicago, who is described as of the general counsel of the buying company. Austrian wrote Blanton, under date of September 5th, asking when he would be ready to finally consummate the matter. Blanton thereupon informed him of the conclusion reached by Pirtle & Trabue and their promise to prepare forms of deeds, and that since then he had heard nothing from them or Stoll. He also wrote that he was ready at any time to close the matter. But Mr. Austrian moved slowly. On September 14th he wrote that he would be in Louisville "inside of the next week or ten days, at which time I will be pleased to take up the matter of the Megibben plant and bring the same to a conclusion." Time could not possibly have been regarded at this stage of the matter as of any moment, for Mr. Austrian did not materialize, nor was he heard from. Though written to three times to know the reason of the delay, no reply was elicited until December 13th, when he broke the silence by writing that Blanton's last inquiry of the cause of delay had been "referred to Mr. Levy Mayer, who is at present out of the city. As soon as he returns he will endeavor to give you a reply." This was the first time that Mr. Blanton had ever heard of Mr. Mayer's connection with the case. Blanton, about the date of his last inquiry of Austrian, wrote Messrs. Pirtle & Trabue, asking them to prepare the forms of deeds as promised, as he could not induce Mr. Austrian to reply to his letters. To this Pirtle & Trabue replied, that his letter had been referred to Mr. C. H. Stoll. Mr. Mayer, under date of December 18th, wrote Blanton as follows: "We have carefully gone through the papers and documents connected with the Megibben property transaction and have come to the conclusion, and have advised our client, that you have not complied with the agreement; that the title is imperfect, and that there are several other substantial breaches of the conditions which were to be performed on your side. We have also had the matter gone over by local Kentucky lawyers who have come to the same as we have arrived at. Mr. C. H. Stoll, of Lexington, has also investigated the matter and is quite familiar with the details and is not far from where

you are. Doubtless you could arrange to have a personal conference with him. I am sending him a copy of this reply and also of your letter of the 11th inst." Some correspondence ensued between Mayer and Blanton in a vain effort to induce him, Mayer, to point out where he, Blanton, had not complied with the contract, and wherein his title was imperfect. Mayer, having rejected the property without giving the ground, referred Blanton to Stoll for the information he wanted. Stoll seems to have pointed out only the matters which had months before been pointed out by Pirtle & Trabue and corrected in the manner and by the steps which they had pointed out as satisfactory. Failing to obtain information as to the grounds upon which the vendees rejected the property, this bill was filed. The Megibben Company was joined as a complainant, and certain persons having liens under the deed of assignment to Blanton and by prior mortgage, execution, levy, or attachment were made defendants along with the vendee company for the purpose of securing satisfaction and relinquishment of such liens.

There was a decree for the complainants, and the Kentucky Distilleries Company has appealed.

Levy Mayer, Alfred S. Austrian, and Wm. Marshall Bullett, for appellant.

Helm Bruce, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The errors which have been urged in the decree of the court below will be considered in the order in which the points have been presented by the learned counsel for appellant.

1. It is said that Blanton, as an assignee under a general assignment for benefit of creditors, had no power to make a private sale of the real estate included in the assignment, and that a title resting upon such a sale, although confirmed by the county court, is not such a title as the Kentucky Distilleries Company can be required to take. The deed of assignment to Blanton directs him to sell all of the property, real and personal, "with all reasonable dispatch," and gives him full authority "to sell and convey the real estate" and to make and sign "all necessary deeds and conveyances." That a Kentucky assignee or trustee might be lawfully empowered to sell the trust property, both real and personal, at private sale, independent of some statutory restriction, is not disputed. Hahn v. Pindell, 3 Bush. (Ky.) 189; Shinkle's Assignee v. Bristow, 95 Ky. 89, 23 S. W. 670. The question is whether any statute of that state forbids an assignee to sell assigned real estate at private sale. The statute law then in force which dealt with the matter of sales by assignees under deeds of assignment are found in the Kentucky Statutes of 1903, in sections 2356, 87, and 96. The provisions are as follows:

"Sec. 2356. No sale made of any real estate by a trustee, by virtue of a deed of trust, or pledged to secure the payment of debts, shall be valid, nor shall the conveyance by such trustee pass the title of the property specified in such deed or pledge, unless the sale thereof shall be in pursuance of a judgment of court or shall be made by an assignee under a voluntary deed of assignment, or the maker of such deed or pledge shall join in a writing evidencing the sale."

"Sec. 87. Personal property conveyed shall be sold by the assignee at private or public sale, as the court may direct; and the assignee shall have power to pass title to the same as fully as assignor could have done at the date of the assignment. Real property [*when sold at public sale*] shall be

sold in the same manner and upon the same terms as real property sold at decretal sale [*provided, the purchaser shall have the right to pay cash and the assignee to accept cash in payment of the purchase price at any such sale*], and the Court may make such orders concerning the advertisement of the sale as it deems proper, and the assignee shall have power to convey and pass all the right and title to the same which the grantors in the deed of assignment had at its date. The report of sale shall be filed by the assignee within ten days after the sale, and if no exceptions are filed thereto, the same shall be confirmed at the second regular term after it has been filed. If exceptions are filed, they shall be heard by the Court and disposed of."

"Sec. 96. The provisions of this chapter shall not prevent actions to settle estates by the assignee, or by any creditor or creditors representing one-fourth of the liabilities, from being brought in the Circuit Court. Provided, That whenever a suit involving the settlement of the estate shall be brought in the Circuit Court of the county in which the assignment is made, the jurisdiction of the County Court shall cease, and all papers relating to the estate, and filed in the County Court, shall be transmitted by the clerk thereof to the clerk of the Circuit Court, and by him filed in such suit; [*and the said Circuit Court shall have all the power and authority to administer and settle up the assigned estate conferred on the County Court by this act, in addition to its power and authority heretofore existing as a chancery court, and the assignee shall have full power and authority to sell the personal and real property belonging to the assigned estate, at public or private sale, and to convey and pass all the right and title to the same which the grantors had in the deed of assignment at its date; and the said assignee shall, within ten days after such sale, report the same to the Circuit Court in which the suit for settlement of the estate is pending and such report shall thereupon be laid over ten days for exceptions, and if no exceptions are filed within that time, same shall thereupon be confirmed. If exceptions are filed, then such exceptions shall be heard and determined by the Court.*]"

The words in italics in sections 87 and 96 were inserted or added to the original statute by an amendment which took effect March 16, 1898. Acts 1898, p. 104, c. 42.

To understand the force and meaning of the amendment of 1898, as shown in the bracketed words above, it is necessary to understand the prior legislation limiting the power of such assignees or trustees under the powers conferred by a deed of trust. The first effort to limit their contractual powers seems to have been under a statute known as the "Act of 1820," which was substantially carried into the Revised Statutes of 1852, which provided that no sale of real estate by any trustee by virtue of any deed of trust "to secure payment of debts shall be valid * * * unless the sale thereof shall be in pursuance of a decree or order of a court or the maker of such deed or pledge shall join in a writing evidencing the sale." Rev. St. 1852, c. 80, § 24. Under that statute the assignee could only sell, either publicly or privately, under a decree or order of a court directing the sale or by the joinder of the maker of the deed of trust in the sale. Thus the law stood until the enactment of February 25, 1893, being section 2356 of the Kentucky Statutes of 1903, as set out above. The plain effect of this last-mentioned statute was to restore to assignees under voluntary deeds of assignment their original common-law power to make sales, either publicly or privately, if authorized by the instrument of trust. It is not the case of statutory powers granted to assignees under voluntary deeds of assignment, but a recognition of their common-law contractual authority. It presupposes that the power is conferred by the maker of the assignment, and

takes that case out of the statutory regulation. This was the law when the act of March 16, 1894, was passed, regulating voluntary assignments. That act, so far as it relates to sales by assignees, appears in the unbracketed parts of what now constitutes sections 87 and 96 of the Kentucky Statutes of 1903, as set out above. These two sections were amended by the act of 1898; the amendment appearing in brackets as shown above. Prior to the amendment of 1898 the act of 1894 plainly required that real property sold under a deed of assignment should be sold at public sale only and upon the same terms as real property was required to be sold "at decretal sale," and by such advertisement as should be directed by the court.

The plain and obvious purpose and effect, though awkwardly expressed, of the amendment of that section of the act of 1894, now section 87 of the Kentucky Statutes of 1903, by the insertion of the words "when sold at public sale," was to repeal the requirement of the act of 1894 that real property, when sold by an assignee under an assignment, should be sold at public sale only, and to restore to the assignee under such assignments his common-law power to sell privately if so empowered by the deed of assignment, and so limit the restrictions of the act of 1894 as to require him to sell, when he sold publicly, at a public sale conducted as decretal sales of real property and under such advertisement as the county court should direct. The amendment affecting such sales, when the settlement of the assigned property was carried into a circuit court, very distinctly provides that in such case the assignee shall have power to sell the assigned property "at public or private sale." In both cases the amendment assumes that the power to sell privately is conferred by the deed, and in the first case it is also implied that the assignee shall report any private sale for confirmation, though this is not distinctly so stated. The insertion of the limiting words "when sold at public sale" would have no practical meaning unless it was intended to restore the common-law authority of the trustee or assignee to sell at private sale when the instrument authorized that mode of sale. Neither is it easy to see why the same assignee or trustee might sell publicly or privately when the settlement of the estate was carried into the Circuit Court at his own motion or upon the initiative of creditors and withheld the power unless so removed. The opinion of Judge Cochran upon this matter of interpretation is full, clear, and strong, and we are unable to add any consideration leading to the result stated not already better stated by him. See 120 Fed. 318.

We conclude, therefore, that the assignee had the power to contract for a private sale of the assigned estate.

2. That no appraisement, under section 2362 et seq. of the Statutes of Kentucky, 1903, was made before the sale, is unimportant. An appraisement under the statute is only essential when a public sale is made, and was not necessary if the assignee had the power to make a private sale.

3. The next objection is that the tenth clause of the contract of sale obligated Blanton to procure and deliver, "along with the distillery property," and without further consideration, "certificates for at least ninety per cent. of the capital stock of the aforesaid T. J. Megibben

Company," and would obtain the resignation of the directors of that company and have a meeting called and a board installed nominated by the vendee. It is insisted that the complainants have not and cannot comply with this term. The T. J. Megibben Company was the assignor in the deed of assignment to Blanton. It was hopelessly insolvent and the assignment included the entire corporate property. The stock of the company was worthless, except, as it is suggested, it might be of value as enabling the purchasing corporation to continue the corporate organization of the insolvent Megibben Company and through it deal with the government in matters of revenue. Complainant tendered in the court below 492 shares of the Megibben stock and the resignations of its directors, and this the court found was a compliance with the terms of the agreement.

The contention of the appellants is that the capital stock of that corporation was $100,000, divided into 1,000 shares of $100 each, and that the 492 shares tendered below was less than 50 per cent. The T. J. Megibben Company was organized in 1888, under the general incorporating statute of the state. The third article provides:

"The capital stock of said corporation shall be $100,000, divided into 1,000 shares of $100 each, one half of which will be fully paid up, the other half to be paid at any time upon the call of the corporation. The capital stock may, by a vote of not less than two-thirds of the stockholders, be increased to any amount not exceeding $200,000.00."

The appellants say that in contracting for 90 per cent. of the capital stock the purchaser "is presumed to have known, relied upon, and to have been contracting with reference to the articles of incorporation of the Megibben Company," and that the contract should be construed as contracting for 90 per cent. of 1,000 shares. In point of fact it does not appear that anything was known in respect to the capital stock of that company. The plain purpose and the only object was to secure 90 per cent. of the "certificates" issued by that corporation, whatever their aggregate might be. The object was control of the corporation. If the Megibben Company had begun business with less than a subscription for 1,000 shares, then its capital stock was less than authorized. But suppose that was the fact. What then? The state might complain. The corporation could not set up the fact as a defense when sued as a corporation, and no one dealing with it could rely upon such a fact as indicating an illegal organization. This is so provided by the very law under which it was organized. Gen. St. 1888, c. 56, §§ 17, 18. If the appellants obtain 90 per cent. of all the outstanding certificates of capital stock, they get all that the contract, under the circumstances of this case, authorize them to demand.

But the appellants say that the stubs of the stock certificate books show the issuance of 1,500 shares, and that 1,000 of these shares are outstanding and not accounted for. This is a gross mistake. The only evidence of the issuance of 1,000 of the shares referred to is the usual entry upon the stubs of the stock certificate book, and across this evidence of issuance is also found equally cogent evidence of cancellation; the word "Cancelled" being written across the entry upon the stub in the handwriting of the secretary of the company, a person long since dead. If the stub entries are evidence tending to show issuance of

the shares referred to, the cancellation entry is evidence tending to show a cancellation. This, in the absence of any evidence tending to show the issuance of any shares other than the 500 originally issued to T. J. Megibben in consideration of the transfer of the distillery property, leaves us with no moral doubt but that only 500 shares were issued, and that a tender of 492 of them is a full compliance with the contract.

4. But the appellants say that time was of the essence of the contract, and that defects in the vendor's title were not cleared, nor liens nor incumbrances removed or released, if in fact all such liens have yet been removed, until the progress of the suit in the court below. Thus, it is said, the contract provided that the vendor should deliver an abstract of title within 10 days from the signing of the contract, but did not do so until after that time had expired, that within 10 days the sale should be reported to the court having jurisdiction over assignees or assigned estates for approval, and that within 10 days after confirmation deeds should be delivered. The effect of the fact that the abstract was not delivered within 10 days after sale has been waived by the acceptance of it, when delivered, without objection, and its retention for months without specifically referring to any other defects in the title than those amendable by the steps taken in the county court suggested by the buyer's counsel as necessary "to perfect title." These steps, when taken, the same counsel pronounced satisfactory, and, as shown by the letter of August 30th, they promised to prepare forms of deeds and send to Stoll, which forms, if satisfactory to him, would be sent to the seller for execution. The sale made to the appellants was, as required by the agreement, reported to the Harrison county court, and an approval asked within 10 days after the actual date of the sale, a date some 10 or 12 days later than the dating of the agreement. The delay in obtaining a satisfactory decree of confirmation was due to compliance with the opinion and request of the appellants, who were not satisfied because there had been no appraisement before the sale was reported. This, as we have already seen, was a nonessential, if, as we have decided, the assignee had the power to make a private sale of real estate. But it is said that the final confirmation was had on August 28th, and reported to the appellant's counsel same day, and that the contract stipulated that within 10 days after such confirmation the vendor should deliver deeds to the vendee and the purchase money be then due and payable, and that no delivery of deeds, within the stipulated time, was made, and that no sufficient tender of performance was made prior to the filing of this suit. It is also said that neither when such delivery of deeds should have occurred, nor at any time prior to the bringing of this bill, was the vendor capable of complying with his agreement, and that certain defects in the legal title existed when the bill was filed, and that certain liens rested upon the property down to the filing of a release during the progress of the cause. But the stipulation of the contract was that the buying company should prepare forms of deeds satisfactory to it and deliver them to Blanton within three days after notice by him of the confirmation of the sale by the court. In addition, the gross price of the entire property was $40,000. The buyer stipulated for one deed carrying the real estate and another the personal

property, including trade-marks, etc., and was to indicate how the purchase price should be apportioned between the two kinds of property. Under the facts of this case Blanton was not obliged to take any further steps until the Kentucky Company indicated its readiness to go on. Until the vendee was satisfied with the title, there was no occasion for the vendor to go forward and pay off existing liens which it was well known the seller must satisfy out of the proceeds of the sale. The delay after counsel expressed themselves satisfied with the county court proceedings was wholly due to the failure of the buyer to examine the abstract then furnished and point out any defects behind the title to Blanton under the assignment. This good faith and fair dealing required the Kentucky Company to do, and, until they indicated the particulars in which the abstract was defective, the seller was not required to do anything more. Willard v. Tayloe, 8 Wall. 557–572, 19 L. Ed. 501. After months of inexcusable delay, the seller being from time to time led to believe that a day would soon be fixed for a meeting and a closing of the matter, there came an out and out refusal of the property justified upon broad claims which gave no idea of the defects subsequently pointed out in the course of this litigation. In legal effect and substance this arbitrary repudiation of the contract was as if Mr. Mayer had said to Mr. Blanton:

"It would be an idle ceremony for me to prepare or deliver to you deeds to execute when we do not intend to accept any tender you can make. You cannot make a good title, and you have broken your contract, and we will not take your property unless you can compel us to do so through the courts."

Under such circumstances it would have been an idle ceremony for the vendor to tender performance, and the defective tender made immediately prior to the filing of this bill should not operate to defeat the relief prayed if other objections of a more substantial character do not exist. In courts of law a more exacting rule may prevail. But in a court of equity, where the legal effect of a bill for specific performance is such that the complainant submits to do everything which may be required of him, it is not essential that a literal and precise tender of performance shall precede the application for the equitable remedy of specific performance. Moore v. Crawford, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Bradford v. Foster, 87 Tenn. 5, 9 S. W. 195.

The case is distinguishable from the case of the Kentucky, etc., Company v. Warwick, 109 Fed. 280, 48 C. C. A. 363, where the appellant company here was denied a decree for a specific performance of a contract for the purchase and sale of a distillery property. In that case the contract provided that the deed should be deposited in escrow, to be delivered if the buyer should, within a date named, pay to the depository of the deeds the consideration money. "The contract," said this court speaking by Judge Day, now Justice Day, "makes payment a condition precedent to the right of the second party to receive the title papers." The buyer did not pay the money within the time named, and time was held to be of the essence of the contract because the terms of the contract and the nature of the property manifested an intent that it should be so. The greater part of the property

then involved was warehoused whisky, an article of fluctuating value, and the price was not deposited with the trustee named until more than a month after the date fixed for the payment, at which time the whisky had increased largely in market value. The contract here involved did not include whisky, and is not shown to have been subject to any great change in market value, and the vendor was not required to deliver deeds within the 10 stipulated days unless he should first be furnished with the forms of deeds satisfactory to the vendee.

But it is said that at the time of the filing of the bill the complainant was not then able to comply with all of the terms of the contract, and that the tender then and thereby made was not sufficient. But this is not necessarily fatal. There is no hint of fraud or unfairness in the original bargain, and no bad faith or unfairness in the subsequent conduct of the vendor. If, therefore, the vendor was able to correct defects in the title, and clear away incumbrances without unreasonable delay, he should be allowed to do so before final decree. The rule is that when time is not of the essence of an agreement or the delay has been the fault of the defendant, and there has been no element of fraud in the bargain, the complainant may, if he can, clear away difficulties in his title before final decree. Hepburn et al. v. Dunlop & Co., 1 Wheat. 179, 4 L. Ed. 65; Kimball v. West, 15 Wall. 377, 21 L. Ed. 95; Jenkins v. Hile, 6 Vesey, 656; Coffin v. Cooper, 14 Vesey, 205; Dresel v. Jordan, 104 Mass. 407; Chrisman v. Partee, 38 Ark. 31; McKinney v. Jones, 55 Wis. 50, 11 N. W. 606, 12 N. W. 381; 2 Story's Equity Jurisprudence, § 777. This is the well-settled doctrine in the state of Kentucky from which state this case comes. Logan v. Bull, 78 Ky. 607; Collins v. Park, 93 Ky. 6, 18 S. W. 1013. The matters in which the complainant's title was defective or incumbered with liens or taxes were those defects which existed when the antecedent tender was made. Without unreasonable delay, they were removed before the decree or the purchasing company was protected by the decree. We have already passed upon the more material of the objections to the title. The contention that the property is still subject to a possible lien in behalf of the government, in consequence of taxes due upon warehoused whisky, we have considered. The fear in this respect has no substance, and we are satisfied with the opinion of the court below upon this point. We quite agree with the opinion of that court that the title of vendor was clear and sound at the time of the decree below.

But it is finally urged that there existed originally such a want of mutuality as is necessary to support a bill for specific performance. In short, it is said that, if the agreement involved a stipulation which one party could not have specifically enforced against the other, that neither party may, for the want of mutuality, avail himself of the purely equitable remedy of specific performance. So far as this objection rests upon the ground that there were certain defects in the title which could only be cured by getting in the title to certain interests which were outstanding in third persons, we need not discuss it, for it is not a case of a speculative sale of something which the seller did not have. Blanton was the owner in trust of the property sold, and entitled as such to perfect a merely defective title. The application of

the doctrine of mutuality of remedy is made to the stipulation requiring the seller to secure the resignations of the directors of the T. J. Megibben Company. Appellants say that a specific performance of this stipulation, from the nature of the subject, could not have been compelled by them, and that this makes the agreement nonmutual. But we have a case where before final decree the resignations of the directors of that company had in fact been secured and filed, and tendered to the defendants below. The obligation of the one side to secure these resignations and of the other to take the property, the other stipulations being also performed, when they should be secured, constitute mutual obligations. For a breach by either an action at law would lie. Why, then, if the seller puts himself seasonably in condition to comply with a stipulation which, from its character, he could not be compelled to specifically perform, shall he be denied the remedy of specific performance? We think he may. Although he could not have been compelled to secure the desired resignations, he has in fact done so, and thus made himself capable of carrying out this as one of the relatively unimportant parts of an entire agreement. We see no good reason why the buyer should now excuse itself from the acceptance of that which it was under obligation to take. In Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955, there was a want of mutuality of obligation; one of the parties having a right to terminate it on giving a stipulated notice. As observed by Judge Cochran, "the same want of mutuality of obligation would have continued to exist had specific performance been decreed," and "to grant specific performance under such circumstances would have been clearly inequitable." The other cases cited by appellant's counsel are all discussed in the opinion of the court below, and clearly shown to have no application to the facts of this case.

The decree of the court below is affirmed.

BOSTON & M. R. CO. v. GOKEY.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 11.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—DEFECTIVE APPLIANCES—ASSUMED RISK.

Plaintiff, a brakeman, while in defendant's employ, was struck by a switch target and thrown to the ground from a moving freight car while he was climbing up the ladder to release a brake, with his back to the switch. The switch had been changed shortly before, and plaintiff testified that he had no knowledge of its dangerous proximity to the track and had never been warned concerning the same. *Held*, that the danger from such structure was not one of the ordinary risks which plaintiff assumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 556.

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

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether plaintiff was guilty of contributory negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1124.]

3. COURTS—FEDERAL COURTS—JURISDICTION—COURT OF APPEALS.

Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the circuit court is in issue, and section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) declares that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in section 5. *Held*, that the Circuit Court of Appeals has no jurisdiction to pass on questions challenging the jurisdiction of Circuit Courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1099.

Jurisdiction of Circuit Court of Appeals in general, see Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

Wallace, Circuit Judge, dissenting in part.

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

See 130 Fed. 992, 994.

Writ of error to the Circuit Court of the United States for the District of Vermont to review a judgment entered on the verdict of a jury in favor of the plaintiff for $3,350.

G. B. Young, for plaintiff in error.

E. A. Cook and H. W. Hovey, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The plaintiff, a brakeman in the employ of the defendant, was, while in the discharge of his duties, struck by the target of a switch and thrown to the ground from a moving freight car. He received injuries which resulted in the amputation of one of his feet three inches above the ankle. The switch which caused the accident was located in the freight yard at Lyndonville, Vt., having been placed in position but a few weeks prior to the accident. The dangerous proximity of the target to the track was unknown to the plaintiff as he testified that he had never operated it in its changed location or been warned regarding it. It was so near the track that while in the act of climbing up the ladder of the moving car to release a brake, with his back to the switch, he was caught by the target and hurled to the ground. In other words, there was not room enough to permit the body of a brakeman in that position to pass in safety.

It cannot be successfully maintained that the danger from such a structure was one of the ordinary risks assumed by the plaintiff on entering the defendant's employ. The law imposed upon the defendant the duty of furnishing for the use of its servants fit and suitable means and appliances. The jury found that the defendant failed to perform this duty; they found, in effect, that the defendant furnished an unsafe switch with the target so located that it served as a trap in which employés, ignorant of its position, might be caught and killed or injured. Whether such a structure was one reasonably safe and

proper to be maintained at the place described was a question of fact and was presented to the jury under instructions as favorable as the proofs warranted.

The same statement is true as to the alleged contributory negligence of the plaintiff. It cannot be said, as matter of law, that he was at fault in not ascertaining the situation in time to avoid contact with the target. The peril was not so obvious as to justify the trial court in imputing negligence to the plaintiff in failing to discover it. In the absence of notice or knowledge to the contrary he had a right to assume that, when in the discharge of his duty he was required to mount a moving car, he would not be hurled to the ground by a target placed so near the car that his body could not pass in safety. At least it was a question for the jury.

The case is an exceedingly simple one upon the facts, involving questions which are constantly arising in negligence cases; these questions were properly sent to the jury under instructions which fairly presented the conflicting contentions of the parties and, after a careful examination of the record, we fail to find any error which warrants us in reversing the judgment. We are unanimously of the opinion that the trial was fairly and impartially conducted and that the verdict, considering the irreparable injury to the plaintiff, was a moderate one.

We refrain from discussing the jurisdictional question argued at the bar and in the briefs, for the reason that this court since its organization has uniformly held that the act creating the Circuit Courts of Appeal confers no authority upon these courts to pass upon questions challenging the jurisdiction of the Circuit Courts. Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547]. Section 5 of the act (26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, and section 6 (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) provides that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in section 5. This court has no appellate jurisdiction except such as is conferred by statute and we have been unable to perceive how the statute can be logically construed to bestow upon us a right which is expressly conferred on the Supreme Court and is expressly withheld from us. U. S. v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299; Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. 79; Penn. Lumberman's Ins. Co. v. Meyer, 126 Fed. 354, 61 C. C. A. 254; in s. c. 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; Sun Printing Ass'n v. Edwards, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027; U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Halpin v. Amerman, 138 Fed. 548, 70 C. C. A. 462.

The judgment is affirmed, with costs.

WALLACE, Circuit Judge (dissenting). Error is assigned, among others, of the denial by the court below of the motion by the defendant to dismiss the action upon the ground that because the writ for the commencement of the action was not properly served on the defendant the court had no jurisdiction of the defendant.

The writ was dated April 25, 1904; was made returnable and notified the defendant to appear and answer at a term of the United States Circuit Court for the District of Vermont to be held on the 17th day of May, 1904; and was served by the marshal on the 2d day of May, 1904, by attaching property designated as the property of the defendant by one Folsom, its agent and division superintendent within the said district, and leaving a true and attested copy of the writ in Folsom's hands at his office in said district.

Upon the return day mentioned in the writ, the writ together with the marshal's return was duly filed, and thereupon the defendant appeared specially for the purpose of the motion to dismiss and for the filing of a plea in abatement. The motion to dismiss was based upon the face of the writ and the marshal's return of service. The plea in abatement alleged facts qualifying the statements contained in the return of the marshal, and in substance asserted that the attempted service upon Folsom was unwarranted by the provisions of the statutes of Vermont. After the court had denied the motion to dismiss and had decided in effect that the plea in abatement was bad, the defendant answered upon the merits.

The assignment of error which challenges the ruling of the court in refusing to dismiss the action presents the general question whether the court acquired jurisdiction of the person of the defendant. If the court did not by a valid service of an authorized process obtain jurisdiction, the judgment is subject to review on a writ of error taken directly to the Supreme Court. This proposition was considered and decided in Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, where the case was one in which the summons required the defendant to appear and answer in a Federal Court of the District of Colorado within ten days from the time of service of the summons instead of thirty days as provided for the procedure of the state courts by the statutes of Colorado. Inasmuch as section 5 of the Act conferring jurisdiction upon this court, (Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) provides that writs of error may be taken from the Circuit Courts direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, as well as in any case which involves the constitutionality of any law of the United States, or the validity or construction of any treaty, while section 6 provides that the Circuit Courts of Appeal established by the Act shall exercise appellate jurisdiction to review by writ of error final decisions in all cases other than those provided for in section 5, the question arises whether this court can properly undertake to decide whether there was jurisdiction in the court below. In United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299, we held that this court was not authorized to decide the validity or construction of a treaty; and in Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. 79, following that judgment, we decided that an appeal presenting the question of the jurisdiction of the Circuit Court, as well as other questions relating to the merits of the controversy, did not authorize this court to pass upon the jurisdiction of the court below. These two decisions were based upon our understanding of the decisions of the Supreme Court in United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87,

and Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861. Since these decisions, however, the Supreme Court has considered again the proper construction of sections 5 and 6 (26 Stat. 827, 828 [U. S. Comp. St. 1901, p. 549]) in American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859, and I think it is apparent from its opinion that we misinterpreted the meaning of its former decisions. I am now satisfied that unless we see fit to certify to the Supreme Court the question of jurisdiction, we have authority, and it is our duty, to entertain and decide it in all cases where the jurisdiction of the Circuit Court is invoked solely because of the diverse citizenship of the parties to the action.

In Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946 it was pointed out that although prior to the passage of the Act of June 1, 1872, it was always in the power of the Federal Courts, by general rules, to adapt their practices to the exigencies and conditions of the times, since the passage of that act the practice, pleadings and forms and modes of proceeding must conform to the state law and to the practice of the state courts, except when Congress has legislated upon a particular subject and prescribed a rule. And the court also declared that "When a state statute prescribes a particular method of serving mesne process, that method must be followed; and this rule is especially exacting in reference to corporations."

The Act of June 1, 1872, now section 914 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 684] does not require a Circuit Court of the United States to observe a strict conformity in actions at common law to the practice and procedure existing at the time in such actions in the courts of the state within which the Circuit Court is held, but permits the Circuit Court to conform thereto "as near as may be." As was said in Ind. & St. L. R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898: "This indefiniteness may have been suggested for a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." In Shepard v. Adams (supra) a summons issued by the United States District Court for the District of Colorado which required the defendant to appear within ten days from the time of service was held to sufficiently conform to the statutes of Colorado regulating the practice of the state courts although those statutes provided that the time within which a summons should require the defendant to appear was twenty days. This conclusion was reached because the summons by the Federal Court was issued pursuant to a rule of that court which was adopted when the existing statutes of the state prescribed that summonses should require the defendant to appear within ten days, but which rule was not changed to conform to a subsequent change in the statutes of Colorado. The court said: "We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question." It is apparent from the reasoning of the opinion that the summons would have been held invalid if it had not been issued in pur-

suance of a rule of the Federal Court which conformed substantially when it was adopted to the state statutes.

The statutes of Vermont in force at the time of the issuing of the present writ, and for many days before, contained the following provisions applicable to the service of writs in actions like the present.

"Section 1088. Every writ and process returnable before the supreme and county courts, except as otherwise provided, shall be served within twenty-one days from the date of issuing the same, including the day of service, and excluding the day of issuing, and shall contain the following direction to the officer, viz.: 'Fail not but service and return make within twenty-one days from date hereof.'"

"Section 1089. The party suing out such process shall cause the same to be entered and docketed in the county clerk's office on or before the expiration of said twenty-one days, or the process shall on motion abate."

"Section 1090. The defendant shall cause his appearance therein to be entered with the clerk on or before the expiration of forty-two days from the date of such writ." The only rule of the Circuit Court of the District of Vermont which touches the case is rule 8 which was adopted prior to the enactment of these provisions and provides as follows: "All mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof according to the laws of the state, otherwise it shall be returnable to the next regular term thereafter."

There is nothing in the rule of the Circuit Court which impinges upon the statutory provisions, and these provisions require the writ to be served within twenty-one days from its date of issuing, and allow the defendant twenty-one days at least after service in which to appear in the action. The present writ was not served or attempted to be served on the defendant until the 2d of May, 1904, or fifteen days previous to the time at which the defendant by the writ was notified to appear and answer. I cannot escape the conclusion that the motion to dismiss should have been granted.

If process is not served pursuant to the required statutory time the service is nugatory unless cured by a voluntary appearance or waiver of the defendant. It was upon that ground only that the court assumed appellate jurisdiction in Shepard v. Adams. The defendant in the present case was deprived of the full opportunity to prepare its defense which the statute was intended to afford, and though it may have had in fact sufficient time, it was entitled to assert its statutory right. The denial of that right was error.

There is respectable authority for the proposition that if a defendant appears in order to take advantage of a defective process or service, and his motion to dismiss the suit on that ground is overruled, he cannot then answer and proceed to trial without making a virtual waiver of his objections. But the weight of authority is to the contrary. "Where a special appearance is made in order to object to illegality in the service of process, or to urge any objection for which a special appearance is appropriate, such special appearance is not waived and converted into a general one by answering to the merits after the objections are erroneously overruled. It is only where the defendant

pleads in the first instance to the merits, without any special appearance, that objections to personal jurisdiction are waived." 2 Encyclopedia of Pleading & Practice, 629. That this is the law of the Federal Courts sufficiently appears by reference to Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237, and Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

For these reasons I am of the opinion that the judgment should be reversed.

BROWN & ADAMS v. UNITED BUTTON CO.

(Circuit Court of Appeals, Third Circuit. November 10, 1906.)

No. 19.

1. BANKRUPTCY—PROVABLE CLAIMS—DAMAGES FOR TORTS.
   A claim for unliquidated damages resulting from injury to the property of another, not connected with or growing out of any contractual relation, is not provable in bankruptcy, under the existing law.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 480.]

2. SAME—INJURY TO PERSONAL PROPERTY BY NEGLIGENCE OR NUISANCE.
   Where, therefore, wool dealers had a warehouse for the storage of wool, which adjoined a building formerly used by the bankrupt as a factory, the two being simply separated by a party wall, and by reason of excessive heat from the furnaces of the bankrupt, which penetrated through the wall, their wool was dried out and damaged, losing weight and depreciating in price, in consequence, a claim for damages for the loss, treating it either as the result of negligence or nuisance, was not provable against the bankrupt's estate.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 480.]

3. SAME—PROVABLE DEBTS—BANKRUPTCY ACT OF 1898—SECTION 63, SUBSECS. a, b, CONSTRUED.
   The debts which may be proved under Bankr. Act July 1, 1898, as specified in section 63, subsec. a, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3447], are fixed liabilities as evidenced by a judgment or an instrument in writing absolutely owing, whether payable immediately or not; taxable costs in certain cases; and claims upon open account or upon contract, express or implied. And while it is further provided by subsection b that "unliquidated claims against the bankrupt may, pursuant to application to the court be liquidated in such manner as it may direct, and may therefore be proved and allowed against his estate," this does not make claims for unliquidated damages provable generally, nor, indeed, add anything to the class of debts which may be proved according to the preceding subsection, but has merely to do with a matter of procedure, as to how unliquidated claims, founded upon open account or contract, previously specified, may be liquidated or made certain.

4. SAME—CONSTRUCTION OF STATUTES—CONFLICTING PROVISIONS—SECTIONS DEALING WITH SPECIAL SUBJECT—SECTION 63 AND SECTION 17 OF BANKRUPTCY ACT OF 1898 CONSIDERED.
   Nor are the debts which may be proved in bankruptcy under section 63 of the existing act (Bankr. Act, July 1, 1898, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3447]) enlarged by the fact that it is assumed, in section 17 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3429]), regulating the effect of a discharge, that liabilities for torts are provable and so discharged, certain specified torts being thereupon excepted from the effect of a discharge; the want of harmony in this respect, between the two sections, being the result of the changes made in that section by the amendment of 1903, and, in case of conflict, section 63, which is devoted specifically to what debts are made provable, being controlling.

Appeal from the District Court of the United States for the District of Delaware.

For opinion below, see 140 Fed. 495.

William R. Sears, for appellants.

Benjamin Nields, for appellee.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The question is whether a claim for unliquidated damages, resulting from injury to the property of another, not connected with or growing out of any contractual relation, is provable in bankruptcy. The appellants, Brown & Adams, are wool dealers in Boston, Mass., and have a warehouse there for the storage of wool which adjoins a building formerly used for a number of years by the United Button Company, bankrupt, as a factory; the two being simply separated by a party wall. Wool in storage needs to be kept at a cool and even temperature; and the charge is that, by reason of excessive heat from the furnaces of the button company which penetrated through the party wall, the wool of the appellants was dried out and damaged, losing weight and depreciating in price in consequence, to the extent of some $12,000. The button company was put into bankruptcy in August, 1904. Just when, prior to this time, the damages which are claimed accrued, is not made clear, but it is fair to assume that some at least was within the year, and the case will be disposed of upon that basis. Claiming that the button company is liable for this loss, treating it either as the result of negligence or nuisance, proof is sought to be made for it against the estate, liquidation of the damages being suggested through the medium of a bill in equity, now pending in the superior court for the county of Suffolk, Mass., brought by the appellants against the button company and its trustee. The claim was rejected by the district court without passing upon the merits, upon the ground that it was not provable, and the propriety of that ruling is the question here.

Bankruptcy is supposedly concerned only with commercial matters, and was early confined to traders. Loveland, § 3. And, while it has been gradually extended and enlarged, the original idea has not been altogether departed from. Its purpose is to free a person from his debts, or to subject him to proceedings on account of them. This may not be controlling, but it is suggestive; and a construction which goes outside of it has certainly to be justified.

By the bankruptcy act at present in force it is provided:

"Sec. 63. Debts Which May Be Proved.—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred

in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments." Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

This to all intents is complete in itself, being given up to an enumeration and specification of the debts which may be proved. It is, however, further provided in this same section:

"b. Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

As contradistinguished from the paragraph which precedes it, this subsection seems to be concerned with a mere matter of procedure, directing how a claim which is open and unsettled—such for instance as one "(4) founded upon an open account, or upon a contract express or implied" precedently specified—may be liquidated and made certain. And whether taken by itself, or with reference to the immediate context, this is the natural, if not the only, construction to be given to it.

It is contended, however, by the appellants, that it is in fact intended to cover an additional and distinct class of claims, the whole section, as indicated by its title, being devoted to the general subject of debts which are provable; the one subsection (a) dealing with those which are of a fixed and more or less absolute character, such as judgments, costs, bills, notes, and accounts, and the other (b) with those which require to be liquidated, such as damages for torts; the word "debt," as defined by the act—section 1 (11)—including a "demand or claim," and being thus broad enough to embrace both. This construction, moreover, is made necessary, as it is said, in order to bring the section into harmony with other parts of the act.

To the contrary of this, however, it is declared in Dunbar v. Dunbar, 190 U. S. 340, 350, 23 Sup. Ct. 757, 761, 47 L. Ed. 1084, that:

"This paragraph, 'b,' * * * adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63 a, to be liquidated as the court should direct."

It is true that this is somewhat aside from the immediate question before the court, which was whether a discharge in bankruptcy operated to release a contingent liability, such as an annuity, which a husband upon his divorce agreed to pay to his wife for the support of herself and their minor children. But it is not to be assumed that a construction deliberately announced in this way was not considered by the whole court, or went out unadvisedly, so as to stand as mere dictum. The law is as it is declared to be by the Supreme Court speaking by one or the other of its judges, and is not to be put aside upon any such suggestion, except as there is no other alternative. That the question is still open and undisposed of, however, notwithstanding what is so held, is confidently affirmed upon the strength of Crawford

v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, where in discussing this section of the act it is said:

"Paragraph 'a' * * * includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph 'b,' two constructions are possible: It may relate to all unliquidated demands, or only to such as may arise upon such contracts, express or implied, as are covered by paragraph 'a.'"

It is upon the latter expression that the appellants particularly rely. But whatever encouragement, standing by itself, it may seem to lend, the court is careful to add:

"Whether the effect of paragraph 'b' is to cause an unliquidated claim, which is susceptible of liquidation, but is not literally embraced by paragraph 'a,' to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provisions of paragraph 'a' as one 'founded upon an open account, or upon a contract express or implied,' and might have been proved under section 63 a had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate."

Taking it altogether, therefore, this utterance does not seem to carry us very far.

Assuming, however, that the question is an open one, let us see to what an independent consideration of it leads. The argument is that the right to prove must, in justice, be coextensive with the release to be obtained, and that, as it is plainly provided (section 17) that the bankrupt shall be discharged from liability for all but certain excepted torts, it must be that all which are not so excepted are entitled to come in. As said by Mr. Justice Brown, in Crawford v. Burke, supra:

"It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a."

The one section, according to this, is to be read in the light of the other, and that construction adopted which will consist with both.

Care is to be taken, however, in this comparison, not to reverse the order of importance in which they are to be considered. Nor in case of conflict to press the argument too far. If any section is controlling in this regard, it is the section which declares what debts are provable, and not the contrary. It is not so much, in other words, that a tort of the character which we have here is discharged by the one, as that it is made provable by the other, that gives it a standing against the estate. Even if the one were true of it and not the other, the right to come in would not be established, it being possible that there is a lapse in the law in this respect, the result of imperfect adjustment, upon amendment; a conclusion to be avoided, if it can be, but not at the expense of that part of the statute which must necessarily govern.

The strength of the argument in favor of claims for torts being provable, as is thus intimated, resides in the section with regard to discharges, where it is provided:

"Sec. 17. Debts not Affected by a Discharge.—a. 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 mu-

nicipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

As originally passed, instead of the word "liabilities," in clause 2, were the words "judgments in actions"; and after the word "for" were the words "frauds, or"; while nothing whatever was said as to alimony, maintenance, seduction, or criminal conversation. Claims grounded in fraud or the other causes of action specified had, therefore, as the law then stood, to be reduced to judgment in order to be saved from the effect of a discharge. Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340. The reason why this distinction was made is not clear, but it was probably, as suggested, in order to avoid the temptation to claimants to try and bring their cases within the exception, and to do away with the necessity for going into conflicting evidence in order to do so. Other cases of false pretense, misrepresentation, or willful and malicious injury, not so protected, were thus apparently left to be released by a discharge. And, as the distinction is now removed by the substitution of the word "liabilities" for "judgments," and the exception still further enlarged by the addition of seduction and criminal conversation, the argument is that all torts not so excepted, being left to be operated upon by a discharge, must have the reciprocal right to come in and be proved against the estate, if a manifest inconsistency, not to say injustice, is to be avoided. It must be confessed that this is not easy to meet. Seduction and criminal conversation are torts, pure and simple, and cannot be resolved away, like some, as being possibly tied up to a contract. And if it was considered necessary to except these by name, without which a discharge would release them, why are not other torts such as the one which we have here, growing out of negligence or nuisance, in the same situation? Slightly modifying the words of Mr Justice Brown in Crawford v. Burke, supra: If no tort could be made the basis of a provable debt, why were certain torts excepted? Nor is the force of this weakened by the fact that, according to the decision in Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, criminal conversation, at least when reduced to judgment, was already taken care of, the same as maintenance and alimony, as to which, to that extent, the amendment of 1903 may be regarded as merely declaratory. Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009; Dunbar v Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084; Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390.

It is to be observed, however, that the construction which is contended for grows out, not of positive, but exceptive, legislation. It is not declared what debts shall be released, but what shall not be.

And they must, in terms, be first provable, in order to be excepted, and not the contrary. The only difficulty that is experienced, also, is with regard to the changes introduced by the amendment of 1903, in part, as we have seen, unnecessary; as to which, it may well be that in providing, out of extra caution, that certain things should not be discharged, care was not taken to note the possible effect upon other parts of the law, or to adjust them to this, producing the present want of harmony. For, after all has been said, it must be recognized that there is a want of harmony between these two different parts of the statute, not, indeed, as originally enacted, but now, as they stand, after amendment. The one section (17) with regard to the effect of a discharge assumes that torts generally are provable and proceeds accordingly; while the other (63) makes no provision for anything of the kind, except by a construction which it is safe to say was not in contemplation when it was passed, and cannot consistently be read into it. The true view to be taken of it has been already indicated. The first of the two paragraphs into which it is divided is given up to an enumeration of the debts which are entitled to be proved against the estate, among which is to be found everything in the way of a fixed obligation, or which, as being of a commercial character, a bankrupt could expect to be relieved from; and, complete in itself, it is not to be added to. The other paragraph plainly has to do with a mere matter of procedure; how unliquidated claims founded upon open account or contract, specified in the preceding paragraph, may be liquidated or settled. Nor can it properly be made to serve any other purpose. Argument may amplify this, but cannot make it clearer. And as so interpreted a claim for damages, such as the one before us, is not included among debts which are made provable. This, if not the latest deliverance of the statute (the amendment of 1903 having to be accorded that position), as the one devoted specifically to the subject, must control. 26 Am. & Eng. Encycl. Law (2d Ed.) 68.

It may be that the conclusion which is so reached, if it is to abridge correlatively the effect of a discharge, is not altogether favorable to the bankrupt, who is interested in being relieved from his liabilities to the fullest extent possible. But this question is not before the court, and it will be time enough to meet it when it is.

There was no error, therefore, in the rejection of the appellants' claim, and the judgment is affirmed.

GRAY, Circuit Judge (concurring). While concurring in the result reached by the majority of the court, and to some extent in the reasoning employed in reaching that result, I am constrained to think that the ratio decidendi of the court below is that upon which our decision should rest. Without attempting to amplify or paraphrase the opinion of the learned judge of that court (In re United Button Co. [D. C.] 140 Fed. 495), it is sufficient, in referring to section 17, to again note that the debts which "a discharge in bankruptcy shall release," are such debts only as are provable under section 63, and the debts which are excepted from discharge, being among others liabilities for certain torts, are also necessarily provable debts. If it be said that "wilful and malicious injuries to the person or property of an-

other," and "seduction" or "criminal conversation" are torts, pure and simple, and as such incapable of liquidation and proof under section 63, it may be replied that liabilities for such torts, when reduced to judgment, are provable, and come within the classification of section 17a (2) as "liabilities" for certain torts. Be this as it may, it is true, however, that even if, out of abundant caution, certain of the torts which are included in the excepting clause could not have been liquidated and proven under section 63, still the fact that the excepting clause in this respect overlaps provable debts and includes some that are not provable, does not nullify the qualifying effect of the word "provable," as limiting the debts to be excepted, as well as these which are discharged by section 17, and, as said in the majority opinion of this court, cannot serve to abrogate or qualify the description of provable debts as contained in section 63.

In this view, the two sections, 63 and 17, are not necessarily irreconcilable.

FISHER v. ZOLLINGER.

(Circuit Court of Appeals, Sixth Circuit. November 22, 1906.)

No. 1,540.

1. BANKRUPTCY—LIENS—CHATTEL MORTGAGE.

Under the law of Ohio relating to chattel mortgages, which governs as to their validity and the rights of the mortgagee in bankruptcy proceedings in that state, a duly recorded mortgage given by a manufacturing corporation to secure bonds, which covers its stock in trade and provides that it may retain possession and sell any of the property in the usual course of its business and use the proceeds until default, is valid as between the parties, and when the mortgagee takes possession, either with the mortgagor's consent or under authority contained in the mortgage, his title becomes complete as against general creditors of the mortgagor; and where such a mortgage was given more than four months prior to the bankruptcy of the mortgagor the taking of possession by the mortgagee within such four months with the consent of the mortgagor and as authorized by the terms of the mortgage, although with knowledge of the mortgagor's insolvency, does not constitute a transfer or preference under Bankr. Act 1898, § 60a, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended in 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]), since the lien so perfected by the taking of possession relates back to the date of the mortgage.

2. SAME—MORTGAGE ON AFTER-ACQUIRED PROPERTY.

A duly recorded chattel mortgage on after-acquired property under the law of Ohio is valid as between the parties, and becomes a valid lien as of its date as against the mortgagor's general creditors when the property is taken into possession by the mortgagee. Hence such taking possession within four months prior to the mortgagor's bankruptcy does not create a lien nor operate as a preferential transfer within Bankr. Act 1898, § 60a, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended in 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]).

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

For opinion below, see 140 Fed. 679.

This is an appeal from a decree of the bankruptcy court sustaining the validity of a mortgage made by the bankrupt corporation to secure an issue of

bonds. The mortgage in question was made by the National Valve Company, a manufacturing corporation organized under the laws of Ohio. The mortgage was made and delivered November 2, 1903. It covered the entire plant, real and personal, and was made to secure an issue of bonds bearing interest coupons maturing semiannually. It provided that the mortgagor might remain in possession and continue business until default in interest or principal, or in taxes or other charges, when the mortgagee might take possession. "That until possession shall be taken * * * upon default as herein provided" the mortgagor "for the proper operation, management and maintenance of the business of said company shall be suffered to possess, manage and enjoy the same with all its property * * * and apply the rents, profits, tolls, income and personal property for the purpose aforesaid and distribute the net annual income to the stockholders of said company, after paying the principal and interest of said bonds according to the terms thereof. * * *" It also contained an after-acquired property clause by which all property, real or personal, thereafter made or acquired should pass under the mortgage. This mortgage was duly filed as a real estate mortgage, and filed and refiled as a chattel mortgage according to the Ohio recording statute. The company remained in possession and operation of its business from execution of this instrument until November 29, 1904, and during that period, with the knowledge and consent of the trustee in the mortgage, sold the product of its manufacture in the ordinary course of its business. During that time additional personal property was acquired, largely with proceeds of the bonds secured by the mortgage, but some part of the price remained unpaid when the trustee took possession of all of the company's property. On May 2, 1904, and again on November 2, 1904, default was made in payment of interest. On November 29, 1904, Zollinger, the trustee under the mortgage, took possession of the entire plant in pursuance of the power contained in the mortgage. On November 30th a petition in involuntary bankruptcy was filed against the mortgagor, and in due course an adjudication followed. By agreement between Zollinger and the trustee in bankruptcy the latter took possession of all of the plant, the rights of the trustee under the mortgage to be transferred to proceeds of the sale. A petition was filed by Zollinger asserting the lien of the mortgage, and an answer by the trustee asserting that it was a fraudulent preference under section 6343, Ohio Statutes, and voidable under sections 60a and 60b of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. p. 689]). Upon these pleadings and the evidence the referee and upon a petition to review, the district judge held the mortgage valid, both as to the real and personal property, that in existence when the mortgage was executed as well as that subsequently acquired. From this decree, the bankrupt trustee has appealed.

A. B. Thompson, for appellant.

R. K. Ramsey and E. B. King, for appellee.

Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, announced the opinion of the court.

It was conceded below, and not contradicted here, that the mortgage is a good security as a real estate mortgage. Appellant denies that it is a valid security so far as it operated as a transfer of personal property in existence and possessed by the mortgagor when the mortgage was made, and that, for stronger reasons, it is invalid in so far as it is set up as a security upon personal property acquired subsequent to its execution.

1. As a chattel mortgage of chattels possessed at the date of its execution, it is said that the instrument is invalid, because the mortgagor was left in possession with a power of sale. That the instrument was

made in good faith to secure an issue of long-time bonds aggregating $40,000, bearing coupons payable semiannually, and that the proceeds of the bonds went mainly to pay for the property, is not disputed. That the transaction was and is free from actual fraud we have no doubt. What, then, is the legal effect of possession by the mortgagor with the power to sell in the usual course of business? This must be settled by the law of Ohio if there is a settled line of decisions in respect of this question. The Ohio rule is clearly stated in the leading case of Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711, where it is said:

"A mortgage on a stock of merchandise, though made in good faith to secure a bona fide debt of the mortgagor, when it allows him to retain possession with a power of sale in the course of his business, is ineffectual to create a lien as against creditors of the mortgagor who assert their rights against the property while it remains under his control; but it is valid between the parties, and when the mortgagee takes possession, either with the consent of the mortgagor given at the time or under an authority conferred by the mortgage, his title becomes complete, and the property is no longer subject to legal process issued against the mortgagor, nor liable for his debts except to the extent of any surplus that may remain after the satisfaction of the mortgage debt and proper charges for enforcing the same."

This statement of the Ohio case is taken from the syllabus, because, under the rule of the Supreme Court of that state, the syllabus contains the authoritative statement of the precise point decided.

No creditor nor any third person had asserted any claim against the personal property covered by this mortgage before the trustee took actual possession under his mortgage. This act of taking possession perfected the lien and made the instrument operative and effective against the world, unless the bankrupt trustee has by virtue of some positive provision of the bankrupt law a right to avoid a mortgage which was good as between the parties and all others who had acquired no intervening rights before the mortgagor took possession. If he has a right to avoid this mortgage under section 60a of the bankrupt law, as a preference made within four months of the filing of the petition in bankruptcy against the mortgagor, it will be because the preference of the mortgage was obtained only when the mortgagee took possession and was not a lien as of the date of the mortgage. But it cannot for a moment be pretended that Zollinger's lien under the mortgage only arose when he took possession. He took possession by virtue of his mortgage, and his lien relates to its date. It was not a lien created when he took possession. The lien upon the chattels conveyed was always good as between the parties. That the property was subject to seizure by the process of creditors, or might pass to a subsequent purchaser, may be conceded. The only effect of taking possession was to cut off the possibility of rights accruing to third persons. The status of Zollinger was identical with that of a mortgagee under an unrecorded chattel mortgage. Until recorded the mortgaged property is subject to seizure by third persons. The lien of such an unrecorded mortgage relates to the date of the instrument, and is not a preference within the meaning of 60a of the bankrupt act, if that date is more than four months antecedent to the filing of a petition in bankruptcy against the mortgagor. Rogers v.

Page et al., 140 Fed. 596, 72 C. C. A. 164; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. The effect of the amendment of February 5, 1903, upon such unrecorded instruments we need not here consider.

2. What was the legal effect of the mortgage clause covering after-acquired property? A mortgage upon after-acquired property is perfectly effectual in equity and fastens upon such property so soon as acquired. Pennock et al. v. Coe, 23 How. 117, 16 L. Ed. 436; Dunham v. Cincinnati, etc., Ry. Co., 1 Wall. 254–266, 17 L. Ed. 584; Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014; Bear Lake, etc., Irrigation Co. v. Garland, 164 U. S. 1–13, 17 Sup. Ct. 7, 41 L. Ed. 327; Harris v. Youngstown Bridge Co. et al., 90 Fed. 322–328, 33 C. C. A. 69; Contracting Co., etc., v. Continental Trust Co., 108 Fed. 1, 47 C. C. A. 143. In Bear Lake Irrigation Co. v. Garland, cited above, it was said:

"Such a mortgage, as against the mortgagor and subsequent incumbrancers, attaches itself to the after-acquired property as fast as it comes into existence, or as fast as the canal or railroad is built, and the lien of the mortgagee is held to be superior to that of the contractor."

Regarded in equity as an executory agreement to give a lien when the property comes into existence or is acquired and therefore enforced as an equitable lien, according to some of the cases, something more is necessary to make such a clause valid as a lien in courts of law.

"This difference," it is said by the Supreme Court of Ohio, in Francisco v. Ryan, 54 Ohio State, 307, 315, 316, 43 N. E. 1045, 1048, 56 Am. St. Rep. 711, "has arisen chiefly from the nature of the jurisdiction exercised by the courts. Those of equitable cognizance applying the maxim that equity regards as done that which ought to be done hold that under such a mortgage a lien attaches to the property as soon as it comes to the mortgagor's ownership. While at law it has been held that it creates no present lien, nor one as the property is acquired, but as between the parties it operates only as a contract for a lien, which may be made effectual for the benefit of the mortgagee by possession lawfully obtained of the property, not only as against the mortgagor himself, but also as against any subsequent legal process issued against him or disposition attempted to be made by him. Whether, or in what instance, in actions under a Civil Code like ours, by which the two systems of remedial justice are blended and administered in the same courts, and often in the same proceeding, the equitable rule should be applied, is a question upon which the courts are not agreed, and one whose decision is not necessary in this case." This reserved question as to whether in the Ohio courts the equitable rule in respect to the effect of an after-acquired property clause might not be enforced as between the parties or the mortgagee and third persons having notice, has not been since decided, and is of importance to the determination of the case in hand. Zollinger took actual possession of the after-acquired property involved here before the rights of any third person had intervened, and, under the Ohio doctrine as enforced in Francisco v. Ryan, this possession had "the same effect of protecting it in his hands from the claims of the

mortgagor's creditors as has possession taken of the property owned by the mortgagor at the time of the execution of the mortgage."

But the contention of counsel for appellant is that it was this act of "taking possession which created the lien and as this took place on the eve of bankruptcy and at a time when Zollinger knew the National Valve Company was insolvent and could not continue its business." It was therefore a preference obtained or granted within four months preceding the bankruptcy of that company. The whole case must turn here; for, if the preference claimed by Zollinger is not to be attributed to the mortgage as of its date rather than as of the date of this act of taking possession, the decree of the court below must be reversed in so far as Zollinger was permitted to enforce a lien against such after-acquired property. But we cannot assent to the premise of the argument. The lien of Zollinger against the after-acquired property did not arise when he took possession. As to third persons at law it was inchoate. The possession then taken only perfected this incipient lien as against third persons who had not theretofore acquired rights. The question as to whether the lien thus perfected relates to the date of the instrument of mortgage, or to the date when possession was taken, is, in principle, identical with the lien of a mortgage of chattels providing that the mortgagor shall remain in possession with a power of sale, or the lien secured by an unrecorded transfer of property. In both the latter instances the mortgage is a perfectly valid security as between the parties, and voidable only by certain third persons who may acquire rights, in one case before the mortgagee takes possession and in the other before the mortgage goes to record. Neither is there anything in the Ohio decisions that will justify any distinction in principle and prevent the lien from relating to the date of the mortgage which included the contract for the lien. It is true that in Ohio, as in some other jurisdictions, the lien upon after-acquired property is not regarded as valid at law until perfected or completed by possession. Chapman v. Weimer, 4 Ohio St. 481; Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711. In Francisco v. Ryan, the Ohio Court, referring to Chapman v. Weimer, said:

"The principle upon which that case rests is, that the mortgage constitutes a valid and binding contract between the parties, and being so it must be given effect according to the intention of the parties. * * *"

Continuing, the court said of such a mortgage:

It "is a completed contract already obligatory upon the parties, and which continues to be so until it is fully executed, so that in taking possession of the acquired property in pursuance of its provisions, the mortgagee exercises a right belonging to him under the mortgage."

The court quotes with approval from Chase v. Denny, 130 Mass. 568, where it is said:

"If the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien, by the operation of the provisions of the mortgage in regard to it."

Whether the lien of an unrecorded mortgage or a mortgage of chattels where the mortgagor is left in possession with a power of sale

shall relate to the date of the instrument or to the date when the lien is completed or perfected as against third persons who have acquired no intervening rights before the recording of the instrument or taking possession of the mortgaged chattels is ordinarily of no importance. All persons are cut off by the recording of the instrument or the taking of possession who have not theretofore acquired some right. This is also true as to the relation of the lien of an after-acquired property clause upon such after-acquired property. It is only when some insolvency statute, or some bankrupt law, avoiding preferences obtained within a given time before a general assignment or the filing of a petition in bankruptcy is involved, that the date of a preference under such an instrument becomes important. In neither Chapman v. Weimer nor Francisco v. Ryan, both cited above, was the date of the lien upon the after-acquired property of any importance. Neither was any such question involved in Re Shirley, 112 Fed. 301, 50 C. C. A. 252, or in Re First National Bank of Canton, 135 Fed. 66, 67 C. C. A. 536, and any reference in those cases to the effect of registration as that of a new mortgage was figurative, and not intended to intimate that the lien was only of the date of registration. That the lien of an unrecorded mortgage is not of the date of recording, but is as of the date of the contract for the lien, is well settled. Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Rogers v. Page et al., 140 Fed. 596, 72 C. C. A. 164. In case of a mortgage upon property to be acquired, as well as in the other instances above referred to, the lien is the lien contracted for by the instrument of mortgage, and there is just as much room for holding that the lien relates to the date of the contract for the lien in the one instance as in the other. There is nothing in Francisco v. Ryan which is antagonistic to this relation of the lien. Upon the contrary, the reasoning of the Ohio court is plainly in line with that of the Vermont court in Peabody v. Landen, 61 Vt. 318, 17 Atl. 781, 15 Am. St. Rep. 903, and Thompson v. Fairbanks, 75 Vt. 361, 369, 56 Atl. 11, 101 Am. St. Rep. 899, where it became necessary to decide the date of the lien, because in one case an insolvency statute which avoided preferences obtained within a short time before a general assignment was involved, and the other the effect of section 60a of the bankrupt act of 1898 avoiding preferences obtained within four months of bankruptcy.

We have referred to this agreement in principle between the case of Francisco v. Ryan and the Vermont cases cited above, because Thompson v. Fairbanks was affirmed by the Supreme Court of the United States, in 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, in so far as the Vermont court held that the taking possession to complete the mortgagee's lien within four months of the mortgagor's bankruptcy was not a conveyance or transfer under the bankrupt act. The Vermont law and the Ohio law are in accord as to the validity of a mortgage upon after-acquired property, when the mortgagee takes possession before the rights of third persons intervene. Thompson v. Fairbanks is a distinct authority for the second proposition, namely, that possession taken under a mortgage is not a preference, although the mortgagee may have known that the mortgagor was insolvent and contemplated bankruptcy. This is the authority upon which this case

was decided below, and is conceded to be conclusive unless there is some radical difference between the law of Vermont and Ohio in respect to the validity of a mortgage of after-acquired property.

In Thompson v. Fairbanks, 196 U. S. 516, 525, 25 Sup. Ct. 306, 309, 49 L. Ed. 577, it is said:

"Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet, if there was no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not in such circumstances occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405."

But it is next argued that Thompson v. Fairbanks was decided before the amendment of February 5, 1903, of section 60a of the bankrupt law, and that this amendment has the effect of destroying the force of that case as an authority. But the amendment bears only upon the matter of liens claimed under unrecorded transfers required by the law of the state where made to be recorded, and makes all preferences under transfers relate, not to the date of the transfer, as was the law before, but to the date of the recording thereof. This matter we fully considered in Loeser, Trustee of Cassie L. Chadwick, v. Savings Deposit Bank & Trust Company (decided at this session) 148 Fed. 975. There is no question here of a lien upon this after-acquired property under an unrecorded mortgage. Zollinger's mortgage, under which he asserts his lien, was duly recorded and expressly provided for the lien asserted below. As that mortgage had been made and recorded more than 12 months before the filing of this petition in bankruptcy against the mortgagor, and as the lien thereby contracted for relates to the date of the mortgage, it is plain that the amendment of section 60a has no effect upon any question here involved.

Decree enforcing lien of Zollinger's mortgage affirmed.

NEELY v. WILLIAMS et al.

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

No. 2,355.

1. VENDOR AND PURCHASER—PAYMENT OF PURCHASE MONEY—DEDUCTION FOR BREACH OF COVENANT.

The rule that, where land subject to an incumbrance is sold in parcels successively to different purchasers, the parcels are chargeable in the inverse order of alienation, is applicable in a case where the owner of separate tracts of land devised them together, charged with the payment of annuities, and the devisee sold and conveyed them successively by warranty deeds to different purchasers, and the last grantee who has expended money to obtain a release of the annuities cannot enforce contribu-

tion from the prior purchasers, but is entitled under his covenant of warranty to deduct the entire amount so necessarily expended from a deferred payment of purchase money due the grantor.

2. SAME—TENDER SUBJECT TO CONDITION.

A note given for the purchase price of land conveyed with covenants of warranty and against incumbrances, where there are existing incumbrances, is due at maturity only on condition that such incumbrances are removed, and a tender of payment subject to such condition is good and stops the running of interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 344, 345.]

Hook, Circuit Judge, dissenting.

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

William Baird and E. S. Durment, for appellant.

J. H. Broady, Sr. (J. H. Broady, Jr., on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a bill in equity instituted by Joseph A. Williams and his wife, Annie Williams, to enjoin the prosecution of an action at law brought by the defendant and appellant, Richard M. Neely, to enforce the payment of a promissory note made by the former and held by the latter for $3,500. The note was given by complainants as part payment for a quarter section of land purchased by Mr. Williams from Annie H. Neely, joint residuary legatee with one Richard S. Malony, Jr., under the will of their father Richard S. Malony, Sr. The grantor made a warranty deed to complainant Joseph A. Williams covenanting that the premises were free from incumbrances. That covenant was broken as soon as made because the land was subject to the lien of two annuities created by the devisor in his last will, one in favor of Hannah Blake for $200 and the other in favor of Sarah Foss for $100. After suit was instituted against complainants to recover the balance of the purchase money represented by the note of $3,500 they brought their bill in equity to enjoin the suit until the present worth of the annuities should be ascertained and provision made for their satisfaction. On a former appeal the equities of the case were considered and settled by this court. See Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232, to which reference is made for a more full statement of many incidental facts not necessary now to be specified. The conclusions then reached became the law of this case and must now be recognized as controlling. Guaranty Co. of North America v. Phenix Ins. Co., 59 C. C. A. 376, 124 Fed. 170, 174. They may be briefly summarized as follows: First, that the remedy in equity as invoked by complainants was available to them; second, that Richard M. Neely, the defendant and appellant, who was payee of the note and who took it by some arrangement satisfactory to himself and Annie H. Neely, his mother, the grantor in the deed, took it subject to any defenses which could have been urged against it in the hands of the grantor—in other words, that Richard, for the purposes of this case, stood in the shoes of his mother—third, that a grantee in a deed containing a covenant against incumbrances who has not

paid the purchase price in full has a choice of two remedies for breach of the warranty, either to pay the balance due and sue the grantor on the covenant against incumbrances or reduce the grantor's recovery for the balance due by the amount of the diminution of the value of the title occasioned by existing incumbrances; fourth, that in a suit by the grantor on a promissory note given for unpaid purchase price of the land which he has covenanted to be free from incumbrances the grantee may plead a defect of title as a failure of consideration of the note in whole or in part.

After reaching and announcing the foregoing conclusions, and as the result of an intimation made at the argument, to the effect that complainants had paid and secured releases of the liens upon their land, this court by Sanborn, Circuit Judge, speaking for it, said:

"In case it shall appear, as counsel have intimated, that since the final hearing below the complainants have paid and secured releases of these liens, the court should reduce the amount of the recovery in the action at law upon the note by the amount not exceeding the value of the annuities at the time such payments were made which the complainants have necessarily expended in paying the liens of the annuities upon their lands and in defending their title against them."

The decree of the lower court was then reversed, with instructions to proceed in conformity with the opinion.

In the light of the law of the case thus declared, the only remaining question for our consideration as conceded by counsel for defendant relates to the amount of credit to which complainants are entitled on their note. This question must be answered by ascertaining how much they necessarily paid to secure a release of their land from the lien of the annuities. There is no substantial doubt that complainants necessarily paid $3,500 for that purpose. An allegation to that effect is made in the supplemental bill filed by complainants after the case was remanded to the court below, to which defendant filed a plea and answer. The plea does not relate to that allegation, and the answer by not denying admits it to be true. Moreover, the proof satisfactorily establishes its truth. We might, therefore, by giving a literal construction to the law of the case as laid down in the former appeal and to the pleadings and undisputed proof now before us, properly affirm the decree below without any further consideration, but some other questions have been ably discussed by counsel to which we feel constrained to give attention. These questions arise out of the following facts: The lien of the annuities in question attached alike to two other quarter sections of land besides the quarter section purchased by Williams from Annie H. Neely. The father of Mrs. Neely died seised of these three quarter sections, and by his will devised them to Annie H. Neely and Richard S. Malony, Jr., creating a charge upon all of them for the payment of the annuities in question. Shortly after his death the devisee, Mrs. Neely, either jointly with Richard S. Malony, Jr., or alone after she had acquired his interest, conveyed the three quarter sections in the following order as to time: First, one to Stanley B. Wilson; second, one to Wenzel Herdlichtka; and, third and last, one to Joseph A. Williams, complainant in this case, executing to each a warranty deed covenanting, amongst other things, against all incumbrances.

The consideration for each of the conveyances was $6,000. Wilson and Herdlichtka each paid that sum in cash on the delivery of their deeds to them, respectively. Williams paid $2,500 in cash and he and his wife gave their note for $3,500, maturing five years after date, and secured the payment thereof by mortgage upon the quarter section purchased, for the balance of the purchase price. The lien of the annuities attaching as between the annuitants and the successive purchasers to the three quarter sections alike, it was impossible for Williams to release his own without necessarily releasing the land of Wilson and Herdlichtka from the same lien.

The contention is that, because the three quarter sections sold, respectively, to Wilson, Herdlichtka, and Williams were of equal value and equally chargeable with the incumbrance created by the annuities, the complainants were entitled to credit for only one-third of the amount paid in satisfying the annuities, and that the learned trial court should not have charged defendant with that portion of the money paid by complainants which was properly chargeable against the quarter sections of Wilson and Herdlichtka. And the further contention is that on the payment by Williams of the annuities he had a right of contribution from Wilson and Herdlichtka each in the sum of one-third of what he had necessarily paid, on the ground that he had paid off and satisfied a joint obligation imposed upon the three alike, and that, if he did not recover from them, it was his own fault, the consequences of which not being chargeable against Neely.

There are two satisfactory reasons why neither of these contentions are sound:

First. Williams, being the last in point of time to take a conveyance from Mrs. Neely, took title so far as the prior successive purchasers were concerned charged with the payment of the entire debt secured by the lien. The question as to the liability of mortgaged property acquired by successive purchasers of different parcels for the payment of the mortgage debt as between themselves has been the subject of much discussion and of somewhat divergent views. Some of the leading cases holding to liability in the inverse order of alienation are Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235; State v. Titus et al., 17 Wis. 241; Root v. Collins, 34 Vt. 173; Deavitt v. Judevine Co., 60 Vt. 695, 17 Atl. 410; Crosby v. Farmers' Bank, 107 Mo. 436, 17 S. W. 1004; Sager v. Tupper, 35 Mich. 134; Cushing v. Ayer, 25 Me. 383; Aiken v. Milwaukee & St. Paul Railway Co., 37 Wis. 469; Mahagan v. Mead, 63 N. H. 570, 3 Atl. 919; Mount v. Potts, 23 N. J. Eq. 188; Brown v. Simons, 44 N. H. 475; Hills' Administrator v. McCarter, 27 N. J. Eq. 41. In an exhaustive note to the leading case of Aldrich v. Cooper, White & T. Lead. Cas. Eq. vol. 2, pt. 1, pp. 228, 293, it is said, citing many authorities in support:

"It is well settled in conformity with these decisions that, where land which is subject to the lien of a mortgage or other permanent incumbrance is sold in parcels successively to different persons the buyers are prima facie chargeable in the inverse order of alienation. Such is the established rule in New York and Pennsylvania, and it prevails throughout the greater part of the United States."

Jones in his work on Mortgages (5th Ed. vol. 2, § 1620) admirably states the reason of the rule as follows:

"This rule rests upon the reason that, where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right between him and the purchaser that the part still held by the mortgagor shall first be applied to the payment of the debt; and this part is regarded as equitably charged with the payment of the debt. Therefore, when he afterwards sells another portion of that remaining in his possession, the second purchaser simply steps into the shoes of the mortgagor as regards this land, and takes it charged with the payment of the mortgage debt as between him and the purchaser of the first lot; but still, as between the second purchaser and the mortgagor, it is equitable that the land still held by the latter should pay the incumbrance. In this manner the equities apply to successive purchasers. * * *"

In section 1621 the author says:

"These equitable considerations have led to the adoption of the rule that the mortgagee in such case shall sell the mortgaged land in the inverse order of its alienation by the mortgagor; and it will be seen by the cases cited that this rule has been generally adopted."

The opposite view, favoring the discharge of an existing lien by the several successive purchasers of parcels of the land subject to the lien pro rata, finds support in Story's Eq. Juris. § 1233; Barney v. Myers, 28 Iowa, 472; Huff v. Farwell, 67 Iowa, 298, 25 N. W. 252; Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458; Burk v. Chrisman, 3 B. Mon. (Ky.) 50; Hall v. Morgan, 79 Mo. 47, and in some other cases.

In this conflict of authorities the case of Savings Bank v. Creswell, 100 U. S. 630, 25 L. Ed. 713, came before the Supreme Court of the United States, where the rule of liability in the inverse order of alienation seems to be finally and authoritatively adopted. In that case Mr. Justice Miller, speaking for the court, after reviewing the English and American authorities and considering the conflicting views of Chancellor Kent in Clowes v. Dickenson, supra, and Mr. Justice Story in his work on Equity Jurisprudence, supra, quotes with approval the argument of Chancellor Kent as follows:

"If there be several purchasers in succession, at different times, I apprehend in that case, also, there is no equality and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or his heirs. If he sells another acre to B., the remaining acre is then chargeable in the first instance with the debt as against B., as well as against A., and, if it should prove insufficient, then the acre sold to B. ought to supply the deficiency in preference to the acre sold to A., because, when B. purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect we may say of him, as it is said of the heir, he sits in the seat of his grantor, and must take it with all its equitable burdens."

Mr. Justice Miller then concludes as follows:

"The doctrine and the reason upon which it is founded cannot be better stated than in this extract from the opinion. * * * We are of opinion that the preponderance of authority as shown by judicial decisions, as well as the weight of sound argument, is in favor of the rule laid down by Chancellor Kent."

A distinction is found in some of the authorities examined on this subject between cases where personal responsibility for the discharge of the lien is devolved upon the owner and cases where the charge, like a rent charge growing out of the land itself, is alone involved. It is claimed that the doctrine subjecting the parcel last conveyed to the payment of the entire lien is applicable only to cases where the debt was the individual obligation of the owner of the land.

Learned counsel for defendants quote from Tiffany on the Modern Law of Real Property (volume 2, p. 1223), as follows:

"Since this doctrine of liability in the inverse order of alienation arises from the obligation of the common grantor, as against the various grantees, to pay off the mortgage, it does not arise when no such obligation exists."

Even if that distinction is sound, which we do not deem necessary to discuss, it is unimportant in this case because the common grantor of the three separate parcels in question as between herself and the successive purchasers had, by her warranty deed, assumed the obligation of protecting them against the lien of the annuities. We see no reason why the principle of liability in the inverse order of alienation applicable as between mortgagor and subsequent successive purchasers should not be applicable to a case like this where a lien is created by the will of the ancestor of the grantor, which, so far as successive purchasers of the land subject to the lien are concerned, the grantor was bound to discharge.

Second. The manifest equity of the situation relieved the lands of Wilson and Herdlichtka from any liability for the discharge of the lien of the annuities. Primarily the duty of securing that discharge rested on the grantor under her covenant against incumbrances. She had received the full purchase price of $6,000 from each of the other two purchasers, Wilson and Herdlichtka, and had received only $2,500 of that price from Williams. He still owed her or her son, the complainant, who stood in her shoes, the sum of $3,500 on account of the purchase price of his land, and had necessarily expended that sum in relieving it from the lien of the annuities. The appropriation of that unpaid purchase money to the discharge of the incumbrance on the land purchased by the three successive purchasers is, in our opinion, a most obvious and equitable disposition of it. Williams, by paying it to release the incumbrance, with his original cash payment of $2,500, paid the exact sum of $6,000 for his land which he agreed to pay, and which Wilson and Herdlichtka agreed to pay and had paid for an unincumbered title to their lands. If Wilson or Herdlichtka should be required to pay any portion of the money needed to pay off the annuities, they would pay correspondingly more than $6,000 which they agreed to pay for a good title, and, if Williams should get any aid from them in paying off the annuities, he would pay less than he agreed to pay for his land. After allowing the $3,500 paid by Williams to be employed in reduction of the sum due on the note, Mrs. Neely has only performed her contract to give all an unincumbered title. The transaction amounts merely to deducting from the purchase price the value of the defect in the title warranted, and in this way the rights of all are recognized and respected and the original contracts performed according to their tenor and effect. Every equitable consideration requires

that this unpaid portion of the purchase price should be controlled and disposed of so as, if possible, consistently with the rights of all others to protect the lands of Wilson and Herdlichtka from liability by reason of the incumbrance. Wynn v. Carter, 20 Wis. 107, 111.

It follows from what has been said that, as between Williams and Wilson and Herdlichtka, there was no liability on the part of the latter to contribute to the fund required to remove the lien of the annuities, and that the former had no right of contribution against the latter for what he did pay for that purpose. As a necessary consequence the supposed existence of that right does not affect Williams' right, as determined by the former appeal, to diminish the amount of liability on the note by the full amount paid to secure a release of the annuity, and as a further necessary consequence any pretended release of that right by Williams did not deprive defendant of any possible recourse against Wilson or Herdlichtka or otherwise injuriously affect him.

It is insisted by defendant that he is entitled to recover on his note the difference between its face, with interest added, and the amount paid by Williams to secure the release of the annuities. In other words, that he ought to be allowed interest on the Williams note from its maturity to the present time. The note by its terms was payable at the First National Bank of Humbolt, Neb. The evidence shows and the trial court found that complainants upon the maturity of the note deposited the amount due thereon at the bank, with directions to pay the note upon its presentment and upon a proper release of his land from the lien of the annuities, and that it has remained there for defendant's acceptance on the condition imposed. The contention is that the tender, being conditional, was ineffective to stop the running of interest. This is not so. The grantor had failed to convey to Williams the title agreed to be conveyed for the consideration agreed to be taken. It was held on the former appeal that this constituted a failure of consideration for the note, that the covenant in the deed and the promise in the note were mutual and dependent, and that the performance of one was the consideration and condition of the promise of the other. This doctrine necessarily leads to the conclusion that the note was not enforceable as long as the title remained defective. The note was due and payable from Williams only upon a discharge of the lien of the annuities by Neely.

A tender in payment of an unconditional demand must, of course, be unconditional. That is elementary. But the note involved in this case being due conditionally, the tender could be made on like condition, and when so made was good and effective to prevent the running of interest. Comstock v. Lager, 78 Mo. App. 390; Clark v. Weis, 87 Ill. 438, 29 Am. Rep. 60; Wheelock v. Tanner, 39 N. Y. 481; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189; Frenzer v. Dufrene, 58 Neb. 433, 78 N. W. 719; Johnson v. Cranage, 45 Mich. 14, 7 N. W. 188; Kennedy v. Moore, 91 Iowa, 39, 58 N. W. 1066.

These conclusions, without a consideration of several other questions presented in argument and brief, being in harmony with the conclusion reached by the Circuit Court, necessarily lead to an affirmance of its decree. It is accordingly so ordered.

HOOK, Circuit Judge, dissents.

WILHITE v. SKELTON et al.

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

No. 2,248.

1. ABATEMENT AND REVIVAL—REVIVAL OF ACTION—PRACTICE GOVERNED BY LAW OF TERRITORY OR STATE OF THE COURT WHERE SUIT IS PENDING.

The power and practice of a court of a territory or state in the revival of a suit upon the death of a party is governed by the statutes of the territory or state under which the court in which the action is pending at the time of the death exercises its jurisdiction.

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

2. SAME—IN INDIAN TERRITORY WHERE ONE OF SEVERAL PLAINTIFFS OR DEFENDANTS DIES PENDING SUIT NO REVIVOR OR SUBSTITUTION IS NECESSARY.

Under the statutes in the Indian Territory where one of several plaintiffs or defendants dies, and the right of action survives to or against the remaining parties, the court may suggest the death upon its record and proceed to judgment without substituting the heirs or personal representatives for the deceased. Ann. St. Ind. T. 1899, § 3439.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 322, 418.]

3. SAME—PERSONAL REPRESENTATIVE MAY BE SUBSTITUTED IF PART OF RIGHT OF ACTION SURVIVES AGAINST HIM.

Where any part of a right of action survives against a personal representative of a deceased party to a pending suit, he may be substituted for the deceased, and the suit may proceed against him under section 3448, Ann. St. Ind. T. 1899.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 403.]

4. APPEAL AND ERROR—DEATH OF PARTY—FAILURE TO MAKE SUBSTITUTION IMMATERIAL IN CERTAIN CASES.

Where one of two defendants dies after submission of a case to an appellate court, which subsequently affirms a decree in favor of the deceased below, its failure to make such substitution is not a substantial error or defect, and it may be disregarded and corrected in a higher court on an appeal from the judgment of affirmance.

5. SAME—FACTS—CONCLUSION.

In a suit by a single complainant against two defendants for specific performance of a contract to convey an interest in land and to recover a share of the profits thereof, a decree of dismissal had been rendered in one of the trial courts of the Indian Territory and the suit was pending in and had been submitted to the Court of Appeals of that territory when one of the defendants died. Neither the appellant nor the court was aware of the death when the court affirmed the decree and it did not sit again until after the time for an appeal to this court had expired. *Held*: (1) The failure of the appellate court of the Indian Territory to state the death of the deceased upon its record and to substitute his personal representative or heirs for him did not affect the substantial rights of the parties, and it may be lawfully disregarded and corrected in this court. (2) As a part of the right of action survived against the administrator of the deceased's estate, the representative might have been substituted for the deceased by that court and he may be by this court. (3) As the suit survived against the surviving defendant the court could have proceeded to an affirmance without substituting either the personal representative or the heirs of the deceased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Appeal and Error, §§ 1846, 1850, 1862.]

6. FRAUDS, STATUTE OF—PLEADING OF CONTRACT IS OF WRITTEN CONTRACT WHERE WRITING NECESSARY.

Where a writing is indispensable to a valid contract, the plea of an agreement which does not affirmatively disclose the fact that the contract was made by parol is a plea of a written contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 353, 354.]

7. APPEAL—ADMISSION CONTRADICTING PLEADING UNAVAILING IN APPELLATE COURT UNLESS IN RECORD.

An alleged admission of counsel in the trial court which contradicts their pleading is unavailing in an appellate court unless spread upon the record of the trial court and embodied in the transcript or evidenced by written stipulation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2288.]

8. SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND—ACTION AT LAW FOR BREACH NOT ADEQUATE REMEDY.

An action at law for the breach of a contract to convey real property is not an adequate remedy, and the existence of the right to it does not forbid the maintenance of a suit for specific performance of the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 6.]

9. EQUITY—JURISDICTION OF PERSON GIVES POWER TO AFFECT PROPERTY BEYOND TERRITORIAL JURISDICTION.

The jurisdiction of the person of a party gives a court of equity plenary power in cases of contract, fraud, or trust to compel him to act in relation to property in his control beyond its territorial jurisdiction.

(Syllabus by the Court.)

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

For opinion below, see 82 S. W. 932.

W. A. Chase, W. H. Kornegay, and G. B. Denison, for appellant.

S. S. Kirkpatrick and Byron Kirkpatrick, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Ola Wilhite brought a suit in equity in the year 1903 against L. A. Skelton and Richard Moore, in one of the trial courts of the Indian Territory, to recover one-fifth of the profits which the defendants had derived from a certain lease, which was to expire in April, 1906, of 1,100 acres of land, for the purpose of mining oil and gas, and to recover one-fifth of the leasehold estate. The trial court sustained the defendants' general demurrer to the complainant's amended bill, dismissed the suit, and rendered a judgment in favor of the defendants for costs. The complainant on February 18, 1904, appealed to the Court of Appeals of the Indian Territory. On June 17, 1904, the case was argued and submitted to that court with leave to the defendants to file their brief within 30 days. Between June 17, 1904, and October 19, 1904, when the decree of the lower court was affirmed, Moore died, and R. L. Beattie was appointed administrator of his estate; but neither the court nor the complainant was aware of the death or the appointment until after the judgment of affirmance had been rendered, and the court did not sit again until after the time for an appeal to this court had expired, so that there was no

opportunity for the complainant to revive the suit or to substitute the administrator or the heirs for the deceased in that court. On April 8, 1905, he appealed to this court, and on May 22d in that year he suggested to this court the death of Moore, and filed a petition for a revivor of the suit against R. L. Beattie, the administrator of Moore's estate. On May 14, 1906, in analogy to the proceedings prescribed by rule 19 of this court for cases in which the adverse party is dead and has no proper representative within the jurisdiction of the court which rendered the judgment when the defeated party desires to challenge it by appeal or writ of error, an order was made that, unless the administrator should make himself a party to this suit or should show cause why such action should not be taken by the first Monday in October, A. D. 1906, the appellant should be entitled to open the record and upon consideration of the briefs on file have the decree reversed if erroneous. On the same day a citation was issued by this court to the administrator, whereby he was admonished to show cause on or before the first Monday of October, A. D. 1906, why this suit should not be revived as to Moore and why the decree should not be corrected. The order to show cause and the citation were properly served upon him, and he objects to a revivor of the suit against him on the ground that the action is for the recovery of real property only, and that the heirs of Moore are the only parties in interest in this action and his only proper representatives herein under section 3449 of the Annotated Statutes of the Indian Territory, 1899, which provides that:

"Upon the death of a defendant, in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor may be forthwith made in the manner directed in the preceding sections."

There are, however, several reasons why this objection is not fatal to the appeal or to a decision of the merits of the case in hand.

In the first place, the case was pending in the territorial court, and not in a court of the United States created under article 3 of the Constitution when Moore died, and the effect of the death upon the suit is to be determined by the statutes of that territory, and not by the acts of Congress. A section of one of these statutes reads:

"When there are several plaintiffs or defendants in an action, and one of them dies, or his powers as a personal representative cease, if the right of action survives to, or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers being stated on the record." Ann. St. Ind. T. 1899, § 3439.

The right of action to recover the one-fifth of the profits and the one-fifth of the leasehold survived against the remaining defendant, Skelton, after the death of Moore, and this statute gives plenary authority to the courts to proceed to a determination of the appeal between the survivors without the presence of the administrator or the heirs of the deceased. Furthermore, at the death of Moore he and Skelton held a joint judgment for costs against the appellant. Their cause of action for these costs was challenged by the appeal. The right of action to recover them survived to Skelton, and these facts brought the suit with-

in the terms of this section and warranted the decision of the issues between the remaining parties after the death of Moore.

Moreover, a judgment had been rendered against the complainant and in favor of the defendants, an appeal had been taken, an assignment of errors had been made, and the case had been argued and submitted to the Court of Appeals of the Indian Territory before Moore died. The death of one of the parties to a suit after an assignment of errors has been made upon a writ of error or an appeal does not abate the action when the cause of action survives. U. S. Mut. Acc. Ass'n v. Weller, 30 Fla. 215, 11 South. 786, 787; Marck v. Supreme Lodge Knights of Honor (C. C.) 29 Fed. 896; Long v. Thompson (Or.) 55 Pac. 979; Philhower v. Voorhees, 12 N. J. Law, 69.

Again, the administrator might have been, and may now be, lawfully substituted for Moore, and the suit might have proceeded, and may now proceed, against him as the representative of Moore without the presence of, or notice to, the heirs under section 3448 of the Annotated Statutes of the Indian Territory of 1899, which provides that:

"Upon the death of a defendant in an action wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may also be against the heirs or devisees of the defendant, or both."

A part of the right of action in this case, that part which sought a recovery from the defendants of one-fifth of the profits which they derived from the lease, survived against his personal representative, the administrator, even if the heirs were the proper defendants to the claim of a right to one-fifth of the lease. In view of that fact, the administrator might have been, and may now be, lawfully substituted for the deceased under this section of the statute, and the suit may be revived against him without notice to the heirs. In truth, there is no merit or reason in the objection to a determination of this appeal on the ground that the heirs of Moore had not been substituted for him, because the leasehold estate has now expired by its terms, and the only relief which the complainant can ever obtain is a share of the profits derived from it by the defendants or damages for failure to convey the complainant's share of the lease to him, and both these claims survive against the personal representative, his administrator.

The result is that the Court of Appeals of the Indian Territory under the statutes there in force might have stated the death of Moore upon its record, and without substituting for Moore either his personal representative or his heirs might have then decided the case and affirmed the judgment. As the failure of that court to note the death of Moore upon the record and to substitute for him the administrator of his estate resulted in no prejudice to the latter, since the judgment in favor of Moore was affirmed, and as the statutes of the Indian Territory and the acts of Congress alike require the courts to disregard any error or defect which does not affect the substantial rights of the parties, to amend such defects, and to proceed to give judgment according to the right of the cause or matter (Rev. St. § 954 [U. S. Comp. St. 1901, p. 696]; Ann. St. Ind. T. 1899, § 3285), the death of Moore will be stated upon the record of this court, his personal representative, R. L. Beattie, the ad-

ministrator of his estate, will be substituted for him, and the suit will proceed against him, instead of against the deceased. The administrator suggests no reason which has not been considered why the record should not be opened and the legality of the decree be determined upon the briefs which have long been submitted, and we turn to that issue.

The material facts pleaded in the amended bill were that in April, 1903, the complainant and Skelton agreed that they would purchase a lease for three years of 1,100 acres of land in the territory of Oklahoma for $15,000, and would operate the same together; that the complainant would pay $3,000 and should own one-fifth of the leasehold; that Skelton would pay $12,000 and should own four-fifths of it; that the payments and transfers should be made through the Bartlesville National Bank; that the complainant deposited $3,000 in that bank payable to the order of Skelton, and directed the bank to pay it to him for the complainant's share of the leasehold; that Skelton bought the leasehold for $15,000 pursuant to their agreement, but refused to take the complainant's $3,000 or to convey one-fifth of the leasehold to him; that Moore claimed to have purchased some interest in the leasehold of Skelton; and that the defendants had derived profits from it. The complainant offered to pay the $3,000 and prayed for a conveyance to him by the defendants of one-fifth of the leasehold estate and for a recovery of one-fifth of the profits which they had derived therefrom.

It is said that the agreement pleaded was void under the statute of frauds because it was not in writing. But the record does not present this question. The amended bill fails to show that the agreement was not written, and, where a writing is indispensable to a valid contract, a plea of an agreement which does not affirmatively disclose the fact that the contract was made by parol is a plea of a written agreement. Barnsdall v. Waltemeyer (C. C.) 142 Fed. 415, 419. Counsel for the appellee Skelton insist that at the argument of the demurrer in the trial court complainant's counsel admitted in open court that the agreement they pleaded was oral, and that the trial court decided the case in reliance upon that admission. But the transcript before us discloses no record, no certificate or opinion of the court that any such admission was made, and there is no stipulation or admission of that fact by counsel for the complainant in any form in this court. It is true that the opinion of the Court of Appeals of the Indian Territory indicates that it was of the opinion that such an admission had been made in the trial court. But cases cannot be heard and decided in an appellate court upon the statement of counsel for one of the parties of admissions of their opponents at the hearing which are not disclosed by, and are contrary to, the transcript of the record presented to the appellate tribunal. If they would avail themselves of such admissions in a court of review, they must by written stipulation of opposing counsel or by proper proceedings in the court of original jurisdiction spread them upon its record and present them to the appellate court in the transcript. As this has not been done in the case in hand and the amended bill pleads a written agreement, the question whether or not an oral contract of the character there set forth would be obnoxious to the statute of frauds is not presented to this court,

and it has neither been considered nor decided. The record portrays an agreement in writing under a familiar rule of pleading, and that agreement was valid and enforceable.

Counsel next argue that the amended bill was insufficient to sustain a decree for specific performance of the agreement to convey one-fifth of the leasehold to the complainant: (1) Because the latter had an adequate remedy at law by an action for damages for the breach. But such an action does not afford as adequate a remedy for the breach of a contract to sell or convey real estate as a suit in equity for specific performance, because it will not place the parties in the same situation in which they were before the agreement was made, and it is not as prompt, complete, and efficient. Castle Creek Water Co. v. City of Aspen (C. C.) 146 Fed. 8, 11; Boyce's Ex'r v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Williams v. Neely, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232. (2) Because the contract is too vague and uncertain. But it is a plain agreement for a conveyance to the complainant of one-fifth of a leasehold estate which is clearly defined and identified and to operate this lease with the complainant. It would be difficult to prepare or to conceive of a more certain or definite contract. (3) Because the court was without power to operate the mine on the leasehold property which was in the territory of Oklahoma and beyond its jurisdiction, and because, if it had held the power, such operation would have been impracticable. But the court had jurisdiction of the persons of the defendants, and thereby had plenary power to compel them to act in relation to the leasehold without its jurisdiction which they owned and to which their contract related. "In a case of fraud or trust or of contract the jurisdiction of the court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." Massie v. Watts, 6 Cranch, 159, 3 L. Ed. 181; Carpenter v. Strange, 141 U. S. 105, 11 Sup. Ct. 960, 35 L. Ed. 640. Nor were the acts to be performed in the operation of this lease for the short period of three years so numerous, so complicated, or so important that a court could not wisely and efficiently direct them. Joy v. City of St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co., 2 C. C. A. 174, 51 Fed. 309. And, if they had been, a decree for the conveyance of one-fifth of the leasehold and for the payment of one-fifth of the profits was not impracticable and the bill made a complete cause of action for this relief. (4) Because Moore was an innocent purchaser. But the record fails to establish that fact. Ignorance of the contract with the complainant, the purchase of an interest in the leasehold, and the complete payment of a valuable consideration therefor were indispensable facts to make him an innocent purchaser. The record is that he claimed to have purchased an interest in the lease of Skelton, and there it stops. Conceding that there may be a presumption from this claim that Moore was ignorant of complainant's contract when he purchased, there can be none in the absence of any statement upon the subject that he completed the payment of a valuable consideration for the interest he bought before he received notice of the agreement. And finally (5) because a specific performance of the agreement would have been in-

equitable. But this suit was brought within six months after the breach of the contract. No striking change in the value of the property within that time was disclosed. The complainant offered to pay his share of the purchase price and of the expense of operating the lease, and there is no sound reason why it would have been either unjust or inequitable for Skelton and for Moore, who claimed under him, to have performed the agreement which Skelton made.

The conclusion is that the amended bill states facts sufficient to constitute a good cause of action. The judgments of the trial court and of the Court of Appeals of the Indian Territory must accordingly be reversed, and the case must be remanded to the trial court, with directions to overrule the demurrers, to permit the complainant, if so advised, to bring in the heirs of Moore and make them parties defendant to the suit, to permit the defendants to answer the amended complaint, and to take further proceedings not inconsistent with the views expressed in this opinion, and it is so ordered.

In re CHAVEZ et al.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1906. On Rehearing, December 26, 1906.)

No. 64.

1. TERRITORIES—TERRITORY ACQUIRED BY CESSION LAW GOVERNING PROPERTY RIGHTS.

In a territory acquired by conquest or cession the laws affecting personal property rights and domestic relations as they existed between the people under the government from which the territory was acquired remain in full force until altered by the government of the United States or by the territorial government under its authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Territories, §§ 5, 6; vol. 29, International Law, § 9.]

2. BANKRUPTCY—PRIORITY OF DEBTS—COMMUNITY PROPERTY.

By the civil law which is in force in New Mexico, except as changed by statute, community property acquired by either husband or wife during the marriage, whether by purchase or their individual or joint labor, is held by them as partners, being primarily a fund for the payment of community debts, and on the bankruptcy of a husband having only a community estate, the claims of an antenuptial creditor must be postponed until those of community creditors are satisfied in full.

3. STATUTES—REPEAL OF EXISTING LAW—EFFECT.

Acts New Mexico March 20, 1901 (Sess. Laws 1901, p. 112), conceding that its purpose was to abolish the rule of community property can have no retroactive effect to disestablish rights which had already attached to community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 346.]

On Petition for Review.

Summers Burkhart (Frank H. Moore and Neill B. Field, on the brief), for petitioners.

R. W. D. Bryan for respondent Frederick H. Jung.

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

PHILIPS, District Judge. In the course of administration of the estate of Bernhard Myer, in bankruptcy, a controversy arose before the referee as to the priorities of certain creditors in the distribution of the assets. The order made thereon by the referee was certified to the District Court of the Second Judicial District of New Mexico for review. As question is only made on the petition to this court to review the action of the District Court in recognizing the claim of Frederick H. Jung to share pro rata with the other claims allowed by the District Court, the question to be decided here is, was the claim of said Jung thus properly classified? His claim grew out of a note given by said Myer, of date November 24, 1870, executed to one Nathan Myer, of which said Jung presumably became the owner by assignment. He reduced this note to judgment on the 30th day of October, 1900, in the Supreme Court of San Francisco, California; and on the 27th day of October, 1903, he obtained judgment on said judgment in the district court of Bernalillo county, N. M. in the sum of $9,216.94.

Bernhard and Pauline Myer were married in 1872. At and subsequent to the time of this marriage the husband received from the mother of said Pauline $1,970 as her dot under the civil law then in force in said territory. This money was squandered and lost by the husband. Thereafter property, consisting of certain lands constituting the estate in bankruptcy, was acquired by the husband, mainly in payment of his services as agent in the prosecution of some Indian depredation claims. The deed to this property was made absolutely to the wife, Pauline, possibly in recognition by the husband of his obligation growing out of the loss of the property coming as aforesaid to the marital community estate. The other debts allowed by the District Court against the estate were contracted by said Bernhard Myer during the coverture. The court also allowed in favor of the wife, Pauline, the amount of property which the husband had received through the marriage as aforesaid, to be paid pro rata with the other allowed claims. She joined in the request preferred by the petition to the referee for the sale of said real estate so held by her, the proceeds of which constitute the fund in question for distribution, which is insufficient to pay all the debts of the bankrupt. Presumably she did this under the assumption that this land was the community property of the husband and wife, and that she would be entitled to have her claim to the wife's dot allowed against the fund. Be this as it may, as the claim so allowed her is not challenged by this petition, it is not the subject of review. The petition before this court is prosecuted by certain of the general creditors against the action of the District Court in allowing Jung's claim to share pro rata with them. The contention of petitioners is that all the property which came to either the husband or wife during coverture by onerous title, that is aided by a valuable consideration, as the payment of money, the rendition of services, and the like, by either spouse, became the community property of the spouses as recognized by the civil law, claimed to be in force in the territory at the time in question; and that inhering in this property right is the further rule that the creditors of the hus-

band who became such during the coverture are entitled to be paid first out of said asset.

The only limitation placed upon the territorial government of New Mexico by the act of Congress organizing the territory approved September 9, 1850, 9 Stat. pp. 446, 452, c. 49, is found in section 17, which declares:

"That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States."

As neither the Constitution nor any law of the United States affects this matter, it is necessarily remitted to the local laws and customs of the territory, as these may be expressed in acts of legislation or the decisions of the highest court of the territory. It is a recognized canon of international law that in the acquisition of territory, by conquest or cession, the jurisprudence, not political but municipal in character, affecting personal property rights and domestic relations, as they existed between the people under the government from which the territory was carved, remain in full force until altered by the government of the United States. While their allegiance and relation to the former sovereign are dissolved by the acquisition, their relations to each other and their rights of property and obligations remain intact. Insurance Company v. Canter, 1 Pet. 544, 7 L. Ed. 242; United States v. Percheman, 7 Pet. 82, 8 L. Ed. 604; Mitchel v. United States, 9 Pet. 729, 9 L. Ed. 283; Chicago & Pacific Railway Company v. McGlinn, 114 U. S. 546, 5 Sup. Ct. 1005, 29 L. Ed. 270.

In Kearney's Code, p. 82, § 1, adopted September 22, 1846, by the territorial Legislature of New Mexico, it was provided that:

"All laws heretofore in force in this territory, which are not repugnant to or inconsistent with the Constitution of the United States, and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this Territory."

This fundamental enactment has been carried forward and repeated in the Compiled Laws of 1865, p. 512, c. 72 (Act July 14, 1851, pamph. 176, § 1). And the only changes found in subsequent acts pertain rather to the laws of descent and distribution and the rights of married women, which do not touch the question under consideration.

That the civil law as it existed in Spain and Mexico at the time of the treaty of Guadaloupe-Hidalgo was in force in the territory of New Mexico cannot be questioned. It has been repeatedly recognized in the decisions of the Supreme Court of the territory as late as 1901. By that law the community interest of the husband and wife is likened to a partnership in all property acquired by either during the marriage, whether by purchase or their individual or joint labor and industry. Schmidt's Civil Law of Spain & Mexico, c. 4, p. 12; Ballinger on Community Property, §§ 5, 15, 16, 17, 18, 19. In the earliest case decided by the Supreme Court of New Mexico, Chavez v. McKnight, 1 N. M. 153, it is said:

"By the civil law, which is recognized and established by legislative enactment as the rule of practice in this territory, in all civil cases the wife acquires a tacit lien or mortgage upon the property of her husband to the

amount of the dotal property of which he became possessed through her. The recognition of this principle and the maintenance of the right of married women to such an 'hipotecacion' runs through all the elementary authorities on the civil law. * * * Her mortgage arising out of her paraphernal and dotal rights stands upon the same footing as regards recording the evidence of them; her legal mortgage attaches in both cases without being recorded."

In Barnett v. Barnett, 9 N. M. 205, 213, 50 Pac. 337, 339, the court, discussing a cognate question, after reviewing certain statutes, not affecting the question here involved, said:

"That any change of the Spanish law as to the acquest property under the foregoing status has been made cannot be seriously pretended; and that the foregoing authorities decisively establish that, in such contingency, the law upon the subject in operation at the date of the cession of the territory must prevail, should be unhesitatingly admitted. 'Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belongs to the community.'"

In Brown v. Lockhart et al. (N. M.) 71 Pac. 1086, 1088, decided by the Supreme Court of New Mexico, February 26, 1903, it is again ruled that:

"The law creates a presumption that property acquired during coverture is community property, and is subject to the payment of community debts."

The right of the wife as holding a tacit lien for the restitution of her dotal property is recognized as late as 1905 by the Supreme Court of the Territory in Ilfeld v. De Baca et al. (N. M.) 79 Pac. 725. Growing out of this doctrine is the result that "the gains being common, the debts which are contracted during marriage are to be paid out of the community property, but not those contracted before marriage or after its dissolution." L. 14, tit. 20, lib. 3, Fuero Real; 1 White's Recep. 63; Ballinger on Community Property, § 120, says:

"The entire community estate when clearly ascertained must be regarded as a primary fund for the discharge and satisfaction of the community debts. This was the rule in Spain and the rule under all laws where the community doctrine is recognized. The private property of each party to the marital union must, as a general rule, bear its own charges and expenses and they should not fall upon the community. This does not mean that the community property is liable for the community debts solely, but that it should be retained for the satisfaction of such debts as are a proper charge against it, instead of being absorbed by the private debts of the spouses to the detriment of the community creditors."

In Packard v. Arellanes, 17 Cal. 525, 537, it is said:

"The relation of husband and wife is regarded by the civil law as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of its debts. 'The law,' says Schmidt, in his work on the civil law of Spain and Mexico, 'recognizes a partnership between the husband and wife as to the property acquired during marriage.' * * * It is the well settled rule of that law that the debts of the partnership have priority of claim to satisfaction out of the community estate."

See, also, Jones v. Jones, 15 Tex. 143.

In Strong v. Eakin, 11 N. M. 113, 114, 66 Pac. 540, 541, it is again said:

"In the case of Barnett v. Barnett, decided by this court October 7, 1897, the court held that where the spouses are both alive the law in relation to

their community property has not been changed by statute in this territory. 'That any change of the Spanish law as to acquest property under the foregoing status, has been made, cannot be seriously pretended; and that the foregoing authorities decisively establish that in such contingency, the law upon the subject in operation at the date of the cession of the territory must prevail, should be unhesitatingly admitted.'"

It may be conceded that community property is subject to the payment of antenuptial as well as community debts of the husband. But we do not find that it has been so ruled in a controversy between the community and an antenuptial creditor where there was not sufficient property to first satisfy the claims of the former. It may also be conceded, for the purposes of this case, that the husband during the coverture is entitled to the dominion over and the control of the community property, and that the interest of the wife therein may be inchoate as distinguished from a vested interest during the coverture. But this does not control the question here involved as to the priority of the community creditors as to the community property.

Contention is made that later legislative acts of the territory have eliminated or modified the foregoing rules. In Strong v. Eakin, 11 N. M. 122, 66 Pac. 539, decided October, 1901, the Supreme Court reviewed the antecedent legislation of the territory, including the married woman's act, and the statute pertaining more especially to descents and distributions, and controverted the proposition that these statutes had done away with the rule of community except as they furnished a rule for determining their devise, descent, and distribution. The court said that those statutes "do not positively or by implication affect, during the lives of husband and wife, the acquest property, or direct its disposition until the death of the other." The court further said that while the married woman's act made the wife practically a feme sole, "she cannot withdraw community property accumulated by the joint enterprise of both during the existence of the marriage community from its liability for legitimate community debts, and so long as the law of community property remains in force, although modified, the reason exists for the presumption raised by the civil law, imposing the onus upon the claimant of a separate estate."

On March 20, 1901 (Sess. Laws N. M. 1901, p. 112, c. 62) the Legislature passed the last act pertaining to this question. Section 1 is as follows:

"All property acquired in any manner by either husband or wife, before or during marriage, shall be his or her separate estate, and shall be liable for his or her separate legal contracts, debts and torts."

Section 2 defines the meaning of the term "lucrative title" and "onerous title."

Section 5 declares that:

"All married persons shall possess the same property rights, the same power to convey or contract, the same power to sue and be sued, and all other powers and rights possessed and enjoyed by single and unmarried persons of legal age and otherwise competent to contract, subject to the limitations in the next following section."

It must be conceded that while some of the language of this statute is somewhat involved and obscure, it is difficult, in the light of the

antecedent prevalence of the community doctrine touching property acquired during coverture, to maintain that it was not the purpose of this act to put an end to it. Conceding this to be the purpose, it would be prospective only in its operation. It could have no retroactive effect so as to affect the established status of such property existing at the time of the passage of the act. It could not disestablish rights which had already attached to the community property. This is elementary.

The bankrupt act in no wise destroys or impairs equitable rights among creditors to the estate which existed four months prior to the filing of the petition in bankruptcy. It only seeks to prevent the obtaining of preferences among creditors by forbidding specified acts within the prescribed period. It recognizes the rights of parties secured to them by the existing local laws which are not interdicted or proscribed.

It results that the District Court of New Mexico erred in admitting the claim of Frederick H. Jung to be paid pro rata with the other claims allowed against the estate. Therefore, so much of its order and decree as directed the claim of said Jung to be paid pro rata with the other creditors in the dividends of the estate, is vacated and set aside and this cause is remanded to the said District Court with directions to enter its order or decree allowing the claim of said Jung, but postponing the payment of any dividends thereon until the satisfaction of the other claims of creditors allowed by the order and decree of the District Court against the estate.

On Rehearing.

The motion for rehearing is filed alone by Frederick H. Jung. Especial criticism is made of the statement contained in the opinion of the court heretofore filed herein, to the effect that as question is made on the petition for review only as to the action of the District Court in recognizing the claim of Jung to share pro rata with the other claims allowed by the District Court, the question to be decided here is, was the claim of said Jung thus properly classified? It perhaps would have been more exact had the writer of the opinion said that as counsel for petitioners for review, in his oral argument to the Court, stated that he did not insist upon the objection to the classification made by the District Court of the claim of Mrs. Pauline W. Myer, it need not be considered by the court. Such was the fact; and it may be added that this concession by said counsel was unavoidable as the logical result of the position he took respecting the rights of the wife under the civil law, which he contended prevailed in New Mexico. He has acquiesced in the action of the court in leaving the claim of Mrs. Myer where the District Court placed it. What right has the claimant, Jung, to complain of this action? He has no standing on the record before this court to be heard respecting the allowance of Mrs. Myer's claim. The District Court, on reviewing the findings of the referee, adjudged that Mrs. Myer's claim should be allowed to share pro rata with all the other claims allowed by it against the estate. Jung took no exception to this action, and presented no petition to this court to have it reviewed. He, therefore, acquiesced in the allowance of her claim. His position before this court was simply one of antagonism

to the effort of the petitioning creditors to have his claim entirely postponed until the satisfaction of the other claims allowed by the District Court. He has been in no position before this court to complain of the action of counsel for the petitioning creditors in abandoning, on argument, any objection to the allowance of Mrs. Myer's claim, or of the action of this court in leaving it where the judgment of the District Court placed it. Likewise is the claimant, Jung, in no position to contend, in the motion for rehearing, that Mrs. Myer should be held to be estopped from asserting an equal participation with the community creditors in the distribution of the fund arising from the sale of the land deeded to her, on the ground that she consented, before the referee, to the sale of the land, and to be postponed in sharing in the proceeds to the claims of the community creditors. The District Court permitted her to amend her claim so as to assert an equal right with said community creditors in said fund. The record does not disclose that counsel for Mr. Jung made any objection to this action of the District Court, and he has never sought any review thereof. Evidently he was perfectly content that she should share equally in the bounty of the fund so long as he was permitted to sit at the table of distribution. So far as he is concerned her claim has passed into irrevocable judgment. Therefore, the maxim might well be applied to his contention: Rixatur de lana a caprina. The contention made in the brief of counsel on behalf of Jung, presented on the original hearing, is not reinforced by any new authority or argument to persuade us that we ought to recede from the conclusion reached on the merits.

The petition for a rehearing is, therefore, denied.

RICH v. CHICAGO, M. & ST. P. RY. CO.*

(Circuit Court of Appeals, Eighth Circuit. November 12, 1906.)

No. 2,400.

1. RAILROADS—LICENSEES—DEATH—NEGLIGENCE—EVIDENCE.

In an action for the death of a pedestrian while crossing defendant's railroad track, the engineer and fireman of the engine that struck deceased, and two others who stood near by, and in front of the engine, testified that the bell was constantly ringing as the engine was being backed toward the place of the accident. *Held* that evidence of witnesses, who were not paying attention to the engine at the time, and were not necessarily in a position to have heard any bell ring or whistle sound before the accident, that they heard neither bell nor whistle, was insufficient to constitute a substantial conflict and warrant a finding that defendant was negligent in failing to ring the bell or sound the whistle.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1356–1359; vol. 20, Evidence, §§ 2432–2435.]

2. SAME—SIGNAL LIGHTS.

Where a witness testified that when he came up to defendant's railroad track where decedent was hurt, he noticed there was no light on the tender of the engine that struck decedent, such evidence was sufficient to charge defendant with negligence in failing to carry a light on the rear of the tender of the engine to warn pedestrians of its approach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1358.]

* Rehearing denied February 27, 1907.

3. SAME—LICENSEES—CONTRIBUTORY NEGLIGENCE.
That defendant railroad company permitted the public, including decedent, to use its yards as a common passageway, and thereby obligated itself to observe ordinary care to avoid injuring them, did not relieve decedent from the obligation to use ordinary care for his own safety.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 891–897, 1286.]

4. DEATH—PRESUMPTIONS—SELF-PRESERVATION.
In an action for wrongful death, the presumption that decedent was in the exercise of due care based on the instinct of self-preservation is inapplicable where the surrounding facts and circumstances conclusively establish his contributory negligence.

5. RAILROADS—PERSONS ON TRACK—LICENSEES—DEATH—CONTRIBUTORY NEGLIGENCE.
Decedent, a man 39 years old, possessed of unimpaired senses of sight and hearing, undertook for his own purposes to cross defendant's railroad tracks in a yard on a dark night when he knew engines and cars were liable to be constantly moving on them. On reaching one of the tracks on which a large road engine and tender was backing at the rate of six miles an hour, he stepped on the track and was run over and killed before he could escape. The engine was necessarily making much noise, and the bell was being constantly rung, though there was no light on the tender. *Held*, that the physical facts conclusively established that he was guilty of contributory negligence as a matter of law.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1294.]

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

Charles A. Dickson (Sam Page, on the brief), for plaintiff in error.
W. H. Farnsworth (Delos C. Shull and J. U. Sammis, on the brief), for defendant in error.

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

ADAMS, Circuit Judge. This was an action instituted under authority of the statutes of Iowa by Carrie Rich, as administratrix of the estate of Hamilton Rich, deceased, to recover damages occasioned by his death. The scene of the accident was the switching yard of defendant company in Sioux City, Iowa. In this yard defendant stores its cars when not in use and makes up its trains for use. It extends from Third street on the north to a little beyond Second street on the south and from what was known as Division street on the east, six or seven blocks westerly. South of and contiguous to the defendant's yard are located the yards of other railroad companies, so that the entire region south of Third street and west of Division street for several blocks is used almost exclusively for yard purposes. Besides making use of its yard for the purposes indicated, defendant's main line for Chicago on the east and for South Dakota on the west runs through it. East of and near to Division street is located defendant's roundhouse, and its locomotives are driven back and forth upon its tracks through the yard when beginning or ending their runs. In these several ways the yard is constantly the scene of great business activity by the defendant. Decedent had lived for some weeks on the north side of Third street in full view of the yard and

was familiar with all the uses made of it by defendant. At about 8:30 p. m. of May 17, 1904, the evening being dark, he left his home for some undisclosed purpose; went south a distance of some 200 or 300 feet and apparently was endeavoring to walk across a space covered by seven or eight parallel railway tracks, with the usual accompaniment of switches, guards, and frogs, when he was struck and killed by an engine slowly backing from the west to the roundhouse. It was found later that his shoe had been caught in a frog; the sole and heel of it were found wedged or made fast in the frog after the engine had passed by. Plaintiff in her petition charged that defendant had so permitted the public to cross its yards as to establish an implied license to do so; thereby obligating itself to the exercise of watchfulness and care in switching its cars and operating its engines and trains, with due regard to the rights of licensees. She further charged as the specific acts of negligence on defendant's part which resulted in the death of her husband: (1) That the engine which ran upon him was being operated at a high and unlawful rate of speed; and without (2) ringing a bell; (3) sounding a whistle; (4) maintaining a lookout; or (5) carrying a light on the rear of the tender, to warn pedestrians of its approach. Defendant denies the alleged negligent acts, and pleads contributory negligence on the part of decedent.

There is some evidence of the use of the yard by workingmen and their children going to and returning from the bridge which crosses Floyd river on the way to Cudahay's packing house where they were working; but if the decision of this case depended upon establishing the existence of a license in favor of the public to traverse defendant's tracks we should have great doubt as to the sufficiency of the evidence to establish it. But, in the view we take of other questions, it is unnecessary to discuss this one. There is no evidence tending to show that the engine was being backed at a high or improper rate of speed. On the contrary, it was conclusively shown, and is so conceded in argument by plaintiff's counsel that the engine was moving at a very moderate rate of speed. Was there any evidence that no bell was rung or whistle sounded by those in control of the engine as it approached the place where the decedent was attempting to cross the track? Carrie Rich, the widow of decedent, testified that she and a neighbor were standing on her back doorstep at the time her husband left the house. The place where he was hurt was more than a block south from the house, on a track running east and west between two others on each of which stood strings of cars, while another string of cattle cars was standing across Division street, a short distance east. She and her neighbor, with whom she was at the time visiting, testified merely that they did not hear any bell ring or any whistle sound before the accident occurred. They gave no reasons indicating that they would have heard either if it had rung or sounded. Moreover, the proof shows that their attention was not in any manner directed to what was going on in the yard. They say they heard a shout or scream, which was either simultaneous with or after the accident, and that it was the first incident that directed their attention to the yard that evening. The proof shows that they were neither actual observers of the condition of things attending the accident, nor were their situation or engagements such

as would likely have enabled them to know anything about the operation of the particular engine in question prior to the accident.

The only other witness who testified for plaintiff on this subject was Ed Wilson, who stated that after decedent left his home he started and followed about half a block behind him. He testified that his attention was not called to any of the circumstances attending the accident until after he heard a cry or loud groan (probably the one emanating from the decedent at the time he was hurt); that on hearing the cry, he ran and got to the decedent about two minutes after the accident occurred. He said he did not see the engine backing down because there was a string of cars between him and it, and that there was another string of cars on the south side of the engine as it backed eastwardly. Situated as thus indicated, with no actual observation of the operation and with a string of cars so intervening between him and the engine as to make notice of its operation unlikely, this witness also said he did not hear any bell ring or whistle sound. Like the other two witnesses, he did not give any reasons why he would likely have noticed either if it had occurred, and his occupation at the time was such as afforded him neither interest in what was going on nor favorable opportunity to observe it.

In these circumstances the evidence under consideration was purely of a negative character and does not commend itself to common intelligence or common experience as of any value. The witnesses may not have heard any warning given and yet it may have been given. The value of such evidence depends upon the existence of facts showing the likelihood that the warning would not have been given if the witnesses did not hear it. Such facts are absent in this case and we are left with the bald statement that the witnesses did not hear the warning as the only evidence that it was not given. They lived close to the yard and, as common experience teaches, had doubtless become so accustomed to the constantly ringing bells and sounding whistles as to be totally indifferent to them. As against this kind of evidence there is the positive testimony, unchallenged as to credibility, of the engineer and fireman who were at work on the engine in question, and two others who stood near by and in front of it as it was moving eastwardly, that the bell on the engine was constantly ringing as it was being backed eastwardly that night. This evidence afforded by the two men whose duty it was to ring the bell, and by two others who actually saw the engine and noted its operations is positive and unequivocal in its character. The testimony of plaintiff's witnesses, on the other hand, was of such a character, and attended by such circumstances as to be entirely true without affording any evidence of the fact sought to be established. This court has heretofore decided that in circumstances of the kind just disclosed there is no real conflict of evidence.

In the case of Chicago, etc., Ry. Co. v. Andrews, 64 C. C. A. 399, 130 Fed. 65, speaking by Judge Van Devanter it said:

"But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in

a situation favorable for observation, and who testify affirmatively and positively to the occurrence."

In the case of Baltimore & O. R. Co. v. Baldwin (C. C. A.) 144 Fed. 53, the Circuit Court of Appeals for the Sixth Circuit examined the question now under consideration and announced its conclusion in the following words:

"The result must be that purely negative testimony is not substantive, and amounts at most to nothing more than a mere scintilla."

To the same effect are the following cases: Stitt v. Huidekoper, 17 Wall. 384, 21 L. Ed. 644; Horn v. Baltimore & O. R. Co., 4 C. C. A. 346, 54 Fed. 301; Hubbard v. Boston & Albany Railroad, 159 Mass. 320, 34 N. E. 459; Culhane v. New York Central & H. R. R. Co., 60 N. Y. 133, 137. In the last-mentioned case, the Court of Appeals of New York had facts before it quite apposite to those now before us and said concerning them as follows:

"It is proved by the positive oath of the two individuals on the engine—one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. * * * As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

While the foregoing rule is a valuable one to prevent speculative and unwarranted verdicts and should be fearlessly applied in appropriate cases, no liberty should be taken by the trial judge under its supposed protection to weigh the force or value of evidence which is substantially contradictory. Where "circumstances attending the failure to notice an occurrence are such as afford reasonable ground to believe that if the occurrence had happened it would have been noticed by the witness, the failure to notice it may be and frequently is some evidence that it did not occur and should go to the jury for its consideration;" but when, as in this case, the failure to notice an occurrence is attended by no facts or circumstances tending to show that the witnesses would likely have noticed it if it had occurred, it should never be availed of to excuse an unwarrantable verdict. There was no evidence to support the fourth specification of negligence, namely, that the defendant failed to maintain a lookout to warn the decedent of the approach of the engine.

Concerning the fifth specification, Ed. Wilson testified that when he came up to the track where decedent was hurt he noticed there was no light on the tender of the engine. This is affirmative and positive testimony, and while it is denied by other witnesses, it constituted some evidence of the fifth act of negligence charged. We are therefore required to consider the other branch of the case relating to con-

tributory negligence. If the defendant had so permitted the public, including decedent, to use its yards as a common passageway and thereby obligated itself to the observance of ordinary care to avoid injuring them, and even if it was guilty of negligence in not maintaining a light on the rear of the tender as it backed eastwardly on the evening in question, these facts would not have relieved decedent from the obligation imposed by law to take ordinary precaution for his own safety. Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542. If he failed to do so and if such failure contributed in any degree to his death his personal representative cannot recover. If, from all the proof and the just and reasonable deductions from it, the contributory negligence is so conclusively established that all reasonable men in the exercise of an honest and impartial judgment would so say it was the duty to declare as a matter of law that no recovery could be had. Chicago G. W. Ry. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423, 428; Chicago G. W. Ry. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712; Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. Counsel for plaintiff recognizes the foregoing well-settled rules, and in endeavoring to exculpate the decedent from the charge of contributory negligence urge that the instinct of self-preservation is so strong as to create a presumption evidential in its character that the decedent was in the exercise of due care, and that that presumption was sufficient evidence to take the case to the jury. The presumption referred to is like other presumptions of fact. It is available in cases where there is an absence of evidence showing the actual occurrence, but like other presumptions it ceases in the light of actual facts. We recognize its evidential value in the former class of cases, as illustrated by Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, and Northern Pac. Ry. Co. v. Spike, 57 C. C. A. 384, 121 Fed. 45, but this court on repeated occasions has recognized and enforced limitations attending its use.

In Tomlinson v. Chicago, etc., Ry. Co., 67 C. C. A. 218, 134 Fed. 233, 234, it is said that:

"The presumption cannot stand against positive and uncontradicted proof such as was presented in this case, that had he taken those precautions which the law required of him he could plainly have seen the approach of the train in time to avoid the danger. * * * The presumption of the exercise of due care is at variance with the physical facts."

In Rollins v. Chicago, etc., Ry. Co., 71 C. C. A. 615, 139 Fed. 639, it is said:

"The presumption that the deceased used due care is destroyed by the force of physical facts shown by uncontradicted evidence, * * *" etc.

In Wabash R. Co. v. De Tar, 73 C. C. A. 166, 141 Fed. 932, 934, it is said:

"Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution. * * * But it is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or

universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it."

Do the actual facts of this case countervail the presumption? Decedent was in the meridian of life, 39 years old, possessed of unimpaired senses of seeing and hearing. He undertook, for purposes of his own, to cross the tracks of the defendant in a dark night, when, as known by him, engines and cars were liable to be constantly moving on them. He reached one of the tracks upon which an engine with tender was backing. The engine was a large road engine going at about a rate of six miles per hour and necessarily making much noise. Its bell, as seen from the evidence already considered, was being constantly rung. Notwithstanding these facts he stepped upon the track and was run over and killed by the approaching engine.

In the light of the foregoing facts, and in view of the following considerations we do not think he exercised ordinary care. It was of doubtful prudence on his part to venture upon defendant's tracks in the darkness of the night when he knew they were subject to constant use as already indicated. The tracks were warnings of danger, and the known and frequent use of them required the greatest circumspection on his part, both by looking and listening for the approach of an engine or train of cars. He could not have looked or listened as he entered upon the track. If he had looked attentively, he would have seen the large road engine that moment making its way towards him on the track he was just about to step upon. If he had listened, he would have heard the rumbling noise or the ringing of the bell. If, notwithstanding these obvious and indispensable precautions, he saw fit to try to make the crossing in advance of the engine, he was guilty not only of want of ordinary care, but of great recklessness. If he had not looked or listened he was, according to all authority and reason, guilty of negligence in not taking that reasonable precaution to prevent exposure which his environment imperatively demanded. His environment was such that he ought reasonably to have anticipated danger at every step, and every precaution suggested by the alert and attentive use of all his senses should have been taken. This he failed to take. The physical facts, in our opinion, conclusively show that he must have thoughtlessly and heedlessly stepped upon the track, and that he did so almost simultaneously with the approach of the engine (for he was not able to cross the track before he was hit by it); or they show that he entered upon the track prior to the approach of the engine and caught his foot in a frog, and was so held as to disable him from completing the crossing before he was injured. The latter contingency is not presented by his counsel, and no claim is made that the existence of the frog, blocked or unblocked, in defendant's switching yard is in itself such evidence of negligence as to constitute the basis of an action. For apt illustrative cases denying plaintiff's right of recovery because of his contributory negligence, reference may be made to the following cases: Rollins v. Chicago, etc., Ry. Co., supra; Tomlinson v. Chicago, etc., Ry. Co., supra; Missouri Pac. Ry. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921; Tucker v. Baltimore & O. R. Co., 8 C. C. A. 416, 59 Fed. 968; St. Louis, etc., R. Co. v. Chap-

man, 71 C. C. A. 523, 140 Fed. 129; Ames v. Waterloo, etc., Company, 120 Iowa, 640, 95 N. W. 161.

We think the learned trial judge of the Circuit Court committed no error in directing a verdict for defendant, and its judgment is affirmed.

ZELL v. JUDGES OF CIRCUIT COURT OF UNITED STATES FOR EASTERN DISTRICT OF VIRGINIA.

(Circuit Court of Appeals, Fourth Circuit. November 14, 1906.)

No. 713.

COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.—WRIT OF PROHIBITION.

A Circuit Court of Appeals has no power to issue a writ of prohibition as an original or independent proceeding, but only in aid of its own jurisdiction, which is wholly appellate, and, except in cases of petitions for review in bankruptcy proceedings, can only be invoked by an appeal or writ of error. Nor can it issue such writ as ancillary to a contemplated appeal or writ of error.

[Ed. Note.—Jurisdiction of Circuit Court of Appeals in general, see note to Law Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

On Petition for Writ of Prohibition.

The following are the petition and exhibits referred to in the opinion:

"The supplemental petition of Frank D. Zell respectfully shows unto the Court:

"(1) That since the filing of his original petition for a writ of prohibition and the granting by this honorable court of the rule to show cause why a writ of prohibition should not issue (which said rule was granted at or about 3 o'clock on November 9, 1906), the Honorable Edmund Waddill, Jr., sitting in the Circuit Court of the United States for the Eastern District of Virginia, at or about 5:30 o'clock p. m. on November 9, 1906, announced in open court certain conclusions reached by him in the matter of Fink v. Bay Shore Terminal Company, and directed that there should be filed of record in said cause a certain memorandum (a copy of which is annexed hereto marked 'Exhibit A') and four decrees, copies of which are annexed hereto, marked 'Exhibits 1, 2, 3, and 4,' respectively. As recited in said memorandum, said decrees were 'filed to the end that such use may be made of them as may be thought proper.' The decree marked 'Exhibit 1,' relating to the refusal of the court to dismiss the restraining order granted against your petitioner and others, and granting an injunction against them was dated November 8, 1906 (his honor, Judge Waddill, having on November 8, 1906, orally announced in open court that the motion of Frank D. Zell to dismiss the restraining order aforesaid was denied, and an injunction against him granted); the three other decrees and the memorandum accompanying the same being dated November 9, 1906.

"(2) That upon the announcement of the said conclusions and the filing of the said memorandum, and for instruments in the form of decrees by his honor, Judge Waddill, one or more of the counsel engaged in the cause asked Judge Waddill to state whether, the decrees not being signed, they were intended and to be treated as the orders and decrees of the court in regard to the matters and things therein ordered and directed, to which inquiry Judge Waddill replied in substance and effect that the papers aforesaid spoke for themselves, and that he did not desire to make any further statement in regard to them.

"(3) That upon the handing down of the memorandum and decrees aforesaid, counsel for your petitioner stated in open court that he desired on behalf of your petitioner to take appeal.

"(4) That on November 10, 1906, your petitioner's counsel requested his honor, Judge Waddill, at chambers, to enter of record an order showing the refusal of the court to permit your petitioner to file the petition, a copy of which is annexed to the original petition addressed to your honorable court and marked "Exhibit D," which petition in effect prayed the lower court for leave to intervene in the case of Fink v. Bay Shore Terminal Company, to the end that your petitioner and William E. Fritz might be heard upon a motion to dismiss the said cause. At the same time counsel for your petitioner presented a draft of an appropriate order. His honor, Judge Waddill, declined to receive or to sign such order, or any other order in the premises, stating, in substance and effect, that, having handed down the memorandum and other papers herein before referred to, he was unwilling to sign any other orders or decrees so long as the prohibition proceedings were pending.

"(5) Your petitioner further shows to your honors that he is now, and since obtaining the evidence of the collusive agreement referred to in the original petition presented to your honorable court, and the exhibits thereto atttached, always has been, ready and willing to show to the satisfaction of the Circuit Court of the United States for the Eastern District of Virginia the facts relating to said collusive and wrongful agreement, and has been, and still is, ready and willing to produce the proof of his allegations in such manner and at such times as to said court seemed most convenient and proper; that he is ready and willing to produce evidence of said facts before a special master, appointed by said Circuit Court, or by this court, to examine the same, or to prove said facts by affidavits, or otherwise, as this court, or the said Circuit Court, may deem most fitting and proper.

"Wherefore your petitioner renews his prayer to your honorable court for a writ of prohibition and such alternative or further relief as to your honorable court may seem right and just and necessary to protect the rights of your petitioner in the premises.

"And your petitioner will ever pray, etc.

"[Signed] Frank D. Zell."

Exhibit A.

"Memorandum.

"Waddill, District Judge: This case has been under argument and consideration for the last two days before the undersigned upon the question of the right to allow Frank D. Zell to appear herein and file a certain petition and answer and certain exceptions to the confirmation of the report of sale, and upon the motion for confirmation of the sale of the property made herein on the 3d day of May last; it having been understood, at the instance of Zell's counsel, that the question of confirmation of sale would not be acted upon until this time. After elaborate argument, the case was finally submitted for determination at 4:30 o'clock this evening, and, having reached a conclusion upon each of the four questions, the court prepared its decree carrying out the same. At 4 o'clock, when in the preparation of the last decree, a rule for a writ of prohibition was handed the court, one of the provisions which in effect suspends further action in the case. Having reached the conclusion and drawn the decrees carrying out the same before the prohibition proceeding was known, the said four decrees are herewith filed, as they embody the court's views and conclusions as to what should be done in the premises, and what is necessary to be done, unless the rights of practically all the parties in interest, including the purchasers, involving hundreds of thousands of dollars, are to be sacrificed and imperiled.

"These papers are filed to the end that such use may be made of them as is thought proper; the court having given its best judgment to the cause, with full knowledge of the facts and circumstances surrounding it from inception to the present time.

"Edmund Waddill, Jr., U. S. District Judge.

"Richmond, Va., Nov. 9th, 1906."

Exhibit 1.

"In the United States Circuit Court for the Eastern District of Virginia.

"Charles E. Fink and Others v. Bay Shore Terminal Company. In Equity.

"Upon Ancillary Petition of B. W. Leigh and M. C. Ferebee.

"This cause came on this day to be heard upon the ancillary petition aforesaid, filed by B. W. Leigh and M. C. Ferebee, stakeholders, on the 24th day of April, 1906, raising certain questions respecting the ownership and use of some of the mortgage bonds of said defendant company, decreed to be used in payment of the property of the defendant company by decree of sale thereof heretofore entered in the original cause; upon the temporary restraining order awarded on said 24th day of April, 1906, upon said petition, against Frank D. Zell and Edward B. Smith & Co., returnable before this court on the 17th day of May, 1906; upon the motion of Frank D. Zell, made the 12th day of May, 1906, pursuant to notice thereof, to vacate said temporary restraining order, and upon motion on said day of said petitioners Leigh & Ferebee to grant said injunction, which said motions to vacate said restraining order, and to grant said injunction were fully heard on said 12th day of May, 1906, and that day submitted to the court; upon the petition aforesaid, and exhibits therewith filed, and the following papers filed by the parties, respectively, that is to say: In behalf of said Leigh and Ferebee, the answer and cross-bill of Edward B. Smith & Co., affidavits of B. W. Leigh, J. A. X. Groner, W. C. Cobb, W. T. Simcoe, and a paper purporting to be a copy of the bill filed by A. L. Sweeney in the law and equity court of the city of Norfolk; and in behalf of the said Frank D. Zell, his own affidavit, together with a supplemental affidavit, the affidavit of William L. Royall and of Malcolm J. Lloyd, and upon the arguments of counsel. And the court, being fully advised of its judgment in the premises, doth on this 8th day of November, 1906, refuse to vacate the temporary restraining order granted as aforesaid on the 24th day of May, 1906, and doth grant the injunction prayed for; that is to say, the court doth adjudge, order, and decree that Frank D. Zell, his agents, attorneys, and servants, and all others, be enjoined and restrained, until the further order of the court herein, from instituting or prosecuting in any other jurisdiction any suit or proceeding against said petitioners on account of his (said Zell's) claim to certain bonds of the Bay Shore Terminal Company in the hands of the said petitioners, Leigh and Ferebee, and especially from prosecuting the suit now pending in the court of common pleas No. 4, Philadelphia county, Pennsylvania, against said petitioners and others, being cause in equity pending in said court No. 2,774, instituted at the March term, 1906, of said court.

"And the court doth further adjudge, order, and decree that Edward B. Smith & Co., a partnership consisting of Edward B. Smith, Frank E. Bond, George W. Norris, John S. Jenkins, Jr., and Edward J. MacVicar, be likewise enjoined and restrained from instituting or prosecuting in any other jurisdiction any suit or proceedings on account of their claim to the ownership of the bonds in said petition mentioned, until the further order of the court.

"————————, United States Judge.

"Richmond, November 8th, 1906."

Exhibit 2.

"In the United States Circuit Court for the Eastern District of Virginia.

"Charles E. Fink and Others v. Bay Shore Terminal Company. In Equity.

"Upon Ancillary Petition of B. W. Leigh and M. C. Ferebee.

"This day came Frank D. Zell, one of the defendants named in the ancillary petition of B. W. Leigh and M. C. Ferebee filed herein on the 24th day of May, 1906, raising certain questions as to the ownership and use of certain mortgage bonds of the defendant company in payment of the property of the defendant company theretofore decreed to be sold in the original suit, and moved the court to allow him to file his answer to said petition, which answer was presented to the court on the 8th day of November, 1906, after the announcement of the court's decision on the application for injunction heretofore heard and submitted, being the paper presented to Judge Pritchard and

referred to in his order of October 12, 1906, to the filing of which the petitioners Leigh and Ferebee objected, but the court granted said Zell's motion, and his answer is accordingly filed, with leave to the petitioners to make such defenses thereto, by replication, exception, or otherwise, as they may be advised. ————————, U. S. Judge.

"Richmond, Va., November 9, 1906."

Exhibit 3.

"In the United States Circuit Court for the Eastern District of Virginia.

"Charles E. Fink and Others v. Bay Shore Terminal Company. In Equity.

"This day came Frank D. Zell, and moved the court to allow him to file a certain petition herein presented to the court on yesterday, the 8th day of November, 1906, being the paper presented to Judge Pritchard and referred to in his order of October 12th, 1906, setting up the fact that he is a large bondholder and stockholder of the defendant company, and in which said petition he seeks to intervene herein for the purpose of raising the question of the jurisdiction of the court, in that, as he avers, the bill, though appearing to be filed by a citizen of Maryland and for a sum within the jurisdiction of this court, was collusively instituted in fraud of the court's jurisdiction; and the said Zell further moved the court to permit him to file exceptions to the confirmation of the sale of the property and franchises of said defendant, made on the 3d day of May last, pursuant to the final decree of foreclosure entered in this cause on the 17th day of March, 1906; the confirmation of such sale having in the meantime been suspended because of the effort on the part of the said Zell to intervene in this cause, and which application on his part was only recently pending in the Supreme Court of the United States, and since the dismissal of said appeal at his request.

"To the right of said Zell to appear herein to file said petition and make such exceptions to the confirmation of the sale the trustee in the mortgage under which he claims to hold bonds, the defendant corporation, the holders of $200,000 of receiver's certificates, and parties representing sundry other indebtedness of the defendant company and obligations of the receivers, objected, and was fully argued by counsel.

"Whereupon, the court doth decline to allow said Zell to appear herein, or to entertain his said petition or exceptions, for the following, among other, reasons:

"First. That said Zell has been before the court by representation through the trustee under the mortgage practically from the inception of this cause; that he is a pendente lite purchaser, who acquired his interest only a short time before the sale of the property; that his said trustee, and the person from whom he bought, his privy, have all along been parties to these proceedings, particularly including the contracting of debts of several hundreds of thousands of dollars for the benefit of the property, whereby the road was completed and made valuable and salable; and that he is estopped to make his present plea, especially in view of the fact that this court, the Circuit Court of Appeals for this circuit, and the Supreme Court of the United States, have in this cause, all within six months last past, denied his right of intervention herein.

"Second. That said Zell, not being a party to the cause, has no right to appear herein for the purpose of excepting to the confirmation of the sale.

"Third. That the averments set forth in his said petition constituting a latent infirmity of the jurisdiction of the court, by reason of the alleged unlawful conduct of some of the parties hereto in connection with the institution of the same, are not sufficient in themselves, under the facts and circumstances of this case, in which a final decree has long since been entered, to justify the court in entertaining the petitioner's request; and this is particularly true, since the rights of a large number of persons, who are legally entitled to sue in this court, have intervened herein upon the faith of the validity of the proceedings and because of the court's being in exclusive possession and control of the property of the defendant company, as well as a large number of persons who have contracted obligations with the court in connection with the construction and operation of the property for three years last past, all of

whose rights would be disastrously affected and destroyed by complying with the prayer of said petition; and the said petitioner is therefore denied the right of appearance and to file said petition, or to make said exceptions, without prejudice to any lawful right he may have in the premises.

"————————, U. S. Judge.

"Richmond, Va., Nov. 9, 1906."

Exhibit 4.

"In the United States Circuit Court for the Eastern District of Virginia.

"Charles E. Fink and Others v. Bay Shore Terminal Company. In Equity.

"This cause came on this day to be heard upon the report of sale of the special commissioners appointed by the final decree entered herein on the 17th day of March last, to make sale of the property, estate, and franchises of the defendant company, filed herein on the 7th day of May last, upon the supplementary report and affidavits filed, and upon the motion of the defendant company, the Atlantic Trust & Deposit Company, trustee in the mortgage, and Wright & Snyder, holders of $200,000 of receiver's certificates heretofore issued herein, to confirm the sale to Edward B. Smith & Co., of said property, estate, and franchises, so made on the 3d day of May last, at the price of $765,000, to the granting of which motion said Edward B. Smith & Co., by counsel present in court, makes no objection, and was argued by counsel. On consideration whereof, the court being satisfied that the price at which the property was struck out to said Smith & Co. was a most excellent one, and that there is the utmost urgency why the sale, a confirmation of which has been suspended for the last seven months, should be passed upon, it is adjudged, ordered, and decreed that the said reports of said special commissioners and the sale therein reported to have been made to the said E. B. Smith & Co. be in all respects approved and confirmed.

"And the court doth further adjudge, order, and decree that the said Edward B. Smith & Co. pay, and the said special commissioners do receive, the balance of the purchase price of said property, the same to be applied in accordance with the terms of said sale, as prescribed in the decree entered herein on the 17th day of March, 1906. ————————, U. S. Judge.

"Richmond, Va., Nov. 9, 1906."

Charles H. Burr, Reynolds D. Brown, and William L. Royall, for petitioner.

Lawrence D. Groner and Tazewell Taylor, for respondents.

Before GOFF, Circuit Judge, and BRAWLEY and McDOWELL, District Judges.

GOFF, Circuit Judge. This case is fully stated in the petition, the exhibits filed therewith, and also in the answer tendered thereto. Should the writ of prohibition, as prayed for by petitioner, be issued by this court? The act creating it provides that it shall have the powers specified in section 716 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 580], which sets forth that the Supreme Court and the Circuit and District Courts of the United States shall "have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." When this petition was filed there was no proceeding of an appellate character pending in this court, relating to the case referred to by it, concerning which any auxiliary writ was necessary for the exercise of the appellate jurisdiction of this court—a court created by a statute which makes it only a court of appeals, and gives it no original jurisdiction.

The petitioner complains, saying that, at the time he filed his petition, the Circuit Court for the Eastern District of Virginia had not signed and caused to be entered of record the decrees he alleged said court had announced that it would enter. The answer to the rule to show cause discloses that said Circuit Court had prepared the decrees so referred to, which embodied the views as announced by the judge of the court, and which would have been entered as part of the record of said cause but for the fact that said court was restrained from proceeding further therewith by the rule of this court to show cause. When said decrees are entered, the petitioner will certainly have the right to appeal to this court from the decree granting the injunction complained of by him, and it may be that then this court will find it necessary to use some auxiliary writ for the purpose of effectually exercising its appellate jurisdiction.

We are of the opinion that every case of which this court can take jurisdiction, except petitions relating to bankruptcy proceedings, must be brought to it by either appeal or writ of error. It has no power to issue the writ of prohibition as an original or independent proceeding, and it has no right to issue it as ancillary to a contemplated writ of error or appeal, though it is quite apparent that cases may present themselves, after a writ of error or appeal has been perfected, in which it would not only be proper but absolutely necessary that such writ should issue in aid of its jurisdiction. While it is quite likely that the Circuit Court for the Eastern District of Virginia will enter the decrees it has so formulated, when it has the opportunity so to do, still it does not follow that it will do so, and it may be that it will so modify them that petitioner will not complain concerning them, or may so change them that petitioner may deem it best to go to an appellate court with other assignments of error regarding them. But, be that as it may, the only way this court can review them is by appeal after they have been passed upon by that court.

For the reasons mentioned, we do not find it to be our duty to now issue in this matter the extraordinary writ of prohibition. The rule to show cause will therefore be dismissed, and the writ asked for will be refused.

TOWN OF WATERFORD v. ELSON.

(Circuit Court of Appeals, Second Circuit. November 15, 1906.)

No. 26.

1. COURTS — JURISDICTION OF CIRCUIT COURT OF APPEALS — JURISDICTIONAL QUESTIONS.

Under section 6 of the act creating the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) an appeal or writ of error does not bring before such court for review the question of the jurisdiction of the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1099.

Jurisdiction of Circuit Court of Appeals in general, see Lau Ow Bew v. United States, 1 C. C. A. 6; United States v. Freehold Land and Emigration Co. v. Gallegos, 32 C. C. A. 475.]

2. HIGHWAYS—INJURIES FROM DEFECTS—ACTION AGAINST TOWN—NOTICE UNDER CONNECTICUT STATUTE.

Under Gen. St. 1902, Conn. § 2020, which requires as a condition precedent to the maintenance of an action against a town to recover for an injury caused by a defective highway that a written notice shall be served on a selectman of the town within 60 days after such injury, which shall contain "a general description of the same and of the cause thereof and of the time and place of its occurrence," as construed by the highest court of the state, a notice describing the cause of the injury as the limb of a tree extending over the highway at a dangerously low height, and the place as "on the Great Neck Road, so called, near the Hedden place so called, in said town of Waterford," is sufficient in respect to the place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 515.]

3. ABATEMENT AND REVIVAL—RIGHTS OF ACTION WHICH SURVIVE—REMEDIAL OR PENAL ACTIONS.

Gen. St. 1902, Conn. § 2020, giving a right of action against a town to recover damages caused by a defective highway, is not penal within the meaning of Acts 1903, p. 149, c. 193, § 3, which excepts from causes of action which survive "any civil action upon a penal statute," but is remedial in that it is intended to afford compensation to the party injured and the cause of action survives to his executor or administrator under the general provisions of section 1 of said chapter.

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

Writ of error from the United States Circuit Court for the District of Connecticut, which sustained plaintiff's demurrer to defendant's plea in abatement, overruled its demurrers and motions in arrest of judgment and for judgment notwithstanding verdict, and rendered judgment on verdict in favor of plaintiff.

The opinions of the court below are reported in 138 Fed. 1004. See 140 Fed. 800.

D. G. Perkins, for plaintiff in error.

W. S. Schutz, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The plaintiff, as administrator, brought this action to recover damages for death of his intestate caused by injuries alleged to have resulted through a defective highway, under section 2020 of the General Statutes of Connecticut 1902. Said section provides as follows:

"Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair; but no action for any such injury shall be maintained against any town, city, corporation, or borough, unless written notice of such injury and a general description of the same, and of the cause thereof, and of the time and place of its occurrence, shall, within sixty days thereafter, * * * be given to a selectman of such town."

Defendant appeared and pleaded in abatement of the writ, on the ground that the copy was not attested by the officer who served it. The plaintiff replied that the copy was served by the marshal, and was attested by the clerk of the Circuit Court to be a true copy of the writ and complaint. To this replication defendant demurred.

The question thus raised is a jurisdictional one. A majority of the court is of the opinion that under the construction adopted in this Circuit of the fifth and sixth sections of the Evarts act the question of the jurisdiction of the court below is not before us for review. U. S. v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299; Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. 79. See, also, Sun Printing & Pub. Co. v. Edwards, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027. Thereafter the defendant demurred to the complaint, on the ground that the notice given by plaintiff did not describe the place of the injury with the certainty required by said statute.

The material portions of said notice are as follows:

"To the Selectmen of the Town of Waterford in the State of Connecticut: I hereby give notice that as administrator of the estate of Jacob Elson, deceased, I have a claim for damages amounting to twenty thousand dollars against said town of Waterford for negligence on the part of said town which resulted in the injury of the said Jacob Elson on the sixteenth day of September, 1903, and in his death. * * * [Here followed a statement of the injuries.] These injuries were caused by the negligence of said Town in permitting and allowing at that time and for a long time prior thereto the limb of a tree to extend out over the highway at a dangerously low height which said limb struck the said Elson who was driving along said highway and hurled him to the ground inflicting the injuries aforesaid. The time said injuries were inflicted was about 7:30 a. m., September 16th, 1903. The place was on the Great Neck Road so-called near the Hedden Place so-called, in said town of Waterford."

The courts of the state of Connecticut, construing the provisions of said section as to notice, have held that its purpose is "that of giving sufficient information to enable the town authorities to properly investigate the claim." Dean v. Sharon, 72 Conn. 667, 673, 45 Atl. 963. In Breen v. Cornwall, 73 Conn. 309, 312, 47 Atl. 322, the place of the injury was described as the road "familiarly called the 'Cook Road,' near the ruin of an old house, we were thrown out of our wagon on that ledge of rocks in the road." The notice was held sufficient. There the court said:

" 'The sufficiency of the notice is to be tested with reference to the purpose for which it is required. If sufficient for that purpose it is a good notice.' Budd v. Meriden Electric R. Co., 69 Conn. 272, 285, 37 Atl. 683. The place, cause, and nature of the injury are sufficiently stated in the notice when they are 'truly described with such a reasonable degree of certainty that ordinary men in the exercise of ordinary intelligence under the circumstances can learn from the notice the nature of the injury, and be able to ascertain by the use of ordinary diligence the place where it occurred and the cause that occasioned it.' Gardner v. New London, 63 Conn. 267, 272, 28 Atl. 42; Budd v. Meriden Electric R. Co., supra; Dean v. Sharon, 72 Conn. 667, 674, 45 Atl. 963.

Much reliance is placed by defendant upon the case of Biesiegel v. Seymour, 58 Conn. 43, 19 Atl. 372. There the place was described as "a place in and upon said road near the former residence of Lyman Clinton," and the notice was held to be insufficient.

But it appears from the opinion of the court in said case that "no reference is made in the notice to any visible object to mark the place where the accident happened." See, also, Lilly v. Town of Woodstock, 59 Conn. 219, 22 Atl. 40.

In the case at bar counsel for defendant has assumed that the no-

tice was necessarily insufficient upon its face. In this respect we think he was in error. Here there was notice of a visible object to mark the place, the limb of a tree. It does not appear, and is not to be presumed, that there were limbs from other trees thus extending out over the highway at a dangerously low height on said road near the Hedden Place, nor that there were any other trees near said place, nor that, for any other reason, the notice failed to contain "for all the practical purposes to be subserved * * * a reasonably sufficient general description of the * * * place of occurrence." Wood v. Stafford Springs, 74 Conn. 437, 441, 51 Atl. 129. We think, in view of the peculiar conditions existing in Biesiegel v. Seymour, supra, and of the later decisions of the Supreme Court of Connecticut construing said statute, that this demurrer was properly overruled.

A more serious question is presented by the defendant's motion for judgment veredicto non obstante, on the ground that:

"Upon the facts alleged in said complaint, said action is based on section 2020 of the General Statutes of the state of Connecticut 1902, and is a penal action, and under the laws of the state of Connecticut, and especially chapter 193 of the Public Acts of 1903, the cause of action set forth in said complaint did not survive to and does not exist in favor of the administrator of said Jacob Elson."

Section 2020 is as follows:

"Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair."

The material portions of said chapter 193, p. 149, are as follows:

"Sec. 1. No cause or right of action shall be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of such deceased person. * * *"

"Sec. 3. The provisions of this act shall not apply to any cause or right of action or to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto; nor to any civil action or proceeding whose prosecution or defense depends upon the continued existence of the persons who are plaintiffs or defendants; nor to any civil action upon a penal statute.

"Sec. 4. In all actions surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally in fault for such injuries just damages not exceeding five thousand dollars; provided, that no action shall be brought upon this statute but within one year from the neglect complained of. * * *"

"Sec. 6. Sections 1094 and 1131 of the General Statutes and all acts and parts of acts inconsistent herewith are hereby repealed."

Section 1094 provided as follows:

"The executor or administrator of any person whose death shall have been caused by negligence, may recover of the party legally in fault just damages, not exceeding five thousand dollars."

Section 1131 provided that:

"No civil action or proceeding shall abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of such decedent. * * * The provisions of this section shall not apply to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto; nor to any civil action or proceeding whose prosecution or defense depends upon the continued exist-

ence of the persons who are plaintiffs or defendants; nor to any civil action upon a penal statute."

In Reed v. Northfield, 13 Pick. 94, 23 Am. Dec. 662, the Supreme Court of Massachusetts considered a statute giving a cause of action against a town for injuries resulting from a defective highway, and held as follows:

"In the present case we think the action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. * * * It appears to us * * * that in form and substance it is a remedial action."

This case is cited with approval in Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, where the Supreme Court says:

"The true test is whether the main purpose of the statute is the giving of compensation for an injury sustained or the infliction of a punishment upon the wrongdoer."

To the same effect is the decision in Boston & Maine Railroad v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, where, however, as in Huntington v. Attrill, supra, the question was not one of survival of action, but of the power of a court to enforce the penal law of a foreign state.

But it is argued that the Supreme Court of Connecticut, in the recent case of Bartram v. Sharon, 71 Conn. 686, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225, has decided that section 2020 is a penal statute. The construction by the state court of the statute of its state is binding upon this court. Manley v. Park, 187 U. S. 547, 551, 23 Sup. Ct. 208, 47 L. Ed. 296. Bartram v. Sharon, supra, referred to the act in question as a penal one, and, inter alia, said as follows:

"Such an act should not be extended by construction beyond the plain meaning of its words. The liability of the towns is to pay a penalty. In Moulton v. Sanford, supra (page 129 of 51 Me.), the court in speaking of a similar statute, Davis, J., delivering the opinion, says: 'The statute is in its nature penal, as well as remedial, and ought to be construed strictly.' Perhaps this modification should be added: In respect to its penal provisions. The duty to repair is mainly remedial."

See, also, Makepeace v. Waterbury, 74 Conn. 360, 50 Atl. 876; Upton v. Windham, 75 Conn. 288, 53 Atl. 660; Lavigne v. New Haven, 75 Conn. 693, 55 Atl. 569.

An examination of the decisions of the Supreme Court of Connecticut bearing on this question has satisfied us that there is no necessary conflict between the views of that court and of the Supreme Court of the United States and other courts, quoted above, as to the construction of the statute in question. We think the apparent conflict arises from the fact that the word "penal," as applied in such cases, has a double meaning. It is penal in the sense that it imposes a penalty measured by the actual injury and is to receive a strict construction. It is remedial as affording compensation to the party injured. In none of the Connecticut cases cited above was the question of survival at

issue. In Upton v. Windham, supra, Judge Hamersley, who wrote the opinion in Bartram v. Sharon, supra, says:

"The precise point decided in that case was this: 'A traveler upon a highway cannot be injured through a defect in a highway, * * * when the culpable negligence of a fellow traveler is a proximate cause of his injury.'"

The statutes which are penal, so far as concerns the question of survival, are those where the primary object is to inflict punishment on the wrongdoer, such as that imposing penalties for failure of a corporation to file annual reports, as in Mitchell v. Hotchkiss, 48 Conn. 9, 40 Am. Rep. 146, or qui tam actions for a prescribed penalty. Thus, in Plumb v. Griffin, 74 Conn. 132, 50 Atl. 1, the action was brought on a statute which provided that every person who cuts trees or timber on the land of another without his license shall pay to the party injured $2 for every tree of one foot in diameter, etc. The statute of Connecticut provided that no suit for any forfeiture upon any penal statute should be brought but within one year next after the commission of the offense. The court, reviewing the authorities at great length, held that a statute which gives no more than a right of action to the party injured to recover increased damages is not a penal statute. Various cases cited in the case of Plumb v. Griffin, supra, indicate that if the question as to the character of a statute, such as the one here in question, were raised in the Connecticut court, it would hold that the right of action on such a statute was one which survived to the executor. And in Burr v. Town of Plymouth, 48 Conn. 460, 473, the court says, referring to the defective highway statute:

"The object of the statute was not to punish towns for misconduct, but to furnish a remedy to a party injured through a defect in a highway which it is made the duty of the town to keep in repair. And the whole object of the statute was to furnish a means whereby the party injured might obtain compensation for any injury he might receive, without fault on his part, by reason of any defect in the highway."

Even if it be assumed, however, for the purpose of this inquiry, that the statute is a penal one, we think that it could not have been the intention of the Legislature of the state of Connecticut, by the act of 1903, quoted above, to destroy the right of action for death caused by negligence in cases of this character. The general right of recovery was first granted in 1848, and has been continued in every subsequent revision of the statutes, and has become a part of the settled policy of the state. We think that such an unbroken course of legislation for nearly 60 years is so persuasive of the legislative intent that it ought not to be nullified by the general language used in the act of 1903.

A comparison of the statutes cited above supports the correctness of this conclusion. The sections repealed, giving the right of action to the representative of a deceased person, and providing that no civil action shall abate by reason of the death of any party thereto, are practically re-enacted in the provisions of the act of 1903, which was a substitute therefor. Section 4 may be treated in connection with section 1 as a broader and more comprehensive statute than section 1094, which it repealed. We think that, taken together, they may be fairly interpreted as declaring that every right of action for injuries resulting in death shall survive in favor of the executor or administrator

of such deceased person, and that he may recover for such injuries; but that where an action is brought, not for the recovery of compensation for such injuries, but upon a statute which is penal in the sense that its main object is to inflict a punishment upon the offender, such action does not survive.

In these circumstances we think the court below rightly disposed of the preliminary questions raised as above, and we should not feel justified in disturbing the verdict after a trial upon the merits.

The judgment is affirmed.

THE KAISERIN MARIA THERESA.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 28.

1. COLLISION — SCHOONER OVERTAKEN BY STEAMSHIP — FAILURE TO EXHIBIT STERN LIGHT.

A finding affirmed that a schooner was in fault for a collision with an overtaking steamship at night because of her failure to exhibit a white light or flare-up astern, as required by article 10 of the International Navigation Rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2866]), on evidence which showed that while she had a torch, it was not in condition for use for lack of oil, so that when its use was attempted it quickly blew out.

[Ed. Note.—Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

2. SAME—EXCESSIVE SPEED.

A steamship is not required to maintain a speed so low as to enable her to avoid collision with other vessels which are navigating without displaying proper lights.

3. SAME—REMOVAL OF LOOKOUTS FROM STATIONS—DUTY TO REDUCE SPEED.

A steamship, navigating the Atlantic on a dark but clear night, which was obliged by the coldness of the weather and the freezing of the spray to remove the lookouts from their proper places forward to the bridge, but which kept a good lookout from there, cannot be held in fault for a collision with a schooner which she overtook, and which exhibited no stern light, because she did not reduce her speed so as to enable her to avoid the collision after coming near enough to make out the schooner.

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, which held both vessels in fault for a collision between the schooner Pavia and the S. S. Kaiserin Maria Theresa. The collision took place about 4:30 a. m., January 4, 1901, on the Atlantic Ocean, about two days' journey from the port of New York, both vessels were westward bound, the steamer overtaking the schooner.

E. E. Blodgett, for libelants.

Jos. Larocque, Jr., for claimant.

For opinion below, see 125 Fed. 145.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. It is conceded that the schooner did not show from her stern the fixed white light, required by article 10, International Rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2866]), but her contention is that she showed a flare-up light, which the article permits as an alternative when no fixed light is carried. The District Judge found that she "failed to properly exhibit a flare-up light. She had a torch aboard, but it was not in a condition to use for lack of oil, so that when it was lighted and attempts made on two occasions to exhibit it to the steamship it quickly went out, and, in effect, she exhibited no light astern."

The evidence fully sustains this finding. There were four persons on the bridge of the steamer, an experienced seaman stationed at each end (port and starboard) and the navigating and watch officers (first and fourth officers) respectively, on the port and starboard sides. None of them, although they were keeping a careful lookout ahead, saw any light on the schooner, the first indication of her proximity being the looming up through the darkness of her masts about half a point on the starboard bow, a short distance ahead. Of the weight to be given to such testimony we have written on former occasions. Sewall v. La Champagne (D. C.) 53 Fed. 398; Gurney v. The John H. Starin, 122 Fed. 236, 58 C. C. A. 600; The Helen G. Moseley, 63 C. C. A. 144, 128 Fed. 402. The evidence from the schooner is unpersuasive. She carried an eight-wick torch, but the single sailorman who was on watch did not know where it was kept, and after sighting the steamer had to go forward to inquire for it, then back to the cabin to get it, then forward again to have it lit in the sheltered forecastle; there was a very heavy blow—almost a gale. An effort to light it with matches failed, so it was thrust into the stove to secure ignition. When lit the watch carried it to a raised place amidships, and waved it above his head; it went out, and he returned to the forecastle. Those below then poured some oil from a can into a pail and thrust the torch into it, apparently expecting that the wicks would absorb enough oil to burn. It was again lit in the stove, again given to the watch, and when he waved it, it again went out. While those in the forecastle were trying to light it the third time, the collision took place. How long on each occasion the torch remained lighted is not certain, apparently the wind blew it out and the probabilities are that its illumination was but momentary. There was a heavy sea running, and it is not surprising that such a brief display was not observed by those on the steamer. The term "flare-up light" is not defined in the articles, but since it is provided as the alternative for a fixed white light at the level of the side-lights, it certainly must be one kept where it will be at hand and in proper condition when wanted, and which will not blow out in a high wind, but will burn with such continuity as to give fair warning to the approaching vessel. We are clearly of the opinion that the schooner was in fault for failing to exhibit such a light.

The steamer was charged with fault in not having a proper lookout, because there was no one stationed at the stem or in the crow's nest. Of this charge the District Judge says:

"The testimony shows that the coldness of the weather had caused the spray, which flew aboard the steamship, to freeze on the forward part of the vessel including the foremast, so that the removal of the lookouts to the bridge was justified by the circumstances."

In this conclusion we concur.

The steamer was also charged with fault because she was going at full speed, 15 to 17 miles an hour. Of this charge the District Judge says:

"If the steamship had been proceeding at a slower rate of speed, the collision could doubtless have been avoided by the reversal of her engines. The removal of the lookouts from the best positions for seeing ahead imposed a duty upon the steamship to slacken her speed, so that she would be under command and could reverse in time to avoid a collision with a sailing vessel ahead of her, which could be seen without a light exhibited astern. Full speed under the circumstances was inconsistent with the duty of the steamship to stop if there should be danger, and there was danger here which doubtless could have been seen in time to avoid it if the lookouts had not been removed from their proper stations. Their removal necessitated the precaution of reducing speed. The Java, 14 Blatchf. 524, Fed. Cas. No. 7,233."

In the Java, it was found that the sailing vessel had her regulation lights set and burning; besides the heavy head sea, there were occasional showers and some mist and the view of lookouts from the bridge was interfered with by a fore trysail.

We are unable to concur in this conclusion of the District Judge because it requires the steamer to maintain a speed so low as to avoid collision with other vessels which may be navigating without displaying lights. This, we think, lays a burden upon navigating vessels not warranted by the rules or by authority. The case of the Sarmatian is closely parallel. She was proceeding at her usual speed in the open sea. The night was dark, but lights when displayed could easily be seen; she had a full watch on deck attending to her duties. The Circuit Court held, affirming the District Court:

"She was not bound to slacken her speed until there was apparent danger [The Scotia, 14 Wall. 170, 20 L. Ed. 822], and she had the right to act on the belief that every vessel she approached would give such notice as the local usages of the place, or the general rules of the sea required. * * * Under these circumstances she might keep up her usual speed till something occurred to make it improper. Had the schooner performed this duty this speed would not have involved any loss to her." Kennedy v. The Sarmatian (C. C.) 2 Fed. 911.

We know of no authority qualifying this decision, which commends itself to us as sound and reasonable.

In the case at bar the night was dark and cloudy, but there was no fog, mist, falling snow or rain, heavy or light, and lights could be seen for miles. The watch on the schooner saw the steamer's lights 20 minutes before she struck—at least five miles away. The less powerful lights of a sailing vessel carried nearer the surface of the water could undoubtedly be seen by those on the bridge at least more than a mile away; the navigators of the steamer estimate they could have seen them from two and a half to five miles off, but if apprised of the schooner's presence when a mile away, there would have been no difficulty in avoiding her. They saw her in fact, her mast and hull, when she was one-half to one-quarter mile away. There was water coming over the

bows—"just spit water—just spray" over the starboard bow, the wind being about three points on the starboard bow; no danger to any one going forward on the deck. With the thermometer far below the freezing point, however, a lookout stationed where that spray would lash him would soon have been out of commission, the spray freezing on him as it fell, but the evidence does not warrant the conclusion that the spray rose so continuously and in such volume as to obscure the view of those on the bridge looking forward to pick up the lights which they were entitled to assume would be found on all vessels navigating in their vicinity. Between the bridge and the bows rose the mast on which the crow's nest was located, but with a lookout at each end of the bridge and two watch officers between on either side it could not have interfered with the outlook. Undoubtedly a lookout in the crow's nest which is a little forward of the bridge and 10 feet higher could have seen a ship's light further off than could those on the bridge; whether he could have seen a dark object, not visible at a distance on the horizon line, any sooner, is doubtful. There was nothing to interfere with maintaining a lookout there. He was withdrawn because the ladder was so coated with ice as to make the place inaccessible. But that is not material. If the conditions were such that those on the bridge could have seen such light so long before any risk of collision as to enable the steamer easily to avoid the other vessel either by change of course or by stopping and reversing we do not see how under the rules of navigation she can be held in fault for excessive speed.

The decree is reversed, with costs and cause remanded, with instructions to decree in accordance with this opinion.

SIEGERT v. GANDOLFI et al.

(Circuit Court of Appeals, Second Circuit. December 4, 1906. On Rehearing, January 7, 1907.)

No. 34.

1. TRADE-MARKS—GEOGRAPHICAL NAMES—ANGOSTURA BITTERS.

Complainants adopted the name "Angostura" as the name of bitters originally manufactured by them in the town of that name in Venezuela, and continuously used the same thereafter, though the name of the town was subsequently changed. Complainants' bitters became widely and favorably known under such name. *Held*, that complainants were entitled to protection in the use of the name as against persons using it to create dishonest competition, though complainants could not obtain a monopoly in the use of the word as a trade-mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78–82.

Use of geographical names, see notes to Hoyt v. J. T. Lovett Co., 17 C. C. A. 657; Illinois Watch-Case Co. v. Elgin Nat. Watch Co., 35 C. C. A. 242.]

2. SAME—UNFAIR COMPETITION—IMITATION OF PACKAGES.

Where defendants imitated both the name and bottles in which complainants' "Angostura" bitters were sold, the labels being similar, except that they disclosed the fact that defendants' bitters were made in Baltimore, Md., instead of Port of Spain, in Trinidad, where com-

plainants' bitters were made, defendants were guilty of unfair competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 83.]

3. SAME—RIGHT TO PROTECTION—FRAUDULENT REPRESENTATION.

Complainants manufactured and sold "Angostura" bitters under representations that it consisted of a mixture of certain bitter, aromatic, and carminative substances, together with alcohol added as a preservative solvent, and that the bitters did not contain any "intoxicating ingredients." An advertising circular contained certificates of physicians and customers, representing that the bitters were a valuable remedy for nearly all ills, and when mixed with water, beer, wine, and spirits, made a "splendid drink," and also that the bitters were free from dangerous ingredients and might be used by invalids, adults, and children to advantage. *Held*, that the statement that the bitters contained no intoxicating ingredients should be construed as referring to the herbs and simples of which it was composed, and that such representations were not so false and fraudulent as to deprive complainants of relief in a suit to enjoin unlawful competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 94.]

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

For opinion below, see 139 Fed. 917.

Arthur Furber and Robert C. Morris (William M. Copeland, of counsel), for appellant.

J. B. Leavitt, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. Notwithstanding the voluminous record and the elaborate briefs by which the controversy between the parties has been presented, the controlling questions of fact and law are few and simple, and permit the case to be briefly disposed of.

The action was brought by the sons and successors in business of Dr. J. G. Siegert, who was the original manufacturer of an aromatic bitters which became known as "Angostura Bitters," to restrain the defendants from selling a preparation made by C. W. Abbott, and put upon the market under the same name, in bottles and wrappings in imitation of those previously adopted by the Siegerts. The action was defended by Abbott, and may be treated as though it had been brought against him. The court below dismissed the bill of complaint upon the grounds that the Siegerts never acquired any right to use the name as a trade-name or trade-mark, that they had been guilty of fraudulent misrepresentations in offering their preparation to the public, and that Abbott had not committed any acts of unfair competition.

It appears that Dr. Siegert, a physician and surgeon, compounded and commenced the manufacture and sale of his bitters some years prior to 1846 at Angostura, a seaport town of Venezuela. In 1846 the name of the town was officially changed from "Angostura" to that of "Cuidad Bolivar." Nevertheless, the former name also survived, and the town has ever since been commercially designated to some extent by the original name. The bitters were originally sold under the name of "Dr. Siegert's Aromatic Bitters." In 1853 they began to command an extensive sale in foreign countries, and were common-

ly styled by dealers as "Angostura Bitters," doubtless because they originated at Angostura. By 1868 the name "Angostura Bitters" had come to signify in all parts of the world the bitters which had been and were then prepared and sold by Dr. Siegert and his son; and the name had been adopted by the Siegerts as one of the trade-names for their article. Between 1868 and 1872 it was used by them in their circulars to the trade and their advertisements to the public. In 1872 it was registered in the Patent Office under the law then in force by their agent for this country as a trade-mark for their bitters; and about this time it was used upon the labels of their bottles as the prominent trade-name of their bitters. In the meantime there had been some sporadic instances of imitation by others, but what had become known the world over as "Angostura Bitters" were the bitters of the Siegerts. In 1870 Dr. Siegert died. In 1872 another of his sons was taken into the firm, and in 1875 the firm moved their factory from Cuidad Bolivar to Port of Spain, in the Island of Trinidad.

Abbott, who as has been said is the real defendant, claims to derive his right to use the name, which had thus been adopted as the trade-name of the Siegerts, through the firm of Maynard & Co., who in the fall of 1872 began making bitters and putting them on the market under the name of "Angostura Aromatic Bitters." This firm put up their bitters in bottles of the same size and shape of the Siegerts' bottles, sometimes using second-hand Siegert bottles; and they wrapped the bottles in labels which were obviously designed to imitate the Siegert labels in their conspicuous features. In 1877 Abbott registered the name "Aromatic Angostura Bitters" as a trade-mark for the bitters. Subsequently in putting them on the market he dropped the word "Aromatic," and has since in his labels, circulars, and advertisements styled them "Angostura Bitters." Neither Maynard & Co. nor Abbott have ever directly represented that their bitters were the Siegert preparation, and they have always stated in their labels and advertisements that their bitters were manufactured by themselves at Baltimore. Nevertheless, we are satisfied that they used the name and simulated the Siegerts' bottles and labels to confuse the identity of their bitters with those of the Siegerts' preparation, and to lead the public to believe that in buying theirs they would be buying those originally made and sold by the Siegerts. In order to justify the use of the word "Angostura," they employed as one of the ingredients of their bitters a trifling infusion of Angostura bark.

The case is essentially in its facts like one which was considered by the Circuit Court of Appeals of the Seventh Circuit in Bauer & Co. v. Siegert, 120 Fed. 81, 56 C. C. A. 487, which was a bill in equity by the Siegerts to enjoin Bauer & Co. from unfair competition in using the word "Angostura," and from simulating their labels and the dress upon the bottles, and in which it was contended that the word "Angostura" could not be the subject of a trade-mark or a trade-name. But the court sustained the bill, and enjoined the acts complained of.

Undoubtedly the Siegerts did not, and could not, acquire such a monopoly in a geographical name as a trade-mark or trade-name as would entitle them to prevent others from using it under any circumstances. But it is sufficient to entitle them to relief that they used

the name lawfully to designate their product until it became known to the trade by that designation, that by doing so they acquired a trade which was valuable to them, and that their business is being injured by acts of the defendants which create a dishonest competition by leading the public to believe that Abbott's bitters are the original bitters. This has long been the law in this circuit (Anheuser-Busch Brewing Association v. Piza [C. C.] 23 Blatch. 245, 24 Fed. 149), and has always been adhered to in this court. When the name of a place or a locality has been so long applied as a descriptive designation of the product of some manufacturer there that it has acquired a secondary meaning, and has come to be generally recognized in trade as signifying his particular product, it becomes so far his property that a business rival cannot appropriate and use it to induce purchasers to buy a product made elsewhere, or even made at the same place. This proposition is so well settled that any citation of authorities would be superfluous, but the case of French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247, may properly be referred to. The syllabus in that case is as follows:

"Geographic names often acquire a secondary signification indicative not only of the place of manufacture but of the name of the manufacturer or producer, and the excellence of the thing manufactured or produced, which enables the manufacturer or owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced or palming off the productions of one person as those of another."

If the geographical name has become a secondary designation indicative of the product of the particular manufacturer, it is as much entitled to protection as any arbitrary or fancy name which he might have selected; and the circumstance that the manufacturer may have removed his place of business, and is making his product in some other place, is of no more consequence than it would be if he had adopted the fancy name.

The court below was impressed that the Siegerts had been guilty of fraud in misrepresenting the therapeutic qualities of their bitters, and especially in falsely representing that they were free from all intoxicating ingredients. We cannot assent to these conclusions. The misstatements referred to are mainly contained in certain certificates of physicians and chemists embodied in an advertising circular issued by the Siegerts. Some of these certificates depict the bitters as a valuable remedy for nearly all the ills that flesh is heir to; but the extravagance of their laudations is sufficient to deprive them of any weight in the minds of those who read the more careful statements in the certificates which accompany them. Representations that the bitters when mixed with water, beer, wine, and spirits make a "splendid drink," that they are free from admixture with the dangerous ingredients "so commonly present in what are termed 'pick-me-ups,'" and are a useful, hygienic liqueur "that may be used by invalids and those in good health, by adults and children, with equal advantage," are hardly a sufficient basis for a charge of fraud. Medical experts have testified to the substantial truth of the statements; and it is not un-

reasonable to suppose that the Siegerts themselves came to believe that their own production which had acquired an unexampled popularity in all parts of the world was as remarkable in its curative properties as some of the chemists and physicians certified. The statement that the bitters did not contain "any intoxicating ingredients" evidently refers to the herbs and simples of which it was composed, as the accompanying statement is:

"They consist of a mixture of certain bitter, aromatic and carminative substances, together with alcohol, added as a preservative and solvent."

The defense of unclean hands comes with ill grace from a rival manufacturer who advertises his article in equally glowing and exaggerated terms, stating among other things that his bitters are "unequaled as a cure for liver complaint, dyspepsia, fever and ague, bilious, intermittent and remittent fevers," and "a sure remedy against Asiatic cholera and yellow fever."

Upon the whole case we are of the opinion that the complainants were entitled to an injunction restraining the defendants from using the word "Angostura," and from imitating complainants' labels and the dress upon their bottles, and to an accounting.

The decree is therefore reversed, with costs, and with instructions to the court below to decree conformably with this opinion.

On Motion for Rehearing.

PER CURIAM. In view of the fact that the opinion expressly states that the case is considered precisely as if it were brought against Abbott, we see no reason for the assumption, which is the basis of this application by the nominal defendants, that they are charged with dishonorable conduct.

The motion is denied.

WILLIAMS v. CHOCTAW, O. & G. R. CO. et al.

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

No. 1,555.

1. TRIAL—MOTION FOR DIRECTION OF VERDICT.

On a motion to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the direction is requested, who is entitled to the benefit of all fair and reasonable inferences from the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 401, 402.]

2. MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO OBSERVE DEFECTS IN APPLIANCES.

A railroad employé, working constantly with an engine in the yards, may not close his eyes to obvious and dangerous conditions or defects therein, and recover for an injury resulting therefrom; but, if an accident occurs, and he pleads ignorance, he must show that his ignorance was not only actual, but excusable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 710, 712, 718.]

3. SAME—ACTION FOR INJURY—CONTRIBUTORY NEGLIGENCE.

Plaintiff was foreman of a switching crew, working with an engine in railroad yards, and had used the same engine for a month, when he slipped from the footboard at the rear of the tender, at night, and was injured. It appeared that the footboard was defective, in that it sloped downward, and was also icy that night by reason of the leaking of the tank. Such defects had existed for some time, and plaintiff had worked

with the engine every day, and had ridden on the footboard. The engine was backing, making the position one of danger, and plaintiff was not compelled to occupy it at the time, but took it for greater convenience. *Held*, that he was chargeable with knowledge of the defects which he ought to have possessed in the exercise of ordinary care and observation, and was guilty of contributory negligence which precluded him from recovering for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 718.]

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

E. G. Bell, for plaintiff in error.

E. E. Wright, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by Williams, the plaintiff below, against the defendant railroad companies, to recover damages for injuries received in the yards at Memphis, Tenn., while employed as foreman of a switch engine and crew. At the time of the accident Williams was on the rear end of the tender. The train was backing, so he was in front of it. Attached to the rear of the tender was a footboard. The night was cold and freezing. He desired to get off the train to deliver some bills and to see that a switch was all right. As he went to get off, his foot slipped on the footboard and he fell under the train, losing one leg and having the other badly mangled. He claimed in his petition that the footboard and the tank above it were defective; the footboard because the L-shaped irons which supported it at the rear of the tank, were bent inward, giving it a dangerous slope, and the tank because it leaked, allowing the water to trickle down on to the footboard, where it froze, creating an icy, slippery surface. Williams claimed he was not aware of the condition of the footboard, and, relying upon the companies having used ordinary care in providing a reasonably safe place and appliances for his use, stepped upon it, when the accident resulted without his fault. The court below directed a verdict for the defendants on the ground either that Williams knew or ought to have known of the condition of the footboard, and assumed the risk of using it, or was guilty of contributory negligence in using it under the circumstances, or both.

The rule is well settled that, where a motion is made to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the direction is requested. In this case, Williams was entitled to receive the benefit of all fair and reasonable inferences from the testimony. Railway Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463; Mason v. Yockey, 43 C. C. A. 228, 103 Fed. 265; Riley v. L. & N. R. R. Co., 66 C. C. A. 598, 133 Fed. 904. It appears from the record that Williams was an experienced railroad man. He had been employed in the business for some 18 years, first as brakeman, and latterly as foreman of the switch engine and crew. As foreman he had charge of the switch engine and crew. The tender, with its appurtenances, was deemed a part of the switch engine. It was the duty of the engineer to inspect the engine each day when he took it out, reporting any defects, and it was also the duty of Williams to

report any defects he might observe, either in the engine or the cars; but he was not obliged to inspect either. This engine had been in use in and about Memphis for about a month, and Williams had charge of it and the crew during that time. The accident occurred on the 27th of December. For two or three days before that date it had been raining, and on that date it turned cold, and in the afternoon began to freeze. The engineer, who had been in charge of the engine from the time it reached Memphis, testified that he had observed the slope in the footboard and the leak in the tender from the first, but did not report them, because he did not think they were dangerous. One of the brakemen, whose station was at the rear of the tender, testified that he had observed the slope and leak, and that an experienced man could tell, from stepping on the footboard, that it was sloping. Williams stated he had not been on the footboard the day of the accident prior to its occurrence, or for several days before, because it was raining and he rode in the cab. He admitted having been near the footboard on numerous occasions, and did not deny having been on it prior to the day of the accident, but testified he was not aware of the existence of the slope or the leak. He conceded it would have been his duty to report these defects if he had observed them, but contended it was the duty of the engineer both to inspect and to report, and, since the engineer did not report them, he insisted he had a right to rely upon the footboard being in a reasonably safe condition.

Conceding that the primary duty of inspection rested upon the engineer as the representative of the railroad companies, and that he should have reported these defects, so that the companies might have discharged their duty to use ordinary care to keep the footboard reasonably safe for the use of their employés, including Williams, nevertheless it was the duty of Williams, as a servant engaged in a hazardous occupation, to employ his faculties, as reasonably prudent men do, to ascertain the condition of the machinery and appliances provided for his use. In the case of latent defects he may rely upon the inspection of the companies; but in the case of open and patent defects he must take steps to protect himself or be held to have assumed the risk. He may not close his eyes to obvious and dangerous conditions and expect to recover in case of accident. If accident comes, and he pleads ignorance, he must show his ignorance was not only actual but excusable. Cunningham v. C., M. & St. P. Ry. (C. C.) 17 Fed. 882; Detroit Crude Oil Co. v. Grable, 36 C. C. A. 94, 94 Fed. 73; Reed v. Stockmeyer, 20 C. C. A. 381, 74 Fed. 186; McCain v. C., B. & Q. R. R. Co., 22 C. C. A. 99, 76 Fed. 125; Tuttle v. Milwaukee Ry. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Washington & Georgetown R. R. Co. v. McDade, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; Southern Pac. R. R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391.

In the present case, the question is, not whether Williams actually knew of the slope and leak, but whether, in the proper and prudent use of his opportunities for observation, he could and should have known of them. Giving Williams the benefit of all he claims from the testimony, still the question recurs whether, if he had used his eyes when near the footboard and tank, and his sense of feeling when on

the footboard, would he not have known, would not any ordinarily prudent man, under the circumstances, have known, that the footboard sloped and the tank leaked? We are unable, after careful consideration, to satisfy ourselves that this question can rightly be answered other than in the affirmative. Conceding the slope and leak were defects which caused the accident, and that Williams did not know of their existence, we are forced to the conclusion that any person of ordinary prudence, exercising reasonable care in the employment of the opportunities for knowledge open to Williams, would have discovered them under the circumstances of this case. The knowledge that he thus ought to have acquired by the proper and prudent use of his faculties the law imputes to him, and he must be taken to have assumed the risk resulting from the use of these defective appliances. Williams had charge of this switch engine for about a month. He was near this footboard and tank every day during that time. He was certainly on the footboard before the day of the accident. In the case of Mason v. Yockey, 43 C. C. A. 228, 103 Fed. 265, where a fireman, stepping on the iron apron between the engine and tender, which had become icy from water escaping from the tender through a defective valve, had slipped and fallen from the engine, receiving serious injuries, the action of the court below in permitting the case to go to the jury was sustained on the ground that the fireman had not been at work on the engine before during that winter, that he got on it at break of day on a cold winter morning, and was kept constantly employed up to the time of the accident in the discharge of his duties as fireman, being required to fire every two or three minutes. It will be observed that, when the defect became discoverable, the engine was out on the road, and the question presented to the fireman of assuming the risk of such a defect, when the alternative was to abandon the engine and train, was quite different from that presented where the engine is in the yard of the railroad company. Still we consider this a very close decision. Of a similar character is that in the case of Le Duc v. N. P. R. R. Co., 92 Minn. 287, 100 N. W. 108, in which the plaintiff's intestate, a switchman, fell from a defective footboard at the rear of the tender of a switch engine, and was run over and killed. It appeared that his duty required him to use the footboard, and that he had never been on it before.

Taking another view: The footboard on the rear of a tender, used when the engine is backing, occupies the same relative position that the pilot of an engine does to the train when it is moving forward. It is a place of danger, not to be used unnecessarily. Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Kresanowski v. N. P. R. R. Co. (C. C.) 18 Fed. 229; Kane v. Erie R. R. Co. (C. C. A.) 142 Fed. 682. An experienced employé, called upon to use it, would naturally, in the exercise of ordinary care, take steps to ascertain its condition, and the nature of the foothold it would afford in alighting from the train, before intrusting himself to it. This would be especially true after dark, on a rough track, in freezing weather, with the chance of ice on the footboard. In the present case, the testimony shows it was not necessary for Williams to use this footboard in front of the moving train in order to get off. He had been riding in the cab. He might have done so that night. No reason for the change was given.

If, as he claims, he did not know the condition of the footboard, then he unnecessarily chose a place certainly of danger, and possibly of unusual danger, when one of safety was open to him. In doing this we think he acted negligently.

The judgment is affirmed.

WABASH R. CO. v. KITHCART.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1906.)

No. 2,357.

1. MASTER AND SERVANT—INJURIES TO SERVANT—BRAKEMAN—PETITION—ALLEGATIONS OF NEGLIGENCE.

In an action for injuries, plaintiff, a brakeman, alleged that in complying with the orders of his superior he was compelled, by reason of a defective coupling rod, to step between the cars in order to uncouple them, and while doing so his foot was caught in an open unblocked frog in the track; that the injury was occasioned because of the negligent and careless construction of defendant's track in failing to properly block the frog, and that the accident was solely caused by reason of defendant's negligence in failing to properly construct and maintain its track at the point of the accident. *Held*, that the petition was insufficient to raise an issue of negligence in maintaining a defective coupling appliance.

2. SAME—NEGLIGENCE—UNBLOCKED FROGS.

Where, in an action for injuries to a brakeman by his foot becoming caught in an unblocked frog, there was undisputed proof that on some of the railroad systems in the state and elsewhere it was customary to leave frogs unblocked, and on others to block them, and the frogs on some parts of defendant's lines were blocked and on others not, and also that there was a fair difference of opinion among practical railroad men as to which was the safer practice, defendant's failure to block the frog in question did not constitute actionable negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 221.]

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

James P. Hewitt (Geo. S. Grover and Carr, Hewitt, Parker & Wright, on the brief), for plaintiff in error.

Halloran & Starkey and Thomas A. Cheshire, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Kithcart recovered a judgment against the railroad company for personal injuries sustained in the state of Iowa while in its service and in the performance of his duties as a brakeman. The averments of negligence in his petition are contained in the following paragraphs:

"That in complying with the said orders of his said superior officer, he was compelled, by reason of a defective coupling rod, to step between the cars in order to uncouple the same, and while between the said cars, in the act of uncoupling the same, his foot was caught and held fast in an open or unblocked frog or guard rail in and on the track of the defendant company.

"That said accident and injury was occasioned the plaintiff because of the negligent and careless construction by the defendant company of its track, in failing to properly block the said frog or guard rail of the switch, located at the point and place of the happening of said accident.

"That said accident occurred solely by reason of the carelessness and negligence of the defendant company, as stated above, in failing to properly construct and maintain its said track at said point of said accident, and the plaintiff was wholly free from contributing in any degree whatever to the same by reason of any negligent or careless acts upon his part."

At the conclusion of the evidence the court denied a request of the railroad company for a directed verdict in its favor, and also refused to give an instruction that there could be no recovery because of a defective coupling rod as a ground of negligence. On the contrary, the court instructed the jury that there were two charges of negligence in the petition, upon either of which a recovery might be had if the evidence warranted it—first, a defective coupling appliance, and, second, a failure to block the frog. In this the court erred. The petition does not charge the defective condition of the coupling appliance as a substantive ground of negligence. The first of the paragraphs quoted from the petition is not an assertion of negligence on the part of the company. It merely sets forth a reason why the plaintiff went between the moving cars, and its purpose was to relieve him from the charge of contributory negligence. Morris v. Railway, 47 C. C. A. 661, 108 Fed. 747. This is manifest, because there is nothing more in the averment than a bare statement that a coupling rod was defective. It is not averred that the company was in any wise negligent in respect thereof, and for aught that appears the company may have been most diligent in the performance of its duties of inspection and maintenance. The purpose of the pleader not to rely upon the defect except as mere inducement to plaintiff's action in going between the cars is further shown by his failure to aver either that the cars were employed in interstate commerce, so that the act of Congress in respect of safety appliances would apply, or that they were employed in commerce within the state, so that a statute of Iowa upon the same subject could be invoked. Moreover, the evidence received during the trial went no further than to show the bare fact that the safety appliances were defective. The other paragraphs of the petition afford further proof, if any is needed, that the plaintiff rested his case solely upon a charge of negligence in respect of the condition of the track. In the second of those quoted he directly charges that the accident and the injury were occasioned because of the failure to properly block the frog or guard rail of the switch, and in the third he says that the accident occurred solely by reason of negligence in failing to properly construct and maintain its track at the point of the accident. Counsel endeavor to escape from this obvious conclusion by claiming that such averments were mere "opinions and conclusions of law," and should therefore be wholly disregarded. Were this true (though manifestly it is not), the plaintiff would have a petition stripped of every averment of negligence on the part of the defendant, and his right of recovery would be rested upon inadmissible inferences and presumptions.

As to the failure of the railroad company to block the frog at the switch where the plaintiff was injured: Without recapitulating the testimony of the witnesses, it is sufficient to say that there was undisputed proof that on some of the railroad systems in Iowa and else-

where it was the custom to leave frogs unblocked, and on others it was the custom to block them. The frogs on some parts of the defendant's lines of road were blocked, and on others not blocked. The particular frog in which plaintiff's foot was caught had never been blocked. The evidence also showed that there was a fair difference of opinion among practical railroad men as to which was the safer practice. The case was therefore brought fully within the rule announced by the Supreme Court and by this court in Southern Pacific R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; Morris v. Railway, 47 C. C. A. 661, 108 Fed. 747; Kilpatrick v. Railroad, 57 C. C. A. 255, 121 Fed. 11, affirmed by the Supreme Court in 195 U. S. 624, 25 Sup. Ct. 789, 49 L. Ed. 349; Gilbert v. Railway, 63 C. C. A. 27, 128 Fed. 529.

When such a diversity of theory and practice in the construction and maintenance of railroads reasonably exists, a company confronted by the problem is at liberty to adopt that course which, in the judgment of its officers, is least productive of danger to all whose safety is to be considered, and its selection of plan or method is not at the risk of being held guilty of negligence. In the Kilpatrick Case the petition charged that the railway company negligently allowed the coupling appliances on the cars to become defective and out of repairs; that because thereof the plaintiff's husband, a brakeman, had to go between the moving cars to uncouple them; that while doing so, and in the exercise of due care, his foot was caught in the unblocked space between a guard rail and a main rail of the track, and he was so injured that death ensued; that the unblocked space was dangerous, and the company was negligent in so maintaining it. At the trial, however, the plaintiff's attorneys stipulated that the failure to block the frog was the proximate cause of the injury, and that plaintiff would rely solely thereon, and not upon the other ground, namely, that the coupling appliances were out of repair. It will at once be perceived that this stipulation reduced the case to the position occupied by the one at bar. At the conclusion of the evidence in that case the trial court directed a verdict for the defendant upon the authority of Southern Pacific R. Co. v. Seley, supra. The judgment which followed was affirmed by the Court of Appeals in the Indian Territory (64 S. W. 560), by this court, and finally by the Supreme Court, all holding that the Seley Case was controlling.

In Union Pacific R. Co. v. James, 6 C. C. A. 217, 56 Fed. 1001, affirmed in 163 U. S. 485, 16 Sup. Ct. 1109, 41 L. Ed. 236, relied on by plaintiff, the principle announced in the Seley Case and in the cases which follow it was not invoked. The sole issue tried was whether a particular frog was blocked or unblocked at the time of the accident, and the trial court assumed in its charge to the jury that the unblocked frog was an unsafe appliance, and constituted negligence in itself. No exception was taken to that feature of the charge, and its correctness was not reviewed by the appellate courts.

The request of the Railroad Company for a directed verdict should therefore have been granted.

The judgment is reversed, and the cause is remanded for a new trial.

In re SMITH & NIXON PIANO CO.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1906.)

No. 57.

BANKRUPTCY—RECOVERY OF COST—BAILMENT OR SALE.

Pianos were shipped to a corporation dealing in musical instruments, which subsequently became a bankrupt, under a written contract stating that they were furnished on memorandum, also the price of each kind, and providing that the bankrupt should "pay for every piano they sell, cash." When pianos were furnished under the contract, invoices were sent containing a recital that the shipper sold the pianos described to the bankrupt, and shortly before bankruptcy proceedings were instituted the shipper wrote the bankrupt, stating that, when the pianos were consigned, it was with the understanding that they should be settled for as sold and paid for in cash when sold, that the shipper insisted on a settlement, and that, if it was not convenient to send cash, the shipper would accept paper secured by the collateral, but "did not care for dead stock." *Held*, that the transaction was a bailment, and not a sale; and that the title to the unsold pianos never passed to the bankrupt.

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Western District of Missouri, in Bankruptcy.

Elijah Robinson, for petitioner.

Edwin A. Krauthoff, for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This petition to revise presents a controversy over the ownership of six pianos. The piano company intervened in the bankruptcy proceedings and petitioned for their restoration, claiming that it had consigned them to the Martin-Vernon Music Company, the bankrupt, to be sold on commission. The trustee who had possession of the pianos asserted that the transaction was a sale, and that by virtue of the adjudication and his appointment and qualification he had succeeded to the bankrupt's title. A decision of the referee in favor of the trustee was affirmed by the District Court (132 Fed. 983).

At the hearing below the facts were not disputed. There was no conflict in the evidence, which consisted of a contract, two invoices, a letter, and some oral testimony. The testimony of the witnesses did not in any wise affect the legal import of the writings. The sole question was as to the character of the transaction between the piano company and the bankrupt—whether a bailment or a sale—and it turned wholly upon the construction of the written instruments. The question was therefore one of law, and a petition to revise is a proper method of bringing such a question to this court.

The pertinent provisions of the contract are as follows:

"The Smith & Nixon Manufacturing [Piano] Company agrees to furnish to the Martin-Vernon Music Company, of Kansas City, Mo. [the bankrupt], Smith & Nixon and Ebersole pianos, on memorandum, at following prices: [then follows a schedule showing the styles of pianos and the respective prices.] The Martin-Vernon Music Company agrees to pay for every piano they sell, cash, and will receive for advertising purposes, on the above prices, a special

discount of $15.00 on the Ebersole Piano, and $25.00 on the Smith & Nixon Piano."

There is also a provision that the bankrupt should have full control of certain designated territory and that the piano company should not give prices to any other dealer therein. When the pianos were furnished under this contract invoices were sent containing the words:

"The Smith & Nixon Piano Company * * * Sold to the Martin-Vernon Music Company, Kansas City, Mo."

About six months afterwards, and shortly before the commencement of the proceedings in bankruptcy, the piano company wrote to the bankrupt as follows:

"When we consign the pianos to you, it was with understanding they would be settled for as sold and paid for in cash, when sold, and that they would be moved with reasonable promptness. It is now over four mos. since these goods were received. We must insist upon a settlement. If not convenient to send cash, we will accept your paper secured by the collateral, and give you liberal time. We are willing to help you but do not care for dead stock."

While the case is not free from doubt, a careful consideration of the terms of the original contract has led us to the conclusion that the parties intended that no title should pass from the piano company, and that no debt should be created unless the pianos were sold by the bankrupt. At no place was the word "sale" or any term of similar import used. The piano company was to "furnish pianos on memorandum," an expression which is more appropriate to a bailment for sale than it is to a sale. On the other hand, the bankrupt agreed to "pay for every piano they sell, cash"; and there was no provision for payment in any other event or at any other time or in any other manner. The reasonable inference from this is that, if the bankrupt did not sell the pianos, it did not owe and was not to pay for them. The payment of a consideration or the creation of a debt for it is an essential element of a sale; but here there was no payment at the delivery of the pianos, nor did a debt arise either by expressed provision or by implication. There was no present or fixed obligation to pay either then or in the future. Nor can the promise of the bankrupt to pay a specified amount for every piano it sold be turned into a promise to pay within a reasonable time or earlier if sale is made. This peculiar phraseology of the contract does not relate to the time of maturity of a debt created by the furnishing of the piano. On the contrary, it was intended to define the condition upon which a debt arose. In other words, it signifies that, if there was no sale, there should be no debt. If the piano company had sued the bankrupt for the price of the pianos, it seems clear that it would have been a sufficient defense that the latter had been unable to sell them. The obligation of the bankrupt to pay for each piano it sold is the ordinary obligation of a factor or commission merchant who, having received goods on commission, has made a sale of them. While there was no express reservation by the piano company of dominion over the pianos before they were sold, such dominion nevertheless existed as a natural incident to a title it had not parted with. We start with title in the piano company, and unless an intention that it

pass to another can be discovered it remains where it was with all appurtenant rights. It is said that the schedule of fixed prices appearing in the contract tends to show that a sale was intended. We held, however, in Re Columbus Buggy Company (C. C. A.) 143 Fed. 859, that such provisions were comparatively unimportant in determining whether a transaction was a bailment for sale or a sale. The specification of fixed prices is as appropriate to one as to the other. It is not an uncommon feature of contracts of bailment, and it means that the commission of the consignee is such sum as he may obtain for the property above the price specified. Allowances or discounts for advertising such as were made to the bankrupt are obviously for the benefit of both parties, and they make for neither construction.

As to the invoices and the letter. The acts of the parties subsequent to the written contract may be regarded for two purposes: First, as an aid to the construction, if the true meaning of the contract is doubtful and the acts were before a controversy arose; and, second, to ascertain whether the parties have mutually agreed upon a change or modification of their original contract relations. The fact that the invoices contained the words "Sold to the Martin-Vernon Music Company" may be disposed of by reference to Dows v. Bank, 91 U. S. 618, 630, 23 L. Ed. 214, where it was said that an invoice is not evidence of a sale; that it is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and is as appropriate to a bailment as to a sale. See, also, Sturm v. Boker, 150 U. S. 312, 326, 14 Sup. Ct. 99, 37 L. Ed. 1093, and Schenck v. Saunders, 13 Gray (Mass.) 37, 40.

While it is not altogether clear what conception of the transaction the writer of the letter had, the language he used is as consistent with the idea of a bailment as with that of a sale. He said that the pianos were consigned, when it would have been quite natural for him to have said that they were sold if such was the case. He said they were to be settled for as sold and paid for in cash when sold; that they were to be moved with reasonable promptness, and since more than four months had elapsed a settlement was insisted on. He then concluded:

"If not convenient to send cash, we will accept your paper secured by the collateral, and give you liberal time. We are willing to help you, but do not care for dead stock."

The words "the collateral" signify that the writer had in mind not collateral in general, but some particular collateral, and it probably was paper taken by the bankrupt upon sales which it had made of two pianos furnished under the same contract, but not involved in the present controversy. Again, if the pianos had been sold to the bankrupt, the piano company having parted with its title to them, it is not apparent why the writer should have said that his company did not care for dead stock. He could hardly have referred to a debt of the bankrupt as "dead stock." The expression is, however, perfectly consistent with the position that the goods were consigned for sale on commission; that it was understood that the bankrupt would be able to sell them soon; that several months had elapsed without results to the piano company; and that, while it was willing to help the bankrupt, it did not desire to carry dead stock.

But if it be said, and there are grounds for the position, that the letter fairly bears the construction that the piano company, having consigned the pianos on commission, was disappointed with the outcome and was trying to force the bankrupt to settle for them by giving its note secured by collateral, it must be at once answered that the effort failed. The bankrupt was silent. It did not agree to the demand of the piano company, and the relations of the parties, not being changed by mutual consent, remained as they originally were. And, if the letter were susceptible of this construction, it should also be added that it would not estop the piano company from asserting its rights under the original contract. No element of estoppel existed. The bankrupt does not appear to have consented to that construction, to have yielded to the demand for settlement, or to have altered its position in any way by reason thereof. An estoppel does not arise from the bare assertion of an untenable position by one of the parties to a transaction.

The petition to revise is sustained, and the order of the District Court is vacated and set aside, with direction to allow the claim of the petitioner to the property in controversy.

McBRIDE et al. v. FARRINGTON.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 5.

INDIANS—INDIAN LANDS—LEASES—VALIDITY.

Rev. St. § 2116, provides that no purchase, grant, lease, or other conveyance of land from any Indian nation or tribe of Indians shall be valid, unless the same be made by treaty or convention entered into pursuant to the Constitution; but Act Cong. March 1, 1889, c. 333, 25 Stat. 784, repealed all laws previously existing intended to prevent the Chickasaw Nation from lawfully making leases for mining coal for a period not exceeding 10 years. *Held*, that leases executed by the national secretary of the Chickasaw Nation, in October, 1890, for the mining of coal and other minerals, were valid, so far as they authorized the mining of coal for a period not exceeding 10 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 45.]

Wallace, Circuit Judge, dissenting.

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

For opinion below, see 131 Fed. 797.

T. C. Becker, for plaintiff in error.

Frank Brundage, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff concedes that, unless he can establish the proposition that the leases executed by the national secretary of the Chickasaw Nation (October 2 and October 20, 1890) were wholly void, so that there was a "total failure of consideration,"

he cannot recover. He contends that they are void because of the provisions of section 2116, Rev. St. U. S., which reads:

"No purchase, grant, lease or other conveyance of land, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution," etc.

The section, however, was modified, before the making of these leases, by Act March 1, 1889 (25 Stat. 784, c. 333), which repealed all laws theretofore enacted to prevent the Indian nation in question or any other from lawfully making leases for mining coal for a period not exceeding 10 years. The leases in question are for the mining of coal, iron, petroleum, oil, gas, asphaltum, and other minerals. If void as to the other minerals, they are apparently valid as to the coal. For what length of time they purported to run is not shown by the record. If for an indefinite time, the terms of the act would no doubt restrict them to 10 years. It is difficult to see how such leases, which apparently conveyed some rights for a restricted period, can be held to be so utterly valueless as to constitute an entire failure of consideration.

These reasons lead to an affirmance.

Some reference has been made to Act June 28, 1898 (30 Stat. 495, c. 517); but, since that was not passed until two years after the leases were assigned to the Wisconsin corporation, it has no bearing on the question here presented.

WALLACE, Circuit Judge (dissenting). I think the judgment should be affirmed, but I do not concur in the opinion of the court. I think the leases were void because the statute declares such leases void, and the repealing act authorizing 10-year leases for mining coal does not change the terms or effect of the original statute. It is well settled that when a conveyance or contract contains conditions, some of which are legal and others illegal, and they are severable and separable as respects consideration and performance, the latter may be disregarded and the former enforced. But the exception to this principle is equally well settled. As was said by Mr. Justice Storey in United States v. Bradley, 10 Pet. 363, 9 L. Ed. 448:

"The only exception is when the statute has not confined its prohibitions to the illegal conditions, covenants, or grants, but has expressly, or by necessary implication, avoided the whole instrument to all intents and purposes."

The leases here are indiscriminately for the mining of other minerals, as well as coal, and it does not appear that they were not for a period exceeding 10 years. If they had been for that time only, they would, in my judgment, have been void by the terms of the original statute.

The case has been argued at the bar as though the action were one by the creditors of a Wisconsin corporation to charge the defendant with individual liability as a stockholder under certain provisions of the Statutes of Wisconsin of 1898, viz., sections 1753 and 1773. An analysis of the complaint, however, shows that it proceeds upon the theory of fraudulent representations made by the defendant, by which the plaintiffs were induced to expend moneys and furnish labor and

materials for the Wisconsin corporation, and thereby sustained damages. The complaint states the following averments.

"That the defendant and certain other persons in 1897 organized a mining corporation under the laws of the state of Wisconsin, whereof the amount of the capital stock was fixed at $1,500,000, divided into shares of the par value of $10 each; that the defendant subscribed for 22,220 shares of the capital stock, and various other persons subscribed and agreed to pay for certain other shares; that neither the defendant nor any of the other persons ever paid 20 per centum of the capital stock of the corporation, nor was that amount ever paid in any way, but that the corporation issued and delivered the 22,220 shares subscribed for the defendant without any consideration; and that said issue of stock to the defendant and all the issues of stock by the corporation to the shareholders thereof were fictitious, and were issued for a pretended and valueless assignment of certain oil and mining leases in Indian Territory, which were valueless or of little value, and were known to be by the defendant and the other subscribers at the time they subscribed for and received the issue of stock."

The complaint then alleges that the defendant and other directors of the corporation fraudulently and falsely represented to the plaintiffs that the corporation had large pecuniary means and valuable property; that upwards of $1,000,000 worth of its stock at par had been subscribed for by persons who were pecuniarily able to pay for same, and some other shares had been paid for in cash; that in fact all the capital stock that had been subscribed for had been issued and delivered without consideration other than the transfer to said corporation of said valueless oil and mining leases and other representations of the defendant were untrue; that thereupon the plaintiffs, being deceived by said misrepresentations, were induced to and did expend money, perform work, and furnish materials for the corporation, and were induced to and did give credit to the corporation in the belief of the truth of the representations stated; and that the corporation and all of its shareholders, except the defendant, are wholly insolvent, and the liability of the corporation to plaintiffs is due and unpaid.

The court found as facts, among other things, that upon the organization of the corporation and in October, 1896, the corporation issued 141,990 of the 150,000 shares of capital stock to a trustee representing the defendant and other beneficiaries, and received in payment therefor the assignment of certain charters or leases procured from the Chickasaw Nation of Indians, granting the privilege of mining for coal, petroleum, and other minerals on certain lands within the territory of that nation; that the assignments of the leases were in good faith estimated by the directors and officers of the corporation as more than equal to the par value of the capital stock; that the trustee thereafter duly transferred the stock to the corporation, and in consideration thereof the corporation issued 100,000 shares thereof to the beneficiaries of the trustee, including 22,220 shares to the defendant. The court also found that the defendant had no personal knowledge as to any expenditures of money, performance of work, or furnishing of materials for the corporation by the plaintiffs; that no statements or representations were made by the defendant, or any others, to induce the plaintiffs to enter into the contract; and that the plaintiffs were not induced to expend any moneys or perform any labor or furnish any materials for the corporation, or to give credit to the corporation

by any false or fraudulent statement or representation made to them by the defendant or the officers or directors of the corporation.

It is contended by the plaintiffs in error that upon the facts found there should have been a judgment for the plaintiffs by force of section 1773 of the Wisconsin Statutes of 1898. This section, after providing that in stock corporations the first meeting may be held at any time after one-half of the capital stock has been subscribed, reads as follows:

"No such corporation shall transact business with any others than its members until at least one-half of its capital stock shall have been duly subscribed and at least 20 per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof the corporation offending shall have no right of action thereon; but the signer and signers of the articles and the subscriber and subscribers for stock transacting such business or authorizing the same, or having knowledge thereof, consenting to the incurring of any debt or liability, as well as the stockholders then existing, shall be personally liable upon the same."

The argument for the plaintiffs in error is that the charters or leases transferred to the corporation in payment of its capital stock were void, because of the law of Congress found in section 2116 of the Revised Statutes of the United States; that the transfer of these void leases was not a payment to the corporation in property, such as is authorized by section 1753 of the Wisconsin Statutes of 1898; and that consequently the 20 per centum required by section 1773 of the Wisconsin Statutes of 1898 had not been paid in.

Assuming, for present purposes, that the leases were void, and that when the debt or liability of the corporation to the plaintiffs was incurred the 20 per centum of the capital stock had not been paid in, I can see no ground upon which the plaintiffs were entitled to recover. As I understand the terms of section 1773, no liability rests upon a stockholder unless he has consented to the incurring of the liability sued on with knowledge that the requisite payment of 20 per centum has not been made. The meaning of the section is to make a stockholder liable to the same extent and under the same conditions as a signer of the articles or a subscriber for stock. There is no finding by the court that the defendant knew of the incurring of any liability to the plaintiffs, but the finding explicitly negatives the fact. It follows that, so far as the case was based on any statutory liability of the defendant, the plaintiffs were not entitled to recover, and the judgment was correct.

Irrespective of this consideration, however, the action was one for fraudulent representations, and the plaintiffs were not entitled to recover without proof of actual fraud. The allegations of fraud were found against the plaintiffs. By the Code of Civil Procedure of this state (section 541) there was a failure of proof which was fatal to any recovery by the plaintiff. Where fraud is alleged as the basis of the action, the law will not permit a recovery by proof of a cause of action upon a contractural liability. Degraw v. Elmore, 50 N. Y. 1; Barnes v. Quigley, 59 N. Y. 265. It would have been error to allow an amendment of the complaint changing the cause of action to one on contract.

For these reasons, I think that plaintiffs were not entitled to recover, and that judgment was properly ordered for the defendant.

DU VIVIER & CO. v. GALLICE et al.

(Circuit Court of Appeals, Second Circuit. November 12, 1906.)

No. 29.

1. BANKRUPTCY—PROVABLE DEBTS—ELECTION OF REMEDIES.

Where a debtor gave to his creditor a series of notes indorsed by a third person, pursuant to an agreement for the compromise and settlement of the debt, which provided that in case of default in the payment of any of the said notes the whole of the debt, "less any payments made in pursuance of this agreement and any collections by legal proceedings or otherwise made upon any of the said notes shall become due and payable forthwith" the bringing of action on the notes against the principal and indorser after default in their payment was not an election by the creditor between inconsistent remedies, and does not debar him from also proving the original debt, less proper credits, against the estate in bankruptcy of the debtor.

2. CORPORATION—SUCCEEDING TO PARTNERSHIP BUSINESS AND PROPERTY—LIABILITY FOR FIRM DEBTS.

A corporation organized by the members of a partnership, to whom all the stock is issued, to take over all of the property of the partnership, and continue its business at the same place is liable for the debts of the partnership, even though they are not expressly assumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 100.]

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

J. A. Garner, for appellants.

G. Nicholas, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Petition by Gallice & Co. for review of order of the United States District Court for the Southern District of New York, affirming order of referee disallowing their claim against the bankrupt for any excess over $62,500, with interest.

The report of the referee accurately states the facts relevant to the main question discussed herein as follows:

"Gallice & Co. * * * filed their proof of debt in this matter for the sum of $471,926, with deductions amounting to the sum of $12,500. The trustee and creditors * * * moved to reduce the amount of the claim to the sum of $62,500. The facts have been agreed upon between the parties and show briefly that the claimants, copartners under the name of Gallice & Co., for many years prior to June 30, 1903, had business transactions with Charles A. Du Vivier and another, composing the copartnership of Du Vivier & Co., engaged in the wholesale and retail wine business in New York City; that on June 30, 1903, a corporation was formed under the name of Du Vivier & Co., with a capital stock of $150,000, for the purpose of carrying on a business of wholesale and retail wine merchants, and it continued to carry on said business at 22 Warren Street, in the city of New York, from said 30th day of June, 1903, until November 25, 1904, when it was adjudicated a bankrupt in this district. It also appears that the account of the transactions of the copartnership of Du Vivier & Co., from December, 1901, to April, 1903, appear in the private general ledger of the copartnership in an account entitled 'Gallice & Co.,' and which shows that by various transactions the amount upon the ledger became $351,868.91. In March and April, 1903, negotiations were had between the said parties,

Gallice & Co. claiming that the sum of $471,926 was owing to them, and on April 14, 1903, an agreement marked Exhibit A, herein, was entered into between the parties and one Francis J. Crilly. * * * "The material portions of said agreement are as follows: 'Whereas, the parties of the first part (Du Vivier & Co.), are indebted to the parties of the second part (Gallice & Co.) in the total sum of four hundred and seventy-one thousand nine hundred and twenty-six dollars ($471,926); * * * And, whereas, the parties of the second part, at the request of the party of the third part (Francis J. Crilly), have agreed to an amicable liquidation and compromise, of the said indebtedness, for the sum of seventy-five thousand dollars ($75,000), provided such sum is paid in the manner hereafter specified: Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained and of one dollar by each party to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto hereby agree as follows: (1) The parties of the first part hereby pay to the parties of the second part the sum of two thousand five hundred dollars ($2,500), in cash, and hereby deliver to the parties of the second part (certain property) * * * and also twenty-nine (29) promissory notes, bearing even date herewith, each for $2,500, bearing 3% interest, and payable respectively, on June 14, 1903, and on the 14th day of each of the twenty-eight months next ensuing, to the party of the third part and by him indorsed to the parties of the second part. * * * (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.'

"Pursuant to said agreement the copartnership paid to Gallice & Co. the sum of $2,500, and executed and delivered to them the series of 29 promissory notes for $2,500, payable respectively to Francis J. Crilly and indorsed by him to Gallice & Co. * * * The note maturing in June, 1903, was paid by the copartnership, Du Vivier & Co., and the notes maturing in July, August and September, 1903, were paid by the corporation Du Vivier & Co. The rest of the notes due at the time of the filing of the proof of claim, had not been paid and the balance of the series of notes have not been paid. In May, 1904, Gallice & Co., after a demand and refusal to pay, commenced two actions in the state of Pennsylvania against Francis J. Crilly, indorser, on the first eight of the said series of notes, which were due and unpaid at that time. No collections, however, have been made thereon. The two actions are now pending. All of the notes which have matured were protested at maturity. No security has been received for the claim, except indorsements of Crilly, if those should be held to be security."

Upon these facts the referee held as follows:

"It does not seem to me that these notes were given as security for the payment of the indebtedness of $471,000, but were given and accepted for $75,000, the creditor, Gallice & Co., having agreed to reduce their indebtedness to that amount if they could obtain what they supposed was a responsible person to guarantee the payment of the notes. By this agreement a new and independent debt from the corporation to Gallice & Co. was created to the extent of $75,000, and secured by the Crilly indorsements with a right to resort to the original indebtedness in case of default. This new debt was not a security for the payment of the old one, but a substitution for the other. Gallice & Co. were willing to reduce the principal amount because they had ample security as they thought, for the payment of that reduced amount. Now upon a default in the payment of any of the notes, two courses were open to Gallice. They could cancel and return the notes and reinstate the original claim, less the payments made, and this of course

would release Crilly, or they could insist upon their claim against Crilly on his indorsements. * * * Insisting upon their claim against Crilly by suing him upon the notes, they, it seems to me, elected to choose that remedy, yielding, as they had to, the remedy to insist upon the original claim. * * * The $75,000 debt and the notes given were in payment or satisfaction of the original debts or as a substitute therefor, subject, however, to the action of Gallice & Co., to cancel the same and reinstate the original claim. This they have not done, but elected to proceed against Crilly, an independent debtor, upon an independent debt, and in doing so have barred themselves from prosecuting the original claim. It seems to me that the claim should be allowed at the sum of $62,500, it appearing that $12,500 of the debt of $75,000 had already been paid."

The theory upon which this conclusion was reached is that Gallice & Co., having elected to proceed upon one of two inconsistent and opposing claims of right, as against Du Vivier & Co., were barred from thereafter prosecuting the original claim against it. The election between inconsistent remedies, if any, affects Crilly only. Whether the effect of the election to prosecute the original claim would be to bar further proceedings against him on the notes remaining unpaid, is a question which is not before us, and as to which we express no opinion. But we are unable to concur in the conclusion that the action of Gallice & Co. barred them from asserting their claim for the entire debt after default in the payment of said notes. We think such a conclusion would be contrary to the express provisions of the agreement considered as an entirety. The ambiguity arising from the claimed inconsistency between the earlier and later portions of the instrument may be resolved by the application of the well-settled principles of construction and interpretation, for the purpose of ascertaining what the parties meant, as manifested by the language they employed, in the light of the surrounding circumstances. It appears from the report of the referee that at the request of Crilly, the creditor having the largest claim against Du Vivier & Co. except that of Gallice & Co., Gallice & Co. agreed to "an amicable liquidation and compromise" of their debt for the sum of $75,000, provided said sum was paid in a certain specified way. By carrying out this arrangement Crilly and Du Vivier could secure, not only a reduction of the debt to said sum, but an extension of time for its payment during a period of more than two years.

On the other hand, it does not appear that there was any consideration for the agreement by Gallice & Co. to release the original indebtedness (other than the $2,500 cash) except said indorsement, but this consideration would have no tangible value if by virtue of the contract Gallice & Co. were prevented from proceeding against the indorser. If the agreement had merely provided that the sum of $75,000 was to be paid by the cash payment of $2,500 and the delivery of the notes, and had stopped there, there would be much force in the nolding of the referee that the cash and notes were received in full payment and satisfaction of the original obligation. But this view ignores or nullifies that portion of paragraph 4 of the agreement, which provides that in case of default in any payment the whole of said debt, less payments or collections, should become due, and whereby the parties of the second part agree to release said indebtedness, not upon the

receipt of the cash and notes, but only upon the due payment of all of said notes and the due performance of all the covenants of the contract. The referee held that while this paragraph of the agreement gave to Gallice & Co. a right, upon releasing their claim on the notes, to resort to the original debt in case of default, yet as they had brought suit against Crilly upon the notes, they had forfeited all right to prosecute the claim for the original debt against Du Vivier & Co. These views conflict with the rule that all the parts of a contract are to be considered together, and "construed in such a way as to give force and validity to all of them and to all the language used where that is possible." Parsons on Contracts, part 2, 505. The agreement expressly provides that the debt, revived by "default in the payment of any of said notes," shall be "less any payments made in pursuance of this agreement and any collections by legal proceedings or otherwise made on any of the said notes." In the face of this situation and of these provisions inserted in the agreement, and in view of the relations of the parties, as shown above, it cannot be successfully argued that if default were made in the payment even of the first note, Gallice & Co. must refrain from any attempt at collection from Crilly, under penalty thereby of a loss of all right to the original debt. On the contrary, the effect of these provisions was to give to Gallice & Co. the right to enforce the payment at least of all except the last of said notes by actions against Du Vivier & Co., or Crilly, or both of them, and thereafter to prosecute their claim for the balance of the debt. It may well be questioned whether Du Vivier & Co., in view of the language providing that they should have the benefit of any collections made on said notes, might not have defended an action to recover on the original debt, provided it appeared that Gallice & Co. had failed to first enforce or exhaust their remedy against the indorser.

As counsel for appellant well says:

"The transaction in effect amounts to this: That a creditor agrees to extend the time of payment of the indebtedness, provided the debtor will induce some one to guaranty the payment of part of the amount due. In such case, the creditor could, of course, proceed against both principal and guarantor at the same time. The only difference in the present case is the additional privilege given to the debtor, that, if a part of the indebtedness should be promptly paid, the creditor would release the remainder of the debt. Unless the court is prepared to hold that there is an inconsistency between the prosecution of a claim against a principal and his surety or between the prosecution of a claim against the maker of a note and its indorser, it must hold that there is no inconsistency in the present case."

Counsel for the trustee claims:

"That there was no assumption by the corporation, Du Vivier & Co. of the debts of the copartnership Du Vivier & Co., further than to the extent of $75,000 of which amount $12,500 had been paid."

This claim is based on the fact that in the bill of sale from the copartnership to the corporation it was provided as follows:

"The property hereby sold is subject to the payment of the debts of said firm of Du Vivier & Co., as now shown upon their books, all of which debts the said corporation hereby assumes and agrees to pay."

Upon this question we concur in the holding of the referee, which is as follows:

"The only express assumption of the debts of the Du Vivier copartnership by the corporation were those shown upon the books of the copartnership, yet, as this corporation was organized, as the agreed statement of facts show, by the same persons who composed the copartnership, for the purpose of carrying on the same business at the same place, with the same employés, using some of the same books of account and issuing all its stock to the members of the copartnership or their nominees, it must, under the authorities, be held liable for the debts of the copartnership, even though they were not expressly assumed by the writings transferring the assets to the corporation. [citing cases] * * * I think it must be held that the corporation Du Vivier is liable for all of the debts of the partnership Du Vivier, whether expressly assumed or not."

The referee has not passed upon the question as to whether the obligation assumed by the bankrupt corporation was the amount of $471,926, under the original agreement, or the amount of $411,897, under paragraph 8 of the agreed statement of facts.

Said paragraph is as follows:

"The determination of the amount actually owing at the time the said agreement was made, on April 14, 1903, by the copartnership, Du Vivier & Co. to Gallice & Co. would involve a tedious and intricate accounting and the taking of proofs without the United States. The parties agree that that amount is the mean between $471,926, the claim of Gallice & Co., and $351,868, the amount shown to be owing by the books of the copartnership, Du Vivier & Co., viz., $411,897."

We think, in view of this agreement by Gallice & Co. as to the amount actually owing by the copartnership to them, that they cannot now take advantage of the statement of account of $471,926 in the partnership agreement. The only liability assumed by the corporation was for the amounts actually owing by the partnership. The further question has been raised as to whether, in making proof of claim, Gallice & Co. are entitled to prove the whole of said sum of $411,897, less the $12,500 paid thereon, or whether a deduction should be made thereon by reason of the notes held by Gallice & Co., and indorsed by Crilly. This question is not presented by the petition for review, and is not raised by the order of the court. Inasmuch as its determination may depend upon the rights and obligations of Gallice & Co. in the pending litigation against Crilly, we expressly decline to pass upon the question at this time.

The order is reversed, and the cause is remanded to the court below, with instructions to direct the referee to enter an order in accordance with this opinion.

MORRIS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 13, 1906. Rehearing Denied January 22, 1907.

No. 1,549.

1. CRIMINAL LAW—TRIAL—RIGHT TO BE CONFRONTED BY WITNESSES.
The accused, in a criminal case in the federal courts, has a right to be confronted by the witnesses, and through and by his counsel given an opportunity to be informed and advised of all the evidence that is submitted against him.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1538.]

2. WITNESSES—EXAMINATION—MEMORANDA—REFRESHING MEMORY.
It was error, in a criminal case, to permit the district attorney to show certain documents, after they had been identified, to witnesses, for the purpose of refreshing their memory, without first submitting them to defendant's attorney, on his demand for an inspection.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 891.]

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

W. L. Crawford, for plaintiff in error.
Wm. H. Atwell, U. S. Atty.

Argued before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The plaintiff in error, O. M. Morris, prosecutes this writ for the reversal of a verdict and judgment rendered against him upon an indictment charging him with carrying on the business of a retail liquor dealer without first having paid the special tax required by law. The errors assigned, some 18 in number, are based upon the rulings of the court on motions to quash demurrers to the indictment, in regard to the admission of evidence, and on refusals to give certain special instructions to the jury as requested.

It is not necessary to pass upon all the assignments, because the conclusion we have reached in regard to the third and eleventh requires a reversal of the judgment below, and on a new trial the rulings herein assigned as error may not be again made. The third and eleventh assignments of error are based upon the following proceedings, shown in the bill of exceptions: One W. R. McCafferty, sworn for the government, having testified as to his residence, business, previous employment by the plaintiff in error, and some other matters, was examined as follows:

"Mr. Atwell: Did you ever see Morris, while you were working there, go into that back room and bring anything out with him?
"Col. Crawford: We object.
"The Court: I will permit the question.
"Col. Crawford: We except.
"A. I can't say that I ever saw him bring anything out of the room that I remember of.

"Mr. Atwell: I don't like— I think you are honest about it. You made an affidavit; been before the grand jury, and made an affidavit before the collector— Collector Hunt?

"Col. Crawford: We ask that that be withdrawn from the jury.

"Witness: I can't say that it was alcohol. Yes; I have seen him bring—

"Col. Crawford: We ask the court to withdraw that, or give us an opportunity to inspect it. If it is for impeachment, the government cannot impeach its own witness without satisfying the court that the witness is corrupt, or that the government is surprised by the testimony. We have a right to inspect a former affidavit or deposition before that is resorted to, as we understand the rule.

"Mr. Atwell: I have a right to show it to him to refresh his memory, and that is all I have done.

"Col. Crawford: We object, and state the rule to be that the defendant has the right, before papers are put in the hands of the witness, to inspect the paper for the purpose of making objections to the use of the papers for the proposed purpose, or for any other purpose, and, further, for the purpose of preparing himself, by the inspection in advance of the examination, for a cross-examination of the said witness upon the said papers. No memorandum, affidavit, or deposition ought to be permitted to be used for the purpose of refreshing the memory of a witness, unless it appear that the present recollection of the witness of the past event has failed, unless it appears that the memorandum, affidavit, or deposition proposed to be used by the party calling the witness was made contemporaneous with the event to which it relates.

"But the court overruled these objections, and refused to permit the defendant to inspect the paper offered and put in the hands of the witness by the district attorney, and permitted the witness to read the paper and return it to the district attorney; and thereupon the examination proceeded as follows, the district attorney holding the paper in his hand, to all of which the defendant excepted.

"Explanation by the Court: With reference to the bill of exceptions as above reserved, the paper which the district attorney handed the witness was first handed by the district attorney to the court, and the paper was in fact what purported to be a written statement and an affidavit thereto, made and signed by the witness, McCafferty, before Deputy Collector of Internal Revenue Hunt. This paper, of course, was not read or submitted to the jury in any way.

"Further explanation by the Court: The written statement handed the witness for the purpose of refreshing his memory, and purporting to be his statement and signed by him, purported to be of date August 28, 1905.

"Further: The explanation hereinabove made, and called 'Explanation,' was made on March 10, 1906, and within the term at which the case was tried, and after notice to attorney for the defendant. The defendant, through his attorney, excepts to the making of such further explanation, on the ground the defendant's attorney did not at the trial have an opportunity to inspect the said paper, and because, further, the United States District Court of Texas for the Northern District of Texas has not now jurisdiction of this case, and because on the trial there was no proof offered of the date of the execution of the paper."

The bill of exceptions further shows that one Hollingsworth, a witness sworn for the government, having been examined and cross-examined, was then re-examined, and during such re-examination the following occurred:

"Atwell: Q. Mr. Hollingsworth, you stated, in answer to a question, that you knew it was there because you heard two employés of Morris talking about it, did you? You understood that question when you answered? A. I think so. Q. That is, you knew the alcohol was there because you heard Turner and McDonald say it was there; is that the idea? (Witness hesitates.)

"The Court: Answer the question.

"A. Yes.

"Mr. Atwell: If you knew it was there, and had their consent to get it, why didn't you get it the first time you went in, without asking Morris? A. I didn't know it was there until I saw the bottle.

"(District attorney hands witness paper.)

"Col. Crawford: I object. It is manifestly— It is not a memorandum made by the witness. It is not made in respect to any transaction—not contemporaneous with any transaction. It is not written by him, as far as we know and believe. It is not such an affidavit as to refresh one's memory. We are entitled to the independent recollection of the witness."

After presentation of authorities, the court said:

"The Court: I will permit the witness to be handed the affidavit.

"Col. Crawford: We save an exception.

"The Court: Can you read that affidavit?

'Witness: I can't read it without my specks.

"(Procures glasses and reads affidavit.)

"Witness: It don't seem like the one I signed.

"Mr. Atwell: Is not that your signature there? A. I don't know. I would not say. That is not what I aimed to tell him, and it is not what I said to the court. Q. You say that is not your affidavit? A. I don't know. I think this is my signature.

"(Witness is given another affidavit and reads it.)

"Witness: That is all right.

"Mr. Atwell: Now; Mr. Hollingsworth, when you approached Mr. Morris in his store—about the middle of his store—and asked him to sell you alcohol, he told you he would not do it?

"Col. Crawford: We object. We object to his using this paper, without submitting it to us and giving us an opportunity to know what it is or where it came from.

"The Court: You can save your exception.

"Col. Crawford: We take an exception.

"Explanation by the Court: The paper shown to the witness Hollingsworth was first handed to the court by the district attorney for the court's inspection, and the paper was in fact what purported to be a written statement, made by the witness and signed by him, and sworn to by him before a justice of the peace of the state of Texas. This paper was not, of course, read to the jury or submitted to it in any way.

"Further Explanation by the Court: The paper handed the witness, and purporting to be an affidavit made by him covering the transaction about which he testified, purported on its face to be made on June 3, 1905, or about four days after the transaction.

"The above explanation, called 'Further Explanation,' was made this 10th day of March, 1906, and during the term of court at which the case was tried, and after the notice to the defendant's attorney. The defendant, through his attorney, excepts to the making of the 'further explanation' by the court, for the reason defendant's attorney was not permitted to inspect the memorandum, and because at this time the court has not jurisdiction of the case, and because at the trial there was no proof offered as to the date of the instrument."

It thus appears that during the trial, and over the objection of the defendant, McCafferty, a government witness, was permitted to read and refresh his recollection with a paper purporting to be a written statement and an affidavit thereto, made and signed by the witness; that an examination and inspection of the said paper was then and there refused to the defendant and his counsel; and that the district attorney proceeded with the examination of the witness, holding the paper in his hand. And it also appears that, over the objection of the defendant, the court permitted the government's witness, Hollingsworth, to read and refresh his recollection with a paper which purported to be a written statement, made by the witness and signed by

him, and sworn to by him before a justice of the peace of the state of Texas, and at the same time refused the defendant and his counsel the right to inspect and examine the said paper.

It is contended that these rulings were correct, and certainly not prejudicial to plaintiff in error, because, first, the said papers were not, of course, read to the jury or submitted to it in any way; and, second, after the witnesses had been examined by the government, the counsel for the defendant, if he had desired to obtain an inspection of the papers for the purpose of cross-examination, could have applied to the court and it would have been granted to him. Not having seen the papers in question, and having only the description of them in the bills of exception, we are unable to say whether it would not have been better for the plaintiff in error, if the papers themselves had been read to the jury, rather than to have had the contents given by an ex parte statement of what they contained; and it is extremely probable that, if the papers had been read to the jury, the counsel for the defendant would have had some information as to the contents thereof, and then, perhaps, a different question, if any at all, would have been presented here. It may be that an inspection of the papers in question would have been given, if asked for, after the district attorney had finished his examination; but then the mischief had been done, and we can hardly criticise the learned counsel for not asking for the papers later, in view of the refusals which had been previously given. Besides, it does not appear that any such suggestion was given to the counsel at the time the rulings were made against him.

The accused in a criminal case in the courts of the United States has a right to be confronted by the witnesses against him, and through and by his counsel given an opportunity to be informed and advised of all the evidence that is submitted against him. To permit the district attorney to furnish a paper to a witness, and allow the witness to testify from and by that paper, without having previously exhibited it to the defendant on his demand, is practically to deny him the right of being confronted with the witnesses against him, and tends to deprive him of full opportunities to defend himself. We understand it to be the universal rule of evidence in the courts of this country that, where a witness is permitted to examine and refresh his recollection with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified. This rule is found in all the text-books, and, if numerous adjudged cases declaring it are not found on all hands, it is because of the absence of nisi prius reports, and because so few trial courts have ever denied the right in question. Of the few at hand, we cite Peck v. Lake, 3 Lans. (N. Y.) 136; McKivitt v. Cone, 30 Iowa, 455; Bashford v. People, 24 Mich. 244; Duncan v. Seeley, 34 Mich. 369; Tibbetts v. Sternberg, 66 Barb. (N. Y.) 201; Chute v. State, 19 Minn. 271, (Gil. 230).

In Duncan v. Seeley, supra, Judge Cooley stated the case and held as follows:

"On the trial the plaintiff, being on the stand, was questioned by his counsel as to the time when he was at the place of the alleged sale after the sale was made; it being deemed important to show that he was there on a certain day. Plaintiff, in reply, stated that he could not state positively

without looking at something to refresh his memory; and, after professing to look, he stated, further, that what he had looked at did refresh his memory. He was then called upon by defendant's counsel to produce the memorandum at which he had looked; but the counsel for plaintiff objected, and the court sustained the objection. We think this was erroneous. The witness was in effect testifying, not from recollection, but from something which he professed to have in writing; and the other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here. The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum. The defendant was entitled to see it at the time, in order to test the candor and integrity of the witness; and the opportunity for such a test might be lost by a delay which an unscrupulous witness might improve by preparing to procure something to exhibit."

The rule should be more rigorously adhered to in criminal than in civil cases.

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

VAN ZANDT v. HANOVER NAT. BANK.

(Circuit Court of Appeals, Second Circuit. October 11, 1906.)

No. 247.

1. BANKS AND BANKING—LIEN OF BANK—SPECIAL DEPOSIT OF SECURITIES.
   A bank has no general lien on securities deposited with it for a special purpose.

2. SAME—CONSTRUCTION OF AGREEMENT FOR LIEN.
   Defendant bank prepared and took a contract, signed by a correspondent bank, by which the latter agreed that "all bills of exchange, notes, * * * money, and property of every kind owned by the undersigned, * * * deposited with the said bank or under its control, as collateral security for loans or advances already made or hereafter to be made, to or for account of the undersigned, by said bank or otherwise," might be held by it as security for any and all indebtedness of the correspondent. *Held*, that such contract applied only to security or property deposited with defendant as collateral security, the words "or otherwise" having reference to the nature of the liability for which the collateral should remain as security, and not to the manner in which it came into defendant's possession, and that it did not give defendant a lien on notes sent it by the correspondent for discount and credit, but which it declined to discount, to secure an overdraft unintentionally made by the correspondent in the expectation that the notes would be discounted and the proceeds placed to its credit.

3. CONTRACTS—RULES OF CONSTRUCTION.
   An instrument is to be most strictly construed against the party who prepared it.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 736.]

4. SET-OFF AND COUNTERCLAIM—TROVER AND CONVERSION.
   A defendant cannot plead an indebtedness of plaintiff as a set-off or counterclaim in an action at law for conversion in a federal court.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 47, 18.]

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

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

E. B. Whitney, for plaintiff in error.

P. S. Dudley, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The question whether the plaintiff (as receiver of the American National Bank of Abilene), or the defendant, was entitled to the possession of the four promissory notes which came to the hands of the defendant in January, 1905, depends upon the following facts: The defendant had been for some time the New York correspondent of the Abilene bank, and the Abilene bank had kept with the defendant a deposit account, making deposits and withdrawing them by checks, bills of exchange, etc. From time to time it forwarded notes or commercial paper made by various persons and owned by itself, indorsing said paper, and offering it to the defendant for sale with a request that in case the defendant purchased the paper the proceeds thereof should be deposited in the deposit account. November 27, 1903, the Abilene bank signed a written contract of hypothecation by which it agreed with the defendant—

"That all bills of exchange, notes, * * * money, and property of every kind owned by the undersigned * * * deposited with the said bank, or which may be in any wise in said bank, or under its control, as collateral security for loans or advances already made, or hereafter to be made, to or for account of the undersigned, by said bank, or otherwise, may be held, collected, and retained by said bank until all liabilities present or future of the undersigned * * * of every kind of said bank, now or hereafter contracted, shall be paid and fully satisfied."

In January, 1905, the four notes in controversy, made by third persons and indorsed by the Abilene bank, payable, three of them, respectively, in 90, 60, and 30 days, and one of them in 6 months, were forwarded by it from Abilene, Tex., to the defendant, by mail, with instructions: "We hand you for discount and credit." The defendant received two of them January 14th, and two of them January 16th, and immediately notified the Abilene bank, by telegrams and letters, that the paper was not satisfactory. After the first two notes had been mailed to the defendant, but before it had received notice of the defendant's refusal to discount them, the Abilene bank drew a check upon the defendant for $3,825.45. This check was paid by the defendant January 17th, resulting in an overdraft of the account of the Abilene bank of about $3,500. Thereupon the defendant, without consulting the Abilene bank, credited the account of that bank with $3,500, and notified the latter by mail that it had made a "temporary loan" of that amount "against collateral in our hands." Before this letter reached Abilene by the ordinary course of mail the Abilene bank had failed, and the plaintiff had been appointed its receiver by the Comptroller of the Currency.

Upon these facts it is plain that the plaintiff was entitled to recover unless the terms of the contract of November 27th authorized the de-

fendant to treat the notes as a security in its hands for an overdraft or indebtedness by the Abilene bank. In the absence of a contract of that purport, it would have been the duty of the defendant, upon receiving the notes and concluding not to discount them, to return them to the Abilene bank or hold them awaiting further instructions and subject to the disposition of that bank. The Abilene bank had not asked for a temporary loan, and was entitled to have its notes used as it had directed, so as to realize their full proceeds; and if not so used, it was entitled to make such disposition of the notes as it saw fit. As the notes had been sent to the defendant for a specific use, they did not become subject to a general banker's lien. Such a lien does not attach upon securities which are deposited with the banker for a special purpose. Armstrong v. Chemical National Bank (C. C.) 41 Fed. 234, 6 L. R. A. 226; Brandao v. Barnett, 12 Cl. & Fin. 787; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Wyckoff v. Anthony, 90 N. Y. 442.

The language of the agreement of November 27th is susceptible of different interpretations. It may be read as follows:

"That all * * * notes * * * owned by the undersigned, * * * deposited with said bank * * * or which may be in any wise in said bank or under its control, as collateral security * * * or otherwise, * * * may be held, collected, and retained by said bank."

Read in this way, it is capable of being construed as a pledge of all notes belonging to the Abilene bank that may in any way come into the hands of the defendant, even though they come accidently or against the will of the Abilene bank. But such a reading omits a material part of the instrument, and when that is supplied the instrument reads that all notes "deposited with said bank * * * or under its control, as collateral security for loans or advances already made, or hereafter to be made, to or for account of the undersigned by said bank, or otherwise, may be held," collected, etc. With these words supplied, the words "or otherwise" may be read as referring to the nature of the liability for which the collateral is security, and as meaning to pledge the collateral, not only for loans and advances, but also for any liabilities otherwise arising, such, for instance, as that of an indorser or surety upon the commercial paper of third persons. If the agreement had been intended to pledge all securities belonging to the Abilene bank that might come in any manner to the hands of the defendant, or even of all that might rightfully come to its hands, that intention could have been manifested unmistakably, and in very simple terms, by omitting the words "deposited" and "as collateral security," etc. The latter are descriptive words which identify the securities which the defendant may hold and collect by reference to the purposes for which they come into his hands. If the contention for the defendant in error is correct, these words were used unnecessarily.

"The language of a contract is always presumed to be used with reference to the matter in the minds of the parties when they contract. Therefore words of broad signification will be interpreted with reference to the subject matter of the contract, unless the intention is clear that they should be taken in the broad meaning." Jones, Construction of Contracts, § 220. The parties here were contracting with reference

to notes, property, etc., which should be deposited by the Abilene bank with the defendant, or should come under its control as collateral security for certain obligations and liabilities, and the general words "or otherwise" should be held to relate to notes and property which should come to the hands of the defendant by way of deposit or collateral security, or some other kind of bailment.

It is apparent, from the fact that the Abilene bank is not named in the instrument, otherwise than as "the undersigned," that it was one for general use prepared by the defendant. Such instruments are always to be construed most strictly against the party by whom they have been prepared. This rule was applied to an instrument like the present one in Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292. It is not to be inferred, in the absence of clear terms, that the Abilene bank intended to authorize the defendant to keep and collect such of its notes or property as it did not intend to part with, or such as might be obtained by the defendant without its consent.

The notes in controversy were never deposited by the Abilene bank with defendant, nor did they come into its hands as collateral security within the commonly accepted meaning of these terms. They were temporarily in the hands of the defendant under an option to purchase them. We conclude that they did not come within the terms of the pledge, and that the defendant did not obtain a lien upon them.

If the check drawn by the Abilene bank upon the defendant, which caused the overdraft of its account, had been drawn with knowledge of the defendant's refusal to discount the notes, a different question would be presented; but it is fair to assume that this check was drawn in the expectation that before its presentation the notes would have been discounted and the proceeds credited to the Abilene bank.

The contention for the defendant in error that it was entitled to set off or counterclaim the indebtedness owing to it by the Abilene bank when the latter became insolvent is wholly untenable. Such a defense is not available in an action at law for conversion, and, if the defendant had any right of equitable set-off, this should have been asserted by a bill in equity.

The assignment of error based upon the ruling directing a verdict for the defendant seems to be well taken, and accordingly the judgment is reversed.

ROCKEFELLER v. WEDGE.

(Circuit Court of Appeals, Third Circuit. December 11, 1906.)

No. 43.

1. TRIAL—VERDICT—JURY—INTERROGATION.

Where several issues are submitted to a jury and a general verdict returned, the court may interrogate the jurors to specialize the verdict and state on which issue or issues it is based.

2. APPEAL—REVIEW—HARMLESS ERROR—SUBMISSION OF ISSUES—PREJUDICE.

Where, in an action on a note, the jury found in plaintiff's favor on an issue as to alleged misrepresentations, plaintiffs sustained no injury by the submission of such issue to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4212.]

3. BILLS AND NOTES—RELEASE—CONSIDERATION.

The defendant, having a good position with the Standard Oil Company, at Bayonne, N. J., was induced by the plaintiff to undertake the management of a zinc mine for him in Missouri, in which the plaintiff was largely interested, being promised a salary of $7,500 and an interest in the mining company, for which he gave plaintiff the note in suit for $15,050, with the stock of the company as collateral. The plaintiff being also interested in a cattle company at Kansas City, and its affairs becoming involved, and a receiver being necessary, the defendant subsequently at his request accepted the position and performed its duties for a number of months, being put under great mental and physical strain in consequence, and also subjected to possible pecuniary liability on his bond, by which he might lose all his property. Wishing to give up the position, he was urged by the plaintiff as a personal favor to continue, which he did. Later on there was a crisis in the affairs of the cattle company, and a large sum of money was necessary to enable the plaintiff, who had guarantied some $2,000,000 of its obligations, to maintain himself, which money the defendant secured by a personal appeal to the plaintiff's brother, who was a man of affluence in New York. Feeling, however, that his position was insecure, the defendant while on this trip obtained another, at a good salary, with a company in Pittsburg; but upon his return, at the earnest solicitation of the plaintiff and his counsel, was led to give it up and keep on with the cattle company, the plaintiff guarantying and paying the salary which had been promised him from the mining company, but which had been stopped, to which payment, however, the defendant contributed the compensation allowed him by the court as receiver, amounting to $3,800. A few months later the zinc mine was sold at a serious loss; the defendant's interest being made practically worthless. About this time, in a casual interview in a street car, the plaintiff, who had several times before expressed his willingness to give up the defendant's note, saying that he did not wish him to lose anything by the venture, declared to the defendant that he might consider the note discharged; the services which he had rendered to the plaintiff and the sacrifices that he had made to do so being referred to and assigned as the reason. The note, however, was not given up, the plaintiff explaining that it might prejudice him with others, whose notes for similar interests he held and whom he proposed to sue. *Held*, in a subsequent suit by the plaintiff on the note, that there was sufficient consideration for the promise to release, which was set up, and that a verdict for the defendant should be sustained.

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

Francis Rawle and B. P. Finley, for plaintiff in error.

Charles B. Downs and W. Findlay Brown, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. This was a suit on a promissory note for $15,050, given by the defendant to the plaintiff for an interest in a zinc mining company. The defense set up was, first, that the note was obtained by misrepresentation, and, second, that before it became due the plaintiff agreed to cancel it. Both issues were submitted to the jury, who found for the defendant; but in response to an inquiry by the court, at the time the verdict was rendered, it was put entirely upon the second ground.

Complaint is made that there was no evidence of misrepresentation, and that it was error to let that question go to the jury; the plaintiff

being prejudiced, even though they found in his favor. The practice of calling on jurors to specialize their verdict in the way that was done is furthermore deprecated, and the right of the court to do so is challenged. But the right to interrogate a jury, and to act upon their findings, is directly sustained in Walker v. Southern Pacific R. R., 165 U. S. 593, 597, 17 Sup. Ct. 421, 41 L. Ed. 837, and City of Elizabeth v. Fitzgerald, 114 Fed. 547, 52 C. C. A. 321, and does not need to be vindicated here. And, far from being open to the criticism made of it, if it were oftener resorted to, it would save not a few mistrials; many rulings to which objection could otherwise be justly made being eliminated and rendered harmless. Clementsen on Special Verdicts, 95, 286; 4 Mich. Law Rev. 493. While, then, in the present instance it may have been error to submit to the jury the question of misrepresentation in obtaining the note, and as matters go in the jury room it may, perhaps, not have helped the plaintiff to do so, in legal contemplation it did him no injury; and, the jury having found in his favor upon that issue, it is out of the case as completely as if it never had been there.

The real question is whether there was any consideration for the promise to release the note, which is relied upon. The facts which bear upon this are not seriously disputed. In November, 1900, the plaintiff, having taken an option on a zinc mine in Missouri which he proposed to develop, wrote to the defendant, who was in the employ of the Standard Oil Company at Bayonne, N. J., and had had considerable general business experience, to come out and take charge of it, offering him a salary of $7,500 per annum, where he was getting but $6,000, as well as a substantial interest in the enterprise, for which he agreed to take a three-year note, with the stock of the company which was to be formed as collateral. The relations of the parties for a number of years had been of the most friendly and intimate character, very much, indeed, like that of father and son; the defendant, who started as a stenographer, having risen by the plaintiff's influence to a responsible and remunerative position. Moved by a sense of personal obligation, as well as by the inducements held out to him, the defendant accordingly gave up his place in the East and assumed the management of the business. The venture, however, was not a success, and the defendant was only a short time engaged with it, at least directly. The plaintiff became involved in other matters, in which he needed his assistance, and the active management of it was therefore given up after a few months; the property being eventually sold out to other parties in December following at a heavy sacrifice. The diversion from the mining business was due to a crisis in the affairs of a cattle company at Kansas City, in which the plaintiff was even more largely interested. A receivership was necessary to extricate it, and, the plaintiff having no confidence in those with whom he was associated, the position was pressed upon the defendant, who assumed it in May, 1901, continuing in it up to the middle of October. The duties which devolved upon him in that connection were of the most arduous and exacting character, and, combined with the personal loss entailed by the failure of the zinc mine, the strain upon him, physically and mentally, was so great that early in July he

almost reached the point of a nervous breakdown. His salary from the mine was also cut off, and the prospect of getting anything out of the receivership was problematical, and would not in any event be realized until it was brought to an end. Money to run the cattle business, moreover, was lacking, and he was falling behind in his accounts to such an extent that liability on his bond was possible, imperiling all his property. The situation seemed desperate, and he wrote the plaintiff to be relieved from it, but was urged to stay on, which he consented to do as a matter of personal favor. No material improvement, however, followed, at least not immediately; and the affairs of the cattle company reached such a crisis in September that, unless relief was speedily obtained, the plaintiff, who had guarantied some $2,000,000 of its obligations, might not be able to maintain himself. The immediate amount needed to tide things over was $86,000, and the defendant suggested that the plaintiff's brothers, William and John D. Rockefeller, men of the largest affluence, should be appealed to. The trouble was that the plaintiff was not on good terms with them, and in addition was himself under such a nervous strain from this and other matters that he was in no condition to go and see them. It was accordingly arranged that, armed with a letter from the plaintiff, the defendant should go to New York and interview Mr. William Rockefeller, which he did with such success that the money was raised and the plaintiff relieved from his embarrassment. Feeling, however, that the situation still was precarious, and that he must look after his own personal interests, the defendant, while away, hunted up and secured a position with a salt company at Pittsburg at a good salary, and upon his return to Kansas City again brought up the question of giving up the receivership. But the plaintiff would not hear to it, and, together with his attorney, labored with the defendant the better part of a day, urging the necessity for his keeping on and the unfairness of his quitting at that time; and, upon the plaintiff promising to take care of the salary due him from the mining company, he agreed to stay, which he did, without further demur, until the receivership was wound up, assisting somewhat, also, again in the management of the zinc company. Not long after this, an offer was made for the zinc property which all parties regarded favorably; the plaintiff being repaid by the sale the cash advances which he had made, and about 10 per cent. being divided around upon the capital, the defendant getting a credit on his note of some $1,500.

This sale was consummated early in December, and soon afterwards, December 17th, while plaintiff and defendant were riding together in a street car, the interview occurred at which, according to the defendant, the note was forgiven him. "You may regard this note as canceled and off the books" is the way it was put; the plaintiff at the same time explaining that he did not surrender it, because he intended to sue certain other parties, who had got him into the enterprise, whose notes for stock he was similarly carrying, and he did not wish to prejudice this. "But your matter," as the defendant was assured, "you may consider disposed of." The plaintiff admits this meeting, and that the subject of the note was brought up, but denies having agreed to release it, and, on the contrary, declares that the defendant wanted him

to do so, but he refused. At least twice before, however, he had voluntarily made a similar offer, and, while the defendant in each case put it aside at the time, only a few days previously he had written to the plaintiff, expressing a willingness to accept, if he thought proper to renew it, which not unnaturally led up to what is claimed to have followed. Right afterwards, also, December 20th, the defendant wrote again, alluding to the point made by the plaintiff about retaining the note, but calling attention to the fact that the matter would be left in bad shape in case either of them died, and suggesting that something should be given to him to show that the note was eventually to be delivered up or canceled. And, while it is true that the plaintiff did not answer favorably, that does not do away with the corroborative effect of this letter. All this, however, goes only to the probability of the defendant's story, and was for the jury. The question which concerns us now is, whether, assuming the promise, there was anything to stand as a consideration so as to make it binding.

As a mere gratuity, if that was all there was to it—the plaintiff not wishing the defendant to be at a loss, as he expressed it, in the earlier offers—the promise to release would not be enforceable; the gift not having been completed by a surrender. The same is true, also, if the stock which was pledged for the note and was demonstrably worthless, was to be taken and the note canceled, which would be merely another way of putting it. Neither was anything done or omitted by the defendant at the time, so as to furnish an inducement directly moving between the parties, although that is not essential; a past transaction being sufficient, provided it actually enters into the bargain. A consideration, however, is claimed to be found in the services rendered by the defendant, to which reference has been made above, which, fortunately for that contention, according to the testimony of the defendant, were expressly assigned by the plaintiff as the basis of his action. "He said he appreciated very much all I had done for him in connection with the receivership matter," is the statement. "He appreciated the heavy strain on my vitality and strength it had been to go through such an experience, and he appreciated what I had done for him in relation to his brother William and other things that I had done; and for these reasons, and all reasons, I might consider that the note was finally disposed of." As to the character and value of these services there can be no reasonable question; nor that they were performed at the urgent solicitation of the plaintiff, for his own personal benefit, and to the marked inconvenience, if not disadvantage, of the defendant.

It is said, however, that they were fully compensated at the time by the salary which he was to get, which was continued to be paid him, as guarantied by the plaintiff, even after the zinc company had gone out of business. But one of the inducements held out to him to leave his position with the Standard Oil Company was that he was to have an interest in the enterprise, which having failed, his salary did not altogether meet the situation. To its payment, moreover, the defendant himself contributed the $3,800, which he was allowed by the court for his services as receiver, which he turned over, at the suggestion of the plaintiff, to help reimburse the latter for the money advanced to the zinc company, out of which the plaintiff's salary was paid; as

the result of which, if his services to the company are held to have been met by his salary, it still leaves him uncompensated for what he did as receiver; and, while it may be that the plaintiff, having personally guarantied his salary, was entitled to command his time in the one position or the other, as it suited him, and even though we disregard the contribution to this which the defendant made by giving up what the court had allowed him, which, after all, goes a long way to eliminate it, outside of and beyond all this there were other and extraordinary services which made up a considerable tale, for which he admittedly got nothing. It was no part of his duty as receiver, for instance, to solicit the $86,000 which was secured from the plaintiff's brother. This was undertaken solely in the interest and for the benefit of the plaintiff, to whom it was of the most supreme importance, the personal character of which he recognized by paying the defendant's expenses, and, if so, why not, also, for his services? And when, at the urgency of the plaintiff and his counsel, the defendant agreed to stay on in the receivership, giving up the position which he had secured elsewhere, it was as a sheer matter of favor to the plaintiff, and was in fact so pressed upon him.

The only difficulty is that the acts of the defendant were apparently rendered without expectation of reward, for which neither then nor afterwards was any direct claim ever made. At the same time, they were in no sense voluntary, in view of which, and the assurances given by the plaintiff from time to time, particularly with regard to the note in controversy, the defendant might fairly anticipate that in some way they would eventually be made up to him. It is in the light of and with reference to all this that the promise to release is to be taken. Fifteen thousand dollars is not given away for nothing, nor is it to be explained in the present instance on the score of friendship, particularly as the plaintiff's regard, as he himself says, had begun to decidedly weaken. Based squarely, as it was by the express declaration of the plaintiff, on the extraordinary services which the defendant had rendered, it thus became at the same time a recognition of their value and of the obligation resting upon him to make compensation, an admission which put the defendant in a position to demand something substantial, even if the release set up were not supportable. It was not simply, as before, that the plaintiff did not want to see the defendant lose by the venture. That, also, may have actuated him. But what he proposed, as it was put, was to positively and directly remunerate him, according to what was acknowledged to be his actual due. Conceding, then, as we must, that a consideration for the promise to release, which is relied upon, must appear, and that consisting, as it did, of services already rendered, they must have been of such a character and performed under such circumstances as entitled the defendant, not only to expect, but to enforce, compensation, there is enough, in our judgment, to meet these requirements in what is found here. It may seem dangerous to hold, as we thus apparently do, that a money obligation of this magnitude can be discharged by a casual observation in an informal interview, without anything directly moving between the parties at the time, and with nothing but the say-so of the party released to sustain it. This is not, indeed, the whole case. But, giving full force to the circumstances

which are thus alluded to, they bear, as already stated, merely on the probabilities, and not on the legal principle involved, with which we are alone concerned at this time, which having been correctly declared at the trial, the judgment is affirmed.

JAMES v. EVANS.

(Circuit Court of Appeals, Third Circuit. December 17, 1906.)

No. 21.

1. NEW TRIAL—ORDER—TIME.
   Where a verdict and judgment were rendered for one of two joint tort-feasors and against the other, an order granting a new trial at the same term was in time.
2. TRIAL—VERDICT—CONSTRUCTION.
   Where, in an action for conspiracy against two joint defendants, the jury returned a verdict finding in favor of plaintiff for a specified sum and against F., "one of the defendants," the finding should be construed as a verdict in favor of the other defendant.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 772.]
3. CONSPIRACY—PARTIES—JOINT AND SEVERAL LIABILITY.
   Where plaintiff sued two defendants jointly for conspiracy, and a verdict was rendered in plaintiff's favor against one of the defendants only, plaintiff was entitled to a judgment as against him.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 24.]
4. WRIT OF ERROR—NEW TRIAL—DISCRETION—REVIEW.
   The rule that the allowance or refusal of a new trial rests in the discretion of the trial court, and will not be interfered with on a writ of error, has no application, where such allowance or refusal results from a clear abuse of discretion.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860–3870.]
5. SAME—ABUSE OF DISCRETION.
   Where a new trial was awarded solely by reason of an erroneous opinion that, under the pleadings, the verdict could not by any possibility lawfully have been found, there was an abuse of discretion, which might be corrected by writ of error.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860–3870.]
6. NEW TRIAL—ORDER—EFFECT.
   Plaintiff sued two defendants for conspiracy, and, a verdict having been rendered in favor of one of them and against the other, judgment was rendered in favor of the defendant found not guilty, after which an order was made granting a new trial. *Held*, that such order operated to vacate the verdict and judgment in favor of the defendant not charged.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 331.]

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

For opinion below, see 140 Fed. 419.

J. C. Swartley, for plaintiff in error.

George T. Hunsicker, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. Regina Evans, the defendant in error, brought in December, 1904, an action of trespass in the circuit court of the United States for the eastern district of Pennsylvania against Wynne James, the plaintiff in error, and Henry G. Freeman, Jr. In her declaration she set forth in substance, among other things, that she was the owner of a farm of ninety-five acres in Bucks county, Pennsylvania, of the value of $5,400 above all incumbrances, and of live stock, crops and farming implements thereon of the value of $3,000; that Freeman was the owner of four old brick houses in Philadelphia assessed at the sum of $21,800, which was in excess of their value; that James was an attorney at law and was employed by the plaintiff for the purpose of effecting a cash private sale of her farm and property thereon; that Freeman and James "did fraudulently, deceitfully, maliciously and unlawfully conspire, combine, confederate and agree together to cheat and deprive plaintiff of her said real and personal property by effecting a fraudulent exchange thereof for a worthless equity in said houses" and by other deceitful and fraudulent devices particularly set forth in the declaration; and that the defendants succeeded in accomplishing the purpose of their conspiracy. The defendants severally having pleaded not guilty, the case went to trial and May 3, 1905, a sealed verdict was brought in and at the same time a written memorandum signed by all the jurors was handed to the clerk, which was in the following words and figures:

"We, the undersigned, jury in the above stated case, find in favor of the plaintiff for $7,273.33, and against Henry G. Freeman, Jr., one of the defendants."

The verdict was formally recorded as follows:

"And afterwards, to wit, on the third day of May, A. D. 1905, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and against Henry G. Freeman, Jr., one of the defendants, and assess the damages at seven thousand two hundred and seventy three and 33/100 dollars ($7,273.33)."

Freeman, through his counsel, moved May 6, 1905, for a new trial and also in arrest of judgment. In support of the motion for a new trial he urged that the court erred, among other things, in charging the jury as follows:

"It is charged in the declaration that there was a conspiracy between these two defendants for the purpose of making these false representations to her, in order to induce her to enter into this transaction whereby she was defrauded. Now in an action like this for deceit or fraudulent misrepresentation, which results in damage, the matter of conspiracy is not the matter which entitles a plaintiff to a recovery. Whether there is a conspiracy charged or proven, or not, if the evidence shows that by false and fraudulent representations of both or one of them, this plaintiff has suffered a damage, she would be entitled to recover against the one perpetrating the wrong upon her; or if both of them had done the wrong, together or separately, whether there was a conspiracy proven or not. If you find that both or one of them perpetrated and have done this wrong, if any wrong was done, the plaintiff would be entitled to recover for the amount of the damage suffered against either one or both, as you find the evidence to be, if you find in her favor, and for such an amount as the evidence would warrant."

And further:

"If, however, you find that there is no conspiracy, and one or the other made false representations of material facts in regard to this transaction which resulted in damage, then you have a right to say that that one is responsible here."

So, too, among the reasons in support of the motion in arrest of judgment substantially the same ground was taken, as follows:

"2. The verdict of the jury having established that there was no fraud or conspiracy as alleged in the declaration, between the said Henry G. Freeman, Jr., and his co-defendant Wynne James, under the pleadings and issue in the case, no verdict could in law be found by the jury against the defendant Freeman individually, and no judgment should be entered on the same."

The counsel for James filed May 10, 1905, with the clerk of the court below a præcipe for the entry of judgment in favor of his client upon the above mentioned verdict, and thereupon judgment was noted upon the record accordingly. The motion for a new trial was granted September 6, 1905, the court, among other things, saying:

"Taking oral and documentary evidence together there was ample proof to sustain the plaintiff's claim, and the jury found a verdict for seven thousand two hundred and seventy-three and thirty-three hundredths dollars ($7,273.33) in favor of claimant but only against Freeman, one of the defendants. * * * The verdict against Freeman alone cannot be sustained in view of the fact that the statement claims for an unlawful combination between Freeman and plaintiff's attorney, James, and the evidence submitted by her tended to prove that allegation, and a new trial should therefore be granted, and it is so ordered."

It is fairly inferable from this language that the court intended and ordered a new trial as to both James and Freeman. The plaintiff, after the expiration of the term in which the verdict was rendered and judgment entered in favor of James, filed a petition in the court below November 2, 1905, praying the court "to reinstate the motions for a new trial and in arrest of judgment, and grant a reargument thereof." The petition recited, among other things, the rendition of the verdict, the filing of the motions for a new trial and in arrest of judgment, the judgment on verdict in favor of James and the order granting a new trial. It alleged in substance, among other things, that the plaintiff and her counsel had believed that a new trial had been awarded as to both defendants, and discovered only October 27, 1905, that a judgment had been entered in favor of James; that owing to the condition of the record it might be contended by the defendants that the judgment in favor of James was a final judgment which could not be set aside by the court; that it might also be contended by them that such judgment "eliminates the element of conspiracy, and plaintiff, if entitled to proceed, can only do so in an action of deceit against Freeman, wherein evidence of declarations and conduct of James in the absence of Freeman will be inadmissible"; that, as the plaintiff was advised and believed, the charge of the court to the jury was correct with respect to the right of the plaintiff to recover against both or either of the defendants, as the facts should warrant, and, therefore, the motions for a new trial and in arrest of judgment should have been denied; that the then condition

of the record was such that "the plaintiff is deprived of all remedy against the defendants or either of them in her action of conspiracy"; and that "unless plaintiff's case, if re-tried, retains its original form of conspiracy against both defendants, and she have a new trial as to both, she is without redress." In disposing of the petition January 8, 1906, the court below considered with some care the scope and effect of the order granting a new trial, which was made September 6, 1905, as above mentioned, and the language used leaves no room for doubt that the order for a new trial related to both defendants. The court said:

"The jury, by the finding for the plaintiff, established the existence of the conspiracy, and a verdict cannot be permitted to stand which seeks to make one defendant pay the total damage. To save Freeman from this injustice, a new trial was granted on a verdict which was as indivisible as the alleged joint wrong upon which it was based. It was a verdict that could only stand or fall as to both. It could not stand as to James and fall as to Freeman. When it was set aside, it was set aside as a whole or not at all. The language used in the opinion shows that both defendants were considered in discussing the reasons for a new trial, and because of their inseparable connection with the transaction the new trial was granted as to both. The action of James, by his counsel, after the term had expired, was a plain indication that he entertained grave doubt as to what the order for a new trial embraced, before the court had any knowledge of the entry of judgment for James, or that there existed any dispute as to the fact that the opinion awarded a new trial against both James and Freeman. Had it been known that judgment had been noted in favor of James at the time of filing the order for a new trial, there is no doubt but that this judgment would have been vacated, but under the decisions it is plain that the awarding of a new trial vacated the judgment in favor of him. Motion to rescind order for a new trial refused. In order that the record may plainly show what was done on September 6th, 1905, the following order will be entered:

And now, to wit, January 8th, 1906, judgment on the verdict as to Wynne James, entered May 10th, 1905, is hereby stricken from the record, and the docket entry made September 6, 1905, which reads 'opinion granting a new trial filed' be amended so as to read 'opinion filed awarding a new trial against Henry G. Freeman, Jr., and Wynne James.'"

The first and second assignments of error present the substantial questions in the case. The latter is that there was error in granting a new trial as to James, and the former, that there was error in making the order of January 8, 1906, striking from the record the judgment on verdict in favor of James, entered May 10, 1905. The order awarding a new trial was made during the term in which the verdict was rendered and the judgment in favor of James entered. It was, therefore, seasonably made, if time alone be considered. But the inquiry remains whether it was in other respects, involving, as it did, the vacation or setting aside of the judgment in favor of James, such an exercise of judicial discretion as cannot successfully be assailed on writ of error. The verdict rendered by the jury May 3, 1905, was not only against Freeman, but in effect, though not in form, was a verdict in favor of James. Girts v. Commonwealth, 22 Pa. 351; Wilderman v. Sandusky, 15 Ill. 60; Missouri Pac. Ry. Co. v. Kingsbury (Tex. Civ. App.) 25 S. W. 322. That such was its operation under the practice of the courts in Pennsylvania we have no reason to doubt. On this verdict, as above stated, judgment was entered in favor of James May 10, 1905. This was a final judgment and its

entry appears to have been regular. Subject to possible reversal on writ of error, and to the power of the court, during the term in which it was entered, in the exercise of a sound discretion, to open or set it aside, it conclusively established immunity on the part of James with respect to all matters in controversy in the suit. The court below having charged the jury that, notwithstanding the fact that the plaintiff in her declaration set forth a conspiracy between James and Freeman to practice the deceit alleged, there could be a recovery on account of resultant damage from both or either of them as the evidence should warrant, a verdict was found, as above stated, against Freeman and in favor of James. The court subsequently changed its views on the subject of several liability, and declared, in the opinion on the motion for a new trial, that a "verdict against Freeman alone could not be sustained in view of the fact that the statement claims for an unlawful combination between Freeman and plaintiff's attorney, James," and, in the opinion on the petition for a re-instatement of the motions for a new trial and in arrest of judgment, that "the act charged could not have been committed by one" and the verdict was "as indivisible as the alleged joint wrong upon which it was based" and "could only stand or fall as to both." We are unable to concur in the opinion of the court below that the only verdict which legitimately could be rendered in this case would be either against or in favor of both defendants. This is in substance an action on the case in the nature of conspiracy. Being a civil remedy, the gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff. The tort in its nature was capable of commission either by both defendants jointly or by Freeman alone. The jury by its verdict found against Freeman and in favor of James. Such a course has been warranted by the authorities from an early day. Skinner v. Gunton, 1 Saund. 228, 230, note; Savile v. Roberts, 1 Ld. Raym. 374, 378, 379; Parker v. Huntington, 2 Gray (Mass.) 124, 127; Laverty v. Vanarsdale, 65 Pa. 507; Collins v. Cronin, 117 Pa. 35, 11 Atl. 869; Rundell v. Kalbfus, 125 Pa. 123, 17 Atl. 238; Fillman v. Ryon, 168 Pa. 484, 32 Atl. 89. It is true that in Wiest v. Traction Co., 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666, followed by Hart v. Allegheny Co. L. Co., 201 Pa. 234, 50 Atl. 1010, Rowland v. Philadelphia, 202 Pa. 50, 51 Atl. 589, Minnich v. Electric Railway Co., 203 Pa. 632, 53 Atl. 501, and Goodman v. Coal Township, 206 Pa. 621, 56 Atl. 65, the court laid down the doctrine that where a suit is brought against a number of defendants jointly charging the commission of a tort, if no concert of action is shown and, therefore, no joint tort appears, there cannot be a verdict against any one of the defendants on proof of a tort committed by him alone. All of these latter cases, however, were in trespass for injuries sustained through negligence; and in none of them was a conspiracy alleged. We cannot assume that the Supreme Court of Pennsylvania intended in deciding them to repudiate the ancient and well-established doctrine applicable to civil actions charging conspiracy. Indeed, in Wiest v. Traction Co., the court evidently intended, without overruling or questioning them, to distinguish its decisions in actions for con-

spiracy from the case of negligence then under consideration. For it said:

"Laverty v. Vanarsdale, 65 Pa. 509, was an action of conspiracy, and that decision is referable to that class of cases. Collins v. Cronin, 117 Pa. 35, 11 Atl. 869, Rundell v. Kalbfus, 125 Pa. 123, 17 Atl. 238, and Fillman v. Ryon, 168 Pa. 484, 32 Atl. 89, are similar in character. These cases do not, we think, when rightly understood, justify the practice, of joining as defendants, in suits for negligence, every one, against whom any ground of liability seems to exist, without regard to the question of whether the case is really one of joint tort."

We think that under the pleadings the court below correctly charged the jury in such manner as to permit a verdict, should the evidence so warrant, against Freeman and in favor of James, and that, the jury having on the evidence found such a verdict, final judgment properly was entered thereon. The ground on which the verdict was set aside and a new trial awarded was, not that a verdict should not have been found against Freeman, but that it "could only stand or fall as to both." While it is a general rule that the allowance or refusal of a new trial rests in the sound discretion of the court and will not be interfered with on a writ of error, it is well settled that this rule has no application where such allowance or refusal results from a clear abuse of discretion. And where a new trial is awarded solely by reason of an erroneous opinion that under the pleadings the verdict could not by any possibility lawfully have been found, there is in legal contemplation an abuse of discretion which can be corrected by writ of error. In awarding a new trial, necessarily involving and effecting the vacation or setting aside of the verdict and judgment in favor of James, the court acted, we think, under a misapprehension of the law, and its action in this regard was not had in the exercise of a sound judicial discretion, but constituted reversible error. In view of the foregoing reasons it is unnecessary particularly to discuss the order of January 8, 1906, made, as before stated, after the expiration of the term in which the verdict was rendered, striking from the record the judgment in favor of James and awarding a new trial against both defendants. The orders awarding a new trial and striking from the record the judgment in favor of James should be reversed, with costs, and that judgment re-instated; and it is so ordered.

McNICOL v. NEW YORK LIFE INS. CO.

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

No. 2,369.

1. INSURANCE—LIFE INSURANCE—CONTRACT—EXECUTION.

Deceased applied for insurance in defendant company, and in order to get a reduction in premium requested informally that his application be dated back. At the time of making the application he paid the local agent the premium for the first year, taking a receipt providing that the premium should be returned in case the application should not be accepted. Defendant elected not to accept the application, unless the applicant amended it, formally requesting that the insurance should take effect as of the prior date, and consenting to certain other conditions

and for this purpose submitted an amended application, with a policy based thereon, which was sent to its local agent with instructions not to deliver until the applicant signed the amended application and paid certain interest on the first premium. The agent wrote the applicant that the policy had arrived "straight as a string" and that he hoped to deliver the same the following Sunday, but insured died before that time without having received the policy, signed the amended application, or paid the additional premium. *Held*, there was no acceptance by deceased of the insurance company's counter proposition, contained in the amended application, sufficient to constitute a contract of insurance.

2. SAME—RECEIPT OF PREMIUM.

The receipt of a first year's premium from an applicant for life insurance, with the qualification that it was conditional on the acceptance by the insurer of the applicant's proposition for insurance as made in his application, and, if the proposition was not accepted, the money should be returned, did not constitute a contract of insurance.

3. SAME—ESTOPPEL.

Defendant insurance company rejected an application for insurance as made, but filled out an amended application and the policy based thereon, and sent the same to its local agent, with instructions not to deliver the policy until insured had signed the amended application and paid the necessary additional premium. The agent wrote the applicant that he had received the policy "straight as a string" and hoped to deliver the same the following Sunday, but the applicant died before signing the amended application or obtaining the policy. *Held*, that the insurance company was not estopped by the letter of the local agent to deny that it had not accepted the applicant's original proposition.

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

On December 14, 1903, one McNicol, of Wichita, Kan., made an application to defendant company for a policy of $5,000 on his life, payable at his death to his son, William D. McNicol, the plaintiff in this action. The applicant was born May 8, 1863, and his age on December 14, 1903, for insurance purposes as determined by his nearest birthday, was 41 years; but, to get a reduction in premium corresponding to a year's less age, he requested informally in his application that his policy be dated back to November 7th, which, if done, would secure for him the benefit of a premium based on the age of 40, instead of 41, years. At the time of making the application he paid the local agent of defendant company at Wichita, in a manner satisfactory to him, the premium for the first year, taking a receipt therefor, with a proviso that, if the policy should not be issued by the company on his application, the amount of the payment should be returned to him by the agent. Pursuant to the usual practice, and as contemplated by him, his application was forwarded to the home office of the company in New York for its approval and acceptance. In due time the company determined that it would not accept the application or issue a policy on it, unless the applicant would make a certain amendment to it, formally requesting that the insurance should take effect as of November 7, 1903, instead of December 14, 1903, the date of the application, and agreeing that the accumulation period and the loan and nonforfeiting provisions of the policy should all relate back to November 7th. The company, finding the medical examination accompanying the application satisfactory, caused a policy of $5,000 to be prepared and executed in general conformity to the application, but attached to it a formal amendment of the application, conforming to its requirement as just stated, and returned them both to its local agent with instructions not to deliver the policy to the applicant until the amendment should be signed by the applicant and until he should pay the sum of $1.10 additional premium; the same being interest at the rate of 5 per cent. per annum on the amount of the first annual premium from November 7th, when the policy was to become effective and when the premium was due, to December 14th, when the application was made for the policy and when the premium was actually

paid. The local agent received the executed policy and the proposed amendment on January 7, 1904, and on that date wrote McNicol, who lived some distance away, that the policy had arrived "straight as a string" and that he hoped to place it in his hands the following Sunday. When McNicol received this letter on Friday, January 8th, he was sick, and, without any change in the facts of the case from those already stated, he died on the morning of Saturday, January 9th, without having received the policy or paid the additional premium or signed the amendment to his application. The beneficiary instituted suit on the policy in the Circuit Court. The court made a special finding of facts, in substance as just stated, and rendered a judgment in favor of the defendant. We are asked to reverse that judgment on this writ of error.

Earl Blake (W. A. Ayres and B. F. Milton, on the brief), for plaintiff in error.

S. B. Amidon and James H. McIntosh, for defendant in error.

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

ADAMS, Circuit Judge, after stating the facts as above, delivered the opinion of the court. The only question in this case is whether the facts as found support the judgment as rendered. The application made for the insurance was a proposition requiring acceptance as made before it became a contract. Travis v. Insurance Co., 43 C. C. A. 653, 104 Fed. 486. This McNicol, not only presumptively, but actually, knew. The receipt taken by him from the local agent when he paid the first year's premium informed him in effect that the payment was only provisionally received, that his application might not be accepted by the company, and, if it should not be accepted, that the agent would return the amount of the payment to him. The facts conclusively show that the application was not accepted. An amended application was prepared by the company, embodying several material modifications or additions to the one made by McNicol, and the same was forwarded to its local agent for submission to the applicant for his consideration and signature if satisfactory. This amounted to a rejection of the proposition as made by McNicol and a counter proposition by the company to him, which could not become a contract until it was accepted by him. Mutual Life Ins. Co. v. Young, 23 Wall. 85, 23 L. Ed. 152; Minneapolis, &c., Ry. Co. v. Mill, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376. This McNicol never did. He unfortunately died before the counter proposition reached him. The minds of the parties never met and no contract was ever concluded between them.

Plaintiff's counsel contend that, as the policy was actually made out as called for in the original application and delivered to the local agent of the company for the applicant, it thereby became a binding contract. If such were the only facts of the case, their contention might be right; but, as already seen, the record contains much more. The proposition as made in the original application was rejected by the company, and a counter proposition made for the consideration of the applicant. The physical making out and sending of the policy to the local agent in themselves constituted no contract. By special direction of the company they were not to be treated as a delivery of the policy. It was not to be delivered until McNicol complied with the terms and conditions specified in the counter proposition.

It is next urged that, as defendant's agent received the first year's premium from the applicant, the company thereby insured him. This contention overlooks important facts of the case, and particularly the qualification attending the act of receiving the money. It was distinctly understood at the time that the receipt of the premium was conditional on the acceptance by the company of the applicant's proposition for insurance as made in his application. If the proposition should not be accepted, the money was to be returned; and that was the agreed limit and measure of the company's liability resulting from the receipt of the first year's premium, in case the policy was not issued.

It was argued orally, but not presented in brief of plaintiff's counsel, that the letter of the local agent, written to McNicol after he had received the policy with special instructions not to deliver it until McNicol paid a further premium and signed a new application, estopped the defendant from denying the consummation of the contract. The company or any of its general officers did not write the letter, and the local agent, as the facts of the case show and as McNicol well knew, had no authority to make a contract of insurance without the approval of the company, and a fortiori had no authority to conclude such a contract in express violation of his specific instructions from the company. Moreover, the letter, whether authorized or not, was not written with the intention that McNicol should regard it as an acceptance of his original proposition for insurance. It would have been gross bad faith on the part of the agent, in the light of his instructions, to attempt to convey any such intention. Not only so, but the language of the letter did not justify reliance upon it by McNicol as an acceptance of his original proposition. It informed him that the agent hoped to place the policy in his hands Sunday. Whether he would do so or not depended as a matter of fact upon whether McNicol would comply with the terms and conditions upon which alone he might deliver the policy or place it in his hands. The expression that the agent hoped to deliver it Sunday is suggestive of a doubt as to his ability to do so; and McNicol had no right to rely on the letter without recognizing the suggested doubt. Moreover, there is no showing that McNicol either refrained from acting or took any affirmative action upon the supposition that the letter concluded his contract with the company. It thus appears that several elements which necessarily enter into estoppel by conduct (Bigelow on Estoppel [5th Ed.] p. 26) are wanting in this case, and their absence effectually refutes the contention of counsel. The case, freed from the obscurities suggested by ingenious counsel is, in our opinion, clearly without merit. The fundamental requisite to the consummation of a contract, the aggregatio mentium, never existed. Before it could have been reached, according to the method of negotiation resorted to by the parties, one of them died, and this unfortunate fact put a stop to further negotiations which might or might not have resulted in a contract.

The judgment of the trial court was clearly for the right party, and is accordingly affirmed.

In re THROCKMORTON.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

Nos. 1,450, 1,522.

1. BANKRUPTCY—PETITION FOR REVIEW.
   On petition to the Circuit Court of Appeals to review orders of the District Court in bankruptcy proceedings, only questions of law arising out of the facts found or conceded can be considered.
   [Ed. Note.—Appeal and review in bankruptcy proceedings, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—REAL ESTATE—LEASING—ACTS OF TRUSTEES.
   At the time of a bankrupt's adjudication, certain of her real estate had been advertised for sale under an order of the state court, and was purchased at the sheriff's sale by F., who immediately leased the farm for $1,200 for the succeeding year. The sheriff's sale was not confirmed, and the land was finally sold by the bankrupt's trustees. On the appointment of the trustees F. turned over to them the tenant's note for the year's rent, and they ratified the lease, after which the tenant paid the note and raised a crop on the land of the value of $8,000. *Held*, that the trustees, after obtaining control of the land, properly ratified such lease as against the rights of the bankrupt.

3. SAME—INTEREST IN LAND—STATE COURTS—JUDGMENT.
   Where, prior to the institution of proceedings in bankruptcy, the highest court of the state in which certain land belonging to the bankrupt was located, had held that W. had acquired title to an undivided one-fifth interest therein on foreclosure of a lien for attorney's fees, and the court in such action had jurisdiction both of the parties and subject-matter, such adjudication could not be collaterally attacked in the bankruptcy proceedings, and the trustees in bankruptcy therefore properly recognized W.'s interest in the land.

4. SAME—SALES—PRICE—ADEQUACY.
   Where land in which a bankrupt owned an undivided four-fifths interest was appraised at $6,000, and the bankrupt's interest was sold for $4,600, the price was not so inadequate as to entitle the bankrupt to have the sale set aside.

5. SAME—DUTY OF TRUSTEES—CONTINUANCE OF SUIT.
   Prior to a bankrupt's adjudication, she had contracted to exchange certain land free from incumbrances for 40 city lots. When the bankruptcy adjudication was made, the bankrupt's land was incumbered by a mortgage for $12,000 and a judgment lien for the services of an attorney. The owner of the lots refused to make the exchange, and the bankrupt had sued him to compel specific performance, in which he had answered that he owned more than the 40 lots in question, and that the contract did not specify which 40 he was to convey. *Held* that, a demurrer to such defense having been overruled, the trustees properly refused to prosecute the suit further.

6. SAME—SALES—ACCEPTANCE OF BID.
   When certain of the bankrupt's real estate was offered for sale, she offered to bid $10,500, but, being unable to deposit $1,000 earnest money or pay the amount of her bid, the auctioneer did not receive or cry her bid, and finally sold the property to another for $10,354. *Held*, that such sale was properly confirmed nearly a month thereafter; the bankrupt having taken no steps in the meantime to make good her bid.

Petitions to Review Orders of the District Court of the United States for the Eastern Division of the Southern District of Ohio, in Bankruptcy.

John Logan, for petitioner.
W. G. Hyde, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On January 7, 1904, Margaret Alice Throckmorton was adjudicated a bankrupt, and on January 27, 1904, Samuel T. Ruggles, Samuel W. Courtwright, and John Schleyer were appointed trustees of her estate. The principal property owned by the bankrupt was a farm in Pickaway county, Ohio, appraised at $17,000, free of dower, a farm in Ross county, Ohio, appraised at $10,500, subject to dower and homestead, after the homestead had been assigned, and six parcels of real estate in Connecticut, appraised at $30,287.50, free of dower. The farms in Pickaway and Ross counties, Ohio, and one parcel of the real estate in Connecticut, have been sold. Each step taken by the trustees in the administration and disposition of this property has been assailed by the bankrupt, first before the referee, and then before the court below, and vigorous efforts have been made to have the trustees removed. Numerous petitions have been laid before us to review the orders of the court below sustaining the referee and the refusals of the court below to remove the trustees. In this connection, we have been urged, not only to consider questions of law not arising out of any facts either found or conceded, but also questions of fact involved in the finding or order sought to be reviewed. Obviously our jurisdiction is restricted to matters of law, and the legal questions we can examine are only those which arise out of the facts found or conceded. In re Taft, 68 C. C. A. 385, 133 Fed. 511; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051. Bearing this in mind, we shall take up the matters sought to be presented so far as they seem to merit consideration.

1. At the time of the adjudication, January 7, 1904, the farm in Pickaway county was being advertised for sale upon an order issued by the common pleas court of that county. It was purchased at the sheriff's sale by a Mr. Foresman. Pending the action of the court on the report of the sale, Foresman leased the farm to one William Cross for $1,200 for a year, from March 1, 1904, to March 1, 1905. The sale by the sheriff was not confirmed, and the land was finally sold by the trustees on December 5, 1904. Upon the appointment of the trustees, Foresman turned over to them the note for $1,200 for the year's rent, and they ratified the lease to Cross. Cross paid the note and was permitted by the trustees to raise and harvest a crop on the farm. On November 17, 1904, before the crop was harvested, the bankrupt filed a petition setting forth the lease to Cross, averring that the crop was of the value of $8,000, that the farm had been advertised for sale without the crop by the trustees, and asking that they be ordered to retake possession of the farm, take possession of the crop, and stop the sale until this should be done. It was charged that there was fraud and collusion between the trustees and Foresman and Cross. The matter came before the lower court, first on a demurrer to the petition, which was sustained, and then, as the record shows, on a consideration of the facts; the entry being:

"On consideration of the allegations of the petition, the facts shown by the record of said proceedings, the statements of the counsel for said parties, and facts relating to said petition and its allegations, within the knowledge of the court and by the court, the court doth find the allegations of said petition not true, and doth dismiss said petition."

There is nothing for us to review in this order. If the petition contained any facts entitling the petitioners to the relief sought, and we agree with the court below that it did not, we must conclude from the entry that the court below found them to be untrue. We have no power to review its action in that regard. Upon the merits, so far as the facts appear, we think the trustees did the proper and prudent thing in renting the farm to Cross under the circumstances. If they had not, there would have been no crop raised and no rent paid.

2. Prior to 1898, the Connecticut land, consisting of six tracts or parcels, belonged to John I. Throckmorton, the husband of the bankrupt. He took advantage of the bankrupt act in 1899, but on March 5, 1898, through one Bacon Wakeman, a member of the bar at Bridgeport, Conn., he conveyed the undivided four-fifths of this real estate to his wife, Margaret Alice Throckmorton. On March 12, 1898, the two, John I. Throckmorton and Margaret Alice Throckmorton, gave a mortgage on the real estate to the Bridgeport Savings Bank for $12,000. On March 24, 1898, Bacon Wakeman, claiming that John I. Throckmorton was indebted to him for legal services, sued out an attachment upon John I. Throckmorton's remaining interest in the land. It is out of this attachment, and the subsequent legal proceedings to enforce it, that the next question arises.

On November 29, 1901, Wakeman recovered a judgment against John I. Throckmorton for $827.69, to be satisfied only out of the interest Throckmorton had at the time of the attachment in the real estate. On February 20, 1903, Wakeman began an action in the court of common pleas of Fairfield county, Conn., to foreclose his judgment lien on the premises attached, and on March 10, 1904, a judgment of foreclosure was entered, after a hearing upon the answers of John I. Throckmorton and the bankrupt. The bankrupt was given until July 5, 1904, and John I. Throckmorton until July 7, 1904, to redeem the premises. But they did nothing. When the trustees attempted on December 14, 1904, to sell the Connecticut land, they found Wakeman insisting that by a strict foreclosure of his judgment lien he had secured title to the undivided one-fifth interest which John I. Throckmorton owned at the time of the attachment. As a result, while one of the tracts was sold at the first sale, a matter we shall refer to hereafter in another connection, the order of sale was subsequently modified so as to authorize the trustees to offer, not the whole, but only the undivided four-fifths interest, in the land. This modification was based upon the finding of the referee that Wakeman by his strict foreclosure had secured the one-fifth interest in the real estate.

This order, the recognition of Wakeman's interest on which it was based, and the action of the trustees in giving it effect, are vigorously assailed. The main assault is naturally made upon the decision of the Supreme Court of Errors of Connecticut, in the case of Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 554, decided March 5, 1902.

A learned argument has been made designed to show that the highest court of Connecticut erred in deciding this case in favor of Wakeman. We are not disposed, under the circumstances, to enter into a discussion of the Connecticut law regulating the taking and foreclosure of liens of this character upon real estate in that state. It is enough to say that it appears in the case mentioned that the Connecticut courts had jurisdiction of the parties and the subject-matter of the action, and that the highest court in that state, in a well-considered opinion, decided the controversy in favor of the validity of Wakeman's claim. We have no authority in a collateral proceeding to set at naught this adjudication. We approve of the action of the court below sustaining the referee's recognition of Wakeman's interest in the Connecticut land, and find no cause to criticise the trustees for pursuing the course they did with reference to it.

3. At the sale on December 14, 1904, the so-called "first tract" of the Connecticut land was sold to D. Fairchild Wheeler at his bid of $4,600. This sale was set aside by the referee, but the court below, upon a petition for review, reversed the referee and confirmed the sale for a four-fifths interest in the tract; that being all the trustees could sell in view of Wakeman's interest. We are now asked to review and reverse the court. We question whether, in this connection, there is any matter here for review; but, if there were, we would not interfere with the discretion exercised by the court below. The tract was appraised at $6,000, and four-fifths of it sold for $4,600. This was not a bad sale as such sales go, and it does not appear that any better offer has been made.

4. Prior to the adjudication, Margaret Alice Throckmorton entered into a contract to exchange the first tract of the Connecticut land to Benjamin Monnett, of Columbus, Ohio, for 40 of the lots the latter had laid out in a suburb of that place. The contract provided that she should convey the Connecticut land in fee simple, free of incumbrance, and that Monnett should secure her a loan of $8,000 on the Columbus lots. When she became a bankrupt, this land was incumbered by a mortgage of $12,000 to the Bridgeport Savings Bank and by the judgment lien of Wakeman. Before this Monnett refused to make the exchange, and she had sued him to compel a specific performance. This suit was pending when the trustees were appointed. Monnett's answer set up three defenses; the third being that he owned more than 40 lots, and the contract did not specify which forty he was to convey. A demurrer to this defense was overruled. Afterwards the trustees declined to prosecute the suit further, because they did not believe they could successfully maintain it. We think in this they did right. Even if the contract could have been made certain, so as to ascertain which 40 lots Monnett had agreed to convey, still the Connecticut tract was incumbered to such an extent, not only by the $12,000 mortgage to the Bridgeport Savings Bank, but also by the recognized claim of Wakeman to an undivided one-fifth interest, that it was impracticable for the trustees to comply with the terms of the contract on the part of the bankrupt. At any rate, under all the circumstances, they should have been allowed some discretion, and the decision they reached met with the approval of the court below.

5. When the Ross county farm was offered for sale the second time, the bankrupt offered to bid $10,500 for it. She did not at that time have the money to comply with the terms of the sale, by either making the deposit required by the trustees of $1,000 earnest money, or by paying the amount she bid. The auctioneer, not deeming her responsible, did not receive or cry her bid, and the property was knocked down to Milton S. Bartholomew for $10,354. This was on the 18th of September, 1905. The sale was reported on the 21st of September. On the 7th of October the referee confirmed the sale to Bartholomew, finding that neither at the time of the sale, nor since, had the bankrupt been able to comply with the terms of the sale and make her bid good. We are at a loss to comprehend what reason can be given for reversing the action of the referee or that of the court in sustaining it. The referee gave the bankrupt every opportunity to make her bid good, and it was only when she failed to do so that the sale to Bartholomew was confirmed.

6. The action of the court below in declining to remove the trustees meets with our hearty approval. The charges against them do not merit discussion.

The orders and judgment of the lower court are affirmed.

ROBINSON et al. v. BRAST et al.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 656.

EQUITY—JURISDICTION—DETERMINING LEGAL RIGHTS ON CROSS-BILL.

A bill in equity was filed by the lessors in an oil lease against the lessee for a discovery and an accounting with respect to royalties reserved by the lease, and for a specific performance of the contract as to delivery of such royalty oil. The defendant answered, and also filed a cross-bill, in which it insisted on its rights under the lease, and alleged that certain other persons who were made defendants thereto claimed ownership of portions of the land, and prayed that their rights be determined by the court. Such defendants appeared, and with the consent of all parties all questions raised by the pleadings were referred to a master who made findings with respect to the title to the lands, which were confirmed by the court and a decree entered. *Held*, that the bill filed by the original defendant was not a bill of interpleader, but a cross-bill in aid of its answer, setting up matters necessary to be determined as preliminary to a decision on the original bill, and which as such the court had jurisdiction to determine, and that all parties having submitted their rights to such determination were bound by the decree, even if it did declare legal rights.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Dave D. Johnson, for appellants Robinson and Smith.

V. B. Archer, for appellant John Stephens.

Thomas P. Jacobs and R. E. Horner (S. Bruce Hall, on the briefs), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

GOFF, Circuit Judge. From the decree of the court below, entered on the 23d day of August, 1905, this appeal has been sued out. The appellees A. E. Brast and M. A. Brast were complainants in the original bill filed in this controversy on the 31st day of January, 1896, and the appellee the South Penn Oil Company was the sole defendant thereto, the object of which was to enforce the provisions of a contract, and to compel an accounting. Said complainants, claiming to be the owners in fee of a certain tract of 640 acres of land situated in the Northern District of West Virginia, on the 2d day of July, 1892, leased the same for oil and gas purposes to Ira De Witte, who assigned and transferred the lease to the South Penn Oil Company, which company entered upon the land, developed the same, produced oil therefrom, and delivered it to the pipe line company for transportation, as was provided for in the lease. The complainants, who also claimed title to another tract of 347 acres of land, adjoining the one so mentioned, on the 23d of July, 1894, leased the same to the South Penn Oil Company, and that company, proceeding with development, produced oil therefrom and delivered it to the pipe line company. Complainants claimed that they were entitled to one-eighth of the oil as royalty, and that they were also entitled, by usage as well as by law, to a division order from said oil company, by which the oil so delivered to the Pipe Line Company could have been apportioned preparatory to its sale. It was alleged in the bill that the South Penn Oil Company refused to deliver the oil from some of the wells it had drilled on the land, and that it declined to execute a proper division order concerning it. Because of such refusal, and of complainants' inability to discover the quantity of oil that had been produced, and also because of the inadequacy of the remedies provided by law, the bill in equity was filed, by which a discovery, an accounting, and a specific performance was asked for. In March, 1896, the South Penn Oil Company demurred to the bill, on consideration of which the court overruled the same, and appointed a receiver to take charge of the royalty oil. The answer of the South Penn Oil Company was then filed, in which it was set forth that the land, or the portion of it on which the wells were located, belonged to John Blackshere, Charles E. Wells, N. S. Beatty, A. N. Pritchard, and A. W. Pritchard, and that said complainants did not have title thereto, and that therefore some of the royalty oil had not been delivered to them.

The South Penn Oil Company afterwards, in April, 1897, filed in said proceeding its bill, in effect a cross-bill, to which the original complainants and a number of persons who claimed title to different parts of the land included in the leases mentioned were made defendants. It was set out in said bill that the South Penn Oil Company was willing to deliver the oil due under the leases to those justly entitled to the same, and the court was asked to determine as between the various claimants to which of them the royalty oil should be given. A further history of the title to said lands and of the various conflicting claims connected therewith is not deemed essential to the proper disposition of this appeal. It will be sufficient to state that on motion the causes were consolidated, that answers were duly filed, and the case regularly matured for hearing; that the court below by decree disposed of many of

the questions at issue, to the satisfaction of the parties in interest, other than the appellants; that it then appearing there were still conflicting claims to the residue of the oil in the hands of the receiver, and to the land mentioned in the pleadings, the case was referred to a master in chancery, with directions that he report what lands claimed by the defendants to the bill of the South Penn Oil Company were included in the leases made by A. E. and M. A. Brast, the titles of such defendants to the separate tracts of land by them claimed, what amount of the oil had been produced from each of said tracts, and the royalty due to each, and the owner thereof, the quantity of oil in the possession of the receiver, and also a description and the location of each well, together with a special report on any matter required by any party in interest. The master was required to have the evidence taken down in shorthand, transcribed, and returned with his report, and a surveyor was appointed to do such surveying and make such plats as the master might direct, or any party to the litigation should require.

The master, after due notice to all of the parties, proceeded to execute said order of reference, heard all of the evidence offered, examined the title papers submitted by the various claimants, had the necessary surveying and platting made, formulated, and returned his report, together with the evidence, exhibits and his findings. Much time was given by the master, by the attorneys of the various claimants, by the receiver, and by the surveyor, to the investigation and the report made under the decree referred to, and the court, after carefully examining the exceptions taken thereto, by many of the parties in interest, including the appellants, made and entered the decree now complained of.

The assignments of error, many in number, are, when considered in connection with the pleadings and the evidence, unusually technical and absolutely devoid of merit. They relate to the jurisdiction of the court below, and to the method of procedure therein under the rules of equity practice.

The demurrer to the original bill was properly overruled. The case made by it was clearly of equitable cognizance, involving not only specific performance, but a discovery and an accounting. Equity jurisdiction in such cases is elementary; the authorities in support thereof suggesting themselves as the question is presented. But it is insisted, that granting the jurisdiction as to the original bill, nevertheless the court below did not have jurisdiction of the questions raised, nor of the defendants to the bill filed by the South Penn Oil Company. It is called by counsel for appellants a bill of "interpleader," and after they so designate it they suggest that it should not be entertained because the complainant, instead of being a mere stakeholder, was interested in the subject-matter and claimed a decree in its favor. But why should we discuss in connection with this case the technical and elementary questions involved in a bill of interpleader, when a glance at the record submitted for our consideration shows that it was not filed as such a bill, was not so regarded by the parties, nor so treated by the court? The fact that parties claiming an interest in the lands in controversy are called on to produce their titles, and the evidence at their command to sustain their claims—in other words, to interplead concerning those

matters—does not make it technically a bill of interpleader, especially when it is disclosed by the bill itself that the complainant claims the exclusive right to develop and operate the lands in controversy, by virtue of the leases mentioned; refers to the original bill filed by A. E. and M. A. Brast, and insists that it cannot be properly disposed of until other parties interested in the issues involved in it are before the court; prays that the bills be heard together; and asks that the interests of the complainant therein, who was defendant to the original bill, be protected as to the royalty oil in controversy.

This bill was really filed as a cross-bill, in aid of the answer of the sole original defendant, and it contained all of the elements of such a bill. Concede that it contained other features, and it does not follow that thereby it was deprived of the virtue that it clearly had, and that because thereof the court was prevented from decreeing concerning the matters set out by it directly bearing upon the questions presented by the original bill. It is quite clear that the South Penn Oil Company could not have made good the defense set up in its answer to the original bill, except by bringing in other parties, which it did by the bill now under consideration. While it is true that by its bill the South Penn Oil Company prayed that the defendants be required to interplead, so that the question of title might be determined before the royalty oil was delivered, still at the same time it set up and claimed its own interests in and to said leases, and made it quite apparent that it was not filing what in equity practice is called a bill of interpleader. The court below, as well as counsel, including those now representing the appellants, regarded it as a cross-bill, and in all of the subsequent proceedings it was so treated. It was duly answered as a cross-bill by the defendants thereto, and, while an order of consolidation with the first bill filed was afterwards entered, such procedure was unnecessary, and was clearly an inadvertence, which will not now be construed to the prejudice of any of the parties, all of whom acquiesced in such action, and in the decree referring the cause to a master before whom they appeared with their proofs, and concerning whose report they stipulated that it should be accepted by them as conclusive of their respective titles and rights, subject to such exceptions as they might in due time file to it. This court must look at the bills, pleadings, and proceedings had in the cause in the light the record presents them in, and not in that technical manner that the exigencies of the situation confronting the appellants may suggest to them. It would be inequitable, cause great loss, unusual delay, and much confusion, to now change the character of the proceedings had in this litigation, proceedings taken in the court below with the assent of those now complaining. It was the intention of all the parties to avoid a multiplicity of suits, to completely determine their respective rights, and to secure full and final relief to all connected with the subject-matter set forth in both the original and the cross-bills. It was the endeavor of the court below to proceed in the manner desired by those in interest, and in so doing we are unable to find error. The court had acquired jurisdiction of the cause upon well-established equitable grounds, and in its proceedings and adjudications, in order to properly dispose of the controversy involved, even if it established legal rights and decreed legal

remedies, it did not go beyond the scope of its authority. In the course of the litigation the chancellor deemed it proper, for the purpose of aiding him in reaching a just conclusion, to refer the cause to a master, a right that was clearly his, and a discretion that he wisely exercised. He was not bound by the master's report, for he could have ignored it, but, after considering all the exceptions to it, he confirmed it and decreed accordingly, a conclusion in which this court fully concurs. He could have directed an issue out of chancery had he thought best, but he would not have been controlled by the verdict of the jury, had it not commended itself to his conscience. As a chancellor, the court below, having jurisdiction of the original cause, could have disposed of both legal and equitable questions, if such disposition had been found necessary to the proper determination of the issues raised by the pleadings.

The assignments of error embrace other points, but they are without force, and as they are in effect included in the observations already given they are not specifically referred to.

There was no decree against the appellant Robinson, and as to her the appeal was improvidently allowed. The errors assigned by appellants Smith and Stephens are without merit, and the decree appealed from is affirmed.

JONES v. GOULD et al.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1906.)

No. 1,551.

1. APPEARANCE—GENERAL OR SPECIAL APPEARANCE—MOTION TO QUASH SERVICE.

The filing in a federal court by the defendant who was a citizen and resident of another state and was there served, of a motion to quash the service on the ground that "it appears from the face of the bill of complaint that the relief sought is of such nature that he cannot lawfully be called upon to defend against the same in this district" did not invoke the exercise of the jurisdiction of the court on the merits, so as to constitute a general appearance; the question raised being whether the case made by the bill was one of a local nature within section 8, Judiciary Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], so as to authorize the court to obtain jurisdiction of defendant by publication or by service of process without the district, which necessarily required the court to look into the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 44.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—LOCAL SUITS.

A suit must be one which concerns the title to some specific property within the district to come within the intent and meaning of Federal Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], authorizing a circuit court to obtain jurisdiction of nonresident defendants by substituted service, and a suit by a member of a syndicate, which was in effect a partnership, to wind up its affairs and for the appointment of a receiver on the ground of mismanagement by the managers, is not such a suit, especially where the only allegation in the bill with respect to property within the district is that the syndicate is the owner of stock in certain railroads therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 809.]

3. EQUITY—NECESSARY PARTIES—DISMISSAL—WANT OF JURISDICTION.
A bill in a federal court is properly dismissed, where the court cannot obtain jurisdiction over nonresident defendants, who are necessary parties, by service of process in another state or by publication, and such defendants cannot be served within the district, and refuse to appear.

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

For opinion below, see 141 Fed. 698.

C. B. Matthews, for appellant.

J. H. Doyle and W. M. Duncan, for appellees.

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

SEVERENS, Circuit Judge. In December, 1901, three of the defendants, Gould, a citizen of New York, and Ramsey and Guy, citizens of Missouri, in the character of managers, entered into an agreement with other subscribers to form a "syndicate," as they called it, for the purpose of acquiring and purchasing certain railroad properties in West Virginia and Ohio, and purchasing coal lands in the former state, and of improving, extending, merging, operating, controlling, and disposing of the properties, the railroads and lands, as the managers might determine, for the benefit of the syndicate. Each of the subscribers agreed to contribute from time to time when required, to the purposes of the syndicate ratably with the others to the extent of their subscriptions. Ample powers were given to the managers for the full control and management of all its affairs, and their appointment was made irrevocable. The profits and losses were to be shared by the subscribers ratably, and the net proceeds of the enterprise were finally to be distributed to them in the like proportion. Subscriptions to this agreement were obtained amounting to $7,000,000 or $8,000,000, of which the managers subscribed about one-half. The complainant in this suit subscribed for $100,000. The project was carried forward by the managers. Railroads were bought or built in each state, and 85,000 acres of coal lands in West Virginia were also bought. For the building and operation of some of the railroads, the managers organized corporations in the states where they were severally located. In other cases, they purchased the capital stock of existing corporations thereby obtaining control. Of the corporations organized by the managers, two were in Ohio, the Janesville, Marietta & Parkersburg Railroad Company and the Marietta, Columbus & Cleveland Railroad Company. Many details of the operations of the managers in the conduct of the business of the syndicate are stated in the bill which it is not now important to enumerate.

On September 26, 1905, the complainant, John S. Jones, of Chicago, and a citizen of Illinois, filed this bill in the Circuit Court for the Southern District of Ohio, against the defendants, Gould as a citizen of New York, Ramsey and Guy as citizens of Missouri, The Union Trust Company, also a citizen of Missouri, and other persons and corporations, citizens of other states than Illinois, the corporations being the railroad companies in West Virginia and Ohio above mentioned,

and the other private parties being persons who had participated in the transactions complained of. The bill, after setting out the agreement of December, 1901, states that the managers, under color of the authority given them, have been guilty of many enumerated breaches of their trust by wrongful acts and negligences in the management of the syndicate's affairs, which have resulted in serious loss and damage to the other subscribers, himself among them. As we are not to decide the merits, it is necessary to do no more than to make this general statement of the charges made by the bill. The prayer is for an injunction to restrain the managers from doing certain specified things in their management of the affairs of the syndicate, which are charged to be prejudicial, for a receiver and for the sale of the assets, the payment of its debts, and the distribution of the net proceeds to the subscribers.

Upon the filing of the bill, the complainant moved thereon for the appointment of a receiver; and the motion was set for hearing on October 9, 1905. And the court made the further order that pending the hearing of the motion, the defendants Gould, Ramsey, and Guy, be restrained from disposing of certain property described in said order. The court also required that notice of the order should be served personally upon the defendants last named, and Blair, another of the individual defendants described in the bill as a citizen of West Virginia. Notice of the hearing and a certified copy of the bill of complaint were served on Blair; at what place is not shown by the affidavit of service, but as the affidavit was made and sworn to in West Virginia, and he is described as a citizen of that state, we infer that the notice was served there. We also infer from what follows that a like notice was also served on Gould, Ramsey, and Guy in the states of which they were, respectively, citizens. Ramsey, Guy, and Blair in one motion, and Gould in another, appearing specially for the purpose of the motions, and, protesting against the jurisdiction of the court, moved to quash the service of the notice of the order above mentioned. These motions were based upon the grounds as therein stated, in the motion of Gould:

"First. That he is an inhabitant and a citizen of the state of New Jersey. Second. It appears upon the face of the bill of complaint that the relief sought is of such nature that he can not lawfully be called upon to defend against the same in this district. Third. This court is without jurisdiction to proceed against him."

And in the motion of the others:

"First. That said Joseph Ramsey, Jr., and W. E. Guy, and each of them, are inhabitants and citizens of the state of Missouri, and that E. D. Fultin and J. T. Blair, and each of them, are citizens and inhabitants of the state of Pennsylvania."

The second and third grounds were, in substance, the same as the second and third of Gould's. On the day appointed for hearing, the court Richards, Circuit Judge, presiding, granted the motions to quash the service of notice and ordered as follows:

"And the court being of the opinion that it is without jurisdiction of the said suit, and of its own motion, hereby orders, adjudges and decrees that the bill of complaint herein be and the same is hereby dismissed for want of jurisdiction, and the restraining order heretofore granted is hereby dissolved."

Judge Richards' opinion is reported in 141 Fed. 698. On this appeal the complainant assigns error as follows:

"First. The court erred in granting the motion in this case made by Joseph Ramsey, Jr., William E. Guy, E. D. Fulton, and James T. Blair, defendants above named, to quash the service of an order of this court entered herein on September 26, 1905.

"Second. The court erred in granting a motion, filed on the ——— day of October, 1905, by George J. Gould, one of the defendants above named, to quash the service of an order on said defendant made by this court herein on the 26th day of September, 1905.

"Third. The court erred in holding that this suit, was not a suit in which service upon nonresident defendants could be made by publication or otherwise, in accordance with the orders of the court in that behalf, under section 738 of the Revised Statutes of the United States.

"Fourth. The court erred in holding that this suit was one over which the said Circuit Court of the United States had no jurisdiction, and dismissing the complainant's bill and amendment to the bill on its own motion, and dissolving the injunction.

"Fifth. This court erred in not retaining jurisdiction of said cause, and directing service by publication on the nonresident defendants, under section 738 of the Revised Statutes of the United States.

"Sixth. This court erred in not holding that the parties making the several motions specified in the first and second assignments of error, had entered their appearance in this cause, and submitted themselves to the jurisdiction of this court."

The principal questions which we are asked to review are:

(1) Did the defendants in stating the second ground of their motion submit as respects their persons, to the jurisdiction of the court?

(2) Was the nature of the case such that the court could obtain jurisdiction of the defendants by publication of notice, or service outside of the territory of its jurisdiction?

(3) Did the court err in dismissing the cause for lack of jurisdiction over persons whose presence was necessary to the prosecution of the suit?

In respect to the first of these questions, it is urged by counsel for the appellant that the defendants invoked the exercise of the jurisdiction upon the merits, by requiring the court to pass upon the facts of the case in order to determine the nature of the relief demanded against each of the defendants. But we think this is a forced construction of the language employed. It was indeed necessary for the court to look into the bill and ascertain from its allegations and the prayer for relief whether the nature of the case was such as to authorize it under the provisions of section 738, Rev. St., and of section 8, Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], to obtain jurisdiction of the defendants by publication of notice or service of process outside of its territory, for service could not be had within it. Without such examination and consideration of the nature of the relief sought, the court could not know whether it was an "action to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance of lien, or cloud, upon the title to real or personal property within the district where such suit is brought," to use the language of the statute, authorizing substituted service. The defendants, therefore, properly referred to the nature of the relief sought by the bill as a reason for denying the jurisdiction of the court over

their persons, for as they were neither citizens of the state nor residents therein, personal service could not be had, and the question for the court would then be whether the nature of the case was such that the substituted service authorized by the statute could be resorted to.

The second question is whether the case made by the bill and the nature of the relief asked would authorize the substituted service permitted by the statute. The provision is one similar to those in many of the states, perhaps all, enacted upon a sense of that public policy which requires that the status of its inhabitants and their rights of property localized in its dominion should be settled by its own tribunals, and that they should not be driven to foreign states to litigate such questions there with persons out of the state's jurisdiction. The territorial limitations of the power of the federal courts has respect to this policy, and aims as far as may be, consistently with the system of the Constitution and laws of the Union, to uphold it. This statute was enacted in that spirit. It did not intend to dispense with the time-honored requirement that personal service of process should be made within the jurisdiction in order to bring the party pursued under the authority of the court, further than is necessary to give the local court the power of decision concerning subjects fixed in its territory. The statute contemplates that the action in which substituted service of process may be made must be one which relates to "the title to real or personal property within the district," language which imports a localized subject. Further, the action must be one to enforce some right in it, or to remove some obstruction to the enjoyment of it. It does not concern the rights to property which is intangible and transitory, choses in action and the like, adhering to the person of the owner, who may be here to-day and abroad to-morrow. Such subjects are not localized, and have never been within the scope of that solicitude which the policy of the state exerts for its inhabitants and over the fixed and tangible objects of ownership within its dominion.

Again, what is the legitimate subject of the kind of action to which the statute has reference? Evidently it must be the title to some property. In strictness, the word "title" is applicable only to real estate. But it is also sometimes used to denote a similar attribute of personal property. When so used, it has a kindred meaning, and contemplates some specific tangible thing, having some resemblance to real property in its characterictics which justifies the borrowing of the term. It is rarely, if ever, used to denote the ownership of transitory and intangible objects. It is singular that, although this statute has been in force for more than 30 years, there should be such a dearth of authority upon the matter of its construction. The validity of state legislation of this kind, so far as it affects titles to real estate, has been repeatedly affirmed; and no doubt is now entertained upon that subject. Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, and cases which have followed it. And it may be assumed that similar legislation for the judicial control of localized personal property would also be sustained. But that is the extent, so far as we know, to which such legislation has been attempted. The only case where the question with which we are now concerned was directly involved to

which we are referred, or have found, is that of Shainwald v. Lewis (D. C.) 5 Fed. 510, where Judge Hillyer, of the District Court of Nevada held that this section was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable upon or to some specific property, real or personal, within the district. Of course he was referring to that language of the act which relates to actions for the enforcement of a claim, and not to that relating to the removal of obstructions. The subject was discussed by Mr. Justice Brown in Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69, and, although nothing particularly relevant here was actually decided, the language of the learned justice seems to assume that the subject of controversy in order to justify obtaining jurisdiction by substituted service must be a res localized within the district.

Now, the object sought by the bill in the present case was the arrest of the business and the winding up of the affairs of the partnership (for such it appears to have been) called the syndicate, on account of the misfeasances and negligences of the managers, Gould, Ramsey, and Guy. These charges were the gravamen of the complaint. Those persons were indispensable parties to the suit. No relief was sought against the two Ohio corporations, and the propriety of making them parties is not apparent. The assets of the syndicate, which it is alleged it had in Ohio, consisted of the stock of the two Ohio railroad companies above mentioned; and it is upon the theory that this stock had a situs in that state which localized it there, and gave ground for a suit in the courts exercising jurisdiction in the state against those railroad companies, and the bringing in of the managers of the syndicate by the substituted service of process provided by the statute above mentioned. And the case of Jellenik v. Huron Copper Mining Company, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, is cited as authority for the proposition that the situs of these stocks was in Ohio and that therefore the court sitting in a district of the state would have jurisdiction of a suit in which the stock is involved in the controversy. But the question there decided is not involved. For here there was no controversy about the ownership of the stock, as in that case, or about any lien or claim to it, or about any cloud or incumbrance upon it. The controversy raised by the bill is over the management of the business and affairs of the railroad companies by the managers, such as their expenditure of large sums of money in grading parts of the road, and not completing them "whereby the grading is going to ruin," the failure to effect proper and advantageous connection with other railroads, and the like. Upon allegations of such mismanagement it is charged that there is such a breach of the syndicate agreement and of the duties of the managers as justifies the dissolution of the compact and a closing up of the enterprises which the subscribers undertook. We are therefore of opinion that the case was not one in which the court could acquire jurisdiction of the defendants by the extraordinary service of process prescribed by the statute referred to.

The third question is whether the court erred in dismissing the bill.

If, as we have held, the case was not one in which the court could obtain jurisdiction by service of process in another state or by publication of notice, it had no power to proceed. The defendants, who were indispensable parties were citizens and residents of other states as the bill stated; and a suit could not be brought against them by a citizen of Illinois in the Southern District of Ohio without their consent. Section 1 Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]; St. Louis & San Francisco Ry. Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659. They did not waive their privilege, which is enough to say; but they expressly dissented.

The order and decree dismissing the bill for want of jurisdiction should be affirmed, with costs.

EAST ST. LOUIS RY. CO. v. LOUISVILLE & N. R. CO.

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

No. 1,317.

1. RAILROADS—USE OF STREETS—INJUNCTION TO PREVENT CROSSING BY STREET RAILROAD.

   Under the settled law of Illinois, authority given a railroad company by a city to cross a street with its tracks confers no exclusive rights in such street, but the right granted is subordinate to the use of the street for ordinary street purposes, which include the operating of a street railroad thereon; and the railroad company cannot maintain a suit in equity to enjoin the building and operating of a street railroad upon such street, crossing its tracks at grade, on the ground that such crossing will cause inconvenience to it in the operation of its trains, and add to the dangers of the street crossing.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 235, 195, 197.]

2. MUNICIPAL CORPORATIONS—POWER OF CITY COUNCIL TO REGULATE RAILROAD CROSSINGS IN STREETS—ILLINOIS STATUTES.

   The plenary powers given to city councils as governmental agencies of the state by City & Village Act Ill. c. 24, § 62 (Hurd's Rev. St. 1905), to regulate the use of the streets of the city, to permit their use by street railroads, and regulate the crossing of streets by railroads, includes power to authorize the crossing of a railroad track over a street by a street railroad; and such power is not taken away or affected by Act July 1, 1889, p. 223, 3 Starr & C. Ann. St. Ill. c. 114, par. 112, p. 3292, creating the State Railroad and Warehouse Commission, with power to prescribe the place where, and the manner in which, one railroad company may cross with its tracks the tracks of another company.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1464, 1465; vol. 41, Railroads, §§ 255, 256.]

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

The appellee, organized under the laws of Kentucky, and lessee of a railroad corporation organized under the laws of Illinois, had constructed and operated, long before the time of the controversy in question, its railway tracks across Seventh Street, in the City of East St. Louis, at the point in dispute.

The appellant is a corporation organized under the laws of Illinois, authorizing the organization of street railroads, and is operating its street railway in the city of East St. Louis, for the carriage of passengers and their hand bag-

gage; never having done, and never having been authorized by its charter to do, a general railroad business.

October 24th, 1904, the city council of East St. Louis authorized appellant to construct and operate its street railroad upon Seventh Street, across the tracks of appellee; expressly providing that such crossing be at grade, and specifying the manner of construction and operation, including gates and such other safety precautions as were deemed necessary by the council.

This crossing of its tracks at grade by the street railway, was resisted by the appellee—a petition invoking the jurisdiction of the Railroad and Warehouse Commission of the State of Illinois, to prevent such crossing, being filed October 22nd, 1904; to which petition appellant filed its answer, denying that the Commission had jurisdiction of the subject matter of the crossing. Notwithstanding this challenge of its jurisdiction, the Commission, December 16th, 1904, entered an order that denied the motion to dismiss, and forbade the construction and operation of the street railway as authorized in the ordinance granted by the city council, unless such crossing was effected by an over head bridge.

Certain correspondence ensued between the vice-president of appellant, and the general manager of the appellee—a correspondence that appellee construed as a threat that the appellee would, notwithstanding the order of the Commission complete its crossing at grade—whereupon a bill was filed, upon which, at final hearing, the decree appealed from was entered, restraining appellant from entering upon the right of way and railroad tracks of appellee at the point in dispute, or any point immediately adjacent thereto, except for the sole purpose of constructing and maintaining an over head bridge as prescribed by the Railroad and Warehouse Commission.

The further facts are stated in the opinion.

M. W. Schaefer and W. M. Warnock, for appellant.

J. M. Hamill, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The bill set forth, and the decree found, facts tending to show that a crossing at grade, at the point named, owing to the curvature and grade of appellee's tracks, would increase the inconvenience of appellee in the operation of its road, and would add to the dangers to life at such crossing. But these facts, standing alone, do not constitute a ground for the injunction. Atchison, Topeka & Santa Fé Ry. Co. v. General Electric Co. (Circuit Court of Appeals, Seventh Circuit) 112 Fed. 689, 50 C. C. A. 424.

The bill also avers, and the decree finds, that a certain other electric railroad, organized under the street railway act of the State of Illinois, running between the city of East St. Louis and Alton, had an agreement with appellant, by which appellant was under contract to take its cars at the city limits—operating them, from that point, over the tracks of appellant on Seventh Street, to their destination in East St. Louis, for a certain annual rental; and that certain other electric roads, organized under the railroad act of the state of Illinois, had been theretofore permitted by appellant to run their cars over appellant's tracks into the City of East St. Louis; from which it is argued that the crossing in dispute will become, in fact, a crossing between companies doing a general railroad business, and is therefore within the jurisdiction of the Railroad and Warehouse Commission. But if, independently of these facts, the crossing in dispute is not within the jurisdiction of the Commission, we need not pursue the inquiry as to what would be the effect in case such crossing is used by these other roads; for the charter of appellant does not cover such case, and the

injunction appealed from does not limit itself to any threatened abuse of appellant's charter in that respect. Should such use be attempted, appellee would have its appropriate remedy to prevent injury.

The single inquiry presented to us, therefore, is this: The city council having granted to a street railway company, doing only a street railway business, the right to cross at grade the tracks of a railroad theretofore laid across such street, the crossing to be at a point within the street, has the Railroad and Warehouse Commission of Illinois jurisdiction either to prevent such crossing or prescribe the terms upon which such crossing shall be made?

Section 62, chapter 24, of the City and Village Act of Illinois (passed originally in 1872; Hurd's Rev. St. 1905), provides that the city council shall have power to establish, alter, grade, and otherwise improve streets and alleys; to regulate the use of the same; to permit, regulate, or prohibit the locating and construction of any horse railroad, such permission not to be for longer than twenty years; to provide for and change the location, grade, and crossing of any railroad; and to compel railroads to raise or lower their tracks, to conform to any grade which may be established by the city.

In Robey v. City of Chicago, 215 Ill. 608, 74 N. E. 770 (decided June 23rd, 1905), it was said:

"The City Council, under the General Incorporation Act, which is in force in the City of Chicago, has full power to pass an ordinance granting to a street railway company the right to operate its street railroad in the streets of the city, subject to such limitations as have been imposed upon such municipalities by the Legislature, and in so doing may prescribe the terms and conditions upon which said company may occupy the streets of the city with its tracks, cars, etc. The city, in passing such ordinance, performs a legislative function, and in so doing acts as a governmental agency of the state, and the ordinance, when passed, had the force and effect of a law of the state. In People v. Suburban Railroad Company, 178 Ill. 594, on page 605, 53 N. E. 349, on page 352, 49 L. R. A. 650, it is said: 'The state does not, however, exercise directly that full paramount power which it possesses over streets, alleys,' etc., but in the distribution of governmental powers the General Assembly adopted the policy of selecting the cities and villages of the state as governmental agencies and delegating to such municipalities the power to regulate and control the use of the streets, alleys, etc., within their respective limits. Such power thus delegated is exercised by the municipal anthorities acting in behalf of the state for the benefit of the public."

In Atchison, T. & S. F. Ry. Co. v. the General Electric Railway Company, supra, it was said:

"The doctrine is firmly established in the state of Illinois, in accordance with the general weight of authority, that by the construction and use of street railway tracks no additional burden is imposed upon the easement, as such use 'falls within the purposes for which streets are dedicated or acquired,' (2 Dillon Municipal Corporations [4th Ed.] § 722,) but that the use for steam railway purposes is beyond the general public easement and imposes an additional servitude. C., B. & Q. R. R. Co. v. Street Railroad Co., 156 Ill. 255, 267, 273, 40 N. E. 1008, 29 L. R. A. 485. and cases cited; Bond v. Pa. Ry. Co., 171 Ill. 508, 513, 49 N. E. 545; General Electric Railway Co. v. Chicago & W. I. R. R. Co., 184 Ill. 588, 56 N. E. 963. It is equally well settled by the uniform line of decisions in the same state, that the use of a street by a steam railway is legitimate when duly authorized but that no exclusive use is conferred by the permit and it can 'only be enjoyed in common with the use of the avenue by the public as an ordinary highway, and without materially impairing its usefulness as such.' Pittsburg, Ft.

Wayne v. Chicago R. R. Co. v. Reich, 101 Ill. 157, 173; Ligare v. City of Chicago, 139 Ill. 46, 62, 28 N. E. 934, 32 Am. St. Rep. 179; C. B. & Q. R. R. Co. v. Street R. R. Co., 156 Ill. 255, 265, 267, 273, 40 N. E. 1008, 29 L. R. A. 485; Pennsylvania Co. v. City of Chicago, 181 Ill. 289, 296, 54 N. E. 825, 53 L. R. A. 223; General Electric Railroad Co. v. Chicago & W. I. R. R. Co., 184 Ill. 588, 56 N. E. 963. With the rights of the appellant in this street crossing thus defined they are in subordination to the use for street purposes, which includes use for a street railway; the right is held in common, is 'joint and mutual, not exclusive,' (Reich Case, 101 Ill. 157, 175) and the primary object of the street is for ordinary passage and travel of which the public and individuals cannot rightfully be deprived. Ligare Case, 139 Ill. 46, 52, 28 N. E. 934, 32 Am. St. Rep. 179; General Electric Ry. Case, 184 Ill. 588, 595, 56 N. E. 963."

Other decisions in line with these holdings are: C., B. & Q. R. R. Co. v. Street R. R. Co., 156 Ill. 256, 40 N. E. 1008, 29 L. R. A. 485; Ry. Co. v. Street Railroad Co., 156 Ill. 385, 386, 40 N. E. 1014; Doane v. Lake Street El. R. R. Co., 165 Ill. 517, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; Harvey v. Aurora & G. Ry. Co., 174 Ill. 295, 51 N. E. 163; Harvey v. Aurora & G. Ry. Co., 186 Ill. 283, 57 N. E. 857; Gen'l Elec. Ry. Co. v. C. & W. I. R. R. Co., 184 Ill. 588, 56 N. E. 963; Hartshorn v. I. V. Tr. Co., 210 Ill. 609, 71 N. E. 612; Wilder v. Aurora, etc., Tr. Co., 216 Ill. 493, 75 N. E. 194—from which it is plain that unless the power of the city to regulate crossings of railroad tracks by street railways, such crossing being in the streets of the city, is meant by the act of 1889, creating the Railroad and Warehouse Commission, to be subject to the jurisdiction of that commission, when its jurisdiction is invoked, the power of the city, over the subject here in dispute, remains plenary and exclusive.

The act creating the Railroad and Warehouse Commission (Act July 1, 1889, p. 223) is entitled "An Act in relation to the crossing of one railway by another, and to prevent danger to life and property from grade crossings," and reads as follows:

"That hereafter any railroad company desiring to cross with its tracks the main line of another railroad company, shall construct the crossing at such place and in such manner as will not unnecessarily impede or endanger the travel or transportation upon the railway so crossed. If in any case objection be made to the place or mode of crossing proposed by the company desiring the same, either party may apply to the board of railroad and warehouse commissioners, and it shall be their duty to view the ground, and give all parties interested an opportunity to be heard. After full investigation, and with due regard to safety of life and property, said board shall give a decision, prescribing the place where and the manner in which said crossing shall be made, but in all cases the compensation to be paid for property actually required for the crossing and all damages resulting therefrom shall be determined in the manner provided by law in case the parties fail to agree." Starr & C. Ann. St. vol. 3, c. 114, par. 112, p. 3292.

It will be noted, first that the title to the act is "In relation to the crossings of one railway by another." This does not necessarily include, in terms at least, street railways.

It will be noted, also, that the act of 1889 leaves to condemnation proceedings, "in manner prescribed by law in case the parties fail to agree," all question of compensation or damages, growing out of the property actually required for the crossing, or the nature of the crossing prescribed. Now no land is required to be taken for the grade

crossing of a street railway over a railroad in the streets; and it is doubtful if condemnation proceedings are open to a street railway to ascertain its damage, in case the street railway is compelled to go over head by bridge.

It will be noted, also, that in no case decided in the Supreme Court of Illinois, or in the United States Courts sitting within Illinois, has the plenary and exclusive power of cities and villages over the location of street railway crossings been denied or abated. Indeed, it would come as a surprise, both to the bar and to the people, were it to be held, that in the location of street railways crossing each other, or other railroads, and the manner of such crossing, within the streets, the final power no longer resided in the local authorities, but was removable, under the act of 1889, to the Railroad and Warehouse Commission of the state.

We think that no such interpretation was meant to be given to the act by the Legislature that passed the act. A survey of the occasion that gave birth to the act seems to us to be against such an interpretation. When the act was passed, the local authorities of Illinois had full power, as the governmental hand of the state, to regulate street railway crossings. There was, therefore, unless the wisdom of retaining that power in the municipal authorities was questioned, no occasion to confer it upon some other governmental hand; and it is not shown that the wisdom of continuing such power in the local authorities was even questioned. But to regulate the crossings of railways, outside of streets and highways, there was, until the act of 1889 was passed, no governmental hand. Any railroad already located could, at its own caprice, prevent a projected road from crossings its track, unless the projected road resorted to proceedings in eminent domain; and when such proceedings were resorted to, (the shoe thereupon being shifted to the other foot) the projected road could, at its caprice, cross where, and in the manner, it pleased, provided it was willing to pay such damages as such crossing entailed—a state of the law that left the interests of public life and safety wholly unprovided for.

The act of 1889 was meant to fill this hiatus. It created the Commission—an independent tribunal, that in the case of dispute, would leave it to the interest and caprice of neither railroad to determine where, or what, the crossing should be; but in the interest of the public, would prescribe the place and manner of the crossing. It fulfilled, in this respect, a clearly defined want—fulfilled it, too, in a way that did not interfere with railways responding to each other under the old principles governing eminent domain, or, with local authorities controlling their streets under the old principles of local rule. And this it seems to us must have been its purpose, its sole purpose, in that respect. Indeed to give to the act a wider scope would, we fear, be to substitute judicial legislation for interpretation.

The decree appealed from is reversed with instructions to dismiss the bill for want of equity.

RIDER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1906.)

No. 2,395.

1. STATUTES—CONSTRUCTION—TITLE.
The title of a legislative act cannot be so read into the body of it as to supply the absence of a substantive provision essential to the conferring of power and authority.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 288.]

2. CRIMINAL LAW—OFFENSES ON HOT SPRINGS RESERVATION—JURISDICTION OF COMMISSIONER.
Act April 20, 1904, 33 Stat. 187 [U. S. Comp. St. Supp. 1905, p. 365] entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed in a portion of the permanent Hot Springs Mountain reservation, Ark.," clearly contemplates the creation of a new office of commissioner clothed with special jurisdiction over offenses committed on the reservation, prescribing the fees, that rules of procedure and practice for "said commissioner" shall be prescribed by the District Court, for appeals to such court, etc., but in the absence of any provision therein for the appointment of such commissioner is ineffective and the jurisdiction so conferred to try offenses cannot be exercised by any United States Commissioner within the district or elsewhere.

3. SAME—JURISDICTION OF DISTRICT COURT—APPEAL FROM JUDGMENT VOID FOR WANT OF JURISDICTION.
A United States District Court although having original jurisdiction of a criminal offense and also jurisdiction on appeal from the judgment of a commissioner cannot render a valid judgment of conviction on an appeal where the commissioner before whom the case was tried below on a complaint filed by a private individual was without jurisdiction of the subject-matter of the offense even though the defendant took the appeal and appeared and submitted to trial.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2573.]

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

R. G. Davies (G. W. Murphy, on the brief), for plaintiff in error.
William G. Whipple, U. S. Atty., for defendant in error.

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

PHILIPS, District Judge. Upon a sworn complaint by the United States District Attorney for the Eastern District of Arkansas, made before J. T. O'Hair, United States Commissioner for said district, the plaintiff in error, Dr. Thomas B. Rider, was arrested on the 18th day of May, 1905. This affidavit charged upon information and belief that said Rider, on the 16th day of May, 1905, was a practicing physician at Hot Springs, Ark., in the Western Division of said district; that he was not then and there a registered physician as provided by the act of Congress entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed on a portion of the Hot Springs Mountain reservation, approved April 20, 1904" 33 Stat. 187, c. 1400 [U. S. Comp. St. Supp. 1905, p. 365], and was not then and there authorized to issue a permit to any patient or

person to take a bath in any of the bathhouses on said reservation; and that said Rider knowingly, willfully, and unlawfully issued a permit to one Mattie Hancock, setting out the permit in hæc verba; that said permit consisted of directions to the said Mattie Hancock for taking a bath at the Superior Bath House; that in pursuance thereof she applied to said bathhouse and attempted to bathe therein; which bathhouse was then and there situated on said reservation.

The warrant issued by said O'Hair commanded the marshal to arrest and bring before him the said Rider. Instead of the marshal taking the prisoner before said O'Hair he took him before Edgar A. Nickels, who styled himself "a United States Commissioner for said district"; by whom he was tried and sentenced, the language of the judgment being:

"From the evidence of the said witnesses, it appearing to me, the commissioner, that the laws of the United States have been violated as charged in the complaint, and that there is a probable cause shown to believe the defendant guilty of the alleged offense, it was ordered that he pay a fine of $25."

From this judgment Rider appealed to the United States District Court for said district, where, on rehearing, he was again found guilty, and sentenced to pay a fine of $100 and costs. To reverse this judgment, Rider prosecuted his writ of error to this court.

At the threshold of every judicial proceeding arises the question of jurisdiction of the tribunal taking cognizance of the cause to proceed to judgment. "The question of jurisdiction is self-asserting in every case. It arises although the litigants are silent. Even their consent cannot authorize cognizance if fundamental grounds of jurisdiction are absent." Yocum v. Parker, 130 Fed. 771, 66 C. C. A. 80. The jurisdiction of said Nickels, before whom Rider was tried, is challenged by him in this court. Authority for his action is predicated by the United States Attorney, on the act of Congress approved April 20, 1904, c. 1400, 33 Stat. 187 [U. S. Comp. St. Supp. 1905, p. 365], entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed in a portion of the permanent Hot Springs Mountain reservation, Ark." The first section of this act designates and defines the Hot Springs Mountain reservation, and limitations. The second section declares that said reservation "shall constitute a part of the Eastern United States Judicial District of Arkansas, and the District and Circuit Courts of the United States in and for said district shall have jurisdiction of all offenses committed within said boundaries." The third section makes provision for the protection of property, etc., within this reservation. The fourth section declares:

"That any person who shall, except in compliance with such rules and regulations as the Secretary of the Interior may deem necessary, and which he is hereby authorized and directed to make, enter or attempt to enter upon said described tract, take, or attempt to take, use or attempt to use, bathe in, or attempt to bathe in water of any spring located thereon, or without presenting satisfactory evidence that he or she (provided he or she is under medical treatment) is the patient of a physician duly registered at the office of the superintendent of the Hot Springs reservation as one qualified, under such rules which the Secretary of the Interior may have made or shall make, to prescribe the waters of the Hot Springs, shall be deemed guilty of a mis-

demeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred dollars, and be adjudged to pay all costs of the proceedings: Provided, That no physician who shall engage in the solicitation of patronage through the medium of drummers, or otherwise, shall be or remain thus registered: And provided further, that if any person so bathing, or attempting to bathe, or so entering, or attempting to enter upon the described tract, shall have the permit of a physician, such physician shall be liable to the penalties of this section, unless he be regularly registered; and such person shall not be liable to the penalties of this section, unless it shall be made to appear that he knew, or had reason to believe, that the physician giving him such permit was not regularly registered."

The fifth section (33 Stat. 188 [U. S. Comp. St. Supp. p. 367]) applies to the punishment of offenses under municipal ordinances of the city of Hot Springs and the laws of the state of Arkansas. Section 6 of the act, which presents the principal controversy in this case, is as follows:

"That such commissioner shall have power, upon sworn complaint, to issue process in the name of the United States for the arrest of any person charged with the doing, otherwise than in compliance with the rules and regulations of the Secretary of the Interior, of any act with reference to the matters which the Secretary of the Interior in section four of this act is authorized to regulate, or in violation of such rules and regulations, or in violation of any provision of this act, or with any misdemeanor or other like offense the punishment provided for which does not exceed a fine of one hundred dollars to try the person thus charged, and if found guilty, to impose the penalty prescribed. In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States District Court for the Eastern District of Arkansas. The said United States District Court shall prescribe rules of procedure and practice for said commissioner in the trial of cases and with reference to said appeals."

As this section does not designate or create "such commissioner," naturally enough the word "such" would refer to some preceding section of the act defining the commissioner and prescribing the manner of his creation and the extent of his authority. There is not a reference to him or his office in any creative provision of the statute. It is conceded in the brief of counsel for the government that unless this casus omissus in the active power of the provisions of the act can be aided and eked out by reference to its title, there is nothing to designate who "such commissioner" is or how he derives his authority. Conceding that the American doctrine is that the title may constitute a part of the legislative act, and that preambles may be referred to to discover the mind of the Legislature, where the statute is obscure or ambiguous, it is as correct law to-day as when uttered by Mr. Justice Field, in Hadden v. Collector, 5 Wall. (U. S.) 107, 18 L. Ed. 518, that the title "is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the Legislature."

There is no authority to support the broad proposition that the title may be so read into the body of the act as to supply the absence of a substantive declaration essential to the creation of power and authority. Most certainly the title of this act cannot be resorted to for the purpose of showing that "such commissioner" is any United States

Commissioner, regardless of where located, when the whole trend of the enactment plainly indicates that it was the mind and purpose of Congress that this special jurisdiction was to be exercised by a special commissioner, who, from the inception to the close of the proceeding, was to exercise functions and powers quite apart from those conferred upon the well-known class of United States Commissioners. As the subject-matter is purely local, confined to the small territory reservation, and to a new and singular character of offenses, in the absence of express language to that effect in the enacting provisions it is incredible that Congress contemplated that this extraordinary and responsible jurisdiction might be exercised by any United States Commissioner in the District of Arkansas or elsewhere. A careful analysis of the whole act contradicts such contention.

In the latter part of said section 6 it is declared that:

"The said United States District Court shall prescribe rules of procedure and practice for said commissioner in the trial of cases and with reference to said appeals."

Evidently the framer of the statute did not have in mind the existing United States Commissioners in said district. If he had, what was the occasion or necessity for the District Court prescribing rules of procedure and practice for "said commissioner" in the trial of cases? The existing statutes, as well as the decisions of the courts, already defined the procedure and practice for the well known United States Commissioners. But as evidence that it was the purpose to create a new office, clothed with a special jurisdiction hitherto unknown to the law, it was provided that the District Court should first prescribe for him rules of procedure and practice in the conduct of trials. It is not shown affirmatively in this case that the District Court had ever formulated or prescribed any such rules for the government and direction of "such commissioner." On the contrary, it is the contention of the government that the functions of such commissioner were to be performed by a United States Commissioner, and, therefore, it would not be necessary that the court should prescribe any rules of procedure and practice for him. The seventh section (33 Stat. 188 [U. S. Comp. St. Supp. 1905, p. 368]) confers power on "said commissioner" to issue process for the arrest of any person charged with the commission of any criminal offense within said boundaries not covered by the provisions of section 6 of the act. It confers on him authority to bind over the defendant for trial to the District Court; provides how the offender may be bailed, and where committed in default of bail—provisions which would have been quite unnecessary in respect of United States Commissioners, whose duties in this respect are well defined by existing law and well-known practice. The eighth section, having in view the creation of a new office, with hitherto undefined powers and modes of procedure, directs that all process issued by the commissioner shall be directed to the marshal of the United States for the Eastern District of Arkansas. The ninth section directs:

"That the commissioner referred to in this act and the marshal of the United States and his deputies in the eastern district of Arkansas shall be paid the same fees and compensation as are now provided by law for like services in said district."

Why make such provision if it were contemplated that the existing United States Commissioners should exercise the jurisdiction, when the general statute specifically fixes the fees for like services in the district? Section 10 directs that all fees, costs, and expenses arising in cases under this act, and properly chargeable to the United States shall be certified, approved, and paid as are like fees, costs, and expenses in the courts of the United States. Why direct especially how such fees, etc., shall be certified, approved and paid, when immemorially the general statutes have provided how the fees, costs and expenses of United States Commissioners shall be certified and paid?

The United States Attorney invokes the aid of the act of August 18, 1894, c. 301, 28 Stat. 416 [U. S. Comp. St. 1901, p. 717], which directs that United States marshals upon the arrest of a person under criminal charge shall take him before the nearest United States Commissioner for hearing, as tending to show that any commissioner nearest the place of arrest was intended as "such commissioner." This very contention demonstrates that Congress had in mind a special, local commissioner, to be created for this especial office. Under said act of August 18, 1894, an offender if arrested in the most remote state or territory and taken before the nearest United States Commissioner would be entitled to a speedy hearing before such commissioner. Can it for one moment be entertained that the Hot Springs act contemplates that Dr. Rider, if arrested in the territory of Alaska, could be taken before a United States Commissioner there, and by him, not bound over for his appearance before the United States District Court for the Eastern District of Arkansas where the offense was committed for final trial, but tried, convicted, and fined by the United States Commissioner for Alaska, outside of the vicinage where the offense was committed? The act of August 18, 1894, has to do alone with matters of fees—the lessening of costs in mere preliminary hearings before United States Commissioners. The act contemplates the issuing of a warrant of arrest by one commissioner and the hearing by another; while it is manifest by section 6 of the Hot Springs act that it contemplates the issuance of a warrant, the trial, and imposition of the fine shall be by one and the same commissioner. It is apparent on the face of the Hot Springs act that the framer attempted to model it after that of the Yellowstone Park act, approved May 7, 1894. 28 Stat. 73, c. 72 [U. S. Comp. St. 1901, p. 1562]. The confusion or oversight arose when it came to making the distinction between the character of trespasses and offenses peculiar to the Yellowstone Park and those of the Hot Springs reservation. After constructing section 4 of the Hot Springs act, corresponding with the same section in the Yellowstone Park act, as to offenses, in order to extend the jurisdiction to a different character of offenses than those respecting bathing, the framer of the Hot Springs act divided the matter into two sections—four and five. So while section 6 of the Yellowstone Park act designated the commissioner who was to exercise the primary jurisdiction, and directed the manner of his appointment, and then proceeded to say: "Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the

arrest of any person charged with the commission," etc.; the framer of the Hot Springs act, when he came to the corresponding provision, began with the clause that "Such commissioner shall have power, upon sworn information," etc. It is not the province of the courts by judicial construction to supply flagrant omissions of essential positive provisions in a statute. The remedy, as well as the responsibility for an abortive act, must rest with the legislative branch of government.

It is suggested by the United States Attorney that the conviction in this case may be sustained upon the theory that as section 2 of the act confers jurisdiction upon the United States District Court for the Eastern District of Arkansas of all offenses committed within the boundaries of said reservation, it was sufficient that such jurisdiction was exercised on appeal from the judgment of the commissioner Nickels. There is some authority for the proposition that where a court has both appellate and original jurisdiction over the subject-matter, and the case reaches such court on appeal from a tribunal which did not have jurisdiction over the subject-matter, if the parties appear in the appellate court and submit to trial, the judgment thereon is valid. Randolph County v. Ralls, 18 Ill. 29. But this proposition is controverted even in civil cases. In Osgood v. Thurston, 23 Pick. (Mass.) 110, a scire facias was issued from the court of common pleas on a judgment rendered in the Supreme Judicial Court. On appeal from the judgment thereon from the court of common pleas to the Supreme Judicial Court, Shaw, C. J., held that the common pleas court did not have jurisdiction over the subject-matter; and notwithstanding the defendant below appeared to the action in the Appellate Court by interposing a general demurrer, it was held that the court only took cognizance by appeal, and, therefore, it was without jurisdiction. Thereupon the plaintiff moved that as the cause was before the court invested with original jurisdiction for leave to amend the original writ so as to make it appear as a writ issued out of the Supreme Court. To this the Chief Justice said:

"But with all the latitude of indulgence with which amendments are allowed, the court are of opinion that this is impossible. It is to be recollected, that the papers now before us, are copies of the writ and judgment of the court of common pleas, as they there appear of record. An alteration of the copy of that writ, would not only falsify the exemplification of the record as it is certified by the clerk of that court, but would make it a bad writ as a writ of the court of common pleas. If, after amendment, it were deemed an original writ issuing from this court, then it has never been served or returned, and the court could not proceed upon it."

In Dillard et al. v. St. Louis, K. C. & N. R. Co., 58 Mo. 69, jurisdiction was assumed by a justice of the peace over a subject-matter for the recovery of damages to an extent beyond his jurisdiction. The action might have been originally instituted in the Circuit Court On appeal to the latter court, it was held that although no motion was made to dismiss the action for want of jurisdiction in the justice court, the judgment was reversed, and the cause dismissed, "as the want of jurisdiction in the court over the cause of action cannot be waived, but may be insisted on at any stage of the proceedings." Citing Webb v. Tweedie, 30 Mo. 488. Without deciding that this prosecution could

be instituted in the first instance in the District Court, it is sufficient to say that we are unable to find any precedent or authority in a criminal proceeding for treating a cause on appeal, where the prosecution might have been originally instituted in the Appellate Court, as if it had been so instituted, the defendant appearing and going to trial. On principle this contention cannot be sustained. It is indispensably essential to confer jurisdiction upon the United States District Court to proceed in a criminal cause, that either a true bill of indictment, found by a grand jury, or information in due form by the United States Attorney, should first be presented to the court. There is no such practice recognized in criminal procedure as a voluntary appearance by the accused and the making up of an issue on an agreed statement of facts, as might be done in a civil action. A judgment of sentence without indictment or information would be both a novelty and a nullity.

This proceeding was instituted under section 6 of the Hot Springs act "upon sworn complaint," which might have been made by any person. Such complaint is adapted alone to a proceeding before "such commissioner." The mere transcript of this proceeding was brought into the District Court by appeal. An original proceeding in the District Court could not be instituted on a mere sworn complaint. It would require an information in due form, lodged by the United States District Attorney, on leave first had from the court, showing probable cause, and not based on mere information and belief. United States v. Baugh (C. C.) 1 Fed. 788; United States v. Tureaud (C. C.) 20 Fed. 621; United States v. Polite et al. (D. C.) 35 Fed. 58; United States v. Smith (C. C.) 40 Fed. 755. The plaintiff in error was not brought before the District Court on such an information, and was not tried on plea thereto; but the District Court acquired jurisdiction only by virtue of the appeal from the judgment of conviction and sentence by an officer who had no jurisdiction. The case before the commissioner, as before the District Court, stood as on a plea of not guilty, under which every defense, whether to the jurisdiction or to the merits, was open to the accused. Had he never appealed from that judgment, as it was coram non judice, the sentence could not lawfully have been enforced. As this case does not depend solely upon any construction and application of the federal Constitution, but turns upon the proper construction of an act of Congress and the authority of the United States Commissioner to try and sentence the person thereunder, the writ of error was properly prosecuted to this court. Spreckels Sugar Refining Company v. McClain, 192 U. S. 407, 24 Sup. Ct. 376, 48 L. Ed. 496; Harris v. Rosenberger, 145 Fed. 449.

It results that the judgment of the District Court is reversed. and the cause is remanded, with directions to the District Court to vacate its judgment, and to discharge the defendant for lack of jurisdiction.

THE JUMNA. THE McCALDIN BROTHERS. THE JAMES S. T. STRANAHAN. THE GYPSUM KING. THE W. FREELAND DALZELL. THE J. B. KING CO. NO. 19. THE GYPSUM EMPEROR.

(Circuit Court of Appeals, Second Circuit. November 14, 1906.)

Nos. 37-39.

1. COLLISION—INEVITABLE ACCIDENT.
   In the admiralty law the phrase "inevitable accident" has a comprehensive meaning, and it is not necessary that the accident should be the result of a vis major. If no negligence can be imputed to either vessel in a collision, there is a presumption that they were navigating in a lawful manner and the accident may be said to be inevitable; the test being whether the collision could have been prevented by the exercise of ordinary care, caution, and maritime skill.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 19.]

2. SAME—INSCRUTABLE CAUSE.
   Where the evidence is so conflicting that it is impossible to determine to what direct or specific acts a collision is attributable, it is a case of damage arising from a cause that is inscrutable, and under the settled modern rule in this country there can be no recovery or partial recovery therefor.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 20.]

3. SAME—EVIDENCE CONSIDERED.
   Evidence *held* to sustain the finding of a court of admiralty that it did not establish negligence or fault on the part of any of the vessels concerned in a series of collisions in East river, following the parting of a tug's hawser, and to exonerate all from liability on the ground that the collisions were due to inevitable accident or to an inscrutable cause.

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

On appeal and cross-appeal from a decree of the District Court for the Southern District of New York dismissing the libel and cross-libels and deciding that the collision between barge No. 19, in tow of the tug Gypsum King, and the steamship Jumna, and the subsequent collision of said barge and the schooner Gypsum Emperor with the New Haven Railroad's pier No. 38, East river, was the result of inevitable accident.

The opinion of Judge Holt in the District Court is reported in 140 Fed. 743.

Charles C. Burlingham, for J. B. King Transp. Co.
La Roy S. Gove, for McCaldin Bros. Co.
Wilhelmus Mynderse, for the Dalzell.
J. Parker Kirlin, for the Jumna.
Joseph H. Choate, Jr., for New York, N. H. & H. R. Co.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. It is conceded on all hands that, except in a few unimportant details, the facts are fully and accurately stated in the opinion of the district judge. He has carefully considered the conflicting theories of fault and has reached the conclusion that negligence has not been established as to any of the vessels participating in the collision. To arrive at this result it was necessary for him to determine several disputed questions of fact regarding which it is suf-

ficient to say that in many instances he was unquestionably right and in no instance is the finding so clearly against the preponderance of proof as to warrant us in setting it aside.

For instance, was the Jumna's hawser sufficient and in proper condition? Was the tow of the Gypsum King properly made up? Did the McCaldin Brothers make proper effort to reach the port side of the Jumna? Did the Dalzell put a sudden strain on the hawser?

In each of these instances the district judge found against the asserted negligence and we think the weight of testimony sustains these findings. Like him we are unable to localize the blame for the collision. We had some doubt as to whether the tugs in charge of the Jumna, and particularly the McCaldin Brothers, can be exculpated but, after an examination of the testimony, we incline to the opinion that they did everything which could be reasonably expected of them and that the McCaldin Brothers started to make fast to the port quarter of the Jumna as soon as the latter cleared the pier and it was possible to get around her stern.

The judge of the District Court has found that the collision was the result of an inevitable accident. Such an accident usually happens when it is not possible to prevent it by the exercise of due care, caution and nautical skill. It is generally, though not invariably, attributed to an act of God, as where a tremendous tempest arises, such as devastated Galveston a few years ago, or more recently destroyed the shipping in the harbor of Havana. So, where a dense fog or falling snow obstructs the vision, where a gale and high seas unite to make navigation difficult, or where a severe storm is prevailing upon a dark night, a collision happening in such circumstances, the colliding vessels exercising the care, skill and caution required by prudent navigation, would be attributed to inevitable accident. Such accidents usually occur when safe navigation is rendered impossible from causes which no human foresight can prevent; when the forces of nature burst forth in unforeseen and uncontrollable fury so that man is helpless, and the stoutest ship and the most experienced mariner are at the mercy of the winds and waves.

In admiralty law, however, the phrase has a more comprehensive meaning. It is not necessary that the accident should be the result of a vis major. If no negligence can be imputed to either vessel there is a presumption that they are navigating in a lawful manner and where no fault can be shown the accident may be said to be inevitable.

In the case of The Morning Light, 2 Wall. 550, 17 L. Ed. 862, Mr. Justice Clifford, quoting Dr. Lushington, says (page 561 of 2 Wall. [17 L. Ed. 862]):

"Inevitable accident must be considered as a relative term, and must be construed not absolutely but reasonably with regard to the circumstances of each particular case. Viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill."

In the case of The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113, the Supreme Court say:

"Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident

occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances."

The test is, could the collision have been prevented by the exercise of ordinary care, caution and maritime skill? In the case at bar we are unable upon the testimony before us to specify any particular fault, to put our finger upon any act or omission and assert that to it the accident was attributable. Fault may exist, but we are unable to discover it; it is inscrutable. Where the evidence is so conflicting that it is impossible to determine to what direct and specific acts the collision is attributable, it is a case of damage arising from a cause that is inscrutable. The Fern and The Swann, Newb. 158, Fed. Cas. No. 8,588. Whether the case at bar be thus classified, or whether it be held to come within the admiralty definition of inevitable accident is not material; in either event the loss must be borne by the party on whom it falls.

In the early administration of the maritime law in this country the damages were divided in cases of inscrutable fault precisely as in cases where both vessels were in fault. The John Henry, 3 Ware, 264, Fed. Cas. No. 7,350; The Sciota, 2 Ware (Dar. 359) 360, Fed. Cas. No. 12,508; The Fern and The Swann, supra. The question has now been definitely decided by a vast preponderance of authority that there can be no recovery or partial recovery unless fault be affirmatively shown. The Clara, 102 U. S. 200, 26 L. Ed. 145; The Breeze, 6 Ben. 14, Fed. Cas. No. 1,829; The Grace Girdler, supra; The Sunnyside, 91 U. S. 208, 215–216, 23 L. Ed. 302.

As we all concur in the conclusion that the case at bar falls within one of these categories, the decree should be affirmed with costs.

BROCK v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 6, 1906.)

No. 29.

BANKS AND BANKING—NATIONAL BANKS—PROSECUTION OF OFFICER FOR MISAPPLICATION OF FUNDS.

Evidence that the cashier of a national bank overdrew his account, by means of checks which were not charged to his account, but carried in the drawer as cash and afterwards taken up by his note, all without the knowledge or consent of the board, is sufficient to warrant his conviction by a jury of misapplication of the bank's funds, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497].

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

George S. Graham, for plaintiff in error.

Henry P. Brown, for the United States.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error sued out by George P. Brock to the District Court for the Eastern District of Pennsylvania. Brock, who had been cashier of the Doylestown Na-

tional Bank, was indicted in that court under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], for willful misapplication of the moneys, funds, and credits of that institution. The jury found him guilty of this offense, and on entry of judgment and sentence he sued out this writ. The assigned errors now insisted upon are the court's refusal to admit a certain account in evidence and to give binding instructions for a verdict for defendant.

Apart from all other cases of alleged overdraft, we are of opinion the proofs bearing on five certain checks to which we now refer made the duty of the court clear to submit the case to the jury. On August 20, 1902, the defendant drew a check for $2,000 against his account in the Doylestown National Bank, of which he was then cashier, to the order of the First National Bank of Philadelphia (where he kept a personal account). This check was paid by the Doylestown Bank August 22, 1902, but was not charged to Brock's account. Had it been, it would have made an overdraft of $1,370.56. On September 2, 1902, he drew another check against his account to the order of the Consolidated Lake Superior Trustees (of some of whose stock he was an underwriter) for $4,000, and one to C. E. Wolbert, Treas. (who was treasurer of a silk company in which defendant was interested), for $6,400, which checks were paid by the bank September 4, 1902, but were not charged to his account. Had they, as well as the preceding check, been charged, they would have made an overdraft of $7,011.37. On September 15, 1902, he drew another check against his account to the order of C. E. Wolbert, Treas., for $1,250, which was paid by the bank September 17, 1902, but was not charged to his account. Had it, as well as the preceding checks, been charged, they would have made an overdraft of $8,351.25. On December 13, 1902, he drew a check for $2,000 against his account to the order of Ross, Morgan & Co. (a brokerage firm with which he had an account), which was paid by the bank December 16, 1902. It was not charged to his account. Had it, as well as the preceding checks, been so charged, they would have made defendant's overdraft $15,415.43.

On the part of defendant it was contended these checks were mere temporary advances made by him for bank customers who ordered securities bought; that as soon as the securities came the customers paid for them, and the money thus paid took up the checks, which had meanwhile been carried in the drawer as cash. When cross-examined, the defendant did not give the name of such customers or the amount paid by them, or specify any particular transactions. On the part of the government there was testimony tending to show that defendant was largely indebted to the bank on other loans, and that these check overdrafts were not known to or sanctioned by the board. Its contention was that these checks were not paid by customers as above stated, but were carried for several months in the drawer as cash, and that finally, on February 3, 1903, they were taken up by the defendant, giving his own note for them to the bank, without the knowledge or consent of the board. The defendant contended the note thus given was not for these checks, but was for an actual discount, the proceeds of which he received, but how he did not show, and that such note was discounted, and afterwards renewed, with the knowledge and consent of the board.

In corroboration of the government's contention, it was shown that the aggregate of these five overdraft checks, viz., $15,650, less a check for $4,650, dated January 31, 1903, given by Brock to the bank, made (making allowance for $90 discount) the exact amount of the note, viz., $11,090. It was also shown that on the stub of defendant's check book, opposite his check of $4,650, so given as above, the defendant had entered, "On ac. checks in drawer, Silk Lk. Sup. and 1st Ph. $4,650," which entries were alleged to refer to the overdraft checks above noted. Now, it is apparent that if the jury found these checks were not temporary advances for customers, but were overdrafts by the defendant himself and made without sanction, that they were carried as cash in the drawer and were finally taken up by the discount of an unauthorized note, they were warranted in finding that in making these overdrafts defendant had willfully misapplied the funds of the bank of which he was cashier. This the jury has done, and we are clear it was the duty of the court below, under the proofs, to deny the request of the defendant for a peremptory entry of a verdict of not guilty.

Further, we find no error in the action of the court in excluding the account of Ross, Morgan & Co. From the colloquy that followed its offer, it appears defendant desired its introduction for the twofold purpose of showing his account with that firm was not a speculative one and that he was a man of means, the owner of the collateral stocks which the account embraced. It will be noted that the objection made was to the account, standing alone, but not if properly proven. This we may fairly infer from the statement of the district attorney:

"If my friend wanted to make use of it [the account], let him call the witness, and ask questions, and identify it in the proper and regular way, so that we should have an opportunity to cross-examine."

There was no offer to do this, and the court then held the account was not competent, and added:

"I want it distinctly understood that I am ruling on the account itself, considered as an instrument of evidence offered now as a piece of paper."

There was no error in this ruling. There was no offer to further prove it, to show that defendant was the owner of the securities which it embraced, or even that they still remained in the broker's hands. But, apart from this, the court in its charge forcibly and clearly placed before the jury as uncontroverted facts all that defendant now contends they might have inferred from this account. In other words, while it excluded the account as not sufficiently proven, it gave the defendant the benefit of all and more than all that was offered to be proved by it. In charging, the court said:

"It is quite clear from the testimony that the defendant was not engaged in speculative purchases of stock during this period. There is no evidence that he was buying or selling any stocks at that time. He had an account with the brokers, Ross, Morgan & Co., which he was protecting. I do not clearly understand what the nature of that account was, but, as near as I can make out, he owed this firm some money; upon what account does not appear, as I recall the testimony; that he had put up with them a certain amount of collateral for the protection of that loan, and from time to time, on two or three occasions—I do not remember exactly how many, but two or three occasions—these securi-

ties that were up as collateral depreciated, some of them at least, and he was called upon to put up some money in order to protect the loan. There were no speculative purchases or sales of stocks during this period. That is quite clear."

After careful consideration, we find no error, and the judgment of the District Court must be affirmed.

In re JACOB BERRY & CO.

(Circuit Court of Appeals, Second Circuit. October 11, 1906.)

No. 274.

BANKRUPTCY—RECOVERY OF PLEDGE—TRANSACTIONS BETWEEN STOCKBROKER AND CUSTOMER.

A deposit of securities with a stockbroker by a customer as margin, and as security against losses in stock transactions, under an agreement which does not contemplate a sale or disposition of such securities by the broker except in the event of losses, constitutes a pledge, and does not create the relation of debtor and creditor, and where the securities have not been sold by the broker to meet marginal requirements prior to his bankruptcy, they may be recovered by the pledgor from the bankrupt's trustee.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

See 147 Fed. 208; 146 Fed. 623.

J. M. Rosenberg, for petitioners.

R. L. Sweezey, Graham Sumner, and A. W. Putnam, for respondents.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is a petition by the trustees in bankruptcy of Jacob Berry & Co. to review an order of the bankruptcy court, awarding to various claimants of the bankrupts certain securities, or the proceeds thereof, in the possession of the trustees. Jacob Berry & Co. were stockbrokers, and the claimants were severally customers of the firm.

Upon the general question whether the relation between customer and stockbroker under the ordinary contract for a speculative purchase of stock is that of pledgor or pledgee, we are in accord with the decision of the court below, and have recently decided that such a relation does exist in Richardson, Trustee, v. Shaw et al. (C. C. A.) 147 Fed. 659.

The claimants of the pledged stock in this case are not seeking to follow into the hands of the trustees in bankruptcy the proceeds of stock purchased for them by the brokers; but are seeking the proceeds of stocks which they had deposited with the brokers upon opening an account, or in the course of dealings, for speculative purposes. The contract between them and the brokers is found in the receipt delivered to each one of them by the brokers at the time of deposit, and is illustrated by the receipt of Mrs. Taggart, which reads as follows:

"Sep. 14, 1904.

"Received from Anna D. Taggart 83 shs U. S. Steel pfd No. A30563–C15546. The same to be a general deposit, and this receipt is given and received with

the mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses or any other transactions in the purchase or sale of stocks, bonds, securities, or commodities made by them for your account.

"This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Co. may repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise; may substitute similar stock, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may, without notice upon the approximate exhaustion of margin sell, or buy as the case may be, any stocks, bonds, securities or commodities bought and sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Co. may close the same by purchase or sale, as the case may be, without notice, provided however, that such purchases or sales may be made upon the consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the city of New York where such stocks, bonds, securities, or commodities are dealt in.

"No. A30563–33 Shs.
"No. C15546–50 Shs.

"Geo. M. Davis, Mgr."

The question upon which the rights of the parties really depends is whether the relation of pledgor and pledgee is created between client and stockbroker by a deposit of this character, or whether such a deposit is not in effect a release of the client's title to the security to the broker which creates the relation of creditor and debtor. If the deposit is to be regarded as a deposit of money, the broker is impliedly authorized to sell the stock and credit the proceeds to the client in account. If it is deposited merely as security, the relation of pledgor and pledgee certainly continues until losses arise which justify a sale of the stock. In the present case the brokers did not sell the securities deposited by the several claimants to meet marginal requirements on account of losses, but hypothecated them in a lump to obtain a loan to themselves.

It will be observed that the contract contains two distinct provisions: One relating to the deposited stock, and the other relating to the stocks, securities, etc., which the brokers are to purchase or sell for the client. It is the latter alone that the brokers "may repledge, rehypothecate, or loan," when held by them as margin or otherwise. As to the deposited stock, they "may hold the same as margin and as security" for losses on any transaction, or may apply it in part payment of or on account of such losses. If money had been deposited instead of the securities, it would ordinarily have been credited on account to the clients and stood as a margin against losses; and as to any balance in the brokers' hands at any time the clients would have been merely creditors. If the securities had been deposited under a stipulation in the contract that they should stand as a margin for a specific sum, perhaps the same legal consequences would have attended the transaction. But there is nothing in terms, nor as we think by implication, which suggests that the parties contemplated any sale of the deposited stock to the brokers, or any sale or disposition of it by the brokers except in the event of

losses of the client, approximately exhausting the marginal requirement.

The order under review is affirmed, with costs to the claimants severally.

In re GARRISON.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 53.

1. BANKRUPTCY—DISCHARGE—DESTRUCTION OF BOOKS—BURDEN OF PROOF.

Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684] provides that a bankrupt shall be discharged unless he has, with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained. *Held*, that, where a creditor seeks to prevent a discharge on such ground, the burden is on him, not only to show that the bankrupt failed to keep books of account, but that his omission was with intent to conceal his financial condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 720.]

2. SAME—EVIDENCE.

Where a bankrupt residing in New York was a member of a firm doing business in Port Huron, Michigan, the failure of such firm to keep proper books of account, and the bankrupt's failure, for a period of a year, during which the firm did business, to see that proper books were kept, did not preclude him from obtaining a discharge for failure to keep proper books, as provided by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684].

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

On appeal from an order of the District Court for the Southern District of New York confirming the report of a referee in bankruptcy, sitting as special master, which recommended that the bankrupt's discharge be denied for the reason that the creditor who opposed his discharge had established the truth of the second specification filed by him, which is as follows: "Second, that (the bankrupt) as a partner and a member of the firm of T. W. Brown & Co., of Port Huron, Michigan, with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy failed to keep any books of account, records or papers from which his true financial condition or interest in said business might be ascertained." The petition in bankruptcy was filed and the petitioner was adjudged a bankrupt August 12, 1904. The order appealed from confirming the second specification, and refusing a discharge was entered December 1, 1905.

J. E. Melick, for appellant.

W. L. McCorkle, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, C. J. (after stating the facts). The section of the bankruptcy act under which the specification was filed is, as amended by the act of 1903, as follows:

"The judge shall hear the application for a discharge, and such proof and pleas as may be made in opposition thereto by parties in interest, * * * and discharge the applicant unless he has * * * with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of ac-

count or records from which such condition might be ascertained." Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684].

It will be observed that in order to establish the second specification it was necessary, under the amended law, to prove two propositions: First, that the bankrupt had failed to keep books of account, and, second, that his omission to do so was with intent to conceal his financial condition. Upon both of these propositions the burden was upon the opposing creditor to prove his allegations by convincing proof. In re Corn (D. C.) 106 Fed. 143; In re Gaylord (D. C.) Id. 833; In re McGurn (D. C.) 102 Fed. 743.

The finding against the bankrupt is based principally upon his answer that it was impossible to get at a correct statement of the condition of T. W. Brown & Co., for the reason that the books kept by Brown and his bookkeeper at Durand and Port Huron, Michigan, are so "unintelligent" that they do not give the necessary information regarding the status of the firm.

The brief of the opposing creditor contains many accusations of fraud and misconduct on the part of the bankrupt which cannot be considered here, for the reason that they were presented by twelve specifications, other than the second, which were all found in favor of the bankrupt, no appeal having been taken by the creditor.

We are now concerned with the single proposition, should the bankrupt, who resided and transacted business in the city of New York, be refused a discharge because the books of the firm of T. W. Brown & Co., of which the bankrupt was a partner, were improperly kept at Durand and Port Huron, Michigan, by Brown and his bookkeeper? The firm of T. W. Brown & Co. was formed in 1902 and continued about a year, the partners being Brown, Jean, and the bankrupt, who was to have one-third of the profits if the business succeeded; in fact it was conducted at a loss. The firm was transacting a small business in buying butter, eggs and poultry in Michigan and shipping them to Jean, Garrison & Co., in New York. When the firm was dissolved its liabilities were about $2,700, part of which was paid. The books were kept by Brown and by his bookkeeper at Port Huron. Three or four of the books were sent to the bankrupt and the ledger was produced in court. He never saw it until it was shipped to New York and had nothing to do with it or any of the books of Brown & Co. When asked why it was that he did not have some knowledge of the manner in which the books were kept the bankrupt answered:

"Simply because this concern was operating in Michigan a thousand miles away, and I trusted to the honesty of T. W. Brown to handle the books and the affairs of the company out there right and make us money out of it."

Granting that his conduct in not keeping a closer watch upon the business at Port Huron was careless and even reprehensible, we fail to see how it can be said that he failed to keep proper books showing the condition of a firm whose business was conducted by one of the partners in a distant state and whose books were never under his control during the short life of the partnership. It would seem a sufficient answer to the charge against him to show that he never saw the

books, did not keep them or direct their keeping and, having confidence in his partner, supposed that the business was being properly conducted.

But there is still greater difficulty in establishing the second ingredient of the charge, viz., the intent to conceal the bankrupt's financial condition. Conceding, for the moment, that he knew of the inadequate and improper bookkeeping at Port Huron it is not easy to perceive how the bankrupt's interests were in any manner subserved by such bookkeeping. The bankrupt would hardly connive at a system, or lack of system, which threw his affairs into inextricable confusion and concealed the true state of affairs not from his creditors but from himself. If any one were to be benefited by imperfect books it would be Brown and not the bankrupt.

Furthermore, the character of the business, the bankrupt's small interest, if, indeed, he had any individual interest therein, the short duration of the partnership, the difficulty of personal supervision of its affairs, the improbability that the bankrupt, residing in New York, would attempt to conceal the details of the comparatively insignificant branch of the business transacted in Michigan and the seeming lack of motive for the fraudulent conduct attributed to him, lead us to the conclusion that the charge against him has not been sustained.

The order is reversed, with costs, and the cause is remanded to the District Court with instructions to grant the discharge.

INTERNATIONAL & G. N. R. CO. et al. v. HOYLE.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1906.)

No. 1,575.

REMOVAL OF CAUSES—WANT OF JURISDICTION OF FEDERAL COURT—DUTY TO REMAND.

The removal by one of two joint defendants of a cause which was not removable because of the absence of a separable controversy does not give the federal court jurisdiction, and the cause should be remanded at any stage, at the instance of any party or on the court's own motion, whenever such fact appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 218, 219.]

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

J. D. Guinn and Waller S. Baker, for plaintiffs in error.
Allan D. Sanford, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The defendant in error, S. C. Hoyle, a resident citizen of San Antonio, Bexar county, Tex., filed this suit in the district court of Robertson county, Tex., against the plaintiffs in error, the International & Great Northern Railroad Company and the Pullman Palace Car Company, to recover $5,000 on account of alleged

personal injuries inflicted upon his wife, Mabel A. Hoyle, on or about the 19th day of October, 1903, resulting from the alleged negligence of the plaintiffs in error in failing to stop their train at the regular stopping place in Hearne, Tex., and causing her to disembark and walk to the depot at Hearne, an alleged distance of about half a mile. The plaintiff in error the International & Great Northern Railroad Company answered in the district court of Robertson county by general exception, general denial, contributory negligence upon the part of Mabel A. Hoyle; and answered, further, that it was not guilty of negligence, and that, if any one was, the employés of the Pullman Company were, and prayed for a recovery over against the Pullman Company if judgment should be rendered against it. The plaintiff in error the Pullman Company answered by general exception and general denial, and thereafter, by petition and bond duly filed, removed this cause to the Circuit Court of the United States for the Western District of Texas, at Waco, Tex. Both plaintiffs in error repleaded in the Circuit Court, but there was no material change in the answer of the International & Great Northern Railroad Company. Judgment was rendered in favor of the defendant in error against both plaintiffs in error on the 18th day of November, A. D. 1905, for $2,300, interest and costs.

Plaintiffs in error filed separate motions for a new trial. The motion for new trial as filed by the plaintiff in error the International & Great Northern Railroad Company raises succinctly the sole question raised by this plaintiff in error—that is, that the petition filed in the state court by S. C. Hoyle, the defendant in error, against the plaintiffs in error, did not present distinct and separate causes of action, one of which was against the railroad company and the other against the Pullman Company, but embraced a single cause of action and a single ground of relief—and it is urged in this motion for a new trial that the judgment be vacated and the cause be dismissed or remanded to the state court for the want of jurisdiction in the honorable Circuit Court. The court overruled the motion of plaintiff in error the International & Great Northern Railroad Company, and it duly excepted in open court, and tendered its bill of exception to the court, which was signed and sealed by the court. The judge signing the bill said in explanation:

"When the cause was called for trial, the court remarked to counsel that the cause was not removable, and suggested that a motion to remand be made. Counsel for plaintiff retired to consult and determined that they would not make the motion. Counsel for railroad company was also present and failed to make a motion to remand. The cause went to trial and judgment, and after judgment the railroad company submitted a motion to remand to the state court, which, under the circumstances, the court overruled."

The suit as originally brought in the state court presented only one cause of action, and there was no separable controversy of which either defendant could avail itself for purposes of removal. See Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; Brown v. Trousdale, 138 U. S. 396, 11 Sup. Ct. 308, 34 L. Ed. 987; Torrence v. Shedd, 144 U. S. 530, 12 Sup. Ct. 726, 36 L. Ed. 528; Pow-

ers v. Chesapeake & Ohio Ry. Co., 169 U. S. 97, 18 Sup. Ct. 264, 42 L. Ed. 673. It follows that the suit was not removable to the United States Circuit Court and that court acquired no jurisdiction.

The want of jurisdiction of the court below can be assigned as error by any plaintiff in error, although he provoked the removal in question. See Capron v. Van Noorden, 2 Cranch, 126, 2 L. Ed. 229; The Dred Scott Case, 19 How. 393–440, 15 L. Ed. 691; Railway Co. v. Swan, 111 U. S. 379–383, 4 Sup. Ct. 510, 28 L. Ed. 462. And this court will on its own motion notice the absence of jurisdiction in the court below. Jackson v. Ashton, 8 Pet. 146, 8 L. Ed. 898; Chapman v. Barney, 129 U. S. 681, 9 Sup. Ct. 426, 32 L. Ed. 800; Mattingly v. N. W. Virginia Railroad, 158 U. S. 57, 15 Sup. Ct. 725, 39 L. Ed. 894, and cases there cited.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to set aside the verdict and remand the cause to the state court from which it was removed, the costs of this court to be paid by the Pullman Palace Car Company.

PRESSED STEEL CAR CO. v. STEEL CAR FORGE CO.

(Circuit Court of Appeals. Third Circuit. December 31, 1906.)

No. 38.

1. TRIAL—VERDICT—FORM.
   A verdict that "we the jury in the above case sustain the validity of the contract sued upon, and fix the damages at ten dollars," was fatally defective and insufficient to sustain a judgment.
2. SAME—AMENDMENT.
   Such verdict was incapable of amendment after the separation of the jury.
3. JUDGMENT—ENTRY NUNC PRO TUNC—POWER OF CLERK.
   Where the clerk neglected to enter judgment pursuant to the direction of the court during the term, he had no power thereafter to enter judgment nunc pro tunc.
4. SAME—ENTRY—OMISSION—COURT RULES.
   Circuit Court rule 16, providing that, where judgment shall be omitted to be entered on a verdict, it shall be considered as entered on the last day of the term, is applicable only to a verdict which is sufficient to support a judgment.

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

Charles Gibbs Carter and James H. Beal, for plaintiff in error.
George B. Gordon, for defendant in error.

Before DALLAS, Circuit Judge, and BRADFORD and LANNING, District Judges.

BRADFORD, District Judge. It appears from the transcript of record that the Steel Car Forge Company, the defendant in error, brought an action of assumpsit in the circuit court of the United States for the Western district of Pennsylvania against the Pressed Steel Car Company, the plaintiff in error, to recover damages for alleged

breach of contract. There was a jury trial, resulting in the following finding, June 15, 1905:

"We the jury in the above case sustain the validity of the contract sued upon and fix the damages at ten dollars."

A motion for a new trial was made by the defendant, June 20, 1905, and was denied as appears from the following record entry:

"And now, to wit, June 30th, 1905, no reasons having been filed in support of the motion for a new trial, the motion is overruled and the clerk is directed to enter judgment. Per Curiam."

Notwithstanding the direction of the court below, the transcript of record does not disclose that any judgment was entered in the case, and during the hearing in this court the attention of counsel was called to that fact. Since that time both parties through their counsel of record have presented a petition to this court setting forth in substance, among other things, that the clerk of the court below did not enter judgment as he had been directed to do; that judgment customarily is entered in the western district of Pennsylvania after the denial of a motion for a new trial by adding the words "and judgment on the verdict"; that the neglect of the clerk to "enter judgment on the verdict was not known to either of the parties in this case until attention was called thereto by this court during the argument of the case"; that according to the rules and practice of the court below the "verdict in this case has the same force and effect as though judgment had been entered as of the last day of the term"; that the clerk of the court below, when his attention was called to the omission to enter judgment, made a minute upon the court docket as set forth in his certificate attached to the petition; and that it was within the power of the court below "to enter judgment nunc pro tunc, even after the expiration of the term". The certificate of the clerk, entitled in the case, under the seal of the court and dated December 5, 1906, is to the effect that the following is a true and correct copy from the record, namely:

"And now, December 5th, 1906, judgment is hereby entered upon the verdict nunc pro tunc as of November 11th, 1905, being the last day of the term in which the verdict was rendered, in accordance with the opinion of the Court filed on the 30th day of June, 1905, and Rule 16 of this Court, and the stipulation of counsel for plaintiff and defendant duly filed."

Rule 16 of the court below is stated in the petition to be as follows:

"Motions for new trials and in arrest of judgment and to take off a nonsuit must be made within four days after the verdict or entry of nonsuit, and motions for new trials must be made notwithstanding points have been reserved within the time limited above. In all these cases, the reasons reduced to writing, shall be filed of record. Where judgment shall be omitted to be entered upon a verdict it shall be considered as entered upon the last day of the term."

The prayer of the petition is as follows:

"Your petitioners therefore pray this Honorable Court to make an order amending the record in this Court in accordance with the minute made in the court below, as is set forth in the certificate of the clerk attached hereto, and that your Honors will direct a writ of certiorari to bring up the record of the judgment in the court below, or, if necessary, issue a special remit-

titur sending the record down to the court below for amendment, and then a special certiorari bringing it back to this Court, or that this Court should take such other action as may to this Court seem the proper practice, and that your Honorable Court should then proceed to determine and dispose of this case."

The prayer of the petition clearly must be denied. The finding that "we the jury in the above case sustain the validity of the contract sued upon and fix the damages at ten dollars" was fatally defective and after the separation of the jury incapable of amendment. It was an anomaly in an action at law. It could not by any possibility warrant the entry of judgment upon it; for it was a mere nullity. Nor does the petition show that any judgment was entered upon it. It admits that the clerk neglected to enter judgment pursuant to the direction of the court given June 30, 1905. In undertaking "of his own motion" to enter judgment nunc pro tunc December 5, 1906, on the finding of the jury, the clerk transcended his authority, and what purports to be a judgment is without effect and absolutely void. The claim that by virtue of rule 16 "the verdict in this case has the same force and effect as though judgment had been entered as of the last day of the term" does not help the petitioners. Certainly if judgment had been entered on the last day of the term on the "verdict" it would have had nothing to support it. But, further, rule 16 is either self-executing or not. If it be not self-executing admittedly no judgment was entered or to be considered as entered during the term when the jury made its finding. If, on the other hand, the rule be self-executing it can have application only to verdicts capable of supporting judgments. This conclusion necessarily results from the provision that "where judgment shall be omitted to be entered upon a verdict, it shall be considered as entered upon the last day of the term." There is thus no ground on which it would be proper to grant the prayer of the petition; and, as no judgment is disclosed, this court is without authority on this writ of error to consider the merits. The dismissal of the writ of error may not, in view of the fact that in legal contemplation there is neither judgment nor verdict in the court below, necessarily prevent the doing of justice between the parties through a new trial. Of course, we are not to be understood as expressing a definite opinion on this point, as it is properly cognizable by the court below. For the reasons given this writ of error must be dismissed with costs, and it is so ordered.

STANDARD PLUNGER ELEVATOR CO. v. BRUMLEY et al.

(Circuit Court of Appeals, Third Circuit. December 5, 1906.)

No. 33.

1. PRINCIPAL AND AGENT—COMPENSATION—ACTIONS—VALUE OF SERVICES—EVIDENCE.

Where, in an action for services under an alleged express contract to pay 10 per cent. of the price of certain sales of machinery made by plaintiff, defendant denied the contract as alleged, and averred that the agreement provided for a much smaller compensation, evidence as to the rea-

sonable value of plaintiff's services was admissible as bearing on the question as to which agreement was made.

2. SAME—PAYMENT—TIME.

Where, in an action for agents' commissions on sales of machinery, the oral contract sued on did not provide as to the time when the amounts claimed should be payable, evidence as to the time usually fixed for the payment of similar commissions was admissible.

3. SAME—QUESTION FOR JURY.

Where, in an action for agents' services in the sale of certain machinery, plaintiffs claimed for additional services rendered to defendants in the performance of certain contracts outside their general oral contract of agency, whether such extra services were incident to such contract or whether they were independent thereof was for the jury.

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

See 144 Fed. 713.

William Metcalf, Jr., for plaintiff in error.

Joseph A. Langfitt, for defendants in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. The original suit in this case was brought in the court of common pleas for Allegheny county, in the state of Pennsylvania, and removed upon petition of the defendant, on the ground of diverse citizenship, to the Circuit Court of the United States for the Western district of Pennsylvania.

The cause of action was the alleged violation of a certain oral contract, the terms of which, as set out in plaintiffs' statement of claim, may be summarized as follows:

Plaintiffs were engaged in the business of constructing and repairing elevators, and acting as agents for the sale of elevator machinery. The defendant was also engaged in the manufacture and sale of elevators, and in February, 1903, entered into a contract with the plaintiffs, by which the plaintiffs undertook to sell elevator machinery produced by the defendant, and were to receive for such agency and sales a ten per cent. commission on the amount of any contracts secured by said plaintiffs for said defendant. The plaintiffs aver that, in pursuance of said contract, four specific sales of defendant's machinery were made by them to four different purchasers, aggregating in amount $133,450, and that thereby the defendant became indebted to the plaintiffs for their commission of ten per cent., as aforesaid, or $13,345. The plaintiffs aver further that the defendant arranged with them to use their place of business as headquarters in the city of Pittsburgh, and induced and employed the plaintiffs to assist defendant in carrying out its contracts, including contracts other than those pertaining to the sales made by plaintiffs, and that said contract for the use of office, and for assistance in carrying on defendant's general business, was duly performed by said plaintiffs during the period of one and a half years; and that said services "were fully worth the sum of $2,000 per annum, or $3,000 for said period." This latter sum, added to the commissions claimed, less certain credits, aggregated $13,960.30, which, with interest from January 1st, 1904, is the amount sought to be recovered in the suit.

Defendant, in its affidavit of defense, denies that there was any contract to pay plaintiffs a ten per cent. commission on all sales secured by them, but avers that the agreement as to compensation for plaintiffs' services was, that the same should be arranged between the parties as to each particular contract which plaintiffs might obtain, until a written contract could be agreed upon between plaintiffs and defendant; that defendant proposed a written contract to plaintiffs, but they refused to accept or execute the same, and no written contract was ever entered into between the parties. Defendant denies that the work or business of the agency was diligently prosecuted by plaintiffs, and especially denies that a certain one of the sales, specified by plaintiffs in their statement of claim, was ever made by said plaintiffs, but was in fact made by the defendant itself, and that as to the other three sales for which commission is claimed by the plaintiffs, specific agreements were made by which a much smaller aggregate amount was to be paid to plaintiffs, a part of which had been paid, and the balance, by the terms of said contracts, had not, at the time of the bringing of suit, become due.

On the issues thus made under the pleadings, the case was tried and submitted to the jury, and a verdict rendered for about one half of the amount claimed. Bills of exception were allowed and signed by the trial judge, as to the admission of certain evidence, and three of the six assignments of error are directed to such admissions. The first and third assignments of error relate to the admission of the testimony of witnesses, alleging themselves familiar with the elevator business, to the effect that the customary compensation for the sale of elevator machinery by an agent, was ten per cent. The objection made to this testimony is that, the suit being one on an express contract, evidence as to the quantum meruit was irrelevant, it being assumed that no count to that effect was contained in the statement of claim. This objection would be good, if the special agreement as to the compensation for, or value of, the services rendered, were not controverted by the defendant. But in this case it is controverted, and a different special agreement is alleged, providing for a much smaller compensation than that claimed under the contract as set up by the plaintiff. In such cases, it is proper for either party to prove the value of such services, as bearing upon the issue between them, and the probability that the one or the other agreement was made. Barney v. Fuller, 133 N. Y. 605, 30 N. E. 1007; Allison v. Horning, 22 Ohio State, 138. Upon this ground, the testimony objected to was admitted by the trial judge. We incline to think, too, that the statement of claim contains what, under the informal pleading sanctioned by the Pennsylvania practice, may be considered a quantum meruit count, under which, of course, the testimony would be admissible.

The second assignment covers an objection made to the admission of testimony, as to the time usually fixed for the payment of commissions in the matter of contracts made by agents. As the oral contract set out in the statement of claim covers no agreement as to the time when the commissions claimed should be payable, evidence on this point was clearly admissible, and was a matter of fact to be dealt with

by the jury upon the evidence, and not a question of law to be determined by the court.

The fourth assignment of error objects to that part of the charge of the court submitting to the jury the question as to the propriety of the charge of $3,000 for the use of plaintiffs' office in Pittsburgh, and compensation for services outside of their agency, rendered during the period stated. We think the court, with perfect fairness, submitted it to the jury, to determine whether these services were incident to the general employment, as agent, or were so independent thereof as to entitle the plaintiffs to claim, under a quantum meruit, separate compensation therefor. It is to be remembered that the contract here declared on is not in writing, and so to be construed by the court, but is an oral contract, to be established out of the mouths of witnesses, and its existence, scope and extent are facts to be determined by the jury. So the question, whether the so-called outside services of plaintiffs were incident to their general contract of agency, or were rendered independently thereof, was primarily a question for the jury, and a careful reading of the evidence, as disclosed in the record, does not convince us that the jury would not be justified in finding this point in favor of the plaintiffs. It is to be noted, too, that the record discloses no request to the court for binding instructions to the jury, and consequently no exception or assignment of error in that respect.

The fifth and sixth assignments of error are without merit, and require no discussion.

The charge of the court, on the whole, was entirely fair to the defendant, and we find no error in the matters referred to in the specifications.

The judgment below is therefore affirmed.

BOYD v. ARNOLD, LOUCHEIM & CO. et al.*

(Circuit Court of Appeals, Fifth Circuit. December 15, 1906.)

No. 1,594.

BANKRUPTCY—APPEAL—REFEREE'S FINDINGS—REVIEW.

Where an application for a bankrupt's discharge was heard on briefs and the report of a referee overruling the specifications of objection, and the referee's findings, so far as they were disputed, were amply supported by the testimony, an order denying the application will be reversed on appeal.

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

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

D. A. Kelley, for appellant.

J. D. Williamson, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The appellant was adjudged bankrupt on his voluntary petition. In due time he made his application

* Rehearing denied January 15, 1907.

for a discharge. Pursuant to a general order of the bankruptcy court authorizing the clerk to set down applications for discharge for hearing before the referee, this application was set to be so heard. Notices were sent out to all known creditors, and in due time certain of them filed objections to the granting of the discharge, specifying several grounds, originally presented and afterwards amended, which sufficiently appear, without specification at this place, in the extracts hereinafter given from the referee's report. Issues thus presented were strenuously litigated before, and examined fully by, the referee; the respective parties being represented by able counsel. The evidence, both documentary and oral, in full compass and minuteness, was taken and brought up in the transcript now before us. We do not deem it necessary to review it in detail. It is accurately summarized in the report of the referee, and thereupon he made his findings as follows:

"From the foregoing facts, I find that it is true, as stated in specification of objection No. 1, that J. W. Boyd, the bankrupt, has an interest in 1,579 acres of land in the name of his wife, A. F. Boyd, in Coryell county, Tex., but that the affidavit to the schedules in which this is not set out as a part of his property was not made willfully and fraudulently, nor with the intention of concealing such interest from his creditors. It is true, as stated in specification of objection No. 2, that the said J. W. Boyd has an interest in 1,579 acres of land in the name of his wife, A. F. Boyd, but that the same was not transferred to his wife, nor procured to be transferred to his wife, for the purpose of defrauding, hindering, or delaying his creditors. I find that it is true, as charged in specification of objection No. 3, that the said James W. Boyd has an interest in the said 1,579 acres of land in the name of his wife, A. F. Boyd, but that it is not true that said property was willfully and fraudulently concealed from his trustee in bankruptcy after his adjudication herein. I further find that it is true, as stated in specification of objection in the amended specification filed herein, that the said James W. Boyd took $85 from the cash drawer of the Boyd Mercantile Company, a bankrupt, and had same charged to his personal account, but that such taking was not done for the purpose of appropriating the property to his own use, or for the purpose of defeating the bankruptcy act, and was not taken from the property, nor was it a concealment of the property in this proceeding, which is No. 496, James Watson Boyd, Bankrupt; that it otherwise appears that said bankrupt has fully complied with the requirements of the acts of Congress relating to bankruptcy, and the orders of court touching his said bankruptcy; and that it appears that all notices, wherever required, have been given in the manner, for the length of time, and in the terms required by the bankruptcy acts and rules of court. Wherefore I recommend that the prayer of said petitioner be granted."

This report was filed in the bankruptcy court the 17th day of May, 1906, and on the 30th day of that month the district judge entered the following order:

"The petition for discharge filed by James Watson Boyd, bankrupt, in the above-entitled cause, coming on to be heard, and the same, together with the specifications of objection thereto filed by creditors, the certificate of the referee, the evidence in the cause, and the briefs of counsel, having been carefully examined and duly considered, the court is of the opinion that a discharge should not be granted. It is therefore ordered and adjudged that the prayer of the petition for discharge be, and the same is, hereby denied."

It clearly appears, from the recitations contained in the foregoing order, that the matter was submitted to the court on briefs of counsel. We have carefully examined and duly considered all the matters

shown in the record which appear to have been before the trial judge, and have reached a different conclusion from that expressed in his order. The referee specifies the four grounds of objection that were made by the creditors to the application for discharge, and distinctly finds that the mistake, if any, that was made in the verified schedules, was not made willfully and fraudulently, nor with the intention of concealing any interests from his creditors; that the 1,579 acres of land was not transferred to his wife, nor procured to be transferred to her, for the purpose of defrauding, hindering, or delaying his creditors; that the indefinite interest which the bankrupt (in the opinion of the referee) had in the 1,579 acres of land was not willfully and fraudulently concealed from his trustee; that the $85 referred to in the fourth objection, which the bankrupt drew from the Boyd Mercantile Company, another bankrupt, and had same charged to his personal account, was not done by him for the purpose of defeating the bankruptcy act; that the bankrupt has fully complied with the requirements of Congress and the orders of court touching his bankruptcy; and that all notices, wherever required, have been given in the manner and length of time required by the bankruptcy act and the rules of court. These findings of the referee, so far as they are disputed by the appellees, are, in our opinion, amply supported by the testimony.

It is therefore ordered that the decree of the District Court be reversed, and the decree now rendered here that the prayer of the petition for discharge be, and the same is, hereby granted.

CHAPMAN DECORATIVE CO. v. SECURITY MUT. LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. November 20, 1906.)

No. 17.

1. DAMAGES—BUILDING CONTRACT—STIPULATION FOR LIQUIDATED DAMAGES FOR DELAY.

   A provision of a building contract, reciting that in case of delay in the completion of the building the damages to the owner will be difficult of computation, and that it is therefore agreed that in case of delay beyond the time fixed the contractor shall pay a stated sum per day from that time until completion as liquidated damages, where it is shown that in fact the damages actually sustained by the owner could not be accurately computed, is conclusive upon the parties in the absence of fraud or mutual mistake.

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

2. CONTRACTS—CONSTRUCTION—DAMAGES FOR DELAY.

   Where a building contract which contained a stipulation for the payment of liquidated damages by the contractor in case of delay in the completion of the work also provided that if such delay should be caused by the default of the owner, architect, or other contractors, the time of such delay should be allowed him, but that no such allowance should be made unless a claim therefor should be made to the owner or architect within 24 hours, the latter clause is enforceable and binding on the contractor.

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

For opinion below, see 145 Fed. 434.

Reynolds D. Brown, for plaintiff in error.
Joseph H. Taulane, 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 Chapman Decorative Company brought suit against the Security Mutual Life Insurance Company to recover on a contract for decorative work done for the latter in its office building. The plaintiff assigns for error certain rulings of the court by reason whereof the verdict rendered by the jury in its favor was for a less amount than it is alleged should have been returned. There was no dispute as to the amount of work done or the price therefor, but the instructions complained of were:

First, that defendant was entitled to an allowance of $50 per day for stipulated damages agreed to in the contract as follows:

"It is mutually agreed and understood that in the event of said interior finish herein contracted for not being entirely finished on or before the 15th day of March, 1905, that the actual damages sustained by the owner will be difficult of computation, therefore it has been agreed and hereby is agreed by and between the parties hereto that in the event of the failure of said contractor to have all of said interior finish of main entrance and eighth floor completed on or before the 15th day of March, 1905, there shall be due and payable, and said contractor shall pay to the said owner the just and full sum of $50.00 per day for each and every day after March 15th, 1905, that the same or any part thereof, remains unfinished and incomplete, and that said sum is hereby agreed upon as liquidated damages."

And, secondly, that plaintiff, having failed to make any request to the architect for allowance for delay, was precluded from defending on that ground by virtue of the contract provision following, viz.:

"That should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, default or delay of the owner or architect, or of any other contractor, employed by the owner, or Robinson Company upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by strikes or lockouts, through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be claimed or made unless a claim therefor shall be presented in writing to the owner, or Andrew J. Robinson Company, within twenty-four hours after the occurrence of such delay. The duration of such extension shall be certified to by the architect, but appeal from his decision may be made by arbitration as provided in article III of this contract."

Manifestly, there was no error in the court so ruling. In the Sun, etc., Association v. Moore, 183 U. S. 643, 22 Sup. Ct. 240, 46 L. Ed. 366, it was held:

"Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. The naming of a stipulated sum to be paid upon the nonperformance of a contract, is conclusive upon the parties in the absence of fraud or mutual mistake."

In Stephens v. Essex, etc. (C. C. A.) 143 Fed. 845, this court applied that principle. We think the facts in the present case likewise

call for its application. The defendant, an insurance company, was erecting a large office building. It arranged to vacate its then present quarters, and itself occupy three stories of the new building on April 1st following the contract. These stories, as well as the main entrance and lobby, plaintiff was to decorate and complete in every detail by March 15th. The other seven stories were to be rented to tenants. The renting term in that vicinity began April 1st. This building was one of the only two large office buildings in that locality, both of which were to be finished at the same time, and were in competition for tenants. In point of fact, the plaintiff did not finish the work until midsummer, and, prior to such completion, defendant was unable to charge rent to the tenants it did obtain under the conditions existing when this contract was made, and, in view of the difficulty of ascertaining all and the impossibility of ascertaining some of the loss sustained by the defendant by reason of delay, the case was a proper one in which to fix such damages in advance by stipulation. Moreover, in view of the large amount of rentals involved, we think the price of $50 per day agreed upon was reasonable. Such being the case, we are of opinion the court was justified in instructing the jury that the amount thus agreed upon by the parties was not a penalty, but stipulated damages.

So, also, in enforcing the provision in regard to delays, the court committed no error. During the progress of the work, the defendant made no claim to the architect, either in writing or otherwise, for allowance for delay in accordance with the provision quoted, and in the answer to the defendant's tenth point, the court instructed the jury that no claim for obstruction or delay could be allowed. No reason is now shown why this clause of the contract should not be enforced. The parties made such an agreement, and thereby made it a law for themselves. Its purpose evidently was to avoid just such a contest as the plaintiff here seeks to raise. In the absence of a claim for extension for delay, the defendant had a right to presume, either that no valid ground to ask an allowance existed; or, if it existed, it was not serious enough to call for an extension. These provisions in building contracts have been enforced in courts. Feeney v. Bardsley, 66 N. J. Law, 240, 49 Atl. 443; Curry v. Olmstead (R. I.) 59 Atl. 392; Davis v. La Crosse Hospital Ass'n (Wis.) 99 N. W. 351; and, as we have said, no reason is shown why it should not be enforced here.

The judgment of the court below is affirmed.

BALTIMORE & O. S. W. R. CO. v. DAVIS.

(Circuit Court of Appeals, Seventh Circuit. October 25, 1906.)

No. 1,316.

1. COURTS—JURISDICTION OF FEDERAL COURTS—ALLEGATIONS AND PROOF OF CITIZENSHIP.

The testimony of a plaintiff that he was at "home" in a certain town and that he lived there is sufficient proof of his citizenship in the state in which such town is situated to sustain the jurisdiction of a federal

court in a suit against a corporation of another state, although the averment of citizenship in his declaration is defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 885.]

2. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff was a brakeman in the service of defendant railroad company, and while engaged in coupling a car on a side track to a train, at night, took hold of the coupling lever of such standing car with one hand while he reached with the other between such car and the approaching car to open the knuckle as was necessary. He then discovered that the chain connecting the pin to the lever was broken so that the pin must be raised by hand which necessitated the use of both hands between the cars. Before he could raise the pin and open the knuckle in that way the cars came together and one hand was crushed. Plaintiff had no previous knowledge of the defect which was due to the negligence of defendant's inspector. *Held*, that the question whether or not plaintiff was chargeable with contributory negligence was one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1125.]

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

The plaintiff in error was the defendant below in suit of Thomas R. Davis to recover for personal injuries, and this writ is prosecuted from a judgment in favor of the latter. The parties are hereinafter referred to as plaintiff and defendant respectively, in such suit below. Jurisdiction is challenged for want of declaration or proof of diversity of citizenship. All other assignments of error rest upon the plaintiff's version of facts, refusal of the court thereupon to direct a verdict in favor of the defendant and instructions which were given; but each question for review is free from complication.

The plaintiff was a brakeman, in the service of the defendant railway company, and was injured while coupling freight cars, in making up a train in the railroad yards at Flora, Ill., where the defendant inspected and repaired its cars. The work was under his direction, to signal the engineer for moving the cars, with the cars standing on a "coach track," extending north and south, in four partings or "cuts," before daylight in the morning—the train having been made up the previous day, with opportunity for inspection and repair. The plaintiff had taken the car numbers, in readiness for coupling, and the engine was at the south end of the south "cut," which embraced five or six cars, with the north one a refrigerator car; this was equipped with automatic couplers, having a lift lever which extended out on the east side of the car. An ordinary freight car similarly equipped, was next north of it, and they were not coupled, as the plaintiff discovered on attempting to couple the air hose; so upon his signals the engine pulled up the first cut a few feet and then backed to make the coupling. When the return movement commenced, the plaintiff stepped in between the cars to open the knuckle of the coupler on the refrigerator car, which was liable to be closed by movement of the car and does not open automatically. These couplers are provided with a lug pin to hold them in place when coupled, and a chain connects the lug pin to the lever, so that movement of the lever raises the lug pin; until raised the knuckle is locked by the pin and will not couple. To make the coupling, when the equipment is in order, the lever to raise the pin can be operated with one hand from the side of the car, but it is necessary to enter between the cars to open the knuckle by hand, if closed. For this purpose, the plaintiff took hold of the lever on the refrigerator car with his left hand to raise the pin, and reached with his right hand to open the knuckle; but then discovered that the chain was broken so that the pin must be raised by hand instead of lever, to release the knuckle. In his position, this required instantaneous change of hands, to remove the pin with the right and open the knuckle with the left hand; he attempted this, but the cars came together before he could accomplish both operations and his left hand was crushed. The defect, opportunity for inspec-

tion by the car inspector, and neglect therein chargeable to the defendant, are undisputed facts; and it is undisputed that the plaintiff was not chargeable with duty as inspector, nor with notice of the defect. Upon submission of the several issues to a jury the verdict was for the plaintiff and judgment was recovered accordingly.

Rudolph J. Kramer, for plaintiff in error.
George M. Morgan, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The questions raised by the various assignments of error are these: (1) Is the proof sufficient to establish jurisdiction, resting on diversity of citizenship? (2) Is the plaintiff chargeable under his testimony with contributory negligence as a conclusion of law? (3) Whether error appears in the instructions to the jury covered by exception.

1. The jurisdictional allegation in the declaration of citizenship on the part of the plaintiff is plainly defective, as it states that he is "a resident of the state of Illinois," but does not state his place of citizenship. In his testimony, however, preserved of record in a bill of exceptions, the plaintiff says, in reference to occurrences both before and after the commencement of the suit, that he was at "home" in Flora, Ill.; that "I live there." This proof is sufficient, under the authority of Sun Printing & Publishing Ass'n v. Edwards, 194 U. S. 377, 383, 24 Sup. Ct. 696, 48 L. Ed. 1027, to cure the defective averment. In that case the question of jurisdiction was certified, under like incidental statement by the plaintiff that he "lived in Delaware" and his family were there, and the sufficiency was upheld, where the averment was alike defective. The declaration mentions the defendant as "a foreign corporation and nonresident of the state of Illinois," so that diversity of citizenship appears, and the assignment for want of jurisdiction is overruled accordingly.

2. On behalf of the defendant, instructions were requested directing a verdict of not guilty, on the theory that negligence on the part of the plaintiff conclusively appeared as contributory cause of the injury; and error is assigned for denial of the several motions to that end. We are satisfied that the contention upon which they rest is untenable, and that the issue of contributory negligence was rightly submitted to the jury. True, the facts were undisputed, but the inferences to be drawn from them—whether the plaintiff exercised ordinary care and prudence in attempting to make the coupling under the circumstances—were clearly within the province of the jury. Under the testimony, the effort of the brakeman to open the knuckle with one hand (as needful), while the other hand engaged the lever to raise the pin, is surely not conclusive of want of ordinary care, when it appears that he was unaware of the broken chain, which prevented action of the lever. In so far as appears, the coupling would have been safely made, except for the defect referred to, and the attempt was no departure from the ordinary method, where the knuckle was either closed or not observed to be open. With the defendant chargeable with negligence for sending in the car with the broken chain, after

opportunity for inspection and repair, and the plaintiff not chargeable with notice, but entitled to assume that it was in order, the defendant is without ground for complaint in the submission. So in respect of the contention that the broken chain was not the proximate cause of injury, we are of opinion that no error appears in the submission or instructions thereupon.

3. The entire charge to the jury is preserved in the record, and error is assigned upon portions of the instructions as not fully stating the issues and the rule to be applied under the evidence. Reading the instructions as a whole, we are satisfied that each of these objections to the instruction is without merit. All the issues were clearly defined and correctly submitted, as we believe, in the course of the charge; and if the portions referred to omit repetition of all the elements to be considered, the context supplies it in clear terms, without room for misunderstanding upon either issue.

No reversible error appears in the assignments, and the judgment of the Circuit Court is affirmed.

PAGE et al. v. ROGERS.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

No. 1,570.

1. APPEAL—MANDATE—CONSTRUCTION.
   Where the mandate on a former appeal provided that appellants were liable for a sum sufficient to "pay all debts of every class which had or might be proved against the bankrupt, and the expenses of the trustee, his fee, and costs," provided the aggregate did not exceed the amount of the preference received by appellants' testator, appellants were properly charged with a reasonable counsel fee to the trustee's attorney.

2. BANKRUPTCY — PREFERENTIAL PAYMENTS — EXPENSES OF ADMINISTRATION—COUNSEL FEES.
   The reasonable fee of counsel employed by a bankrupt's trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses, and, as such, a part of the costs and expenses of administration, entitled to preferential payment.

3. SAME—EXCESSIVE ALLOWANCE.
   Executors were held liable to repay to a bankrupt's trustee, of an alleged preference, a sum sufficient to pay all debts of every class proved against the bankrupt, and the expenses of the trustee, his fee, and costs. A fee of $15,000 was allowed to the trustee's attorney, but the executors' total liability was more than $7,000 less than the aggregate of the debts and expenses, including the allowance to counsel. *Held*, that such allowance was not excessive, in so far as such executors were concerned.

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

King, Waters & Page and Brown & Spurlock, for appellants.

Williams & Lancaster and Pritchard & Sizer, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This is a second appeal. The opinion upon the first appeal states the case. 140 Fed. 596. In pursuance of our decree modifying the decree of the court below, the district judge directed a special master to report the amount of claims proved or provable against the bankrupt, and the costs and expenses of the administration of the bankrupt estate, including fees of counsel for the bankrupt's trustee in this case. The master reported that the total amount of claims and costs and expenses, including trustee's counsel fees, was $78,086.78. The total liability of the estate of Thomas Merriam to the bankrupt's trustee he reported at $70,891.54, including interest to January 15, 1906. Upon this basis there was no surplus over and above the liabilities of the bankrupt's estate, and no room for a refusal to direct the payment of any sum less than the full liability of Thomas Merriam to the trustee.

But the appellants assign as error the allowance of $15,000 as counsel fees to the counsel employed by the trustee, first, because they say that under the mandate of this court no counsel fees were allowed. This is a mistake. We expressly held that the appellants were liable for a sum sufficient to "pay all debts of every class which have been or may be proven against the bankrupt and the expenses of the trustee, his fee, and the costs," provided the aggregate did not exceed the amount of the preference received by the testator, Thomas Merriam. The reasonable fee of counsel employed by the trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses, and as such a part of the costs and expenses of administration, entitled to preferential payment. Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553. These counsel fees were, therefore, a part of the trustee's expenses, and allowable under our mandate.

It is next objected that this allowance was excessive. We are not altogether prepared to approve of the large compensation allowed counsel, in view of the strong admonition in the direction of economy found in the bankrupt law. But if we assume that, under the peculiar mandate of this court, the district judge was authorized to refer the question of the aggregate sum necessary to pay all probable claims, costs, and expenses to a special master for a report, and that we would be authorized to consider an exception to an allowance for the counsel fees for the attorneys employed by the bankrupt's trustee upon the ground that it was so grossly excessive as to be an abuse of the sound discretion of the court below, we see no sufficient reason under the facts of this case for doing so. The total liability of the appellants is more than $7,000 less than the aggregate of the debts and expenses, including this allowance to counsel. The result is that about one-half of this allowance is paid by the creditors, who are not complaining. Unless, therefore, we should hold that this allowance was excessive to the extent of more than one-half, it would not benefit appellants. That we are not willing to do.

All of the assignments are overruled, and decree affirmed.

ROSS v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Third Circuit. November 2, 1906. Rehearing Denied December 31, 1906.)

No. 32.

COLLISION—TUG WITH TOW AND ANCHORED DREDGE—MUTUAL FAULTS.

A tug coming down the Hudson river at night with a long tow *held* in fault for a collision between her tow and a dredge anchored at the side of the channel in a position known to the tug, and the dredge also *held* in fault for remaining at night in a place where by reason of a bend in the river it was difficult for vessels with long tows to pass her in safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 79.]

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

For opinion below, see 143 Fed. 166.

Charles D. Thompson, for P. Sanford Ross.

J. Parker Kirlin, for Cornell Steamboat Co.,

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

PER CURIAM. These are cross-appeals from a final decree of the District Court for the District of New Jersey in a cause civil and maritime.

The libelant was the owner of a dredge, and in his libel he sought to recover damages from the respondent for a collision between the dredge, which was anchored in the Hudson river, and one or more of a string of barges in tow of the respondent's steamboat. The court below found both parties at fault, and divided the damages between them. In approving this decision, we adopt the reasoning of the learned judge upon which it is founded, as set forth in the full and satisfactory opinion filed by him and to be found in 143 Fed. 166.

The decree of the court below is affirmed.

UNITYPE CO. v. LONG.

(Circuit Court of Appeals, Sixth Circuit. November 22, 1906.)

No. 1,462.

APPEAL AND ERROR—REHEARING—TIME FOR FILING PETITION.

The rule of the Circuit Court of Appeals which requires a petition for rehearing to be filed within 30 days after the filing of an opinion is one of convenience, and should not be enforced where the point on which a rehearing is asked is a reversal of the authority upon which the decision was based after the time for filing of the petition had expired, but before the court had lost jurisdiction over the judgment by the expiration of the term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3232.]

On Petition for Rehearing.

For former opinion, see 143 Fed. 315.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. A petition to rehear was filed in this case before the close of the last term, and our mandate recalled, and a rehearing ordered for the first week of the present term. We held in the opinion filed herein, upon the authority of Dolle v. Cassell, 135 Fed. 52, 67 C. C. A. 526 (a case decided by this court), that a conditional sale of personal property, retaining the title until the purchase price was paid, was a void agreement as against the creditors of the buyer and his trustee in bankruptcy when not filed as required by section 4155–2, Rev. St. Ohio, 1906. Our opinion was subsequently overruled by the Supreme Court, and our judgment reversed, and the agreement retaining title to secure the price held valid and enforceable against the bankrupt's trustee.

It follows that the order of affirmance heretofore made will be set aside, and the judgment of the bankruptcy court reversed. The petition to rehear was filed after the time within which rule 29 (90 Fed. lix, 31 C. C. A. cvi) requires it to be filed. But the case is one which could be carried to the Supreme Court. That our judgment would be there reversed, there can be no doubt. The rule which requires a petition to rehear to be filed within 30 days after the filing of an opinion is a rule of convenience, and should not be enforced where the point upon which a rehearing is asked is a reversal of the authority upon which our decision was made after the time for a petition to rehear, but before we had lost jurisdiction over the judgment by the expiration of the term.

E. EPPSTEIN & CO. v. WILSON.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1906.)

No. 1,522.

BANKRUPTCY—LIENS—UNRECORDED CHATTEL MORTGAGE.

The failure to record a chattel mortgage under the provisions of Rev. St. Tex. 1895, art. 3328, which, under the state decisions, does not affect its validity as between the parties or as against general creditors, does not render it invalid as against the trustee in bankruptcy of the mortgagor by virtue of Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Texas.

F. M. Etheridge and Rhodes S. Baker, for petitioner.

J. W. Stitt, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the 4th day of May, 1905, one Cleve McNeil, being indebted to E. Eppstein & Co. in the sum of $2,822.85, balance due on a previous chattel mortgage, and $1,661.47 on an open account and $60 for rent, executed and delivered to E. Eppstein & Co. his note for $4,544.32 with interest from date at 10 per cent.; and, to secure said note he executed on the same day a chattel mortgage, bearing no date upon its face, upon certain bar fixtures in a certain saloon in Quanah, Hardeman county, Tex. Six days afterwards, Cleve McNeil

was, on his own petition, adjudged a bankrupt. E. Eppstein & Co. proved the execution of the aforesaid note and mortgage, and asked to have the same allowed with full recognition of the mortgage lien. To the allowance of the claim the trustee made objection as follows:

"(1) That the alleged lien attempted to be asserted by claimant is void, because when given bankrupt was insolvent. (2) Because the alleged lien was given within four months next preceding the filing of bankrupt's petition herein. (3) Because neither of the mortgages on which claimant relies were registered as required by law, and are therefore void as against creditors and against the trustee of this estate. (4) That the trustee reduced the property on which the lien is asserted to his possession immediately on his qualification as such trustee of this estate and prior to the filing of the claim herein contested as a secured claim. (5) That claimants by withholding said alleged mortgages from proper registration and record aided said bankrupt in practicing a fraud on his other creditors, by making it appear that his assets were unencumbered, thereby inducing credit from creditors other than claimants, which would not have been extended had said mortgages been legally registered."

The finding of the referee was that the claim of indebtedness under the note was a lawful, just, and valid indebtedness of the bankrupt, and lawfully provable therein; that the chattel mortgage, though otherwise valid, was not duly registered as a chattel mortgage in Hardeman county prior to the institution of proceedings in bankruptcy, and therefore the claim of lien thereunder should not be allowed. On review before the District Court, the finding of the referee was sustained. In due time E. Eppstein & Co., filed this petition for revision. If the only question below was as to the validity of the mortgage lien because it was not registered in Hardeman county, the decision of the court was erroneous. See Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240; York Manufacturing Co. v. Cassel, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. Counsel for respondent argue in this court that the mortgage lien was and is invalid, because it was given for a pre-existing indebtedness when the grantor was insolvent and within six days before the bankruptcy. The referee does not find that the bankrupt was insolvent at the time the mortgage was executed or that there was any fraud in the inception or execution of the mortgage.

Under the facts as presented, we are constrained to reverse the decree of the bankruptcy court, and direct the allowance of the lien claimed by the petitioner, and it is so ordered.

HERDIC v. MARYLAND CASUALTY CO.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 22.

INSURANCE—ACCIDENT POLICY—CONSTRUCTION.

An accident policy recited that it insured against bodily injuries sustained through external, violent, and accidental means, and in a subsequent clause provided that it did not cover death from disability resulting from mineral, animal, vegetable, gaseous, or any other kind of poison, but, subject to its conditions, covered death or disability resulting from

septicæmia, etc. *Held*, that the policy did not cover death from septicæmia ensuing from a surgical operation for appendicitis.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1175.]

Buffington, Circuit Judge, dissenting.

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

For opinion below, see 146 Fed. 396.

Seth T. McCormick, for plaintiff in error.

C. E. Sprout and John E. Cupp, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The Circuit Court sustained the demurrer of the defendant in that court (and here) to the statement of claim of the plaintiff below, wherein she alleged that the defendant, on the application of Carl Herdic (her husband), had issued a policy of insurance, made part of her statement, by which, as she averred, the defendant "did insure Carl Herdic in the sum of $5,000 against death resulting from septicæmia"; and the question was, and is, whether the policy sued on did insure against death resulting from septicæmia not caused by "accidental means," but ensuing upon a surgical operation for appendicitis.

The policy is an accident policy, and Carl Herdic could not have conceived it to be anything else. The company he applied to was a "casualty company." His application was for an "accident policy," and the policy itself was so designated, both on its face and by indorsement. Presumably such a policy would be intended, and understood, to insure against bodily injuries through accidental means, not against death from disease; and accordingly we find at the outset of this one, and in what may be called its cardinal clause, the statement that the company issuing it did thereby insure against "bodily injuries * * * sustained * * * through external, violent and accidental means." This language, of course, is not inclusive of death from septicæmia, when not resulting from accident; and in our opinion the subsequent clause upon which the plaintiff in error relies should be construed in harmony with it, and with the general character of the entire instrument as a policy of accident, and not of life, insurance. That subsequent clause is:

"(4) This policy does not cover death nor disability resulting from mineral, animal, vegetable, gaseous, or any other kind of poisoning, except as hereinafter stated; but, subject to its conditions, covers death or disability resulting from septicæmia, freezing, sun stroke, drowning, hydrophobia, choking in swallowing, and death only, as the result of an anesthetic, while actually undergoing a surgical operation at the hands of a duly qualified regular physician."

This clause is not to be so interpreted (in the event of death from septicæmia) as to render inoperative the previously expressed and broadly characterizing limitation of the entire insurance to bodily injuries sustained "through external, violent and accidental means." It was not designed to transform the policy from an accident one into one of restricted life insurance; and we do not believe that Mr. Herdic was, or could have been, misled into supposing that it had that effect.

This, however, has been so satisfactorily shown by the learned judge of the court below as to render any more extended discussion of the subject by us unnecessary. See Herdic v. Maryland Casualty Company (C. C.) 146 Fed. 396.

The judgment is affirmed.

BUFFINGTON, Circuit Judge, dissents.

AMERICAN CAN CO. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. November 24, 1906.)

No. 176.

INJUNCTION—RECEIVER OF NATIONAL BANK—DIRECTION TO RETAIN FUNDS PENDING SUIT.

It is a proper exercise of discretion on the part of a Circuit Court to enjoin a receiver of a national bank from transmitting a fund in his hands to the treasurer of the United States pending the determination by the court of a preferential claim thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 86–90.]

Townsend, Circuit Judge, dissenting.

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

F. F. Oldham and F. W. Stevens, for appellant.

J. M. Mitchell, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The majority of the court are satisfied that it was a proper exercise of discretion on the part of the Circuit Court to retain the fund within the jurisdiction until it shall have been determined, at final hearing, to whom it belongs.

TOWNSEND, Circuit Judge. I dissent from the opinion of the majority of the court. The order in question enjoins the receiver "from disposing in any manner of any funds in his hands as receiver of the Fredonia National Bank by transmission to the Treasurer of the United States or otherwise, so as to reduce" the amount claimed by the plaintiff as a preference in the pending suit.

The federal statute makes it the duty of the defendant to take possession of the assets of the insolvent institution, and to pay over all moneys resulting therefrom to the Treasurer of the United States, subject to the order of the Comptroller. There is no evidence that the defendant is doing or threatens to do any act in violation of the plaintiff's right. It would seem from the language of section 5236 of the Revised Statutes [U. S. Comp. St. 1901, p. 3508] that the comptroller, and not the defendant, would be the proper person to pay the plaintiff's claim if it were finally sustained. In the absence of evidence that unless the injunction issue there will be an invasion of the plaintiff's rights, there is no sufficient justification therefor. The right to a pre-

liminary injunction is not granted ex debito justitiæ, but the application is addressed to the sound discretion of the court. The discretion is not an arbitrary one, but is to be exercised subject to the established principles of law. High on Injunctions, §§ 11, 13.

It is to be assumed that the receiver, the Treasurer and the Comptroller will execute their duties according to law. I am of the opinion, therefore, that no adequate ground has been shown to justify the interference by injunction with the executive officers of the Government in the discharge of their duties in accordance with the statute.

WILDMAN MFG. CO. v. ADAMS TOP CUTTING MACH. CO.

(Circuit Court of Appeals, Third Circuit. November 20, 1906.)

No. 16.

CONTRACTS—BREACH—IMPLIED CONDITION.

A contract by which one party was constituted the sole manufacturer and the sole sales agent for a machine under a patent owned by the other, and required to manufacture and have ready for delivery at least 50 machines each year, provided there was sale for such number, placed upon such agent by implication the duty of exercising reasonable diligence in endeavoring to market the machines, and rendered it liable for a breach of the contract if by reason of its failure to do so the required 50 machines were not manufactured and sold each year.

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

For opinion below, see 145 Fed. 576.

Dimner Beeber, for plaintiff in error.

Ellis Ames Ballard, 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 Adams Top Cutting Machine Company brought suit against the Wildman Manufacturing Company to recover, first, the value of certain jigs, patterns, and designs, and, secondly, damages for breach by the Wildman Company of its duty as selling agent of certain knitting machines for the Adams Company. The Adams Company, being the patentee of a certain machine for cutting the tops of knit hosiery, entered into a contract with the Wildman Company on June 14, 1891, whereby the Wildman Company agreed to manufacture and sell such machines for five years. In consideration of $3,500 paid by the Adams Company, the Wildman Company agreed to make for it all the jigs, patterns, and designs required to build this machine. The money was paid and the articles manufactured. In that respect the contract provided:

"It is further agreed that said jigs, patterns, designs, etc., shall be the property of the party of the second part, but shall never be delivered to the party of the second part, and shall always be and remain in the possession of the said party of the first part, excepting, first, in the event of the voluntary

abandonment of this contract by the party of the first part within three years from the date hereof, and, second, in the event that the party of the first part shall fail to manufacture and furnish, provided there be sale for the same, fifty (50) machines each year for the first two years, unless prevented by circumstances over which it has no control. In either of the above circumstances the said jigs, patterns, designs, etc., shall be delivered over to the party of the second part."

The Adams Company averred the Wildman Company, although there was sale for the same, failed to manufacture and furnish such 50 machines yearly for each of said years, and by reason thereof it was entitled to demand, and had demanded, possession of said jigs, etc., or payment of $3,500 therefor, but the defendant refuses delivery or payment. This constitutes the first claim for damages.

As pertinent to the second claim, viz., to recover damages for breach of duty as selling agent, the contract provides:

"The party of the first part agrees to manufacture the Adams Top Cutting Machines for the party of the second part and become their sole manufacturers and sole selling agents for a period of five years, with the privileges of the party of the first part to renew this contract and extend the same for a further period of five years. * * * The party of the first part agrees to sell as agents of the party of the second part said machines, when so manufactured, at the price of seven hundred and fifty dollars ($750) f. o. b. cars at Norristown Pennsylvania, or for a price to be fixed by the party of the second part. All billheads shall contain the name of the party of the first part as sole manufacturers and sole agents for the party of the second part. * * * All selling expenses which the party of the first part may have to be borne by the party of the first part. * * * The party of the first part agrees to furnish and have made for sale, unless prevented by circumstances over which said party has no control, at least fifty (50) machines each year, provided there be sale for said number of machines. Should the party of the first part fail to manufacture and deliver one hundred machines sold or leased, unless prevented by circumstances over which said party had no control, in the first two years, then the party of the second part shall have the privilege to cancel the agreement, or take steps to place agents for the purpose of trying to increase the manufacture and sale of the machines, at their option. The party of the first part agrees to use the customary prudence and discretion in making sales, but shall not guaranty any sales, and should any losses be incurred the party of the second part agrees to pay to the party of the first part the price of manufacture, as above provided for. The party of the second part shall have the right to reject all orders of intended purchasers whose financial responsibility may be doubtful in the opinion of the party of the first part. The party of the first part agrees to make monthly reports and returns for all sales made, and liquidate monthly on the basis of such returns, and in so liquidating the party of the second part agrees to allow the party of the first part to deduct the price of manufacture and commissions, as aforesaid, on payments made on consummated sales."

The contention of the Adams Company was that defendant failed to discharge its duty as manufacturer and as selling agent, in that it did not, with due diligence and promptness, either manufacture the machines needed for sales, or sell the machines it could have sold.

It will be seen that the underlying question affecting the right of the plaintiff to recover on both these claims was the defendant's obligation as selling agent. In that respect the court said:

"Without any special provision in the contract to that effect, it is implied that the Wildman Company, having accepted the position of selling agent, and especially as being the sole selling agent, so that nobody else could put this machine on the market but itself, and to exercise reasonable diligence and care in endeavoring to market this machine."

In view of the foregoing provisions, we agree with the court below that the contract constituted the Wildman Company the selling agent of the Adams Company, and the obligation to reasonably perform all the duties incident to such a relation rested upon it. We are also of opinion the defendant had no cause to complain of the court's instructions as to its liability for damages for failure to perform its duty as such agent. Not only did the judge carefully call the jury's attention to the necessary delay in perfecting and manufacturing the device, to the difficulties incident to the introduction of a new and untried article (elements that were in defendant's favor), but he referred to the fact that, while 50 machines was the maximum which defendant could be required to make, it was not bound to manufacture any for which there was no sale. The language of the charge was:

"Their contract was that they would provide, manufacture, and have ready for delivery fifty machines a year for the first two years, provided there was a sale for the same, and that is an exceedingly important matter for the jury to consider. Taking all these matters into consideration, was there a sale for as many machines as that? Can it be said reasonably and fairly, and in view of all the evidence, that there was a market for as many machines as that? If there was, then the duty of the defendant was to supply that market. If there was no such market, their contract is not broken by their failure to furnish those machines. They were only bound to furnish the market up to that maximum. They were only bound to furnish up to a certain number of machines in case there was a sale for them. If there was only sale for twenty-five machines, they were only bound to furnish twenty-five. They were not compelled to pile up a lot of machines on their hands for which there was no sale, and which would only have to be stored in their plant. That was the reason, no doubt, that this provision was put in, that unless there was a sale for this machine, they were not compelled to market them."

So, also, in regard to the other branch of the case, viz., the right of the plaintiff to recover the value of its jigs, etc., which were in the defendant's possession. In that regard the court instructed the jury the plaintiff was not entitled to recover possession of them, or their value if possession was denied, unless there was sale for 50 machines, and the defendant failed to make them. In that respect the court said:

"It is said that the Wildman Company has failed to manufacture those fifty machines each year for the first two years, and about this there is no dispute. However, it is also said that there was a sale for these machines, and that therefore this second contingency has come to pass. You will have to determine how that is, in the light of the instructions that I shall give you hereafter upon this clause, and if you find that there was a sale for those machines, that fifty of them could have been sold for the first two years, and that the Wildman Company failed to manufacture them and furnish them as their contract called for, then this second contingency may have to come into operation, and the plaintiff may be entitled to recover the fair value of those jigs, patterns, designs, and so forth. That is the first branch of the plaintiff's claim."

We are of opinion that the construction thus placed upon this contract by the court was correct, and presumably the jury acted upon it in reaching their verdict.

The assignments of error not being sustained, the judgment of the court below is affirmed.

WARD et al. v. WARD et al. (two cases).

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

Nos. 61, 62.

EQUITY—REHEARING—NEWLY DISCOVERED EVIDENCE.

A party will not be given leave to file a bill of review and for a rehearing on the ground of newly discovered evidence, where such evidence is hearsay or otherwise inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1091–1094.]

On Motion for Stay and for Rehearing.

For former opinion, see 145 Fed. 1023.

Henry M. Ward and Austin G. Fox, for appellants.

Before WALLACE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

PER CURIAM. The motion of the appellant to stay the entry of the decree affirming the decree of the Circuit Court and withhold the issuance of a mandate pending an application by the complainant to the Circuit Court for leave to file a bill of review and for a rehearing upon the ground of newly discovered evidence should be denied, if for no other reason because the alleged newly discovered evidence is merely hearsay testimony, and would be inadmissible if objected to, and entitled to no weight if received without objection. The declaration of the deceased witness was not made in the course of the proceeding to which his agency extended, but was made many years after his relation to the proceeding had terminated.

Motion denied.

FIRST NAT. BANK OF BEAUMONT v. EASON.

(Circuit Court of Appeals, Fifth Circuit. November 29, 1906.)

No. 1,597.

BANKRUPTCY—PROVABLE CLAIMS—AMOUNT OF DEBT.

A creditor holding the note of a bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 513.]

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

Cone Johnson and Jas. M. Edwards, for appellant.

Ben B. Cain and W. Frank Knox, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The appellant has two obligations of the bankrupt, one is on a note of $15,000, of which the bankrupt was maker, the other is on an indorsement on a forged note for $15,000, given as

collateral to secure the first-mentioned note. The appellant seeks to prove both obligations against the bankrupt's estate. There was only one consideration, really only one debt, and the appellant is entitled to only one satisfaction. The payment of either obligation would extinguish the other. The District Court held that the appellant could not prove both and thus establish a double liability against the bankrupt's estate.

The decree appealed from is affirmed.

BELL v. MacKINNON et al.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 138.

1. PATENTS—SUIT FOR INFRINGEMENT—DEFENSE OF ANTICIPATION.
   The defense of anticipation will not be considered in a suit for infringement of a patent where it is supported by the introduction of a number of prior patents for complicated machinery without any explanatory testimony.

2. SAME—INFRINGEMENT—KNITTED FABRIC.
   The Bell patent, No. 599,438, for a knitted fabric, if conceded patentable novelty, is of very narrow scope, and is not infringed by a fabric which has neither the groups of short and long loops of plush thread of the specification, nor the short and long loops of the claim.

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

Appeal from decree, sustaining the validity of the second claim of complainant's patent, No. 599,438, granted February 22, 1898, to Winslow M. Bell, for improvement in knitted fabrics, and finding infringement and granting an injunction.

Milton E. Robinson, for appellants.

J. E. H. Hyde, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The specifications and drawings of the patent in suit are indefinite and incomplete, anticipation is claimed, but the defense is only suggested by injecting a large number of prior patents into the record without any explanatory testimony, and, apparently for this reason, the court below has filed no opinion, except a statement that the claim in suit is valid and infringed. If an examination of the prior art were necessary to the decision of the case, we should not sustain the defense of anticipation upon such mere production of patents for complicated combinations of machinery. It is evident, however, from the file wrapper, the language of the specifications, hereafter quoted, and the testimony, that the patent is a narrow one. It concerns knitted fabrics having diversified patterns. The 31 claims in the original application were divided between claims for methods for forming knitted fabric and for the fabric itself. After repeated rejections and amendments, the claim in suit was inserted and allowed for a special construction of fabric.

The patent is printed with two claims. The court below held the first of these claims void. This claim was, in fact, erased by the applicant before the issue of the patent, so that the patent contains but one claim—the claim in suit.

Said claim is as follows:

"A fabric consisting of body-threads, and two or more plush-threads, said plush-threads engaging with the body-threads in alternately short and long loops, the long loops of one plush-thread lying over the short loops of the other plush-thread and vice versa, and all of said long loops lying higher than the short loops above the body portion of the fabric, substantially as described."

The specification states, inter alia, as follows:

"My invention relates to improvements in knitted fabrics, in which certain cords or threads, hereinafter designated 'plush-threads,' are so knitted into the body of the fabric as to form definite contrasts, figures, or designs, either in color, shape, relief, material, or all four, and allow of being suitably napped thereafter, if desired, without injury to the body fabric. * * * Some patterns, such as straight and diagonal stripes, can be produced by a slight alteration in the arrangement of parts of the present plush-machines. I attain these objects in the following manner: * * * My improved fabric differs from those previously used in having a plush-thread surface, which consists of alternating groups or series of loops of said plush-threads, some of which loops are shorter than the others, such groups being arranged so as to be intermittently and recurrently visible and invisible, the relation of such groups to each other and the number of loops in each group being varied at pleasure, whereby various patterns or designs may be formed upon the surface, as desired. My new method of making such a fabric consists in interlacing plush-threads through loops of the binding-threads of said fabric and in so arranging the plush-threads that they will appear above the surface of the fabric in groups or series of loops, each group alternating with another group of a different height or length; for instance, one group, Z, composed of long high loops and a neighboring group, Y, composed of short low loops, and the groups being separated from each other by short loops of plush-threads tightly interlaced with the body fabric.

"Referring to Fig. 1, A represents the binding-thread composing the foundation texture or body of the fabric, such as knit shirting or hosiery, for example, and which may be of any suitable material. Into this the plush-thread, B, which may be of any suitable material and color, is interlaced or knit, as at e, in such a manner as to form a long loop raised considerably above the general surface of the fabric. These loops may be knit in series or groups of two or more, as may be desired. At E this plush-thread is interlaced or knit in such a manner as to form a short loop, B', raised only slightly above the body as compared with the long loop. These short loops may be also knit in series or groups. In this figure there is a group of three long high loops and one of four short loops of medium height and short loops, E", tightly interlaced with the body fabric, and between each of the long or short loops. It will be seen that this method of knitting will permit of infinite varieties of design as regards the outline of the figure thus formed in relief by the difference in height of the respective loops or series of loops. At the same time, if desired, a second plush-thread, C, which may be of different color or material, or both, may in the same way be interlaced or knit into the body, A, and loops, BB', so as to form a similar series or group of short loops, C, under the long loops formed by the plush-thread, B, and in a similar manner several such threads may be knit so as to produce several series or groups of different colors and materials."

The patentee proposed to produce his fabrics "by a slight alteration in the arrangement of parts of the present plush-machines." The language of the specifications indicates that he thought that the novel fea-

ture of his invention consisted in the formation of an improved fabric with a novel pattern surface by means of groups of floated loops separated from each other by short loops, not floated, but "tightly interlaced with the body of the fabric;" and the patentee evidently intended that this fabric should comprise groups of long loops followed by groups of shorter loops extending transversely across the fabric, end to end; that is, in the lines formed by the loops themselves. This is made clearer by the patent drawings, which show a group of long, high floated loops thus alternating with a group of short, lower floated loops and separated by tying-in loops. The alternative construction, whereby an additional thread of different color might be introduced, need not be here considered. The claim in suit, however, does not answer to the group invention as described in the specifications. It is confined to "short and long loops; the long loops of one plush-thread lying over the short loops of the other plush-thread," etc. In view of the patentee's admission that his fabric differed from those of the prior art in a "surface which consists of alternating groups," etc., and of the references cited by the Patent Office, as shown by the file wrapper, and of the holding of the examiner that fabrics having alternating long and short loops were common in the art, it is doubtful whether any novelty could be claimed for the patented construction, except when combined in groups. But even if the claim as allowed be sustained for the precise construction shown, and even if, in violation of the language of the specification and of the constructions shown in the drawings, it be extended to embrace a fabric wherein there are no groups, and if, as claimed by complainant, the single long loop in one row of the fabric is to be understood as lying over or above the short loop in another row, we are unable to see how infringement by defendants could be predicated thereon.

In complainant's patent, the loops of plush-threads where shown in the drawings as floated over eight chains of body stitches before engaging the body-threads, are called "long loops;" where thus floated over four chains of stitches they are called "short loops;" while the tying-in loops are shown as not floated at all, and are described as "tightly interlaced with the body fabric." The patentee, in his testimony, defines these tying-in loops as "the small stitch * * * being the part of the plush-thread which is attached to the body-thread."

Complainant's witness, Wood, testifies as follows:

"X-Q. 79. In complainant's patent, as you look at it, the novelty is the arrangement of the long and short floated plush thread loops, and the short floated plush thread loops are just as material and important in the construction as the long loops, are they not? A. They are. * * *

"X-Q. 117. The tying-in loops, E, of Fig. 5 of the drawings of the patent show loops that lie down the fabric instead of up the fabric, do they not? A. We don't call that a loop. The yarn has to go around the needle to be tied in, and that is the place where it goes around the needle.

"X-Q. 118. The patent says 'short loops, E.' Where do these appear in the drawings of the patent? A. This E in Fig. 5 that you speak of, in the patent it is called a loop, but it has no bearing on the face; it simply shows where it goes around the needle and is tied in the body thread. It would show more on the back of the body thread than it would on the face.

"X-Q. 119. Then, as you understand it, 'short loops E' tightly interlace with

the body fabric and between each of the long or short loops in the specification refers to loops, 'E,' there being no 'E' to be found on the drawings. Is that right? A. That is the way I understand it. * * *

"X-Q. 168. If the long loops lop over and lie on top of the short loops, as you have stated, the short loops serve to act as a padding to give greater elevation to the long loops, do they not? A. Yes.

"X-Q. 169. The loops that are tightly interlaced with the body fabric do not serve that end to much purpose, do they? A. They do not."

Defendants' fabric is composed solely of loops which correspond to complainant's short loops and tying-in loops. Or, if the short loops be considered as the equivalent of complainant's long elevated loops, then there are no short loops whatever, in the sense of the patent, because none of the remaining loops are "raised above the body fabric" or floated on any chains of stitches. They are merely "tightly interlaced with the body of the fabric."

In order to support his contention complainant is forced to differentiate two such tying-in loops lying side by side and identical in size, construction, and location, and to call one a short loop and the other a tying-in loop, and to further designate what corresponds to complainant's short loop as a long loop. Inasmuch, therefore, as defendants have neither the groups of short and long loops of the specifications, or the short and long loops of the claim in suit, it must be held that there is no infringement.

The decree is reversed, with costs, and the cause is remanded to the court below, with instructions to dismiss the bill.

SMYTH MFG. CO. v. SHERIDAN et al.

(Circuit Court of Appeals, Second Circuit. November 7, 1906. On Rehearing, November 21, 1906.)

No. 145.

1. PATENTS—INVENTION—ADJUSTABILITY OF PARTS.

Merely making the parts of a machine adjustable with respect to each other does not constitute invention, but is within the ordinary ingenuity of a skilled mechanic.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 17.]

2. SAME—NOVELTY—BOOK-SEWING MACHINE.

The Reynolds & Jacobs patent, No. 435,613, for a book-sewing machine for sewing the signatures of books together, claims 3 and 15, which are broad claims, covering a combination of detail parts not specifically described, except that they are adjustable, and the sewing devices generally arranged in groups, if given the broad construction imported by their terms, are void for lack of patentable novelty, in view of the prior [illegible]; the only novel feature being such adjustability.

3. SAME—SUIT FOR INFRINGEMENT—APPEAL.

Patents set up in the answer in a suit for infringement as a part of the prior art, printed and indexed in the record on appeal, and referred to in the briefs, and in relation to which witnesses were examined, all without objection, will not be excluded from consideration by the Appellate Court because they were not formally marked as exhibits by the examiner.

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

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, holding defendants guilty of infringement of claims 3 and 15 of United States letters patent No. 435,613, dated September 2, 1890, to Reynolds and Jacobs for book-sewing machines, and ordering injunction and accounting. The decision of the Circuit Court is found in 144 Fed. 423, and the following excerpt therefrom exhaustively and clearly describes the machine of the patent. "This patent relates to a book-sewing machine by which the separate signatures of which the book is formed are stitched together prior to binding. In the machine in question each signature is placed astride a swinging sheet-holder or bar, the upper edge of which enters the fold of the signature. The sheet-holder is swung forward and down into such a position as will enable the operator to place a signature upon it. The holder is then swung up, bringing the signature into proper position to be operated upon by the sewing devices. These sewing devices are arranged in groups, and the instrumentalities of each group cooperate to form a line of stitches. These lines of stitches are independent of each other. When each group of these sewing devices has formed a stitch in a signature, and secured it to the preceding signature, the sewn signature is pushed back, and another brought into position. The sewing is done by a series of semicircular needles, which pass through perforations in the back of the signatures, which are made by perforators mounted on the sheet-holder bar. The perforators move in guideways in blocks on the bar, and are lifted and retracted when necessary for the performance of the work by suitable mechanism. Loopers are carried by a bar, and employed to take the loops of thread from the needles. These loopers at each operation cast off the loops previously taken from the needles, and take other loops in a manner unnecessary to describe, but which is well known in the art for making the chain stitch. The shafts of the circular needles are mounted in needle blocks adjustable along a stationary bar, the face of which is provided with a row of cavities engaged by screws. Each needle block is provided with a screw, and each block may thereby be adjusted and held in any desired position. The blocks in which the perforators are guided, as well as the perforators, are adjustable along the sheet-holder bar, and may be moved into positions which correspond with the positions given the needles, and these blocks are held in position by screws. The loopers are adjustable on a transverse bar, and the blocks guide not only the perforators but the curved needles. The blocks guide other needles not used in the formation of the independent line of chain stitches, which secure the signatures to each other. These last-mentioned needles are used to introduce tapes across the backs of the books, to give them strength, and assist in securing them to the covers. These needles are many times omitted. The thread is supplied by spools. One spool [for each independent line of stitches] supplies the thread of which the chain stitches are formed, and another spool supplies the thread by which the tapes are secured to the backs of the books. The tapes are supplied from tape reels. The spools are mounted on a spool-holder adjustable transversely of the machine, and this spool-holder is provided with a screw or stud, which passes through a slot in a bar upon which the spool-holder rests. The spool-holder is locked into position by means of a nut. The reels supporting the tapes are mounted on bars in such a manner that they can slide transversely of the machine. When the position of the sewing devices, which consist of the needles, the perforator guiding blocks, the loopers, and the perforators, is shifted, the thread-supplying devices may also be shifted to correspond therewith. This is true of the tape-supplying devices when used."

Paul Synnestevedt and E. R. Newell, for appellants.

J. Q. Rice, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The machine of the patent is a complicated one, comprising many parts, and exhibiting various combinations. The patentee sought to cover whatever fea-

tures they conceived to be novel by 16 separate claims, some of which deal with quite minute details of operative parts. Two claims only (3 and 15) are relied upon, and we are therefore concerned only with the particular combinations which they refer to. Whether invention may or may not lie in the combinations set forth in other claims need not be discussed; it is not charged that any of those other claims are infringed. The specification is especially illuminative as to the main feature of the patent, and as to what the patentee understood to be its distinctive novelty:

"Machines have heretofore been made for sewing books in which the folded sheet or signature is laid upon an arm or bar and presented to the sewing mechanism; but such sheets vary in size according to the size of the book to be produced, and, in addition to this, different characters of books of the same size require different kinds of sewing, and difficulty has heretofore been experienced in introducing the sewing at the desired point in the back of the book. One of the principal features of the present invention relates to grouping the sewing devices and mounting the same upon adjustable supports, so that they can be placed at any desired point along the back of the signature, and the groups of sewing devices can be associated at any distances apart, so that the sewing may be more or less closely together, according to the character of book that is being sewed, and these sewing devices can be placed at the proper distance from the top and bottom of the signature. In carrying out our invention we group together a semicircular needle and the devices for supporting and moving the same, a loop-tightening mechanism, and presser-plate, which come above the signature and sheet-holding mechanism, and we group together the perforator and the hook-pointed needles that act within the fold of the signature, the perforators forming the holes through which the circular needle passes, and the hook-pointed needles drawing down the loops of thread through which the circular needle passes, and these groups of instrumentalities are so supported that they can be moved or adjusted to any desired points, and the one is easily brought into the proper position to the other, and the actuating devices for the respective groups of instrumentalities do not have to be changed. Hence the machine can be adjusted by the party using the same so as to bring the sewing to whatever place or places may be desired upon the folded signature, and we group together the spools and tension devices, so that they can be brought into proper position in relation to the groups of sewing devices as required from time to time."

The specification then proceeds elaborately to set forth, in 13 columns, all the details of the "present invention."

From the above excerpt it is manifest that the principal feature, or one of the principal features, is the making of the parts which do the sewing adjustable, so that upon a single machine books of varying length may be sewed. It is this feature which is characteristic of the two claims declared upon, which read as follows:

"(3) The combination, in a book-sewing machine, of the sheet-holder bar and two or more groups of sewing devices adjustable transversely of the machine, one part of each group of sewing devices being upon the sheet-holder bar and adjustable thereon, and the other portion of the group being above the sheet-holder bar, which holds the signature that is being sewed, and also adjustable upon a stationary transverse bar on the machine, substantially as set forth."

"(15) The combination, in a sewing machine, of sewing mechanism adjustable transversely of the machine, a spool-holder adjustable transversely of the machine, and a reel frame and reel for a tape or cord, also adjustable transversely of the machine, whereby the instrumentalities for perfecting the book-sewing can be thrown in the proper positions in relation to the signatures to be sewed, substantially as set forth."

Referring to claim 3, the complainant's expert says:

"The elements of this claim are expressed in terms which do not, and evidently were not intended to, confine the claim to the particular construction shown and described. It is evident, for instance, that the terms of the claim do not refer to the particular form of sewing devices illustrated in the patent, nor do they refer to the particular agroupment of the sewing devices shown in the drawings and specifically described in the specification."

This conclusion of the expert is manifestly correct, and the fifteenth claim is as broad, if not broader, undertaking to cover any "sewing mechanism," any "spool-holder," and any "reel frame and reel," which are adjustable, so that they can be thrown into the proper positions in relation to the signatures to be sewed.

The specific construction of the group elements in defendants' machine concededly differs from that of the patent, and the charge of infringement cannot be sustained unless these two claims, broadly phrased as they are, can be held valid. The specifications, the language of the claims, the concurring testimony of the experts, the laudations of counsel's brief, all unite in showing that the distinguishing feature of the patented machine is its adjustability. By it, as counsel asserts:

"A practical way was devised of constructing a book-sewing machine so that the position of the lines of stitches could be varied according to the character of the books to be sewn, thus enabling the placing of the independent lines of stitches across the backs of the books where they would be most effective and exercise the greatest holding power."

Apparently the prior art showed some adjustable needles (Hall's patent, 105,329), but only in a machine which did not make independent rows of stitches. But the citation of the Hall patent is unimportant. Mere adjustability of parts does not constitute invention. Peters v. Hanson, 129 U. S. 541, 9 Sup. Ct. 393, 32 L. Ed. 742; Doig v. Morgan, 122 Fed. 460, 59 C. C. A. 616; Sipp Electric & Machine Co. v. Atwood-Morrison Co. (C. C. A.) 142 Fed. 149. If we had the particular combination of complainant's groups of sewing devices, spool-holders, and reels with "one part of each group of sewing devices," as its expert says, "arranged on a particular part of the machine, to wit, the sheet-holder bar, * * * and another part of the group upon another part of the machine, to wit, the stationary transverse bar," but all rigidly affixed to their respective mountings, it would require no more than the ordinary ingenuity of the skilled mechanic to cut slots and arrange washers, set screws, etc., so as to give to each part of each group capacity for lateral adjustment.

In order to escape this result, two other features are referred to as giving validity to the combination of the third and fifteenth claims. It is pointed out that the separate groups of sewing devices are so arranged as to enable each group to form an independent line of stitches across the back. We concur with the finding of the Circuit Court that:

"Books sewn in this manner are very strong—much stronger than when sewn in the ordinary manner. When so sewn, if one line of stitches breaks, the holding of the signatures by the other lines is not disturbed, and the book does not fall to pieces. When signatures are held together by a thread or threads common to all the lines of stitches [as was Hall's device, cited supra], the breaking of the thread in one line will permit one and perhaps more of

the signatures to fall from the book, and as a result the book will soon come apart. The securing of the signatures by independent lines of stitches is essential to the highest success in the sewing of books by machinery."

But independent lines of stitches were not new. In the patent to Smyth, No. 250,991, there are four semicircular needles, which act in pairs. Each pair so operates threads supplied from two spools as to make a line of stitching across the back, and the line of stitching so made by one pair is wholly independent of the line made by the other pair, whose supply of thread comes from two wholly independent spools. There are unsatisfactory features about the stitching of each individual line the needles entering alternate sheets only, and the loops at the back being held in place by a cord passing through and locking them; but entire independence between the stitches made by each separate pair of needles is manifest, the breaking of any thread sewed in by the one pair having no effect upon the sewing done by the other pair with independent threads. Whatever invention there may be in the combination of detail parts which produces a better locked and better secured individual line of stitches is not imported into either of these claims; their only assertion of improvement being adjustability, and the general arrangement of the sewing devices in groups, one part of each group being upon the sheet-holder and the other part above the sheet-holder. Such a general arrangement is shown in Reynolds, No. 366,793, or, to speak more accurately, is suggested by that patent, since it shows only the perforators on the sheet-holder bar, but these are to co-operate with the needles located above that bar. Much is sought to be made of the "perforators arranged in groups," so as to punch the holes from within, thus leaving the paper along the crease line inside of the signature smooth and in good condition to receive the needles, while they also automatically center the signature, so that the openings for the needles are formed exactly on the crease line. But such a location of the perforators is shown in Reynolds (No. 366,793), only without any capacity for transverse adjustment.

If these two claims are to be given the construction which their phraseology necessarily imports and which complainant contends for, they cannot be held valid in view of the prior art, because their only novel feature is adjustability. Whether the patentees did or did not invent a novel and useful device, for which, within the limits of their invention, they are entitled to patent protection, we do not undertake to decide. We are concerned only with the two claims here counted on. What has taken place since the entry of the decree in the Circuit Court, however, is somewhat suggestive as to the scope of the patent. It is stated that the defendants, in the face of the injunction now under review, have so altered their machines as to deprive them of their "adjustability," leaving the action in sewing and the form of stitch made and the mechanism itself otherwise exactly the same; but apparently no step has been taken to extend the injunction to these nonadjustable machines. These facts do not appear in the record, but they are asserted in the appellants' brief, and not disputed in the appellee's. If the statements are correct, it would seem that defendant's machine is not covered by any other of the 16 claims; but

that circumstance is immaterial here. The claims now in controversy, if construed broadly enough to cover defendant's machine, must be held invalid for lack of patentable novelty.

The decree is reversed, with costs, and cause remanded, with instructions to decree in accordance with this opinion.

On Rehearing.

PER CURIAM. This petition may be divided into three parts. The first, which deals with the question of adjustability, is substantially but a restatement of the argument presented on the hearing of the appeal. The second is devoted to a dissertation in support of the proposition that it would require inventive genius to transform the machine of patent 250,991 into the machine of the patent in suit. This court did not hold the converse of that proposition, as is apparent from a reading of the opinion. Finally, it is suggested that prior art patent No. 250,991 was "not offered in evidence." It is set up in the answer, and is printed and indexed in the record. It is referred to in large type in appellants' brief, which appellee's counsel admit was before them when they prepared their own (see page 5 thereof); it was twice referred to on the oral argument, and one member of the court asked a question about it, but no objection to its consideration was presented. Moreover, the very counsel who signs this petition for rehearing, on cross-examination of a witness (record, page 394) said: "X-Q. 137. I call your attention to patent No. 250,991, * * * and ask you whether this patent does not represent the construction of the six machines," etc.? and followed this question with four others, referring to the same patent. In view of these circumstances, the objection made at this late day, that the examiner did not formally mark it in evidence as an exhibit, is not one calculated to commend itself to an appellate court.

A similar objection is raised to prior patent 366,793, also referred to in the opinion. Except for the questions on cross-examination, the facts with regard to this are the same. It is printed in the record, and, as the court's annotations show, counsel on both sides read from it and discussed it, with no suggestion from any one that it was not properly there.

The petition is denied.

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

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 35.

PATENTS—INFRINGEMENT—PRINTING PRESSES.

The Read patent, No. 688,690, for improvements in bed motions for cylinder printing presses, is not for a pioneer invention, and as limited by the prior art *held* not infringed.

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

For opinion below, see 141 Fed. 112.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, dismissing a bill for infringement of United States letters patent No. 688,690, December 10, 1901, to complainants as assignees of George F. Read. The patent is for "certain new and useful improvements in bed-motion for cylinder printing-machines." The specification states that the "present improvements relate to that class of bed-motions more especially adapted for use in connection with bed-and-cylinder printing-machines in which the bed is driven throughout the major portion of its reciprocation by its bed-driving wheel gearing with one or the other of two driving-racks with which the bed is provided and in which the reversal of said bed at each end of its stroke is accomplished, preferably, by means of a crank connection that is caused to travel in a right line and to gradually slow down and stop the movement of the bed in one direction and to start and accelerate the same in the opposite direction." The particular mechanism which regulates the reversal of bed motion is not involved here and the invention consists, as the patentee says, "more particularly in a means for accomplishing the couple between the bed-driving wheel and bed-driving racks by sliding the rim of the bed-wheel to and from said racks, which are for the purpose set in different planes with respect to the driving-wheel." The cause is reported below in 141 Fed. 112.

J. Q. Rice and M. B. Phillipp, for appellants.
J. W. Munday and A. E. Dowell, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The Circuit Court held that the patent was valid, but found that the defendant's device did not infringe the claims which were relied upon by the complainant. In Judge Holt's reasoning and conclusions we fully concur, and therefore do not feel it necessary to enter into any extended discussion of the case.

The complainant's counsel contends that inasmuch as defendant company has appropriated, as he insists, the several features of Read's invention it should not be held to avoid infringement, merely because it has added a new feature which may constitute an improvement on the combination of the patent; and he cites Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, American Delinter Co. v. Am. Machinery Co., 128 Fed. 709, 63 C. C. A. 307, and similar cases. But it is not necessary to inquire whether defendant has taken the Read structure to improve or has gone for its starting point to the earlier art; nor whether, as it contends, its improvement was the essential addition which made the Read combination commercially practicable. Infringement is to be determined by a consideration of the claims, and if their language is such that, upon a fair construction of them, defendant's structure does not fall within their terms, infringement cannot be found. For a full description of the invention reference may be had to the opinion of the Circuit Court.

Suffice it to say here that in the prior art the driving wheel had been shifted from one rack to another by devices which moved not only the wheel itself, but also the shaft on which it rotated. Also in the prior art the wheel had been so arranged that it could be itself shifted on the shaft. To correct defects alleged to exist in these methods of operation, Read made his wheel in two parts of which an enlargement of the shaft or axle was one and a so-called "cogged rim" was the other; the enlarged part (central or body portion) being fixedly secured to

the shaft, and the rim part having a movement on the other part at right angles to the plane of rotation. As shown in the drawings and described in the specification the rim rests upon the central body portion, being "splined onto the body or crank, 0, so as to rotate therewith." It is supported solely by the body portion. As the applicant stated to the Patent Office when prior art was cited, "The broad body of the driving wheel is made the steadying carrier for the narrow toothed rim which moves upon it." Its ultimate support is the revolving shaft itself. In defendant's structure the rim is not mounted upon any body portion or in any way directly or indirectly upon the shaft. A fixed circular projection from the frame of the machine constitutes the sole support on which it revolves and moves facewise; a support wholly independent of the shaft or any of its appurtenances. The rim is revolved upon its individual support by a finger extending upward from the crank or shaft. Whether this is or is not an improvement, it is a different structure from a machine which mounts the rim not on an entirely independent support, but on the shaft enlargement, or body portion. That the patentee was himself impressed with the importance of mounting his rim on the enlarged shaft is apparent from the circumstances that in all the claims which are relied upon (1, 4, 5, 6, 11, and 15) he has included that feature. Thus claim 1 covers a wheel having a rim and a body, "the rim being adapted to move longitudinally * * * on said body." Claim 4 describes the gear as made in ring form and "slidingly mounted upon the enlargement of said shaft." Claim 5 covers a sliding ring gear and an enlargement or hub on the gear shaft, "on which enlargement the gear is splined." Claim 6 reads:

"* * * a sliding ring-gear, an enlargement or hub on the gear shaft upon which enlargement said gear is mounted and to which it is splined."

In claim 11 we find:

"An annular or ring pinion slidably mounted on but rotating with said crank-disk, * * * and means for shifting the pinion upon the disk."

In claim 15:

"A rotatable longitudinal immovable shaft having a large hub on one end, a gear mounted on the said hub and sliding," etc.

The Circuit Court remarked that "the ordinary meaning of one thing being mounted upon another is that it is directly supported by the other," and that the patentee had no intention to "cover a rim mounted on and supported by a sleeve covering the body of the wheel." It is not necessary to construe the claims so closely as to confine them to a rim directly supported by the enlarged shaft or body portion. It may well be that they are fairly entitled to a construction which would cover a rim indirectly mounted upon the shaft. In ordinary speech a man is said to be mounted upon a horse, although there may be a saddle between himself and the animal's back, and, if the circular support, upon which the defendant's ring gear is mounted were itself supported by the shaft, we are not prepared to hold that infringement would not be made out. But such is not the fact. The circular support on which the ring gear is mounted, revolves and slides is not itself mounted upon or supported by the hub or shaft, but is a wholly independent pro-

jection from the frame of the machine. The claims cited could be made to cover such a structure only, if at all, by the extremely liberal construction which has sometimes been accorded to highly meritorious pioneer patents.

Concurring as we do in the conclusion of the Circuit Court that Read's is not a pioneer patent, we cannot expand its claims sufficiently to cover defendant's structure.

The decree of the Circuit Court is affirmed, with costs.

SWIFT v. PORTLAND BRUSH & BROOM CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 29, 1906.)

No. 1,289.

PATENTS—INFRINGEMENT—CELL-CASE MACHINE.

The Swift patent, No. 622,403, for a cell-case machine for the manufacture of cell cases or fillers for crates used in the transportation of eggs or fruit. Claim 1 is void for lack of novelty and invention in view of the prior art. Claim 19, conceding its validity, *held* not infringed.

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

The appellant was the complainant below, in a bill for infringement of letters patent No. 622,403 issued to him, April 4, 1899, for "cell-case machine." As stated in the patent, the "invention relates to the manufacture of cell-cases or 'fillers' for crates used in the transportation of fruit, eggs, etc.; one of its objects being to provide simple and efficient mechanism to automatically produce from flat paper webs a continuous fabric comprising rectangular cells." Twenty-five claims are contained in the patent, and upon motion for specification of the claims relied upon, 18 were so specified by the complainant. On this appeal, however (as in the hearing below), the charge of infringement is narrowed to two claims, numbered 1 and 19, which read as follows:

"(1) In a cell-case machine, the combination with feeding mechanism for a paper web, of perforating mechanism having means to produce a transverse series of unalined or divergent slots in said web, the corresponding slots of each series being longitudinally disposed in said web, mechanism to divide said web longitudinally in strips, mechanism to twist said strips at right angles to the plane of said web, and mechanism to converge said strips with said perforations in straight transverse alinement, substantially as set forth."

"(19) In a cell-case machine, the combination with feeding mechanism for the cell-case strips, of mechanism to notch or perforate said strips, a fixed conduit for said strips, and an oscillatory former adapted to bend the edges of the notches in said strips against the wall of said fixed conduit, substantially as set forth."

The facts bearing upon the issues, including the references, in so far as deemed material, are stated in the opinion.

Border Bowman, for appellant.

V. H. Lockwood, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The machine described in the patent (No. 622,403) is a complicated and useful combination of means to make egg cases or fillers of straw board to

be used in crating eggs. The face of the patent, with the array of claims allowed, gives the impression of invention of great merit; and the story of its capability in manufacturing the cases out of webs of straw board, is even more impressive. This view of the invention, however, is completely dispelled upon the introduction of numerous patent devices, which not only anticipate the mechanism and function of the patent means in all save minor details, but the want of novelty in respect of all claims upon which infringement was charged, except 1 and 19, is not disputed upon this appeal. So, it is neither necessary nor desirable to discuss the general mechanism, claims, or prior art, beyond such reference as may bear upon the narrow issues thus remaining. Nor is it needful to discuss the contention on behalf of the appellant that the appellees cannot be heard in denial of the validity of any of the claims, by reason of prior contract relations between the former and predecessors of the latter, as it is plain that the proof raises no such question, were it otherwise material.

1. The essential element of claim 1 is the means for perforating the paper web when fed into the machine, described in the claim as "means to produce a transverse series of unalined or divergent slots in said web, the corresponding slots of each series being longitudinally disposed in said web." The object of the perforations was for interlocking or engagement of the strips to form the cell, and it is conceded that means and function were old, except in the special feature of alinement. It is contended by the appellant, that "claim 1 by providing for the slots out of alinement and converging the longitudinal strips, so that the cell would be greater in height than in width, did not interfere with the proper interengagement of the cells." The divergence, as indicated in the drawing, is hardly appreciable to the observer—upon measurement is shown not to exceed two-sixteenths of an inch divergence from a straight line in the total length of the series, 15½ inches —and neither meaning nor function is apparent in claim or specification without careful study. Upon the argument, the utility of this provision is pointed out in reference to the particular form of slot made by the patent means, but the divergence is without value or function in the appellees' different form of slot; and it is obvious that the seeming fact of like divergence in the latter was an inadvertence. We are satisfied, however, that the provision upon which this claim rests is without novelty, under the disclosure of like divergence in the drawings of Bates' patent, No. 570,621; and that, in any view, invention is not involved in the obvious expedient to adapt the means to the slots of the patent device.

2. The elements of claim 19 are feeding and perforating means, the fixed conduit for the strips, and the so-called "oscillatory former," further described as "adapted to bend the edges of the notches in said strips against the wall" of the conduit; and the only feature for which novelty is contended is this "former."

The question of infringement hinges, as stated in the appellant's brief, on the construction of this claim—in fact, upon interpretation of the last mentioned element as referred to in the claim and specifications. If this element is limited to the terms of the claim, as "an oscillatory

former adapted to bend the edges" etc., it is conceded that the appellee does not infringe. While the forming or bending means thus provided in the patent structure is needful to bend the special form of notch and slot adopted for the strips of strawboard, so that the mouth of the slot in the upper strip is widened to receive and interlock with the slot of the other (longitudinal) strip, the appellees' machine cuts off and removes these edges in both strips, making V-shaped openings—bending is not required, and the patent means referred to is not present in the machine. The contention is, however, that another function is provided in this means of the patent, namely, in means referred to in the argument as a "flipper bar," to "insure the proper feeding of the strip by bending the web against the wall of the fixed conduit;" and that the appellee employs like means for like function. Assuming, however, that such identity appears, the interpretation which is thus sought for this claim is strained and unauthorized. It ignores both name and description of the means and the function attributed to it; and as well the only feature which is pointed out for this element in the specifications. Thus various references in the specifications are unmistakable in their meaning:

(1) "The web from which the transverse strips are to be formed is passed between feed rollers to suitable mechanism and perforated with a series of slots arranged transversely with respect to said web in a straight line. The edges of said slots are then bent to facilitate engagement thereof with the notches in the longitudinal strips, with the notches of which said transverse web is in registry. A strip of width equal to the longitudinal strips with which said web is engaged is then cut transversely from said web and passes thence as a portion of the cell-case fabric.

(2) "Owing to the peculiar interlocking form of my improved filler-strips, it is necessary for their proper engagement that they should be prepared by opening the respective notches which are to be engaged before said engagement is effected. This preparatory bending of the notched edges is best shown in Fig. 23 and is effected as follows:

(3) "The edges, y^2, of the notches, y^3, in respective strips, Y', of the latter are bent, as shown in said Fig. 23, by means of the frame, P, which is mounted for oscillation upon its upper shaft member, P', in the bearings, p, upon the frame member, A^6. The lower bar, Px, of said frame is provided with forming plates, px, adapted to bend the edges, y^2 of said notches, y^3, over the corners, p^2, of the rear wall, g' of the conduit, G, and thus open said notches, y^3, for engagement with the notched strips, X'. See Fig. 23."

We are of opinion that the evidence fails to establish infringement of claim 19, under any reasonable construction of its import; and the issue upon its validity in view of the prior disclosures does not require consideration.

The decree of the Circuit Court accordingly is affirmed.

BALL BEARING CO. v. STAR BALL RETAINER CO.

(Circuit Court of Appeals, Third Circuit. December 6, 1906.)

No. 26.

PATENTS—INFRINGEMENT—BALL BEARINGS.

The Simonds patents, Nos. 449,968 and 449,959, for ball bearings, narrowly construed, as required by the prior art, *held* not infringed.

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

For opinion below, see 147 Fed. 721.

A. B. Stoughton, for appellant.

Julien C. Dowell, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree dismissing a bill in equity, in which the appellant charged the appellee with infringement of two patents belonging to the appellant, viz., patents No. 449,968 and No. 449,959, both dated April 7, 1891, and issued to George F. Simonds, for "Improvements in ball-bearings."

The claims of patent No. 449,968 are as follows:

"(1) An annular ball-retaining cage consisting of a tubular body having a central opening to receive a central support and provided with flanges having lateral openings that surround the central opening, in combination with spherical rollers or balls that are held in said cage and project through said lateral openings to resist end pressure or thrust, said balls being arranged to revolve freely in all directions and removals in a body with the cage, substantially as described.

"(2) An annular ball-retaining cage consisting of a central tubular body having end flanges provided with lateral openings, in combination with spherical rollers or balls that are held between said flanges and project through the lateral openings to resist end pressure or thrust, substantially as described.

"(3) In a ball-bearing, the combination, with a central support, of a removable annular cage consisting of a tubular flanged body provided on opposite sides with lateral openings, and a series of spherical rollers or balls confined in said cage in such a manner as to revolve freely in all directions and projecting therefrom in position to resist end pressure or thrust, said cage and balls being removable in a body, substantially as described."

Patent No. 449,959 contains two claims; but the first only is alleged to have been infringed. It is as follows:

"(1) In a ball-bearing, the combination, with spherical rollers or balls, of a removable annular cage in which the balls are retained in a body and in which they have free lateral play and are capable of revolving in all directions, said cage being independent of the bearing-surfaces, against which the balls act and between which said cage is adapted to move, whereby the said balls are free to move in varying lines, so that all parts of the bearing-surfaces will be subject to the rolling contact of said balls and the wear and friction distributed, substantially as described."

The Circuit Court based its decree wholly upon its finding that the defendant below had not infringed any of these claims, and as we concur in that finding, the validity of the patents need not be questioned. We assume the validity of both of them; but that this may be reason-

ably done, they must be narrowly construed, for the record before us makes it plainly apparent that the prior state of the art requires the limitation of each of them to the precise devices mentioned in its claims. Boyd v. Janesville Hay-Tool Company, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973.

The claims of patent No. 449,968 all specify a tubular body having flanges with lateral openings, through which the balls project to resist end thrust. The construction alleged to infringe has no such flanges, and does not appear to be designed or adapted to resist end thrust, but to oppose radial pressure. Claim 1 of patent No. 449,959 calls for an annular cage in which the balls have "free lateral play" and are "free to move in varying lines." This freedom to move is an essential feature of the first claim of that patent, and it seems to us to be lacking from the construction complained of.

Upon the grounds stated, we think it clear that the court below was right in holding that the charge of infringement had not been sustained as to either of the patents sued on; and the opinion of the learned judge of that court (147 Fed. 721) is so entirely satisfactory as to render any further discussion of the case unnecessary.

The judgment is affirmed.

BATES MACH. CO. v. WM. A. FORCE & CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 163.

PATENTS—INFRINGEMENT—NUMBERING MACHINES.

The Bates patent, No. 676,084, for an improvement in typographic numbering machines, narrowly construed as required by the prior art, held not infringed.

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

Defendant's appeal from interlocutory decree of the United States Circuit Court for the Southern District of New York sustaining the validity of complainant's patent, No. 676,084, and granting an injunction and accounting. The opinion of the court below is reported in 145 Fed. 529.

Wm. E. Warland, for appellant.

Hubert Howson and Warren Wright, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The patent in suit is for a minor improvement in a typographic numbering machine, and every element comprised in the combinations of the claims in suit was old in the art, except the projecting arm on the plate with teeth engaging the gear teeth of the plunger device of claim 2, or "the extending arm with rack teeth" of claim 22. Counsel for complainant says:

"It is the projecting arm in the plate above, bridging and overhanging the intervening wall, that constitutes the new element of claim 2 not found in the prior art."

Complainant's plunger plate is "guided in its reciprocating movements by pins in holes or sockets." Defendant's plate is likewise guided by a pin extending vertically downwards and moving in a vertical slot in the stem of the plate. Such guiding pins are admittedly old. In defendant's machine another pin extends laterally from said vertical pin and engages with a notch in the arm of the pawl carrier. There are no gear teeth either on the pin or arm.

Defendant's device does not infringe the claims in suit, unless the laterally extending pin attached to said guiding pin and the notch in the pawl carrying arm are the equivalents of the two arms having gear teeth of the claims in suit. The court below found that the two forms of engagement were equivalents. We are of the opinion that in such a narrow patent, inasmuch as the patentee has specifically described, illustrated, and claimed, a construction calling for "gear teeth" meshing with other gear teeth, the doctrine of equivalents should not be extended to embrace defendant's pin and notch device.

Furthermore, the prior Rhinehart patent, No. 388,307, disclosed, in a typographic numbering machine, this identical combination of a pin extending laterally from the vertical support of a plate, guided in its up and down movement by a slot in the partition, and engaging with a notch in the pawl carrying arm. Therefore, if the pin and notch are equivalents of the gear teeth, there was no novelty in the substitution of the one for the other by the patentee. If they are not equivalents, there is no infringement. The defendant's so-called projecting arm is not one "bridging and overhanging the intervening wall" except as above shown.

But complainant argues as follows:

"Bates has secured a new result, namely, that of permitting the vertical removal of the plunger, the aim and purpose of the invention."

This would seem to be immaterial because we are not satisfied that any practical advantage is derived from such capacity for vertical removal; because means for permitting vertical removal were shown in the Bartusch and Haney machines of the prior art; because it is not contended that defendant's locking and unlocking device is an infringement of the claims in suit; because said claims do not call for a removable plunger; and, further, because given the Rhinehart closed slot it would be obvious to any mechanic to open the upper end if a device was to be used where vertical removal of the plunger was desired.

It is true that a patentee is entitled to all the beneficial uses of his real invention whether stated or not. But the fact that this patentee, while enumerating in his specifications some 12 advantages resulting from his improved construction, has not even hinted at or suggested any resulting capacity for vertical removal of the plunger, is very persuasive that this element, instead of being "the aim and purpose of the invention" of the patentee is rather the discovery of his expert.

The decree is reversed, with costs.

UNITED STATES FASTENER CO. v. BRADLEY.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 214.

1. PATENTS—INFRINGEMENT—SEPARABLE BUTTON.
The Pringle patent, No. 580,000, claim 1, for a separable button catch, designed for use with a stud member, to form a separable button or fastener, was not anticipated, and discloses patentable invention. Also *held* infringed.

2. SAME—SUIT FOR INFRINGEMENT—EFFECT OF NONUSE OF PATENT.
Where a patented device is obviously operative and useful, the fact that it has never been manufactured by the owner of the patent does not affect his right to maintain a suit for infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 34, 448.]

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, holding valid and infringed claim 1 of letters patent, No. 580,000, granted April 6, 1897, to Eugene Pringle, for an improvement in separable buttons. The opinion of the Circuit Court is reported in 143 Fed. 523.

J. A. Carr, for appellant.

Donald Campbell and H. C. Messimer, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts are fully set out and the issues clearly stated in the opinion of the court below. These need not be repeated.

We agree with the judge of the Circuit Court in his disposition of the defenses of noninfringement, double patenting, inoperative character of the device covered by the first claim, abandonment and res judicata. That the latter defense was correctly disposed of is now conclusively established by the production in court of the original decree showing affirmatively that the former suit was not decided on the merits but was dismissed solely for lack of prosecution. The only question requiring further consideration is the question of patentability.

The invention, so far as it is involved in the present controversy, relates to improvements in the socket member of snap fasteners for gloves and other articles which are to be detachably fastened together. Previous to the patent the art had developed largely, though not exclusively, in the direction of improvements in the stud member, which was made with a resilient globulous head, which was forced into a nonyielding socket contracting and expanding each time it was pressed in or pulled out. The present invention reverses these conditions, the stud being solid and unyielding and the socket member being elastic. The description and drawings illustrate a two piece studholder consisting of an elastic slitted stud-catching part and a holder therefor so attached that the central elastic stud-holding piece is held firmly in

position but with sufficient room in which to expand when the stud is forced against its inner surface.

The first claim was suggested by the examiners of the patent office after the subject-matter of the invention had been thoroughly discussed and carefully examined by them. The claim is as follows:

"(1) A separable button-catch comprising an apertured washer and an eyelet having a shank of less diameter than the aperture of the washer, and having two enlargements securing it in the aperture of the washer and slitted lengthwise through the shank and the enlargements as and for the purpose set forth."

The device of the claim when completed is so diminutive in size and simple in construction that, unless care be taken, the assertion that there is no room for invention in so small a structure may receive greater consideration than is warranted. This court has repeatedly upheld patents for similar improvements, the test being not the simplicity of the device, but the difficulties overcome and the result accomplished.

In Fastener Co. v. Littauer, 84 Fed. 164, 28 C. C. A. 133, a patent for similar improvements in the stud member of a snap fastener was, after full consideration, declared valid. See, also, Kent v. Simons (C. C.) 39 Fed. 606; Fastener Co. v. Hays, 100 Fed. 984, 41 C. C. A. 142; Consolidated Co. v. Fastener Co. (C. C.) 79 Fed. 795.

The improvement now under consideration, notwithstanding its simplicity, shows a marked improvement over the elastic sockets of the prior art. It is simple, inexpensive, strong and durable; it does not tear or injure the material to which it is attached or lose its elasticity by use. The washer not being slitted, but firm and rigid, prevents the undue expansion and consequent weakening of the elastic stud-catcher, which is at all times held in proper position for engaging with the stud. A device having these valuable characteristics is not found in the prior art.

The defendant's expert was asked on direct examination to name the patents which, prior to September 8, 1888, the date of Pringle's application, "showed a socket-member of a fastener comprising a slitted eyelet mounted in an apertured washer." In answer he named patent No. 181,979, granted to C. M. Platt in 1876, and patent No. 374,609, granted to C. W. Mandrill in 1887. He also mentioned two patents to W. S. Richardson, but these need not be discussed as they are apparently not relied upon in the defendant's brief and were hardly alluded to at the argument. Unquestionably the Platt and Mandrill patents are defendant's best references.

Platt shows an eyelet having a slot cut into it breaking its continuity and permitting expansion and contraction. The eyelet is secured to the shoe or glove by punching a hole in the fabric, passing the shank of the eyelet through and upsetting the end of the shank to form a flange. The eyelet does not form a complete annulus because of the slot which is cut into it. One of the figures shows the socket made in two parts, both in the form of split eyelets, one slightly larger than the other. The latter is first affixed to the fabric when the former is inserted and clinched thereto thus giving additional flange surface and keeping the socket more firmly in position. "In all cases, however, the

slot or opening 'g' must be made through both flanges and the shank of the eyelet." If this were otherwise the necessary resilience would be lacking. In operation the socket is pressed over the stud when the socket, or eyelet, by reason of the slot formed therein, will spring open, permit the enlarged head to pass and contract again below the head. The parts are disengaged by pulling the fabric to which the eyelet is attached upward, then the eyelet will again spread and permit the head to pass through. "An eyelet with a slot formed therein" is one of the elements of the claims.

We think it very plain that whether this member is constructed of one eyelet or two its continuity must be broken by the slot which is made through both flanges as well as the shank. If this were not so the device would be inoperative for want of elasticity. Certainly this is a very different device from the one in suit where the apertured washer prevents the resilient stud catch from being overstrained and unnecessarily expanded or distorted. Pringle presents the glovemaker with an accurate, symetrical, workable device, requiring no adjustment and needing only to be attached to the fabric without change or adaptation. Platt hands him a split eyelet, or two split eyelets, and tells him to clinch one or both to the fabric. Whether or not an operative fastener is produced depends largely upon the skill of the glovemaker.

The Mandrill patent is for an improved "glove fastener," in which the stud-holder consists of "a split expansible socket-ring or annulus, the interior periphery of which is made smooth for the ready and free passage of the head on the post." This socket-ring is provided with a tubular boss, which also has a longitudinal slot, which aligns with the slit in the ring, or annulus, thus imparting a yielding action to both the boss and socket-ring. The boss may be formed of a single piece of sheet metal with the socket-ring. When the stud is inserted and withdrawn the entire structure, ring, boss and fabric, must expand and contract, diminishing its resiliency, injuring the fabric and ultimately becoming detached therefrom. The Mandrill device is of the same type shown in the Platt patent, and has all the latter's defects, with some new ones added.

We are clearly of the opinion that neither patent anticipates the invention of the claim in controversy.

We are also of the opinion that it requires an exercise of the inventive faculty to produce the device of the claim. The record shows many attempts to construct a successful elastic socket member and it also shows as many failures. Pringle succeeded, by producing the exceedingly simple combination of the apertured washer and slitted eyelet as described and claimed. The invention, though one of minor importance, is entitled to protection.

It is asserted by the defendant that the complainant never made fasteners under the Pringle patent. If this be true it is wholly immaterial to the present controversy. Where it is asserted that a patented device is inoperative and lacks utility, evidence that it has never been put to use is persuasive, but in a case like the present, where the fact that the device is useful and operative can be seen at a glance, such evidence is negligible. The complainant had a right to use the patent in any way it saw fit.

The decree is affirmed.

UNITED STATES FASTENER CO. v. STAHEL et al.

(Circuit Court, S. D. New York. December 18, 1906.)

PATENTS—INVENTIONS—BUTTON.

The Kempshall patent, No. 565,276, for a button or snap fastener, claim 3, which covers a button-head or socket member, is void for lack of novelty or patentable invention in view of the prior art.

Suit in equity to restrain alleged infringement of United States letters patent No. 565,276, dated August 4, 1896, to Eleazer Kempshall, assignor, to Theopolus King, trustee, for "button," and for an accounting.

Donald Campbell (Hillary C. Messimer, of counsel), for complainant.

R. R. Rasquin (Wm. F. Hall and Wm. W. White, of counsel), for defendants.

RAY, District Judge. The patent in suit relates to that class of buttons known as "snap fasteners"; that is, you have a button or button-head with a socket into which you insert, and with which you connect, usually, an eyelet or some similar device, having a flange which connects the button or button-head to one flap or part of a garment or glove. Into this socket you push, usually, a resilient stud member attached to the other flap of the garment or glove, thus fastening the two flaps together. The eyelet in the socket of the button-head may be resilient, and the head of the stud member may be solid or non-resilient. In this patent the eyelet (tubular) is not resilient, but has fingers, which, pushed into the dish-shaped metal head or core (one of the elements of the claim in suit), come in contact with the under side of the bottom of the dish-shaped head, and are spread outwardly, and the two parts are thus held together, and the button-head is attached to one flap of the garment or glove. The recess or socket thus formed in the button-head is larger on its interior than at its opening, or at the point where it engages with the flap, and a resilient stud member attached to the other flap of the garment, when pushed into the recess, expands, and the two flaps are thus held together. The claim in suit (claim 3) reads as follows:

"(3) A button-head, comprising in its construction a dish-shaped head, whose edge is bent over upon itself, and extended to form a flange that extends rearwardly and inwardly, the sides of said dish-shaped head and said flange being arranged in planes that are at an angle to the axis of the head, and a covering of plastic material molded about the top and sides of said head, and anchored thereto by the flange, substantially as and for the purpose set forth."

Take an ordinary metal pan or basin, reduced in size, with its sides sloping from its bottom outwardly, and extended to the necessary height, and then turned or bent over and extended downwardly and inwardly—that is, towards the axis of the dish—to the required distance, thus forming thereby the flange, and we have the metal core described. This core can be made of any metal. Fill and cover it on its upper and outer sides with plastic material of any kind, so far

as the patent goes, and we have the button-head or member of the button described in claim 3 (the one in suit) of the patent. It is assumed that this dish-shaped core is cylindrical. The flange, we will assume, is at such an angle with the sides proper as to leave a space between it and the sides, and so form "a gripping member," and also form "an anchoring means" for the plastic covering. I fail to discover novelty amounting to invention when we consider the prior art in this combination of elements.

Complainant's expert, William Edson, says of the patent and claim in suit, as follows:

"Q. 4. Please explain the character of the button which is shown in the Kempshall patent in suit, and described in the third claim thereof. A. In the patent the thing which is claimed is called a button, but as described in the descriptive part it is in fact what is now known as a snap fastener. This consists properly of a button-head which is attached to the outer cloth or fold by means of an eyelet, and a second part, which consists of a bulbous portion indicated by r' in Fig. 4 of the drawings of the patent. This part is attached to the inner fold or part to which the outer fold is to be attached by the snap fastener as a whole. The parts referred to in the third claim consists of a button-head alone, and relates purely to the two parts that form the button-head. Of these two parts the essential one is of metal, and is referred to as a dish-shaped head, and shown by itself in Fig. 1. The essential operating features of this dish-shaped head consist of an inclined member a4 (see Fig. 1), which has integral with itself a part spoken of in the second line of the claim as an 'edge.' This edge is bent over upon itself, so as to extend rearwardly and inwardly. Rearward, in this case, means from the outside or button-head proper towards the cloth to which the outer fold is to be attached by means of the fastener. In fact, the part a4, called the 'edge,' and the part a2, called the 'flange' constitute the whole of the operative part of what is called the 'dish-shaped head,' and in itself forms a metallic lining for the plastic material which constitutes the other part of the button-head; that is, the plastic material forms a convenient and ornamental part, while the other parts described—that is, the dish-shaped head—constitutes a part whose sole function is to properly hold the eyelet to the button-head. The 'dish-shaped head' is formed as described so that it may be firmly molded into and held in the plastic material which forms the ornamental part of the button-head, and in the claim it is said that the plastic material is anchored by this flange—that is, the flange marked in the drawing a2—which I understand means that the plastic material is held to the dish-shaped head by means of this flange that extends rearwardly and inwardly. The other function of this flange, as I understand it, is simply to form a fastening for the upper edge of the eyelet, which is used for fastening the button-head to the fabric. The button-head of the claim consists of two parts only, and is complete and entire in itself. The essential and operative part being made preferably of metal, and having an 'edge' and a flange which together form what may be called an anchor, which is securely held to the part which forms the second part of the button-head, namely the plastic material, which is molded onto and about the said edge of the flange, and serves as an ornamental finish for the said button-head. These two elements, namely the dish-shaped head and the plastic material, are the only elements referred to and described in the third claim, and they constitute the subject-matter of the said third claim."

And again:

"There are two distinct elements referred to in this claim: First a dish-shaped head. This dish-shaped head has a flat central portion, which is not referred to specifically in the claim. The part referred to in the claim is the 'edge,' which is bent over on itself. This edge must refer to the parts marked in Fig. 1, a4, a1, a2; that is, these three divisions of the edge constitute the sides, a4, the junction or edge proper, a, and the flange, a2. The edge

as used in the claim must refer to these three parts, since it says that it is bent over onto itself; and further on it says: 'And extended to form a flange that extends rearwardly and inwardly, the sides of the said dish-shaped head and said flange being arranged in planes that are at an angle to the axis of the head.' These planes are indicated by a4 and a2 in the drawing Fig. 1, and together constitute the first element of the claim, and form together all that is required for anchoring the plastic or second element of the claim to the first element. The second element of this third claim is a covering of plastic material molded about the top and sides of the said head, and anchored thereto by the flange. This claim makes no reference to any other parts except those mentioned, namely, the dish-shaped head and the plastic part; the dish-shaped head serving to make a firm and durable socket into which the upper edges of the eyelet may be forced and held, the other element being principally for ornamental purposes, and for preserving the metal from becoming unsightly. The plastic part also makes the button-head considerably larger, therefore better than it would be if the dish-shaped part alone were used."

And again:

"X-Q. 17. You do not contend there is anything novel in a button-head having a surface for deflecting the upper end of the tubular part of an eyelet and a surface for interlocking with such deflected portions, whereby the fabric is clamped between the eyelet and the head, and the head thus secured in place, and a part corresponding to the resilient stud of the patent in suit intended to engage with the eyelet, do you? (Objected to as improper cross-examination, since no basis whatever has been made for going into the question of novelty.) A. I do not. X-Q. 18. So far as the structure called for by claim 3 of the patent in suit is concerned, it is immaterial what sort of an eyelet is used in connection with the button-head. This is correct, is it not? A. It is, except that the eyelet must be adapted to this button-head. X-Q. 19. You mean that it must have a tubular part intended to be outwardly deflected when pressed against a surface such as a4, so that it will interlock with a surface such as a2. Is my understanding correct? A. I think it is. X-Q. 20. In other words, so far as this claim is concerned, it is immaterial exactly what functions the part intended to interlock with the head performs, so long as said part has a tubular portion intended to be deflected when pressed into the head by one surface of the head, so that it will interlock with another surface of the head. Is not this correct? A. As the claim makes no mention or allusion to any eyelet whatever, it is difficult to define or limit in any manner whatever the shape of the eyelet or its construction. As I understand it, it is only essential that the part that serves the function of an eyelet shall interlock with this button-head when the two are put together. X-Q. 21. In other words, the construction or function of the part which interlocks with the head gives no vitality to this claim, the same covering solely the construction of the head itself; is this not correct? A. I think so."

In short the claim embraces a dish-shaped head of metal, which forms a socket for the button-head, and is the only operative part of the device; the covering of plastic material being ornamental mainly, but serving also to make the button-head larger and firmer. However, the idea of a plastic material, hard after being attached in place, for a button-head or button is old, or, if not old, would occur to any one skilled in the art. The mode and manner in which the plastic material is held to the dish-shaped head or metal socket is not new or novel. The edge of the dish-shaped head "bent over on itself," and "extended to form a flange that extends rearwardly and inwardly"—that is, inwardly towards the sides of the dish and rearwardly towards the garment—form a flaring or spreading socket, and when the eyelet of the patent, not mentioned in the claim in suit, or any similar eyelet, is pushed in, its ends are spread outwardly, and necessarily held against any ordinary force applied to separate the parts. This construction

is not new or novel. It would, in my judgment, occur to any mechanic or person skilled in the art. It is plainly suggested in prior inventions in this art. It is quite true, as said by Judge Coxe in U. S. Fastener Co. v. Bradley (decided November 7, 1906) 149 Fed. 222, speaking of a patent for improvements in a socket member of a button-head in this art granted April 6, 1897 (Pringle patent No. 580,000, granted April 6, 1897): "Previous to the patent, the art had developed largely, though not exclusively, in the direction of improvements in the stud member." But this condition of the art does not warrant the upholding, as disclosing patentable novelty and utility, every device, or every form of device, not before used in the art. When a device made the subject of a claim is so plainly indicated in the prior art that one possessing ordinary skill therein will naturally see it and its contruction and utility, we can hardly accredit him with inventive skill if he does see it, and puts it in form for use.

Entertaining these views, I need express no opinion as to the defense of anticipation or noninfringement, although I do think the defendants' button is more near the prior art than complainant's button-head.

There will be a decree dismissing the bill of complaint, with costs.

In re OUTCAULT.

(Circuit Court, S. D. New York. November 15, 1906.)

PATENTS—CONTEST IN PATENT OFFICE—POWER OF COURT TO ISSUE SUBPŒNA DUCES TECUM.

Rev. St. § 4906 [U. S. Comp. St. 1901, p. 3390], providing for the issuance by the clerk of any federal court of subpœnas for witnesses within the district for the taking of testimony for use in any contested case pending in the Patent Office, does not authorize the issuance of a subpœna duces tecum; nor is such subpœna authorized in such proceeding by Rev. St. § 716 [U. S. Comp. St. 1901, p. 580], which deals only with writs necessary for the exercise by the courts of their own jurisdiction.

On Petition for Order to Punish for Contempt.

Benno Loewy, for the motion.

W. A. Megrath, opposed.

LACOMBE, Circuit Judge. The provisions of section 4906, Rev. St. [U. S. Comp. St. 1901, p. 3390], are broad enough to cover the issuance of subpœna in this proceeding, which certainly is "a contested case pending in the Patent Office." That section, however, does not authorize the issuance of a subpœna duces tecum; nor can any such authorization be found in section 716 [U. S. Comp. St. 1901, p. 580], which deals only with writs necessary for the exercise of the court's own jurisdiction to hear and determine a controversy before it. The decision of Judge Dallas in Ex parte Moses (C. C.) 53 Fed. 346, is approved and followed.

The petitioner may take an order holding parties in contempt for failure to "appear and testify," and a fine of $50 to the United States is imposed in each case. If respondents wish to review this decision,

provision will be made for suspending payment of the fines pending appeal.

The application to punish for failure to produce books and papers is denied.

BOARD OF COM'RS OF CRAWFORD COUNTY, OHIO, v. PATTERSON.

(Circuit Court, N. D. Ohio, E. D. November 9, 1906.)

No. 6,736.

1. TRUSTS—MINGLING OF FUNDS BY TRUSTEE—RIGHT OF BENEFICIARY TO FOLLOW PROCEEDS.

When a trust fund is mingled with other funds of the trustee, and the whole is invested in assets which come into the hands of a receiver, a trust will be declared in favor of the beneficiary, and a preference given in such assets.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 520–525.]

2. SAME.

The cashier of a national bank in Ohio, at the time it went into the hands of a receiver in insolvency, was a deputy county treasurer, and for about three months previously had been collecting taxes at the bank; the money so collected being mingled with the funds of the bank, and the amounts credited to an account kept in the name of the county treasurer. Neither of such officers had power under the state law to deposit money so collected or to part with title thereto. Of the funds of the bank with which such taxes were mingled, a portion remained during all of such time in the bank and came into the hands of the receiver, and the remainder was used in its general business, being invested in loans and securities, a part of which came into the hands of the receiver and were collected by him. *Held*, that the county was entitled to recover from the receiver, as a trust fund, an amount of the cash taken possession of by him equal to the lowest cash balance remaining in the bank at any time during the time the collections were being made, which was presumably a part of the trust fund not used, and also the proceeds of all loans collected by the receiver and made during such time from funds with which the taxes collected had been mingled.

In Equity.

Finley & Gallinger and Ford, Snyder & Tilden, for complainant.

W. J. Geer, Smith W. Bennett, Booth, Keating & Peters, and Cushing & Clarke, for defendant.

TAYLER, District Judge. On the morning of February 15, 1904, the Galion National Bank, of Galion, Crawford county, Ohio, being insolvent, closed its doors, and thereupon its assets went into the possession of a receiver appointed by the Comptroller of the Currency. The books of the bank, on the day of its failure, showed a credit balance of $48,289.17 in favor of the treasurer of Crawford county, arising from taxes collected by the cashier of the bank, who had been appointed a deputy treasurer of the county. The bill in this case prays that the amount of money thus collected for the county, and turned into, and mingled with, the funds of the bank, and invested in its assets, be declared a trust fund, having a lien against the assets of the bank prior to the general creditors thereof.

In so far as the facts essential to the determination of the rights of the parties are concerned, there is no contest. For many years prior to 1904, it had been the custom of the county treasurer of Crawford county to authorize some official of the Galion National Bank to collect the taxes charged against citizens of the city of Galion, and of Polk township, in which Galion is situated. To conveniently carry out the object of this arrangement, the treasurer supplied the officer of the bank, thus deputized to collect the taxes, with forms of receipts issued by the county treasurer, and with a certified copy of the duplicate showing the amount of taxes charged against each individual. The money received for taxes thus collected was disposed of precisely as other funds passing over the counter of the bank were handled; that is to say, the proceeds of checks, as well as the currency paid in for taxes, were mingled with the funds of the bank, and never afterwards were capable of identification. So far as the account kept with the treasurer was concerned, it was exactly similar to the accounts which it kept with depositors; that is to say, there was an individual ledger account, as with a depositor, headed "County Treasurer, Tax Account," and on these sheets were entered the several items—deposits, balance, and checks. Ordinarily, the amount thus collected for taxes was paid to the county treasurer near the day on which it is the duty of the county treasurer to settle with the county auditor—approximately the 1st of March and the 1st of September—by cashing drafts made by the county auditor on the county treasurer for the benefit of the treasurer of the city of Galion, or of the Galion school district, or of the township of Polk, and the remainder of the amount, not thus paid out, was turned over to the county treasurer in currency; that sum being usually carried to Bucyrus, the county seat, a distance of about 12 miles.

Some time in 1902, L. W. Blyth, cashier of the Galion National Bank, was appointed by the treasurer of Crawford county as deputy to collect the taxes for the city of Galion, for the Galion Union school district, and for Polk township. For the faithful performance of his duties in this regard, he executed a bond, which was signed, as sureties, by officers and directors of the bank. Prior to the collection of the taxes due in December, 1903, Blyth, as cashier and deputy treasurer, had settled with the county treasurer for all of the taxes previous to that time collected; so that, at the time the bank failed, there was no obligation on its part, or of the deputy, to the county treasurer, except for the taxes which were collected on account of the taxes due in December, 1903. These collections commenced to be made, as shown by the books of the bank, on the 8th of October, on which day $225.96 was paid. Taxes continued to be paid slowly and in small sums, so that, by December 1st, something over $6,000 had been collected. During December, payments were much more rapid; the whole amount collected up to December 31st being $40,686.73. Between that time and the 2d day of February, the last day on which taxes were paid in, about $7,500 additional was collected.

When the bank closed its doors, it had in its vaults, in cash, $20,274.01. The lowest point to which the cash on hand had fallen subsequent to the time when the bulk of the taxes were collected was $11,-

652.25, on February 1st. After February 1st, $45.36 was collected for taxes; so that hereafter, in dealing with the subject of the lowest amount of cash remaining on hand after the collections were made, the $45.36 will be added to the $11,652.25, making the lowest amount remaining on deposit $11,697.61. Suitable demand was made by the commissioners of the county, whose duty it is to act in that regard, upon the receiver of the bank, for the payment of the full amount of the taxes which the bank had received. Such other facts as are material will be referred to in the course of the opinion.

1. The first question to be considered is as to the nature of the relation which arose between the bank and the treasurer of the county by reason of the collection of the taxes and the deposit of the money to the credit of the treasurer.

Without referring in detail to the several statutes of Ohio which bear upon this subject, it is enough to say that the funds were public funds, and that, neither by contract nor estoppel, could they become possessed of any other character. The treasurer, under the law, had no right to deposit them; and neither the treasurer nor the county commissioners could, by knowledge of the method of dealing with the fund, or by consenting to the same, change the character of the fund or the rights of the county. The cashier of the bank, as deputy, was the treasurer of the county as to the particular taxes which he collected. The fund was, and always remained, a trust fund, and, as such, was rightfully subject to the application of every rule which exists in favor of its preservation.

2. Such being the character of the fund, what are the rights of the parties?

It is contended by the complainant (1) that, under the so-called rule of good conduct, and the legal presumption arising therefrom, so much of the funds of the bank as its officers permitted to remain in its vaults after the taxes were paid in must be recognized as the funds of the county, and that therefore the lowest amount on deposit after the funds had accumulated must be decreed to belong to the trust; (2) that, as to the residue of the fund, it swelled, pro tanto, the assets of the bank, and therefore impressed upon the remaining assets of the bank a trust; (3) that, as the bank, during the period in which the deposits were made, invested the mingled mass in various bills, notes, and other securities, the residue of the fund, after allowance for the amount that remained on deposit, must be charged against the proceeds of the loans made from the funds of which the public funds formed a part.

The general rules of law applicable to cases of this character may be said to be definitely established in this country. Much difficulty is encountered in the application of the facts of any particular case to these rules, but I think that an analysis of the conditions here will resolve any difficulties which present themselves.

The rule, as laid down by Mr. Justice Bradley, in the case of Frelinghuysen v. Nugent (C. C.) 36 Fed. 229, is as follows:

"Formerly, the equitable right of following misapplied money or other property into the hands of parties receiving it depended upon the ability of iden-

tifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it, by exchange, purchase, or sale; but, if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

This doctrine is also declared by the Supreme Court of the United States, in the case of Bank v. Life Insurance Company, 104 U. S. 54, 26 L. Ed. 693, as follows:

"That, so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust; and that, if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own—are established doctrines of equity in every case of a trust relation, and to moneys deposited in a bank account and the debt thereby created, as well as to every other description of property."

The rule declared in Frelinghuysen v. Nugent, supra, is quoted with approval by Mr. Chief Justice Fuller, in the case of Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696. In that case, the court held:

"The individual partners in a private bank were also directors in a national bank, and, by reason of their position, became possessed of a large part of the means of the national bank which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended, and went into the hands of a receiver. *Held*, that the receiver was entitled to the surrender of such of the property as had been actually purchased with the moneys of the bank as he might elect; but that purchases made and paid for out of the general mass could not be claimed by the receiver, unless it could be shown that moneys of the bank in the general fund at the time of the purchase were appropriated for that purpose."

This rule is amplified, also, to the effect that, if the trustee has mingled a trust property with his own, he will be deemed to have used his own rather than the trust property, and so to leave the remainder under the trust; and that is sufficient identification for the owner. And so, as stated in another form, when a trustee wrongfully commingles trust money with his own, and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money. Standard Oil Co. v. Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739; State v. Bank, 54 Neb. 725, 75 N. W. 28.

We discover, therefore, that, in the first place, identification of a trust fund is complete, where moneys are found in the hands of the trustee who has mingled his own funds with the trust fund, and that the remaining fund, if not in excess of the trust fund, will be deemed to be that portion of the trust fund which the trustee has not touched, because belonging to the trust; and, in the second place, that, if the trust fund has been mingled with the body of the trustee's estate, and the trust fund, or any part of it, has been converted into other specific forms of property which can be discovered and followed, and which passed into the hands of the assignee, receiver, or trustee, that property will be turned over to the beneficiary of the trust, or, if the trust fund has

been mingled with the funds of the trustee, and has been invested, along with trust funds, in assets which have come into the hands of the receiver or assignee, then the trust fund is made a charge against the entire mass of the assets in the acquisition of which the trust fund, together with the other property of the trustee, was used.

Bearing constantly in mind the nature of the fund, and the fact that it could not, by any agreement or otherwise, become a "deposit" in the sense in which that term is used in banking, and that the relation of debtor and creditor could not exist, we must differentiate this case from those in which the parties to the transaction were a bank on the one hand, and, on the other hand, an individual who, whether rightfully so doing or not, yet had the power to contract with the bank and make deposits with it, we find light thrown upon our inquiry by the language of Mr. Justice Miller, in the case of Marine Bank v. Fulton Bank, 2 Wall. 252, 17 L. Ed. 785, and quoted by Mr. Justice Brewer, in Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 59, 13 Sup. Ct. 533, 535, 37 L. Ed. 363:

"All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker. And the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter."

In this case, the depositor, if we may call him such, did not part with the title to his money. He could not part with it. The law forbade it. The case therefore falls within the first class referred to by Mr. Justice Miller, namely, into that class in which the bank becomes bailee of the depositor; the title to the thing deposited remaining with the latter.

Among other cases upon which the defendant seems to rely very largely, as far as federal authorities are concerned, is the case of Spokane County v. Clark (C. C.) 61 Fed. 538, decided in the Circuit Court for the Eastern District of Washington, in 1894, by Judge Hanford, and on the same case, decided by the Circuit Court of Appeals, 68 Fed. 979, 16 C. C. A. 81, in which the judgment of the lower court was affirmed. The lower court passed upon a demurrer to the bill, which seems to have been predicated upon the allegations of a deposit by the treasurer in the First National Bank of Spokane of certain sums of money, of which all but about $11,000 had been repaid; that the bank became insolvent, and went into the hands of a receiver; that the receiver, since his appointment, had received of the assets of the bank sufficient money and funds wherewith to pay and satisfy the balance so deposited by the county treasurer. Of course a demurrer to such a bill would have to be sustained, and the holding of the court, both originally and on appeal, is in no way inconsistent with the contention of the complainant here. There was no allegation in the bill, either (1) that the bank had on hand, at the time it went into the hands of the receiver, any cash; or (2) that the money deposited by the treasurer had, either separately or in conjunction with the other funds of the

bank, been used to purchase any securities or acquire any other property which went into the hands of the receiver. If we should eliminate those two propositions from the case that is now before us, there would be nothing of it. They are the two facts which do appear, and upon which stress is laid. And the court distinctly declares the law as just stated, in the case in the Circuit Court, on page 539 of 61 Fed.:

"Money held by a bank as trustee is not part of its assets, nor legally subject to the claims of its creditors. If the money had been kept intact as a special deposit, or if it was possible to prove that any of the complainant's money, or any securities or property acquired by the bank by investment of money with which it had been mingled, came into the receiver's hands, according to the principles of equity now firmly established, the right of the complainant to the relief prayed for would be clear; but there is no averment in the bill of complaint that the money deposited can be traced, nor that the estate which has come into the receiver's hands includes securities or property of the bank acquired since receiving said deposit. It does not appear that any of said money was invested, nor that it was not all paid out to other depositors or creditors before the bank closed its doors."

And again, on page 540, after referring to the case of National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693, Judge Hanford says:

"The complainant has failed to bring the case at bar within rule established by the Supreme Court in the above-mentioned decision, by not alleging that any of the money deposited by the treasurer can be traced to the custody of the receiver and identified, or that any of said money has been mingled with the property which has come into his hands."

So that, so far as the decision of the lower court in that case is concerned, it states the law not inconsistently with the claim made by the complainants in this case. And this view is emphasized when we examine the opinion of the Circuit Court of Appeals in the same case. 68 Fed. 979, 16 C. C. A. 81. On page 980 of 68 Fed., page 82 of 16 C. C. A., the opinion says:

"It is not alleged in the bill that any of the money of the complainant, or any assets or property thereby procured, has come into the hands of the receiver. It is true it is averred that the bank still retains $11,355.68 of the complainant's money, but it is not said that any portion of the same was in the possession of the bank when it closed its doors. We interpret the averments of the bill to mean—as in fact it was conceded upon the argument—that the money which the receiver holds is not that which was turned over to him, as such, when the bank closed, but that it is the proceeds of collections made by him since that date. If it had been alleged in the bill that, at the time of its failure, the bank held a sum of money equal to, or less than, the amount here sued for, the court might lawfully presume that sum to be of the public funds of Spokane county, since it will be presumed that trust funds have not been wrongfully misappropriated or criminally used by the officers of the bank."

The court goes on to discuss the general rule, as first amplified in Knatchbull v. Hallett, and lays down the rule in the following language:

"The newer and more equitable doctrine permits him to recover it (that is, the trust property) from any one not an innocent purchaser, and in any shape into which it may have been transmuted, provided he can establish the fact that it is his property, or the proceeds of his property, or that his property has gone into it, and remains in a mass from which it cannot be distinguished."

The only proposition decided by the court in this Spokane County Case is that stated on page 982 of 68 Fed., on page 84 of 16 C. C. A., as follows:

"We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion."

It is true that some of the courts have gone to that extent; but this case has not been tried upon any such theory, or upon any such claim. But we are not confined to an examination of the Spokane County Case, just cited, to learn what was the view of the Circuit Court of Appeals of the Ninth Circuit. On the very day that it decided Spokane County v. Bank, it also decided City of Spokane v. Bank, 68 Fed. 982, 16 C. C. A. 85. This case grew out of the same failure, and was against the same bank. The lower court had sustained a demurrer to the bill, and this decision the Court of Appeals reversed. The court says, in its opinion, that the bill in the Spokane City Case differs from the Spokane County Case in one important particular:

"It contains the averment that the city treasurer had deposited with the First National Bank of Spokane moneys of the city known by the officers of the bank to be such, and that said officers failed to keep said moneys separate and distinct from other funds, but wrongfully mixed and commingled the same with the money of the bank, and that it has used the same in paying its employés, patrons, clients, and depositors, 'and in the purchase by said defendant, First National Bank, of property, notes, bills, and securities now constituting and forming the assets of said defendant, First National Bank, in the possession of the receiver hereinafter mentioned.' Thereafter follows the allegation that the receiver has, since his appointment, collected of the assets of said bank a sum equal to the amount still due the city. We construe these averments of the bill to distinctly allege that the assets that came into the hands of the receiver were purchased by the bank with the city's money. In the light of the authorities cited in the foregoing decision [Spokane County Case], and of the conclusions there reached, we are of the opinion that the demurrer to this bill should have been overruled."

If the facts in that case were identical with the facts in this case, the bill of complaint could have been framed in the same language.

Much stress is laid on the case of Beard v. Independent District of Pella City, 88 Fed. 375, 31 C. C. A. 562, decided by the Circuit Court of Appeals for the Eighth Circuit. An examination of that case shows that it is entirely in harmony with the case last above cited, and with the conclusion arrived at in this case. A very full discussion of the law is presented by Judge Shiras, who sat with Judges Sanborn and Thayer, and the court arrives at the conclusion that no trust can be declared, because no money was ever deposited in the bank whereby the assets of the bank were increased. The case of San Diego County v. California National Bank (C. C.) 52 Fed. 59, undoubtedly went much further than the Circuit Court in Washington; but both cases are authorities supporting the contention of the complainants here.

In re Mulligan (D. C.) 116 Fed. 715, is an interesting case, in which Judge Lowell discusses the general subject of impressing assets with a

trust, and, in the main, taking the view against liberal allowances in that respect. Referring to the rule that drafts made against an account in a bank are supposed to be paid out of the trustee's own funds, leaving the trust fund in the residuum, he says that the rule is also extended to cases in which the bank itself was the defaulting trustee. The cestui has sometimes been allowed a charge prior to that of the general creditors upon the general cash assets of the defaulting bank, or upon the minimum value of these assets since the date of the trust deposit. If, since that date, the cash assets have at any time fallen below the amount of the trust deposit, it has been held that the trust fund has been dissipated to that extent. A number of cases are cited on page 718. On page 721, in passing upon another phase of the same case, he says that the mingling of another undefined trust with other trust funds so complicates the situation as to make it impossible to apply the principle last referred to, and therefore all the funds go into the general estate.

So that, when we narrowly examine the cases, there would seem to be no real conflict, at least among the federal courts, upon the proposition that, when a trust fund is mingled with other funds of the trustee so as to form an indistinguishable mass, and the whole mass invested in assets which come into the hands of a receiver, a trust will be declared in favor of the beneficiary, and a preference given, to the extent that the trust fund has been, along with other funds, invested in such assets.

Now, in this case, we find a trust fund aggregating $48,289.17 passing into the possession of the bank. Of this, $11,697.61, of cash which remained in the vault of the bank, may be said to be the residue left of the fund, under the rule of law hereinbefore quoted. As to the residue, $36,591.56 was used by the bank in the course of its business. By the course of its business, I mean the usual course of a bank's business. There is no claim made that the books of the bank do not correctly state the business that was done by it, or that any of its money was diverted to improper uses, except as an improper use can be found in the loaning of money to customers who were known to be insolvent by the bank officials at the time the loans were made.

The period of the reception of the deposits covers but little more than three months. The deposits were made between October and February, and the $36,591.56 must therefore have been used in the ordinary course of business, either in payment of obligations of the bank due in the ordinary course, or in the loan of money or purchase of paper or other securities in the ordinary course of business. It therefore follows that, if a portion of this fund was used to pay off debts of the bank, the creditors of the bank are benefited, pro tanto; but it does not appear that any of these funds were used to pay off debts of the bank, as that expression is commonly used, for the condition of the bank did not change, from time to time, from the beginning of these deposits of the county funds until the bank closed. There was no suspicion of its insolvency, and it continued to receive deposits, from time to time, in the usual manner. The daily transactions of the bank were of the same general character over the entire period. The cash balance on

the first day of the deposits was over $24,000, and on the day it closed something over $20,000. During the period in controversy, the transactions of the bank aggregated over $8,000,000, but the difference between the credit and debit transactions was only $4,356.20. So that, considered as a series of business transactions, it cannot be said that the trust fund was used to pay off debts. If this be true, we are relieved from a consideration of the question as to whether or not, in the case of a trust of this character, where the fund was used prior to the disclosure of insolvency for the paying of debts of the concern, the creditors will be heard to oppose the declaration of the trust as against the proposition that the fund coming into the hands of the assignee or receiver has been increased, pro tanto, and the debts decreased in like amount, by reason of the use of the trust fund.

I think it is fair to say, as a business transaction, that all of this fund, aside from the $11,697.61, was used for the purchase of commercial paper and other securities of the same kind. Now, if the paper bought with this and other funds which the bank had at its disposal all proved to be worthless, no charge could be made against the assets in the hands of the receiver on account of this trust, because, as we are following the trust fund into property which it, with other funds, purchased, we must suffer the consequences if it turns out that the purchased property is valueless. That, to a certain extent, is true in this case. During the period in controversy—that is to say, between October 9, 1903, and February 1, 1904—the bank acquired commercial paper aggregating $142,008.20. A large part of this paper was worthless, and, as to a part of it, the funds of the county were not invested in it. The whole amount collected on account of the moneys loaned during the period while the trust fund existed was $12,825.84. Of this amount, $1,911.76 was collected from loans made between October 8th and November 1st, while during that period only $674.63 was collected on account of taxes; so that we must, of necessity, exclude from the total amount received during the period in controversy the sum of $1,237.13, being the amount collected on account of loans into which the trust fund could not have gone. The amount, therefore, collected by the receiver on account of loans made out of funds with which the trust fund was mingled, is $11,588.71.

Complainant also asserts a claim against the balances on deposit with the various depository banks of the Galion Bank. I cannot certainly trace any part of the trust fund into these depositories. Deposits in these banks were made from time to time; but these were all open accounts, fluctuating from day to day according to the demands for exchange, and affected almost always by the indebtedness of the Galion Bank to the various depositories, and by the amount of rediscounted paper which it handled through them.

It follows, therefore, from this view of the law, that the complainant is entitled to assert, as against the receiver, the right to a repayment of the sum of $23,286.32, being the portion of the trust fund which can be traced into the hands of the receiver, viz., $11,697.61 cash remaining in the bank, and $11,588.71, being the amount collected by the receiver from loans which were made out of funds of which

the trust formed a part; and the residue of the trust fund, to wit, $25,002.85, will be charged against and satisfied, if so much is realized, out of such further collections as the receiver may make on account of these loans.

A decree may be entered accordingly.

THE WYOMISSING.

(District Court, E. D. New York. August 3, 1906.)

COLLISION—TOW AND ANCHORED DREDGE—UNNECESSARILY OBSTRUCTING CHANNEL.

A tug, with a tow of 23 boats in tiers, the whole 1,000 feet long and 100 feet wide, with helping tugs on the sides, passing through the Arthur Kill in the night, *held* not in fault for a collision between one of the rear boats in the tow and a dredge engaged in dredging the channel, which had been breasted off toward the Staten Island shore for the night, a distance of about 50 feet from the side of the dredged channel; it appearing that it could have safely moved 60 feet further toward the shore, and therefore needlessly obstructed the passage of vessels and left insufficient room for such a tow to pass, in view of the reverse tide in the Kill.

In Admiralty. Suit for collision.

Carpenter, Park & Symmers, for libelant.
Armstrong & Brown, for claimant.

THOMAS, District Judge. This action involves a collision, between 4 and 5 o'clock on the morning of November 10th, of a tow in charge of the tug Wyomissing and the starboard side of libelant's dredge No. 7, lying westerly of the Elizabethport Ferry, in the Arthur Kill. There were two helping tugs on the starboard side of the tow. The dredge had on November 9th been working in the most southerly cut, No. 1, and finished at about 6 p. m., when it was breasted off towards Staten Island.

Ittman, the United States inspector, could only say that it moved, but did not give the distance. It moved itself, without the usual aid of the tug General Newton. Moriarity, the captain of a tug, was near dredge No. 2, 1,000 feet away, and saw it moved, and saw it the next morning. He stated that it "went in 50 or 100 or 75 feet," and that it was within about 75 feet from the bank, and that there was no scow alongside of it. He also says that a tow going east would have 450 feet from the dock, and that there was from 350 to 400 feet of water between the bar on the north shore and the dredge. The actual distances are stated below.

Clancy, the master of the tug Bouker, states that he was at the dredge at 7:30 p. m., and that it was 75 feet off the Staten Island shore, and that it had moved from 25 to 50 feet out of the cut, and could not have gone farther to the southward; that it would take 10 minutes to take up the spuds; and that with the Bouker he could tow it 3 miles per hour against the tide. Taylor, the president of the libelant, saw the dredge November 9th at about 7 o'clock p. m. He states that it was then some 200 feet west of the ferry and 80 feet off shore; that the

dredge drew from 9 to 10 feet; that it had no scow; and that it was not possible to get the dredge farther towards the Staten Island shore, as there was not more than 10 feet of water south of where the dredge lay.

Savage, who was the master of a local tug, stated that a strong tug like the Bouker could tow the dredge, but that a small tug like the General Newton could not tow it to the northerly shore; that scows of the Taylor Dredging Company and dredges tie up at the pipe dock on the northerly side; and that the Bouker could shift it to that place about as quickly as he could breast it off. But Taylor, president of the libelant company, stated that he was not allowed to use this dock. It appears from the evidence of this witness, as well as others, that at the point where the dredge lay, the flood tide towards the Staten Island shore, a bar ran out from the northerly shore about 200 feet. Savage states that it was a hard place to get by, in which he is confirmed by the claimant's evidence and disputed by libelant's evidence. That question is discussed later.

Carolsen, who was on dredge No. 7, stated that it moved about 50 feet towards the Staten Island shore, and 70 or 80 feet therefrom; that if it had gone farther it would have gone aground; that he pulled the spuds up flush with the bottom. Lee, the cook of the dredge, stated that the dredge was 200 feet west of the Staten Island Ferry; that the dredge was breasted off 50 to 75 feet from the cut, and was from 60 to 70 feet away from the shore. Peterson, deckhand on dredge No. 7, stated that he helped breast in the dredge; that it went towards the shore; that the spuds were taken up, the dredge warped over, and the spuds dropped again. Peterson did not know much about distances, nor did Neilson, who was on the dredge, and stated that it moved 70 or 80 feet, and was 80 to 100 feet from the shore. Thompson, on the dredge, stated that it breasted over from 50 to 60 feet from where it left off work and was 80 feet from shore.

Scott, captain of the Wyomissing, not on duty at the time of the collision, said that going westerly at 7:30 the evening before he passed between the dredge and Staten Island; that it had a scow on its port side; that there was 150 feet of clear water south of it; that the Wyomissing draws 13 feet 6 inches; that he stopped and asked some one on the dredge, if he was going to move but received no answer. He stated that to pass the dredge safely he needed 25 to 30 feet more room than he had, and that in ordinary navigation at low water he came with his tug within 50 feet of the meadows; that if the dredge were not there he could keep within 50 feet of the meadows with his tow coming up; that he had seen Taylor's dredges at the pipe dock.

Scheid, the pilot in charge of the Wyomissing at the time of the collision, stated that his tug had the hawser, while there were two tugs on the starboard side of the tow. He confirmed the evidence of Scott as to passing the dredge going down at 7:30 on the previous night. He stated that the Wyomissing, at the time of the collision, passed 150 feet off the dredge, the first tier of boats passed about 20 to 30 feet, the second tier 18 feet, the third tier 8 feet, and the fourth tier 6 feet; that the fifth tier collided; that the tug Ashbourne was shoving on the

starboard side of the third tier, and that the Pencoyd had backed away from the tow at the time of the collision.

Powers, the pilot of the helping tug Ashbourne, stated that he went down light between noon and 5 p. m. of the night before; that the dredge was in the middle of the channel; that when he came back he went alongside of the fourth tier; that the fifth tier passed the dredge 15 to 20 feet, and that the Ashbourne, did not clear over 4 or 5 feet; that the Pencoyd dropped off to avoid the dredge. It appears that there were six tiers of boats, four boats in five tiers, and three boats in the last tier. This witness states that 300 feet of clear water was needed to take the tow past the dredge.

Halpin, pilot of the Transit, stated that he passed the dredge going down at 1 or 2 o'clock a. m.; that the dredge had a scow on its port side. He stated that he had been within 25 feet of the Meadows with a tow drawing 11½ feet at half tide; that at low tide there was 2½ feet less water than at half tide; that the dredge was 200 feet off the Staten Island shore, and the scow on its port side 150 feet off such shore; that the dredge on its starboard side was from the New Jersey shore 390 or 400 feet, "something like that." "Q. So that there was 400 feet, or how many feet, to navigate in there between the Jersey shore and the side of the dredge? A. No, sir; we had Elizabethport bar to contend with. We didn't have that much clear water. We couldn't go over that bar."

O'Toole, captain of the Pencoyd, testified that he was pushing on the fifth tier, but necessarily backed away when within 25 feet of the dipper of the dredge; that the dredge was lying 150 or 175, maybe 200, feet off the Staten Island shore, which would leave 200 feet between it and the New Jersey shore.

There is the usual conflict. The libelant insists that the dredge without a scow was as far to the Staten Island shore as possible, while the claimant declares that the dredge and its scow were near the middle of the channel and had not moved from 7:30 o'clock of the evening previous. The blue print, "Exhibit No. 1," offered by the libelant shows that the new channel, opposite the point where the dredge lay at the time of the collision, was 300 feet wide, the distance to the dock line on the New Jersey shore 100 feet, the distance from the south line of the cut to the shoal line on the Staten Island shore about 150 feet, the greatest width of the bar on the New Jersey shore from the north side of the new channel as projected was 100 feet, and the distance from such point of the bar to the shoal line on the Staten Island side about 300 feet, and the distance from the point where the starboard side of the dredge lay, which is found to be 50 feet outside the southerly line of the channel, westwardly and parallel to such line, to a point opposite the point of the bar, was 325 feet, and the distance between such last point and the nearest part of the shoal was about 250 feet.

The evidence is vague as to the dimensions of the dredge, but there is some suggestion that it was 42 feet wide and 75 feet long. Whether that includes the overhang of the bucket does not appear. The tow was about 1,000 feet long, and, except the last tier, probably 100 feet wide, and the helping tugs were to the starboard, occupying additional

space. Therefore the problem was to take, on a strong flood tide setting towards Staten Island from Elizabethport river, a tow 1,000 feet long and 100 feet wide with helping tugs on the outside thereof, through a piece of water 300 feet wide at its westerly end, 450 feet wide on the easterly end, where the dredge lay, with a distance of 325 feet between such easterly and westerly ends, with the consideration that the tow must be kept off a dredge of the size named, and yet not be carried onto the projecting bar or New Jersey docks, where boats customarily are lying. It is true that at the point where the dredge was lying there was 450 feet on its starboard side, but 325 feet westerly this space was reduced to 300 feet between shoal points. That was a contracted space through which the tow must pass to utilize the ampler space north of the dredge. After the tow passed Elizabethport river the tide set right towards the dredge, and after the tug passed the dredge easterly about 1,000 feet to Dooley's Point the tide set towards the New Jersey shore, against which the towing tug must guard, lest it be driven upon the docks or whatever might be lying there.

This reversing tide was a matter to be taken into account. The navigator had the point of the shoal on his port side, and 325 feet easterly on his starboard side the dredge, so that an oblique line between such obstructions shows about 400 feet, not counting the length of the dredge.

The dredge moved out from the new cut not more than 50 feet. Some of the libelant's witnesses make the estimate less. But the map shows that there was room to move out 150 feet before reaching shoal water. The dredge was 42 feet in width. It moved towards shore 50 feet. That left 150—92, or 58 feet of water before reaching the shoal that the dredge did not utilize. Hence it unnecessarily reduced the passage by that distance. Taking into consideration the difficulties of the situation and the unnecessary obstruction of the dredge, the libelant does not fulfill the burden of proving that the collision was caused by any fault of the tug, or that the tug negligently contributed to the injury. The dredge had daylight and ample time to move out of the way. The tug had night, adverse tides, and uncertainty to confuse, and obstructions on either side to avoid; and it is deemed unjust to condemn her.

The libel will be dismissed.

THE WYOMISSING.

(District Court, E. D. New York. July 31, 1906.)

COLLISION—TOW AND ANCHORED DREDGE.

A dredge, engaged in government work in dredging a new channel in the Arthur Kill, at the close of work in the afternoon was breasted off toward the Staten Island shore. During the night a collision occurred between the dredge and one of the starboard scows in a tow of 22 arranged in tiers of 4 boats each, except the last tier. A preponderance of the evidence showed that the dredge was 100 feet or more south of the south line of the new channel and as near the shore as she could safely get, and that the tow had an available space of 500 feet in which pass. *Held*,

that the collision must be attributed solely to the fault of the tug in failing to keep the tow at a safe distance.

In Admiralty. Suit for collision.

Carpenter, Park & Symmers, for libelant.
Armstrong & Brown, for claimant.

THOMAS, District Judge. On October 25th the libelant's dredge No. 2, pursuant to a contract with the United States, was dredging a new channel, 300 feet wide, in the Arthur Kill. Work was stopped about half past 5 o'clock p. m., and the dredge was breasted off by the steam tug Newton towards the Staten Island shore. Between 4 and 5 o'clock in the morning of October 26th, the steam tug Wyomissing, aided by the tug Transit on her starboard side, was towing, on a hawser which was 50 fathoms in length, 22 loaded canal boats and barges, arranged 4 in a tier, save the last tier, where there were 2. The forward tier contained 4 scows, each about 30 feet wide. On the starboard side of the tow was Pencoyd, a helping tug. The starboard boat in the second tier came in collision with the starboard corner of the dredge, which was headed westerly. The claimant's evidence tends to show that the dredge was in the middle of the channel, although some of its witnesses state that it was somewhat nearer the southerly side thereof; that a schooner, 30 feet in width, was lying at the docks on the north side of the Kill, on which the flood tide set, so that there was not sufficient room to pass the dredge; and that, as the point itself is on that tide one of the most difficult for navigation, the tugs were not in fault for the collision.

There are two essential questions of fact: How much room did the tow have? Could the dredge have given her more room? The parties differ as to what point opposite the Staten Island shore the dredge was at the time of the collision and as to her relation to the center of the new channel.

The claimant's evidence tends to show that the dredge was in the new channel, and opposite Dooley's Point, at the point marked "X," through which Capt. Scheid of the Wyomissing and others afterwards made soundings every 15 feet, whereby he discovered, as he testified, that the water showed a depth of "21 feet up to about 150 feet from the Staten Island shore; * * * from 16 to 14 feet to within about 75 of the shore." Thereupon, as he testified, the water gradually shoaled up until he found 12 feet of water within 25 feet of the shore.

The evidence for the libelant, given by Vollum, the government inspector on dredge No. 2, shows that the dredge had been working on the fourth cut on the south side of the central line of the new channel, that each cut was 25 feet wide, and that she was breasted off to the point marked "X" (opposite which he placed his initials, "P. E. V."). Vollum knew approximately where the dredge was before and after she was breasted off, as he had the official map showing the workings. He was an intelligent and apparently a fair witness. He places the dredge at the time of the collision farther to the eastward than the place indicated by the claimant's witnesses, and within 150 feet of the Staten Island shore. He states that she was 100 or 125 feet south of the south line of the new channel, and that she was carried so far

to the southward that her port side same against a bank, so that she listed. Johnsen, the captain of the dredge, estimates that she was breasted off 50 feet south of the new channel and until she was 150 feet from the Staten Island shore, and he also describes her list from striking the bank, although he seemed to think that the listing was caused by the spuds striking the bank. The spuds were four great timbers, one in each corner of the dredge. The forward spuds weighed about 20 tons each, and the after spuds about 8 to 10 tons each. These spuds were used to hold the dredge in position. They could have been drawn up by some labor, and the draft thereby reduced to 7½ feet; but in that case other means of anchoring would have been required, and, moreover, this would have allowed the bottom of the dredge to ground, if, perchance, sufficient shallow water was met, which would have exposed the machinery of the dredge to injury. It is thought that the libelant was not required to draw up the spuds.

This evidence that the dredge was breasted off is supported by Taylor, the owner of the dredge, who places the distance from the Staten Island shore at 125 feet; by Moriarity, the captain of the attending tug General Newton, who states that he by means of his tug breasted the dredge to a point about 125 feet distant from the Staten Island shore, when the scow on the port side of the dredge grounded, with 8 to 12 feet of water on her port side; by Ittman, the United States inspector of dredge No. 7, which was lying about 800 feet to the eastward of dredge No. 2, who states that the port side of the scow was about 125 feet from the Staten Island shore and the starboard side of the dredge 200 feet therefrom. These witnesses saw the location by daylight, while the claimant's witnesses saw the dredge only by night. The claimant's witnesses—Scheid, master, Martin and Milles, deck hands on the Wyomissing; Halpin, the pilot, and Scott, master, of the Transit; O'Toole, master of the Pencoyd; Carolan, pilot of the tug Overbrook, who followed Scheid's tow and safely passed the dredge with a tow of 18 or 20 boats—placed the dredge in the middle of the channel, or a little to the southward thereof. Savage, the captain of the Erie, stated that at low tide there was sufficient water to within 90 or 100 feet of the point "X" on the line marked "X, X." But that line was somewhat westward of the actual location of the dredge when the collision occurred. O'Toole placed the dredge off Dooley's Point, and testified:

"Q. What is your course, when you come up to Dooley's Point from the bridge, with respect to one shore or the other? A. About northeast. Q. How close do you go to the shore? A. To the Staten Island shore you can go right along there within 25 feet of it. Q. Did you go there on this occasion? A. We couldn't do it. Q. Why not? A. On account of the dredge being there in midstream. Q. If it hadn't been there, you could have done it, could you? A. If it hadn't been there, we could have done it very easy. * * * Q. You say, after you get up to Dooley's Point, you can go within 25 feet of the Staten Island shore from Dooley's Point? A. You can go within 25 feet, but naturally we go along there 100 feet all the way from the time we leave the bridge until we come to the Point."

Later he says:

"I know we can go within 10 feet of the shore west of Dooley's Point. Q. How about east of Dooley's Point? A. You come around Dooley's Point, and it

shoals up. The tide cuts off there, and it shoals up on your starboard hand. * * * Q. After you pass Dooley's Point to the eastward, what do you say? A. It shoals all up; all flat. Q. You mean you can't go within 100 feet of the Staten Island shore? A. Not with 10 feet of water, you couldn't. Q. That is to the eastward of Dooley's Point? A. That is to the eastward of Dooley's Point."

He further states that the dredge was opposite the point marked "X," on the line marked "X, X":

"Q. That you call Dooley's Point, and opposite that point, in the center of the stream, you would say the dredge was? A. Yes, sir."

This evidence has been given in some detail, as it furnishes a probable explanation of the differing statements of the witnesses as to the navigable water on the south side of the channel. The measurements of Capt. Scheid have already been noted. They differ materially from the evidence of Capt. Moriarity, who made measurements before the trial was concluded, whereby he found, as he states, that five soundings, beginning at the east end of Dooley's dyke, show, 130 feet off, 8 feet of water. He said:

"We went down abreast of Dooley's property, where the dry dock is, that we fetched about here (drawing a line on the chart). We went off there 130 feet, and found 9 feet of water. Q. 130 feet north from there? A. North from there. We went down farther, taking five soundings below this. We ran off 130 feet, and found 10 feet of water. We ran down farther 100 feet, and found 10 feet. And at the point we stopped the boat, right up on the point, and found, 24 feet off, 8 feet of water, and the boat was right against the point then in 8 feet of water."

This evidence, in connection with that of O'Toole, claimant's witness, shows that the dredge was anchored as far towards Staten Island as was safe, and that the libelant's evidence that she or her scow struck a bank and was precluded from going further south is the probable fact. The claimant urges that the dredge should have been taken to the docks on the north shore. But this seems unnecessary, even if it was practicable. The tow had room to pass to the northward of the dredge. The Overbrook and her tow followed the Wyomissing at a short interval of time, and passed between the dredge and docks on the New Jersey shore. The libelant's witnesses place the available breadth of water at not more than 250 feet. But the new channel is 300 feet wide, and the whole width available for passage was probably about 500 feet.

It is concluded that the tug was negligent in not keeping her tow off the dredge, with such water at her disposal. The libelant will have a decree.

In re FELLERMAN et al.

(District Court, S. D. New York. November, 1906.)

1. CONTEMPT—PROCEEDINGS FOR PUNISHMENT—JOINT PROCEEDINGS.

A person charged with contempt not being entitled to a jury trial, the rules regarding indictments are not applicable to such proceedings, and two persons may be jointly proceeded against for contempt, although it consists in alleged false swearing before the court.

2. SAME—ANSWER AS EVIDENCE.
In a proceeding for contempt in a court of equity or bankruptcy, the answer of the respondent, though under oath, is not conclusive, and his denial of the contempt does not entitle him to a discharge.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 172.]

3. BANKRUPTCY—FALSE SWEARING—PUNISHMENT BY CONTEMPT PROCEEDINGS.
False swearing in bankruptcy proceedings, although a criminal offense, is also a contempt of the court and punishable as such in summary proceedings.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 385.]

4. SAME—DEFEATING PURPOSE OF EXAMINATION.
The duty imposed on bankrupts by Bankr. Act July 1, 1898, c. 541, § 7 (9), 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], when present at the first meeting of their creditors to submit to an examination concerning the conduct of their business, their dealings with their creditors, etc., and under section 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], to be examined on order of the court concerning their acts, conduct, or property, involves the duty of answering truthfully and as intelligently and connectedly and fully as their mental equipment will permit, and their failure to do so is a contempt of court.

5. SAME.
Bankrupts *held* guilty of contempt of the power of the court in failing to file schedules as required by the act and of the authority of the court in defeating or attempting to defeat justice by refusing to surrender their books of account, or to give any reasonable excuse for their disappearance, by swearing falsely on their examinations, and by persisting in giving vague, contradictory, and evasive answers to material inquiries.

In Bankruptcy. On proceedings to punish for contempt.

Abram I. Elkus, James N. Rosenberg, and Robert P. Levis, for the motion.

Leonard Bronner and Roger Foster, opposed.

HOUGH, District Judge. In and prior to August, 1905, the persons proceeded against (who are father and son) were in business in this city under the firm name of A. Fellerman & Sons. In the month named, an involuntary petition in bankruptcy having been filed against them, a receiver was appointed and such proceedings were subsequently had as that on November 9, 1905, a trustee was appointed. Prior to the appointment of a trustee both the bankrupts were examined in this court under section 21a, c. 541, Act July 1, 1898, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], and further testimony upon the same points was taken at the first meeting of creditors.

The trustee now moves to punish the bankrupts and each of them for contempt (1) because, although duly ordered so to do by the decree of adjudication, they have never filed schedules as required by the act, nor, indeed, any schedules at all; (2) because they, and each of them, have failed to deliver either to their receiver or trustee the books of account of their joint business, and have failed to give any reasonable explanation for their failure so to do; (3) because in the progress of their several examinations they, and each of them, have testified with willful falsity; and (4) because they, and each of them, have repeatedly and continuously testified in their several examinations

in a vague, unsatisfactory, ambiguous, and contradictory manner, with the intention of obstructing the administration of justice and preventing the collection and distribution of their property and the discovery of the whereabouts of the same or any considerable portion thereof.

These charges are embodied in an order to show cause based upon certain affidavits and fortified by the records of this court containing the alleged obnoxious testimony and the order of adjudication. The order has been served personally upon each of the bankrupts, and required their personal attendance in court. Upon the adjourned return day neither of the defendants appeared, but they interposed by their counsel a joint document called an "answer," which is verified by the statement that "the same is true to the best of their knowledge, information, and belief," which verification is signed by their cross-marks. Abraham Fellerman, although foreign born, has been in this country for 37 years, and the record of his testimony shows him to be ready in English speech and obviously of quick apprehension. It is asserted, however, that he cannot write in English or any other language. Isidor Fellerman is native born, and has, by his own evidence, sufficient education to act as a traveling salesman and conduct the correspondence of his late firm. The answer contains no new matter, and in respect of the alleged falsity, etc., of the testimony, merely denies such falsity, vagueness, ambiguity, or the like. As to the failure to file schedules, it denies that any order therefor was made, and as to the question of books denies that the same were "in the bankrupts' premises upon the day of the filing of the petition," a fact which is not alleged and is immaterial; the question being whether they were within the bankrupts' control on that day.

Upon the issues thus framed, without any personal appearance or request for further examination, the bankrupts have elected to rest; and their counsel now assert that the proceeding is defective, in that it proceeds jointly against these two men, declaring that each is entitled to a "separate proceeding and separate petition," and to a jury trial, and, further, that the answer is "a complete justification of their conduct and shows that they have not been guilty of any intentional wrongdoing."

The first branch of this contention depends upon the proposition that, inasmuch as contempt of court is a criminal offense (New Orleans v. Steamship Co., 20 Wall. 392, 22 L. Ed. 354; Ex parte Swan, 150 U. S. 652, 14 Sup. Ct. 225, 37 L. Ed. 1107), therefore the rules of criminal proceedings must apply, and that, inasmuch as the two Fellermans could not be indicted jointly for perjury, neither can they be proceeded against together for a contempt involving false swearing.

It is certainly clear that one accused of contempt is not entitled to a jury trial (In re Debs, 158 U. S. 594, 15 Sup. Ct. 900, 39 L. Ed. 1092), and, indeed, "a contempt is sui generis. It may be considered as having the same meaning as a misdemeanor, but it differs from it, in this: that it is not indictable, but punishable summarily. No one has ever claimed that a party is entitled to a trial by jury in a proceeding for a contempt. It must, therefore, follow that the rules re-

garding indictments are not applicable to proceedings for contempt." In re Terry (C. C.) 37 Fed. 650.

The second branch of this argument—i. e., the incontrovertible nature of the answer—fails to recognize the fact that this proceeding is in a court of equity. It has been said that "one proceeded against as for a contempt has the right to purge himself if he can by his own oath, and that the common law is so rigid in this matter that it does not allow the sworn answer of the respondent to be controverted as to matter of fact by any other evidence." In re Pitman, Fed. Cas. No. 11,184; U. S. v. Dodge, Fed. Cas. No. 14,975. But the procedure here taken is in entire conformity with the practice of courts in equity as carefully considered in United States v. Anonymous (C. C.) 21 Fed. 761. "The court proceeds to investigate ex parte the alleged contempt, and being satisfied thereof directs that the guilty person stand committed, unless he shall, on the day assigned, show cause to the contrary. This order nisi being served, if no answer is made, the rule is made absolute, and the accused is then arrested and imprisoned according to its terms. If the accused appears, he is heard in any way that suits the convenience of the court, by an examination ore tenus, upon affidavits, or by propounding interrogatories. If he deny the contempt the court, either for itself or by reference to a master, ascertains the facts upon the proof, either party examining witnesses by affidavit or otherwise; but there never was in a court of equity as at common law any rule that the answer of the respondent to the interrogatories should be taken as true and he be discharged if he deny the contempt." Id., p. 767. See, also, U. S. v. Debs (C. C.) 64 Fed. 738.

These respondents have chosen to rest upon an answer which is in the main a mere statement of conclusions, which is, as to the order for schedules, false by the records of this court, and as to the nonsurrender of books of account attempts to make an issue not presented by the trustee's proceeding. And they have finally verified the whole in a method so unusual in this jurisdiction as to excite suspicion of the good faith of those who pursue it; for it cannot be suspected that they have not been ably advised.

Contempt of court involves two ideas—disregard of the power of the court and disregard of its authority. Disregard of power, in that lawful orders have not been obeyed; and disregard of authority, in that its jurisdiction to declare the law and ascertain and adjudicate the rights of the parties is hindered, prevented, or set at naught. Such conduct is an offense against the court as an organ of public justice, and may be rightfully punished on summary conviction, whether the act complained of be punishable as a crime on indictment or not. The offense may be double; so is the remedy and the punishment. Yates v. Lansing, 9 Johns. (N. Y.) 417, 6 Am. Dec. 290. It is, therefore, no answer to urge as to that part of this proceeding involving false swearing that perjury is an indictable offense. Perjury in the presence of the court is a contempt as old as the courts themselves. It is "undoubtedly a great contempt." Stockham v. French, 1 Bing. 365. It is a "gross piece of contempt." Chicago Directory Co. v. U. S. Directory Co. (C.

C.) 123 Fed. 194. It may be necessary to inquire whether the question put was relevant or material to the case or hearing. In re Judson, Fed. Cas. No. 7563; Ex parte Peck, Fed. Cas. No. 10,885. But once established that the investigation is upon a relevant subject it is not even necessary to prove the conduct of the defendants (as in a criminal trial) beyond a reasonable doubt, but only by a fair preponderance of evidence. Drakeford v. Adams, 98 Ga. 722, 25 S. E. 833. And in the numerous instances wherein bankrupts have been committed by the English courts for failure to give satisfactory answers to questions concerning their property the test of what is a satisfactory answer was said by Baron Alderson to be "whether a reasonable man would believe the story told" by the bankrupt. Ex parte Lord, 16 M. & W. 468.

It is, of course, true that the right to punish for contempt has been in many jurisdictions limited by statute. This is true in the state of New York. Of this Fromme v. Gray, 148 N. Y. 695, 43 N. E. 215, In re Ryan, 73 App. Div. 137, 77 N. Y. Supp. 132, and Bernheimer v. Kelleher, 31 Misc. 46, 64 N. Y. Supp. 409, are examples, and render these decisions of limited value in courts not controlled by the statutes of this state.

In order to render a witness guilty of contempt, it is not, however, necessary to allege or prove, either with the strictness of criminal practice or by laxer methods, particular instances of false swearing demonstrating the falsity by proving the truth. It is enough if the witness' conduct tends to bring the authority of the law and of the court engaged in the administration of the law into disrespect or disregard. It has never been doubted that a refusal to testify on the part of a witness or to give evidence on relevant questions is contempt. Taylor on Evidence (8th Ed.) 1264. And the matter is not mended by a refusal obviously willful to give intelligent, connected, and reasonable answers to questions fairly calling for the same.

These bankrupts when examined under section 21a were "competent witnesses under the laws of the state in which the proceedings were pending," and when examined at the first meeting of creditors it was the duty of each of them (section 7, subsec. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]) to submit to an examination concerning "his dealings with his creditors and other persons," and in respect of "all matters which may affect the administration and settlement of his estate," and the obligation to submit to the examination involved the duty of answering truthfully, and as intelligently, connectedly, and fully as mental equipment would permit. Both of these bankrupts are persons of obvious intelligence. Within a very short time, perhaps only a few hours, of the filing of the petition against them, they had assigned a large number of their open accounts of the face value of over $4,000 to one Stich; the consideration being a cash payment of a considerably less amount. The time when and the circumstances under which this transfer was made became, of course, vastly important, and upon the details of this transaction both bankrupts were examined. Isidor Fellerman on one occasion testified under oath that he did not recollect selling any accounts to Stich; that he

did not think he would recognize Stich if he saw him; that he could not be sure that he had ever met Stich, and he was certain that he had never been in Stich's place of business. Six months later he testified that he had met Stich; that he met him at the latter's office; that he had met him once or twice before calling at his office, and he specified the day on which he attended at that office. I find that Isidor Fellerman was guilty of willful false swearing in court when under examination pursuant to section 21a of the bankruptcy act, on September 29, 1905.

It being alleged that this device of the transfer of accounts immediately before bankruptcy was done by advice of counsel, Abraham Fellerman was (when examined under section 21a) closely questioned regarding the time when he saw his attorney and the time when he met Stich. On one occasion he testified that he left his store the day before the failure and consulted his attorney on that day for the first time, and that this occurred after 4 o'clock; that his attorney told him to go to see Stich, and he did so on the same day after having left his attorney's office. A week later he testified that he had seen Stich before he saw his attorney, and was perfectly certain of it, and this statement he repeated twice. On another occasion he declared that he never met his attorney and never saw him until after he had failed. I find that Abraham Fellerman was guilty of willful false swearing when under examination as a witness in court under section 21a on September 29, 1905. These are but illustrative instances of falsity. If they stood alone, they might be attributed to excitement or inadvertence, but they occur too frequently to be passed over.

In re Salkey, Fed. Cas. No. 12,253, arose under the act of 1867, and the court there adopted, under circumstances not dissimilar to these, the rule that the law which gives to the court in bankruptcy power to require an account from the bankrupt of the disposal of his estate and of his dealings with others in respect thereof "implies of itself a power to punish if a satisfactory account is not given." In Berkson v. People, etc., 154 Ill. 81, 39 N. E. 1079, a debtor, being under examination in respect of his property before a master in chancery, behaved in such a manner as to amount to an absolute refusal "to honestly and truthfully testify and submit to an examination concerning his property and the disposition he had made of it." The court remarked that no one could read the testimony "without being impressed by the feeling that the respondent by various evasions or by claiming not to remember is endeavoring to conceal and withhold from the receiver an amount of money. * * * We think he was properly adjudged guilty of a contempt." So in this case it would be idle to further specify the style of testimony offered by both father and son. No one can read the testimony of either without concluding that their answers were intentionally vague on points as to which no reasonable man can believe their recollection infirm; unintentionally contradictory when their attention was directed to points previously touched upon, and they did not remember the answers previously given; intentionally evasive when evasion and delay might serve to give time for considering the answer finally to be given, and revealing throughout a scheme of concealment

and prevarication accompanied by assumptions of ignorance impossible of belief; and all intended to weary investigation, exhaust the patience and the funds of petitioning creditors, and prevent the court from discovering what the law charges it to discover—the truth—concerning their acts, conduct, and property.

The bankrupts, and each of them are, in my opinion, guilty of contempt of the power of the court in refusing and neglecting to file schedules as required by the act, and of the authority of the court in defeating, or attempting to defeat, the ends of justice by (a) refusing to surrender their books of account or to give any reasonable explanation for their disappearance; (b) in falsely swearing as above set forth; and (c) in giving, and persisting in giving, vague, contradictory, and evasive answers to material inquiries as charged in the petition.

A commitment may issue against each of the bankrupts directing that they, and each of them, be imprisoned for the space of two months, and that they, and each of them, pay a fine of $250, each to stand committed until the same shall be discharged.

LEDERER v. FERRIS.

(Circuit Court, S. D. New York. November 19, 1906.)

COPYRIGHT—SUIT FOR INFRINGEMENT—DISTRICT OF SUIT.

The provision of section 1 of the federal judiciary act of March 3, 1887 (24 Stat. 552, c. 373 [U. S. Comp. St. 1901, p. 508]), that no suit shall be brought in any other district than that whereof the defendant is an inhabitant, does not apply to suits arising under the copyright laws, as to which section 11 of the judiciary act of September 24, 1789 (1 Stat. 78, c. 20), is still in force, and such a suit may be brought in any district in which the defendant can be found and served with process.

At Law. On demurrer to complaint.

Louis Steckler, for plaintiff.

Gifford, Hobbs & Beard (John D. Fearhake, of counsel), for defendant.

HOLT, District Judge. This is a demurrer to a complaint on the ground that this court has no jurisdiction of the person of the defendant. The action is brought to recover damages for the infringement of a copyright. The complaint contains an allegation that the defendant is a resident of the city of Minneapolis, Minn. He has been found and served in this district. He demurs to the complaint on the ground that under the act of March 3, 1887, the suit cannot be brought except in the district in which the defendant is an inhabitant.

The eleventh section of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 78) provided that all civil suits should be brought in the district in which the defendant either was an inhabitant or was found at the time of serving the writ. Under this provision suits arising under the copyright laws, like all other suits, could be brought in any district in which the defendant could be personally served. This rule of service remained unchanged until 1887. It was included in section

739 of the Revised Statutes and in section 1 of the act of March 3, 1875 (18 Stat. 470, c. 137 [U. S. Comp. St. 1901, p. 508]), relating to the jurisdiction of the Circuit Courts. That act provided that the Circuit Courts of the United States should have cognizance concurrent with the courts of the several states of all suits of a civil nature, of certain classes, in respect to which jurisdiction was conferred by the Constitution of the United States. This act was amended by the act of March 3, 1887 (24 Stat. 552, c. 373 [U. S. Comp. St. 1901, p. 508]). That act related to suits of substantially the same class as those described in the act of 1875, but it amended the act of 1875 in certain respects, among others, by providing that no suit should be brought "in any other district than that whereof he [the defendant] is an inhabitant," and omitting the provision, which had existed ever since the judiciary act, that the suit could be brought in the district in which the defendant was found at the time of serving the writ. The act of 1887, however, and the act of 1875, of which it is an amendment, only relate to suits of which the courts of the United States have original cognizance concurrent with the courts of the several states. It therefore did not apply to or repeal the existing provisions of the law in reference to the service of process in suits of which the United States courts have exclusive jurisdiction. For instance, it did not apply to a suit to recover penalties and forfeitures under the customs laws (U. S. v. Mooney, 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550); or to suits arising under the patent or copyright laws (In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; In re Keasbey, etc., Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402).

By the act of March 3, 1897, it was provided that, in suits brought for the infringement of letters patent, Circuit Courts should have jurisdiction "in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business." This act now prescribes the rule of jurisdiction in patent cases, but there has never been any act changing the rule in copyright cases. The act of January 6, 1897, amending section 4966 of the Revised Statutes (Act Jan. 6, 1897, c. 4, 29 Stat. 481 [U. S. Comp. St. 1901, p. 3415]), relating to the liability of persons publicly performing dramatic compositions for which a copyright has been obtained, provides that any injunction obtained in such an action may be served anywhere in the United States and that any motion may be made in any Circuit Court to dissolve such an injunction, upon notice to the plaintiff. But it does not make any provision for the manner in which jurisdiction shall be originally obtained. I think, therefore, that, in suits arising under the copyright law, the method of service provided by the judiciary act is still in force, and in my opinion such a suit may be brought in any district in which the defendant can be found and served with process. In the case of Fraser v. Barrie (C. C.) 105 Fed. 787, Judge Kohlsaat dismissed a bill in a copyright case for want of jurisdiction, on the ground that the defendants did not reside in the district. The only question discussed in the opinion was whether the act of 1897 authorized a suit to be brought in any

district, and Judge Kohlsaat held that it did not; that the provisions of that act only authorized the service of injunctions obtained, and the making of motions to dissolve injunctions obtained, in such a suit, but did not provide for a method of beginning such a suit. In that opinion, I entirely concur.

But it seems to have been assumed by the counsel and by the court that, unless the act of 1897 authorized a suit arising under the copyright act to be brought in any district where the defendant could be found, the act of 1887, requiring actions generally to be brought in a district whereof the defendant is an inhabitant, applied. As already stated, in my opinion, it never did apply, and suits arising under the copyright acts may still be brought in any district in which the defendant can be found.

The demurrer is overruled, with costs, with leave to the defendant to answer upon payment of costs.

UNITED STATES v. McKENNA.

(District Court, W. D. New York. November 13, 1906.)

LOTTERIES—NATURE OF SCHEME—DISTRIBUTION OF TICKETS THROUGH INTERSTATE COMMERCE.

A scheme by which a prize is given to the person who obtains seven complete paper animals, the parts of one of which, to be put together, are contained in each package of a food product sold, but without anything on the outside of the package to indicate what animal is contained therein, has an element of chance in the purchase of the packages, and is a lottery scheme; and the conveying of a ticket or instrument purporting to represent a share or interest therein from one state into another constitutes a criminal offense, under Act March 2, 1895, c. 191, § 1, 28 Stat. 963 [U. S. Comp. St. 1901, p. 3178].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Lotteries, §§ 21, 22.]

On Demurrer to Indictment.

Charles H. Brown, for the United States.
Rogers, Locke & Babcock, for defendant.

HAZEL, District Judge. The indictment in this case, to which a demurrer has been interposed, charges substantially that, to obtain the prize or premium offered by the H-O Company, there must be procured seven different so-called "Kinderbeasts," or kindergarten animals, one of which is contained in each package of the food product specified in the indictment, which may be purchased from the accused or dealers therein. The puzzle feature simply consists in cutting out and placing in proper juxtaposition the illustrated parts of the pictures or designs, after procuring them, to correctly form the kinderbeasts.

Defendant contends that the general plan of the device lacks the character of chance, and that the dominating or determining element in the enterprise is the skill required to fit the parts of the different animals together. This view, however, ignores the manner of procuring the several animals. It is self-evident, from a cursory examination of the printed circular, entitled "A Ten-Dollar Watch for Every

One Who Solves the H-O Company's 'Kinderbeast' Puzzles," that there is an element of chance in the enterprise, consisting in the purchase of packages which may or may not contain the animal necessary to complete the set. Various purchases may result in finding in the packages similar animals, while obviously the necessary seven, which must be had before a prize or premium is awarded, may be obtained only by the purchase of innumerable packages, or as a result of chance in the purchase of but seven packages. In other words, each purchase carries with it the possible chance or fortuitous occurrence of securing such animal as may be required to complete the set. The argument of counsel for defendant seems to be completely answered by the differentiation between a game of skill and a game of chance, as illustrated in People ex rel. Ellison v. Lavin, 179 N. Y. 170, 71 N. E. 755, 66 L. R. A. 601:

"Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforeseen accident, usually called 'luck.' The test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game."

The dominating element in the case at bar beyond question is the chance which the purchaser gets of finding in his package a missing animal; the contingency depending upon the event of a lottery, as that term is defined in Horner v. United States, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237. See, also, United States v. Jefferson (C. C.) 134 Fed. Rep. 299.

Assuming the facts stated in the indictment to be true, the defendant has violated section 3929 of the Revised Statutes (chapter 191, Act March 2, 1895, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688]), for causing to be conveyed from the Western district of New York to the state of Pennsylvania a paper certificate or instrument purporting to represent a ticket, chance, share, and interest in and dependent upon the event of a lottery or similar enterprise.

The demurrer is overruled.

UNITED STATES v. B. P. DUCAS & CO.

(Circuit Court, S. D. New York. January 22, 1903.)

No. 3,187.

CUSTOMS DUTIES—CLASSIFICATION—BONE-SIZE SUBSTITUTE—STARCH.

Bone-size substitute, consisting of chemical starch, dextrin, magnesium chloride, and silica, which is used for stiffening the backs of fabrics, is not a preparation fit for use as starch, under paragraph 285, Schedule G, § 1, Tariff Act July 24, 1897, 30 Stat. 173, c. 11 [U. S. Comp. St. 1901, p. 1653], but is a chemical compound, under paragraph 3, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627].

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

For decision below, see G. A. 4,883 (T. D. 22,872), relating to importations at the port of New York.

The character of the issues involved appears from the opinion of the Board of General Appraisers, which reads as follows:

FISCHER, General Appraiser. The merchandise in question consists of an article called "bone-size substitute." It was returned by the local appraiser as a "preparation of starch," and duty was assessed thereon at the rate of 1½ cents per pound, under the provisions of paragraph 285, Schedule G, § 1, Tariff Act July 24, 1897, 30 Stat. 173, c. 11 [U. S. Comp. St. 1901, p. 1653]. It is claimed to be dutiable under the provisions of section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), at the rate of 20 per cent. ad valorem as an unenumerated manufactured article, or under the provisions of paragraph 3, Schedule A, § 1, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], as a chemical compound, at the rate of 25 per cent. ad valorem.

Following the ruling laid down by the Supreme Court of the United States in the case of Chew Hing Lung v. Wise, 176 U. S. 156, 20 Sup. Ct. 320, 44 L. Ed. 412, we hold that this article is not dutiable as a preparation fit for use as starch. This article is used for stiffening the backs of corduroys and plushes, a use similar to that to which the tapioca flour, passed upon in the case above cited, was applied, and which the court held was not starching. The tapioca flour was a starch chemically, but not commercially; and the article before us consists of chemical starch, dextrin, magnesium chloride, and silica; but it is not a preparation fit for use as starch, nor is it a starch, either chemically or commercially. It appears also by the testimony that this article contains no glue. It is therefore not the class of merchandise passed upon in G. A. 349, which was called bone-size and was therein held to be dutiable as an article similar to glue.

We find that the merchandise in question is a chemical compound dutiable at the rate of 25 per cent. ad valorem under the provisions of paragraph 3, and sustain the protests to this extent, and reverse the decision of the collector. Proper reliquidation will follow.

Charles D. Baker, Asst. U. S. Atty.
Howard T. Walden, for importers.

WHEELER, District Judge. The decision of the Board of General Appraisers is affirmed.

BRADLEY, ALDERSON & CO. v. McAFEE.

(District Court, W. D. Missouri, S. D. October 26, 1906.)

No. 258.

1. BANKRUPTCY—CONTRACTS WITH BANKRUPT—CONDITIONAL SALES—FAILURE TO RECORD.

A contract between claimant and the bankrupt's predecessor in business, which was continued by the bankrupt, provided for the sale of vehicles to be shipped by claimant to the bankrupt, who assumed the risk thereof from the time they were loaded on the cars at the point of shipment. The bankrupt agreed to pay the freight, insurance, and taxes, and house the vehicles when received, and to assume any loss by fire, flood, mobs, or any other cause, with or without his fault. The contract called the consignee the shipper's factor, but contained no provisions for accounting, and, instead of providing for the return of unsold goods, provided that the consignee agreed to purchase and pay for such goods at net cash prices, at the option of the consignor, or, if defendant so elected, the goods might remain in the consignee's possession, under the agreement, subject to future settlements. *Held*, that such agreement was a contract of con-

ditional sale. and not a contract of agency, and was therefore void, as against the bankrupt's trustee and creditors, for failure to record the same, as required by Rev. St. Mo. 1899, § 3412.

2. SAME—RECORD—TIME.

The record of such contract, after the filing of a petition in bankruptcy against the buyer and when the property was in the actual possession of the court's receiver, but before adjudication in bankruptcy, was insufficient to save the seller's rights to possession of the property.

John S. Farrington, for claimant.
E. C. McAfee, pro se.

PHILIPS, District Judge. Bradley, Alderson & Co., a corporation doing business at Kansas City, Mo., presented to the referee in bankruptcy, after the selection and qualification of a trustee in bankruptcy, its petition claiming certain goods or the proceeds thereof in the hands of the bankrupt at the time of the filing of the petition against him, which property was first taken charge of by a receiver appointed by the court in the bankruptcy proceeding and afterwards turned over to the trustee in bankruptcy. The bankrupt was a merchant at Marshfield, Webster county, Mo., engaged in the business of selling wagons, buggies, and other vehicles. The claim of the petitioner is that certain buggies on hand in the possession of the bankrupt at the time of the institution of the proceedings in bankruptcy were held by him merely as an agent or factor for said company, to be sold on commissions, and that the title thereto was in the petitioner, and not in the bankrupt. The referee found as a matter of fact and law that this property was, as to the creditors of the bankrupt, held under a contract of conditional sale in reality, and, as the contract was not acknowledged and recorded, as required by section 3412, Rev. St. Mo. 1899, it was absolutely void as to the creditors of the bankrupt; and he denied the claim. To review this action of the referee, the matter has been certified to this court.

The contract in question was entered into in July, 1905, between Bradley, Alderson & Co., as party of the first part, and Freeman Evans, as party of the second part. The substantive provisions of said contract are as follows:

"Party of the second part agrees to receive and pay freights on any and all goods shipped, to house and protect the same from the weather and elements, and sell at retail as the agent of the party of the first part; sales on time to be made only to good and responsible parties.

"The party of the second part agrees to take up and pay for in cash all notes pronounced unsafe or doubtful, upon request of the party of the first part. The list of prices attached to be the prices at which the goods shall be billed by party of the first part to party of the second part; said goods not to be sold for less than said figures. Prices subject to change without notice. All sums received by party of the second part for the sale of goods over and above said prices to be retained by the party of the second part as his compensation and commission for the performance of the contract. Party of the second part to remit to party of first part the proceeds of all goods at invoice prices in settlement of sales, as follows: On cash sales to remit the cash at the time of sale, less cash discount as stated below; for time sales to remit purchaser's notes drawing 7 per cent. interest from date, due and payable in the following time from date of sale: On spring vehicles, 4, 6, or 8 months. Party of the second part agrees to sell not less than one-third of all goods sold for cash.

"All purchaser's notes to be indorsed and payment guarantied at maturity by second party. Full reports of sales and settlement for same to be remitted on the 1st and 15th of each month.

"This mode of settlement to be effective on the respective kinds of goods until the following dates:

	No cash discount after
Implements	
Wagons	
Spring vehicles, 7–1–06	5–1–06.
Harness and windmills	

"Any and all goods of the respective kinds on hand at these dates the said party of the second part agrees to purchase, and to pay and settle for the same as follows:

Implements .....
Wagons .....
Spring vehicles, net cash .....
Harness .....
Windmills .....

with ——— per cent. interest from maturity, at option of party of the first part, or, if the party of the first part so elects, said goods to remain in possession of the party of the second part on the basis of this agreement, subject to settlement provided for goods as sales are made only. Any and all goods shipped on the basis of this contract to be and remain absolutely the property of party of the first part and subject to their order and removal at any and all times.

"In consideration of party of the first part carrying said stock of goods subject to sale, and at the expense of interest for value and special terms given, party of the second part agrees to be fully responsible for all damage or loss by fire or otherwise to any and all goods shipped under this contract, and to furnish party of the first part policy of insurance in their favor. Premium to be paid by party of the second part. Party of the second part to pay any and all taxes and insurance on any and all goods shipped under this contract.

"No settlements under this contract are binding on Bradley, Alderson & Co. until their acceptance is indorsed thereon at their office.

"This order is not complete or binding until acceptance is indorsed hereon by Bradley, Alderson & Co. at their office in Kansas City, Mo.

"This contract to remain in force and effect until full and final settlement is made by party of the second part to party of the first part."

At the hearing before the referee is was stipulated "between the claimant, by its attorney, and the trustee and the general creditors, by their attorneys," that the goods described in the claimant's petition were delivered to W. W. Ward (he having succeeded to the rights of Freeman Evans under the contract), and were taken into possession of the receiver (in bankruptcy), and later by the trustee; that neither of said contracts were placed on file in the office of the recorder of deeds of Webster county, Mo., until the 4th day of June, 1906, which was after the filing of petition in bankruptcy and taking charge of stock by the temporary receiver, but before the adjudication of bankruptcy, when both were so filed and recorded in said office; that the said goods were received by said Ward and by him commingled with other goods then in stock, without anything to mark the same as not being a part of the general stock of goods owned by said Ward, either in the nature of brands or marks or the manner of keeping and storing the same, unless it be that, when the receiver took charge, all of said goods, except two or three carriages, were still crated, and had the card or shipping tag of the claimant attached thereto, with claimant's

name and manufacturing number thereon; that a large number of general creditors have proved their claims against said estate and had the same allowed before the referee, to an aggregate sum of near $3,000; that a majority of these general creditors had no knowledge or notice of the fact that said goods were not paid for in full, nor that the claimant had or claimed title thereto, or any interest therein or lien thereon; that said estate will not pay all of said general claims in full; that claimant had demanded return of said goods and filed this claim before or with the referee prior to the allowance of said claims of the general creditors.

The evil connected with and growing out of the reclamation of goods by alleged owners after the insolvency of the party, to whom they were intrusted as the ostensible owner under undisclosed contracts, whereby the vendor retained the title in himself, and sometimes under the guise of a lessor, hirer, and the like, became the subject of legislative action in Missouri, until it was finally expressed in section 3412, Revised Statutes of Missouri of 1899, as follows:

"Conditional Sales Void As to Creditors Unless Recorded.—In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired, or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain to the vendor, lessor, renter, hirer or deliverer of the same, until such sum, or the value of such property, or any part thereof shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing executed, acknowledged and recorded as provided in cases of mortgages of personal property."

It is to be observed that this statute is most comprehensive in its terms. It not only covers property sold, to be paid for in whole or in part in installments, or which shall be leased, rented, or hired, but it covers property "delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain to the vendor," etc., "or deliverer of the same, until such sum, or the value of such property, or any part thereof, shall have been paid." The courts of this state construe the provisions of this statute rigidly. They have uniformly held that such contracts, unacknowledged and unrecorded, are absolutely void as to all creditors, both prior and subsequent, whether they have notice or not of the existence of such unrecorded contracts. Collins v. Wilhoit, 108 Mo. 451, 456, 458, 18 S. W. 839; Hughes v. Menefee, 29 Mo. App. 192; Jewet & Company v. Preist, 34 Mo. App. 509; Johnson-Brinkham Co. v. Central Bank, 116 Mo. 571, 22 S. W. 813, 38 Am. St. Rep. 615; Straus v. Rothan, 102 Mo. 266, 14 S. W. 940; Cooper Wagon & Buggy Co. v. Wooldrige, 98 Mo. App. 648, 73 S. W. 724.

In Bicking v. Stevens, 69 Mo. App. 168, it is held that where the consignee is to sell the consigned goods upon terms fixed by himself, and he is bound to pay the consignor a fixed price, the contract is one of sale, and "the fact that payment is to be made on the contin-

gency of the consignee's selling does not affect the character of the transaction as a sale." The court held that:

"The time in which the purchase money was to be paid, whether in so many days or months, or upon the happening of some contingent event, as a resale, did not affect the character of the transaction as a sale. The provision in relation to payment did not suspend the transfer of title. The sale was complete, and the title passed when the goods were delivered and the purchaser put in full possession and control of them."

If this transaction between Bradley, Alderson & Co. and the bankrupt comes within the purview of said statute, it was absolutely void as to all creditors of the bankrupt; and the trustee in bankruptcy, who represents the creditors, must of necessity be the only party who can assert this right in favor of the creditors. Under the Missouri statute it is not necessary, as under the Ohio statute, followed by the Supreme Court in York Manufacturing Company v. Cassell, 201 U. S. 351, 25 Sup. Ct. 481, 50 L. Ed. 782, that to enable the trustee to avail himself of the statute the creditors should, by levy or attachment anterior to the proceedings in bankruptcy, have taken steps "to fasten upon the property for payment of the debt." Nor does the case of Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, apply, as that case arose under the New York statute, which avoided the sale only as to "subsequent purchasers in good faith," and there was no evidence in the case of the creditors being such purchasers.

As applied to the Missouri statute, the holding by the Court of Appeals of this Circuit in Re Pekin Plow Company, 112 Fed. 308, 310, 50 C. C. A. 257, is conclusive on this court, which is that:

"The institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all property of the bankrupt. By such a proceeding the creditors 'are using the courts of law and their processes for the collection of their debts,' and the creditors thereby make an effectual seizure of the property of the bankrupt. * * * The trustee chosen under the act of 1898 becomes the representative of all creditors, and is possessed of their rights to attack fraudulent conveyances. It has been held by this court that the trustee is so much the representative of all the creditors that no appeal can be taken under the provisions of Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432] from an order of the District Court allowing a claim of any individual creditor who objected to such allowance, but that such appeal can only be taken by the trustee as the representative of all the creditors."

See, also, Missouri Moline Plow Company v. Spilman (D. C.) 117 Fed. 746.

The question to be decided is: What was and is the real character of the contract between Bradley-Alderson & Co. and the bankrupt? Was the actual status of the bankrupt that of a mere agent or factor to sell the goods on commission, or was it a disguised contract of sale to evade the requirements of the spirit of the Missouri statute? Were it not for the ruling of the Court of Appeals in John Deere Plow Company v. McDavid, 137 Fed. 802, 70 C. C. A. 422, I should feel no embarrassment or hesitancy in holding that the contract in question is a cunningly devised scheme for avoiding the statute. Many of the provisions of the contract in the John Deere Plow Company

Case are materially different from those in the case at bar. It is evident to my mind that in its last analysis what controlled the judgment of the court in the John Deere Case was the construction placed upon the contract that it recognized a right of the consignee at some time to return the goods in kind to the consignor, based, doubtless, upon the stipulation found in that contract that it was "to remain in force, unless canceled and annulled by said first party, until October 1, 1904, at which time said second party agrees, if required by said first party, to return all goods remaining on hand unsold at the expiration of this contract to them at their warehouse at Kansas City, in good order and free of all freights and charges." This must be so, as the court cites in support the case of Metropolitan National Bank v. Benedict Company, 74 Fed. 182, 20 C. C. A. 377, in which Judge Caldwell said:

"The money to be paid by the commission company was not upon a sale of the goods to that company, but upon a sale of the goods by that company. The commission company was never to pay for the goods as upon a purchase by it, but only to account for the proceeds of the sale of them at prices fixed by the contract."

The court also cites the case of In re Galt, 120 Fed. 64, 56 C. C. A. 470. An analysis of the facts in that case justified the conclusion of the court that it recognized a period at which the consignee might return the goods. As Judge Jenkins said in the opinion:

"The company could compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within 12 months, the option for their return or payment was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods, as in the case of a sale."

Turning to the contract under review, what do we find? Every obligation, risk, and burden were imposed upon Ward, as upon any other conditional purchaser. From the moment the goods were loaded upon the cars at Kansas City, they were at the risk of the consignee. He was to pay the freight, the insurance, the taxes, and to house and care for them when received. If they were destroyed by fire, or flood, or mobs, or from any cause, with or without the fault of the consignee, the loss was his. We search this contract in vain for any provision which enabled this so-called factor, at any time or under any circumstances or conditions, to return the goods, except at the option of Bradley-Alderson Co. On the contrary, the contract contains the following provision:

"Any and all goods of the respective kinds on hand at these dates (referring to the antecedent date, which would have been July 1, 1906) the said party of the second part agrees to purchase, and to pay and settle for the same as follows: Net cash, with ——— per cent. interest from maturity, at option of the party of the first part, or, if party of the first part so elects, said goods to remain in possession of party of the second part on the basis of this agreement, subject to settlement provided for goods as sales are made only."

From which it is patent that at a specified date Ward was compellable by Bradley, Alderson & Co. to pay for the goods at a designated cash price. He had no alternative left him of choice. It was wholly at the election of Bradley, Alderson & Co. If so demanded by Brad-

ley, Alderson & Co., when the time arrived, just as in the case of any other purchaser of goods, Ward was compellable to pay the stipulated price, whether or not he had sold a single article. This payment made, he would become the absolute owner. I respectfully, but earnestly, submit that, if such a contract can pass as a consignment made to a factor, all that any vendor has to do to evade and render valueless the declared public policy of the state to compel the placing of conditional sales or delivery contracts on record is to send his wares to a country merchant, to be displayed in his store as his own, and sell to whom he may select, to be paid for to the sender at a future time, at a given price, at his option, provided, only, that the sender call the transaction, inter nos, a consignment or commission, or himself principal and the sendee his agent. If, when the time of payment arrives, the shipper wants his money, he elects to have the sendee pay the cash, provided he then be solvent; but, if the sendee become insolvent and bankrupt, the sender then leaves himself in position to exercise his other option to demand and reclaim the goods. If such cunning jugglery as this can get around or through the Missouri statute, then it is but a cobweb through which the cunning of the vendor, with the subservient assistance of his vendee, may break at will.

To escape this criticism it is urged that the paragraph above quoted, which imposes upon the sendee the obligation to pay cash prices therefor at a given time, gives to the sender the option to continue the possession of the sendee on the basis of the agreement, subject to settlement provided for. In giving effective operation to the state statute, this contract should be construed rather by its expressed possibilities, as to what the vendor may do and claim under it, than by its double aspect, under which it may be a sale or not, at the pleasure of the vendor. Can a court sanction such cunning evasion of a state statute, by which, at a given date, the consignor of the goods may, at his pleasure, compel the consignee to pay the fixed cash price therefor, if at that time the consignee be solvent, but, if then insolvent, the consignor may assert that there was no sale and the right of reclamation? Such double attitude is precisely what this contract under the claimant's contention permits, which no refinement of reasoning can escape. If this contract can be upheld as a mere consignment of goods to a factor to sell as the agent for the principal, it must result that if in the contract the sender designates himself as consignor and the sendee as agent or factor, with a stipulation that the title to the property shall remain in the sender, and that the sendee shall sell at least one-third for cash at a fixed price and return the proceeds to the consignor, and all time notes indorsed by him to the consignor, he may by the same authority provide that at the end of 30 days all goods on hand shall, at the option of the so-called consignor, be paid for in cash at a fixed price by the so-called consignee, or even in a shorter time, without having such contract acknowledged and recorded under the statute; and if the consignee, when the time comes, is put into bankruptcy, the consignor can claim a consignment merely on commission, and reclaim the goods. Under such an arrangement the consignee has

but one option, and that is to sell at once for cash or at a short date to pay in cash for all the goods on hand. Such a subterfuge can never receive my sanction.

As a dernier ressort the petitioner, as if conscious of his doubtful attitude, after the filing of the petition in involuntary bankruptcy and the goods were taken charge of by the receiver in bankruptcy under order of the court, caused his contract to be recorded; and it is insisted that, as this was done prior to the adjudication in bankruptcy, it saved the petitioner's rights under the statute. If the law accord to the petitioner such a locus pœnitentiæ, it would be a sufficient answer to the act that it does not appear that the contract was ever acknowledged or proved, without which it was not admissible to be either filed or recorded. But, even had it been acknowledged or proved, it would be a post mortem performance. Aside from the legal effect of the filing of the petition in bankruptcy, the property in question was in custodia legis, in the actual possession of the court's receiver. The rights of the petitioner and the creditors had then a fixed status, which no subsequent act of the claimant could add to or take from.

This same claimant presented to this court for its consideration and construction one of its contracts, little different in essential qualities from the one at bar. That case is styled "In re Rabenau," reported (D. C.) 118 Fed. 471, wherein the attempted evasion of the Missouri statute in question was rejected. Without appealing to have that ruling reviewed, this concern persists, with some change in form, but not in substance, in refusing to place of record its contracts. In my judgment it presents an apt instance of the application of the wholesome rule applied by Judge Thayer, speaking for the Court of Appeals in Davis & Rankin B. & M. Co. v. Jones, 66 Fed. 124, 126, 14 C. C. A. 30, where, considering the construction of a contract about which there had been litigation and a diversity of opinion as to its purport before the one in suit was acted on, it is said:

"Under these circumstances, it was the duty of the plaintiff to alter the form of its contracts then in use, so as to avoid the question whether it imposed a joint or a several liability, which had theretofore given rise to conflicting decisions. Not having done so, the plaintiff cannot complain if the courts adopt a construction of the contract which is most favorable to the defendants."

Deeply impressed, as I am, with the fact of the persistent purpose of this petitioner to evade, by mere jugglery of forms and expressions, the declared public policy of the state in enacting section 3412 of the Revised Statutes of 1899, I feel constrained to hold that the referee properly rejected this claim.

CONWAY v. UNITED STATES et al.

(Circuit Court, D. Nebraska. January 7, 1907.)

1. DIVORCE—RIGHTS OF WIFE—LAND.

Where a trust patent for land previously allotted to Indians was issued to the male allottee after his marriage to the female allottee, the right of the wife to an equitable share of the property on her being divorced solely

on account of her husband's fault, was within the exclusive jurisdiction of the court granting the divorce, and a suit by the divorced wife to secure an interest in such land will not lie.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 587, 589.]

2. INDIANS—LANDS—ALLOTMENT—RIGHTS OF ALLOTTEES.

Act Cong. March 2, 1889, c. 405, 25 Stat. 892, provided that to each member of the Ponca Tribe of Indians who was the head of a family, there should be allotted 320 acres of the Great Sioux Reserve, to every single person over 18 years of age, a one-fourth of a section, etc. The act also declared that on the approval of the allotment by the Secretary of the Interior he should cause trust patents to issue under which the United States should hold the land in trust for the allottee and his heirs for 25 years, etc. Complainant, a female member of the tribe more than 18 years old, was allotted 160 acres of land after the President's proclamation that the act was in full force, as was also another Indian whom complainant subsequently married. The selections were approved, and more than four months after the President's proclamation for the purpose of extinguishing the Indian tribes, the parties were married, after which each of them made other separate applications in lieu of their previous applications, in order to get adjoining land, but the trust patent was by mistake made out in the name of complainant's husband for the entire land, as the head of the family. *Held*, that the fact that complainant and her husband married before actual allotment and the issuance of a trust patent did not deprive complainant of the right to the land for which she applied, which became vested in her on the President's last proclamation, and that she was entitled to one-half the land patented to her husband.

On Demurrer to the Bill.

The bill alleges: That by the provisions of the act of Congress approved March 2, 1889, it was, among other things, provided "that each member of the Ponca tribe of Indians then occupying a part of the Old Ponca reservation, within the limits of the Great Sioux reserve, shall be entitled to an allotment upon the said Old Ponca reservation, as follows: To each head of a family 320 acres; to each single person over eighteen years of age one-fourth of a section; to each orphan child under eighteen years of age one-fourth of a section; and to each other person under eighteen years of age then living one-eighth of a section." 25 Stat. 892, c. 405. Another section of the act provided that, "upon the approval of the allotments by the Secretary of the Interior, he shall cause patents to issue therefor in the names of the allottees, which patents should be of legal effect and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the state or territory where such land is located, and at the expiration of said period the United States will convey the same, by patent, to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 25 Stat. 891, c. 405. That at the time of the passage of said act, the complainant was a member of the Ponca tribe of Indians, who occupied the reservation in the state of Nebraska, and for a long time prior thereto, and for several years thereafter, she has always maintained her tribal relations with the said Ponca tribe of Indians. That she was born on the 26th day of July, 1870, and was, on the 2d day of March, 1889, living upon said Old Ponca reservation, within the limits of the Great Sioux reserve, in the said state of Nebraska, and was at the time an unmarried person more than 18 years of age. That shortly after the passage of said act of Congress of March 2, 1889, the United States, through its duly authorized officers, apprised and informed the Ponca Indians of the terms and provisions of the said act of Congress, to secure the consent of the tribe to the provisions of said act. That within six months after the passage of the act, the said Ponca tribe of Indians accepted the terms and provisions thereof. That about the month of July, 1889, the complainant, in conformity with the

provisions of said act of Congress, duly selected a tract of 160 acres of land within the said Ponca reservation, and duly notified the proper allotting agent of the United States of her said selection of said tract of land, and duly demanded of him that the same be allotted to her in severalty, according to the provisions of the said act of Congress of March 2, 1889, and the said selection so made by complainant was by the allotting agent of the United States duly approved.

The bill further charges: That the defendant, David Sherman, is also a member of said Ponca tribe of Indians, living at the time of the passage of the act, and long prior thereto, upon said reservation, and maintaining his tribal relations with the said Ponca tribe of Indians, and therefore entitled, under the provisions of said act of Congress, to an allotment in severalty of 160 acres of land, to be selected by him in said reservation. That some time in the summer of 1889 the said David Sherman did make such selection, which was approved by the allotting agent. That on the 13th day of June, 1890, the complainant and the said David Sherman were duly married in the state of Nebraska, and until the month of November, 1897, continued to be husband and wife. That immediately after their marriage they went to live at the home of the parents of Sherman, and while there living they agreed and decided between themselves that, as the allotments respectively selected by them were situated several miles apart, and for this reason too remote from each other to be used advantageously by each of them, they would try to select others. That thereupon the complainant, of her own volition, made the request to the proper allotting agent of the United States that, in lieu of land heretofore selected by her, she be allotted a different tract of 160 acres of land lying in said Ponca reservation, and described as follows: the south half of the northeast quarter and the north half of the southeast quarter of section 24, township 32 N., range 7 W., and the lots numbered 2 and 3 in section 19, township 32 N., range 6 W., said tract of land being at that time subject to selection and allotment to the members of said Ponca tribe, under the act of Congress. That this request of complainant was granted and approved by the allotting agent. That at the same time the said David Sherman agreed and declared that, in lieu of the 160-acre tract of land previously selected by him as aforesaid, he would select and take the remaining 106.31 acres of land within the metes and bounds aforesaid, and in addition thereto, in order to make up the 160 acres to which he was entitled, a tract of land more particularly described as follows: Lot 1 in section 2, township 32 N., range 9 W., being a part of the land previously selected by him. That thereafter said original selections were, in consideration of said new selections, canceled; and in the fall of the year 1890 the complainant and said David Sherman moved upon and took possession of the tract of land described as the south ½ of the northeast ¼ and the north ½ of the southeast ¼ of section 24, township 32 N., range 7 W., and the lots numbered 2 and 3 in section 19, township 32 N., range 6 W., and continued to make their home at that place until the year 1897. That after the cancellation of said original selections by the allotting agent, as above set forth, on the 14th day of October, 1890, the schedule of allottments of the lands as provided for in the act of Congress was finally completed, and, on the 22d day of October, 1890, by the acting Commissioner of Indian Affairs, deposited in the General Land Office of the United States, and approved by the Secretary of the Interior, and upon said schedule of allotments it was wrongfully made to appear that the said David Sherman, as the head of the family consisting of himself and complainant, had been allotted the lands last-above described, together with lot numbered 1 in section 2, township 32 N., range 9 W., but of which fact, complainant alleges she had no knowledge. That on the 26th day of May, 1891, a trust patent was by the United States issued, conveying said tracts of lands to David Sherman, which she says was erroneous, as they were each entitled to patents for 160 acres in severalty. That the trust patent was delivered to complainant and David Sherman together, and, with the consent of the said David Sherman, complainant took the same into her own possession, and it was understood and agreed between them that, in consideration of the premises, one-half of the land mentioned in said trust patent should belong to complainant and one-half to the said David Sherman, and that at the end

of the 25-year period mentioned therein one-half thereof should belong absolutely to complainant and one-half to David Sherman. That neither complainant nor the said David Sherman made any effort or took any steps to have the said trust patent corrected, so as to include both names therein as grantees because of said complete and mutual understanding, and for the further reason that they understood from what had been said by the duly authorized agent of the United States that the said trust patent was a mere preliminary paper, and that ultimately, at the end of the 25-year period, they each of them would receive 160 acres of land. That complainant and David Sherman jointly controlled and retained possession of said lands, and that David Sherman at all times conceded and admitted the right of complainant to one-half thereof. That in 1897 complainant, on account of divers cruelties of the said David Sherman towards her, and on account of the habitual drunkenness of the said Sherman, was duly awarded a decree of divorce from the bonds of matrimony by a court of competent jurisdiction of the state of Nebraska, and was by said decree of divorce awarded the care and custody of the three minor children of the complainant and the said David Sherman; but that since the granting of said divorce, said David Sherman has excluded complainant from the possession, occupation, and control of the said tracts of land, and within the last few years has denied the right of complainant to any of said lands or the profits or proceeds therefrom. That since then the defendant David Sherman has intermarried with the defendant Dora Sherman, and one child has been born of said marriage, who is now living. That she has repeatedly applied to the Department of the Interior of the United States to have the said trust patent corrected so as to include the name of complainant and David Sherman as grantees, and has repeatedly applied to the said Department of the Interior to compel the said Sherman to permit her to participate in the control, possession, and rents, profits and proceeds of said land with the said David Sherman, and the said Department of the Interior has refused to accord to her any relief whatever.

The prayer of the bill is for a decree adjudging her to be entitled to one-half of the lands described in said trust patent issued to David Sherman on the 26th day of May, 1891, and that as to one-half of the rights and benefits conveyed by the said trust patent, David Sherman be decreed to have received the same in trust merely for the complainant, and that said trust patent be corrected so as to include the names of complainant and David Sherman as grantees therein, and a decree for mesne profits and all proper relief.

The defendants demur to this bill.

J. W. Woodrough, for complainant.
A. W. Lane, Asst. U. S. Atty., for defendants.

TRIEBER, District Judge, by assignment from the Eastern District of Arkansas (after stating the facts). The contention on the part of complainant, that, owing to the fact that complainant was divorced from her husband without fault of her own, but solely on account of his faults, she is equitably entitled to some share of the property for the support of herself and the children, fruits of her marriage with David Sherman, cannot be sustained. That was a matter solely within the jurisdiction of the court which granted the divorce. Some reliance is placed upon Morrisett v. United States (C. C.) 132 Fed. 891, but that case is clearly distinguishable from the one at bar. There the husband, divorced for his misconduct towards his wife, sought to have a patent which had been issued to his wife, she representing herself to be unmarried when, in fact, she was married, adjudged to be held for his benefit. This the court refused to grant upon the sole ground that "He who seeks equity must do equity." The rights of the

parties having been once established by the allotment and the execution and delivery of the trust patent cannot be changed by anything that may happen thereafter.

The main question to be determined in this case is, when did the members of the Ponca tribe of Indians become entitled to the lands directed to be allotted to them by the act of 1889? On the part of the defendants, it is contended that no right, title, or interest whatever passed to the members of the tribe under that act until the allotment rolls had been approved by the Secretary of the Interior and the last proclamation of the President; and as this was not done until October, 1890, the complainant being then the wife of the defendant David Sherman, she was not entitled to an allotment in her own right, but that the defendant Sherman, being then a married man, was under the act entitled to an allotment of 320 acres as the head of a family. On the other hand, it is contended on behalf of the complainant that the act of 1889 was a grant in præsenti, and that there was vested in each of the members of the Ponca tribe an inchoate right to the lands to be allotted to them under the act, to become perfect by the allotment and the issuance of the trust patent. The learned counsel for the defendant relies principally upon the very able opinion of Judge Shiras in Sloan v. United States (C. C.) 118 Fed. 283. That opinion is entitled to the highest consideration, as it indicates the great care with which the issues involved had been examined by the learned judge; but a careful examination of the act of 1882, under which the Sloan Case arose, will clearly show that the language used in the two acts is not identical, and for this reason the Sloan Case is not conclusive of this case.

The act of Congress under consideration was not to go into effect immediately after its passage, but was to become operative only upon acceptance by the Indians in manner and form prescribed by the twelfth article of the treaty between the United States and the Sioux Indians concluded April 29, 1868 (15 Stat. 635), which acceptance and consent is to be made known by proclamation by the President of the United States. Section 28, Act March 2, 1889, c. 405, 25 Stat. 899. On February 10, 1890, the President issued his proclamation that the act had gone into effect, having been accepted by the Indians. 26 Stat. 1554. The proclamation of the President issued October 23, 1890 (26 Stat. 1559), after the lands had been allotted, was not for the purpose of confirming or in any other wise affecting the title of the Indians, but was in pursuance of section 13 of the act of Congress for the purpose of declaring the Indian titles extinguished and enabling the state of Nebraska to extend its jurisdiction over the same, in pursuance of the provisions of the act of March 28, 1882. As these acts of Congress are in effect treaties with Indians, having taken the place of treaties since treaties with Indian tribes were prohibited by Act March 3, 1871, c. 120, 16 Stat. 544, 566, they should receive the same construction as was given to Indian treaties. In construing the language used in a treaty or in an act of Congress dealing with the Indians, and which is to take effect only upon the acceptance by the Indians, it

is the well-settled law that the language used should never be construed to their prejudice.

In Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483, Mr. Justice McLean, in his concurring opinion, said:

"To contend that the word 'allotted,' in reference to the land guarantied to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it seems to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." 6 Pet. 582.

In Rutherford v. Greene, 2 Wheat. 196, 198, 4 L. Ed. 218, the language used in an act of the Legislature of the state of North Carolina for the relief of the officers and soldiers in the continental line was: "Shall be allotted for and given to." These words, it was contended, gave nothing; that they were in the future, and not in the present tense, and indicated an intention to give in the future, but created no present obligation on the state nor present interest in the grantees; but it was held that, as the act was to be performed in the future, the words directing it were necessarily in the future tense, and although the land was undefined, the survey afterwards made in pursuance of the act gave precision to the title and attached it to the land surveyed. Chief Justice Marshall, in delivering the opinion of the court, said:

"Were it even true that the words 'are hereby given' would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of the legislative act depends in no degree on its containing the technical terms used in a conveyance. Nothing can be more apparent than the intention of the Legislature to order their commissioners to make the allotment and to give the land when allotted to Gen. Greene."

In United States v. Brooks, 10 How. 442, 13 L. Ed. 489, the language used in a treaty with the Caddo Indians was:

"Shall have their right to the said four leagues of land reserved for them, and their heirs and assigns, forever. The said lands to be taken out of the lands ceded to the United States by the said Caddo nation of Indians, as expressed in the treaty to which these articles are supplementary; and the said four leagues of land shall be laid off," etc.

It was held that these words gave to the reservees a fee simple to all rights which the Caddos had in those lands as fully as any patent from the government could make one.

In Freemont v. United States, 17 How. 542, 15 L. Ed. 241, a Mexican grant of a certain tract of land known as "Las Mariposas" was made, with certain undefined boundaries. The grant was of 10 square leagues, subject to certain conditions, and was to be made definite by future survey. The grant purported to convey a present and immediate interest, in consideration of previous public services, and it was held to be a grant in præsenti, upon the authority of Rutherford v. Greene, 2 Wheat. 196, 4 L. Ed. 218, that the conditions were conditions subsequent, but that noncompliance with them did not amount to a forfeiture of the grant.

In New York Indians v. United States, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927, it was held that a provision in the treaty of June 15,

1838, which was as follows: "In consideration of the above cession and relinquishment, the United States agree to set apart a tract of country containing 1,824,000 acres of land as a permanent home for all the New York Indians * * * to have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act of May 28, 1830, with full power and authority in the said Indians to divide said land among the different tribes, nations or bands in severalty, with the right to sell and convey to and from each other"—was a grant in præsenti.

In Doe v. Wilson, 23 How. 457, 464, 16 L. Ed. 584, the question before the court was the effect of certain reservations to individual Indians made in the treaty of October 27, 1832, with the Pottawatomie tribe of Indians. By that treaty, the Indians ceded to the United States certain tracts of land therein described, reserving some to individual Indians. These reservations were described as one or two sections without any specific descriptions as to metes and bounds, as the lands were then unsurveyed. The treaty provided:

"The foregoing reservations shall be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys." 7 Stat. 401.

Before the lands were selected or located by the President, one of the Indian reservees sold them, and it was claimed that his deed was a nullity, and nothing passed by it, as the lands had not been selected or located by the President and no patent issued therefor. But this contention was overruled by the court, the court holding that:

"Pet-chi-co [the Indian reservee] was a tenant in common with the United States, and could sell his reserved interest, and that when the United States selected the lands reserved to him and made partition, his grantees took the interest he would have taken if living."

This was approved and followed in Crews v. Burcham, 1 Black, 352, 17 L. Ed. 91, and numerous other cases since that time; the last being Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49.

The facts charged in the bill, and admitted to be true by the demurrer are, that on February 10, 1890, the date of the President's proclamation, the act of March 2, 1889, was then in full force, the complainant, as well as the defendant David Sherman, were unmarried adults over the age of 18 years; that each of them had selected 160 acres of land, which selections were then duly approved by the allotting agent of the United States; that on June 13, 1890, more than four months after the President's proclamation, they intermarried; that in the fall of 1890 the parties applied for different allotments, each of them making separate applications, which applications were approved by the allotting agent and the first selections canceled; that when the trust patent was delivered to them it was made out to David Sherman as the head of the family for the entire 320 acres, or, to be exact, 321.3 acres, comprising the selections made by the complainant and the defendant David Sherman separately; that, although the trust patent was delivered to complainant, she supposed it conveyed to her, for her

own use, one-half of the lands last selected by her and David Sherman, and that both of them jointly took and retained possession of all the lands; the defendant Sherman at all times conceding and admitting her right to an undivided half thereof until after the divorce, when he excluded her from the possession and for the first time denied her right to any of said lands or the profits thereof.

Applying the rules above enunciated to these facts, the conclusion reached is that, upon the proclamation of the President on February 10, 1890, the grant to each of the Indians became complete, and complainant being then an unmarried adult over 18 years of age, she became entitled to 160 acres of land, to be allotted to her thereafter. The fact that she married the defendant Sherman thereafter, and before the actual allotment and issuance of the trust patent did not deprive her of the right which became vested in her when the President's proclamation was issued, and the mistake in conveying the two tracts selected by them separately to the defendant Sherman as the head of a family, especially in view of the fact that complainant's ownership to an undivided half thereof was recognized by the defendant Sherman, could not affect her rights as against him.

For these reasons, she is entitled to the relief prayed, and the demurrer to the amended bill should be overruled.

HURLEY et al. v. DEVLIN.

(District Court, D. Kansas, First Division. November 24, 1906.)

No. 937.

BANKRUPTCY—SUITS BY TRUSTEE—JURISDICTION OF COURTS OF BANKRUPTCY.

Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], as amended in 1903 (Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690]) by the addition of the provision that "for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction," gives a court of bankruptcy jurisdiction of a suit brought by a trustee thereunder to set aside an alleged fraudulent transfer of property made more than four months prior to the bankruptcy, both as to subject-matter and as to parties, without the consent of defendant, notwithstanding the fact that such a suit is not one of those expressly excepted by amended section 23b, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 686], from the general provision therein made that suits by a trustee, unless by consent of the defendant, can only be brought in the courts where they might have been brought by the bankrupt if bankruptcy had not intervened.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 411; jurisdiction of federal courts in suits relating to bankruptcy, see Bailey v. Mosher, 11 C. C. A. 313.]

In Equity. On plea to the jurisdiction of the court.

A. A. Hurd and J. S. Dean, for complainants.
Harkless, Crysler & Histed and D. R. Hite, for defendant.

POLLOCK, District Judge. There is but one question raised by the plea for decision. It arises in this manner: Subdivision "b" of

section 23 of the National Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 686], provides:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*"

Subdivision "b" of section 60 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended (32 Stat. 799, § 13b [U. S. Comp. St. Supp. 1905, p. 689]), provides:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. *And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Subdivision "e" of section 67 (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), as amended (32 Stat. 800, § 16 [U. S. Comp. St. Supp. 1905, p. 690]), provides:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors, of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Subdivision "e" of section 70 (30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]), as amended (32 Stat. 800, § 16 [U. S. Comp. St. Supp. 1905, p. 690]), provides:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the pur-*

pose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

In each of the subdivisions above quoted the italicized words were added by the amendments made to the act on February 5, 1903, in changing and fixing the jurisdiction of the District Courts of the United States over suits brought by trustees against third parties.

This is a suit brought by the trustees of a bankrupt estate in this court to recover property transferred to defendant, the wife of the bankrupt. She is, and was at the date of the commencement of this suit, a citizen of the state, domiciled here. The conveyances by which the legal title to the property in question passed from the bankrupt and vested in the defendant were made much more than four months prior to the institution of the bankruptcy proceedings in this court against the husband of defendant. It is claimed by complainants these conveyances were made without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of the bankrupt. No question of preference is involved. Hence, it is clear the suit cannot be maintained under the provisions of subdivision "b" of section 60, or subdivision "e" of section 67 of the act above quoted, and can only be maintained in this court, if at all, under authority conferred by subdivision "e" of section 70 as amended, above quoted.

Defendant has not consented to the institution or maintenance of this suit in this court, and for want of such consent files her plea challenging the jurisdiction of the court over her. The question is: Can this suit be maintained in this court without her consent? That this court has full and complete jurisdiction of the subject-matter of the suit, under subdivision "e" of section 70, as amended, must be conceded; but does this court have jurisdiction of the person of defendant against her consent is the disputed point. The Supreme Court in Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, forever settled the question that subdivision "b" of section 23 of the original act precluded the District Courts of the United States from entertaining jurisdiction of suits brought by trustees of bankrupt estates to recover or collect debts due from third parties, or to set aside transfers of property to third parties alleged to be fraudulent as against creditors, or to recover voidable preferences without the consent of the proposed defendant. The necessary effect of this holding was on a case like this, in the absence of the requisite facts essential to confer jurisdiction on the Circuit Courts of the United States and failing to obtain the consent of the defendant to the institution and maintenance of the suit in this court under the original act, resort must have been had by the trustees for the purpose of such recovery to the appropriate state tribunal where the appearance of the defendant could have been compelled against her will. Subsequent to this decision, and it is thought at least in some measure to strengthen the act, and to enlarge the jurisdiction of the District Courts of the United States over the persons of defendants in such plenary suits as above mentioned, Congress amended the act on February 5, 1903. From the subdivisions of the several sections above quoted, as indicated by the italicized parts, it is clear there can be no longer any controversy over the right of trustees in

bankruptcy to bring and maintain in the federal District Court suits to set aside and recover preferences voidable under the provisions of subdivision "b" of section 60 of the act, or to set aside conveyances fraudulent under the provisions of subdivision "e" of section 67 of the act, and recover the property thereby conveyed without the consent of the defendant to the proposed suit; for such jurisdiction and power is not only expressly conferred by the amendments made to the subdivisions quoted, but the operation of such subdivisions are expressly excepted from the general terms of subdivision "b" of section 23 of the act as amended.

Although the identical language employed in extending the jurisdiction of the federal District Courts over the classes of cases embraced in subdivision "b" of section 60 and subdivision "e" of section 67 of the act as amended without consent of the defendant is employed in the amendment to subdivision "e" of section 70, yet the lawmaking power, either through accident or design, failed to except the operation of that subdivision from the general terms of subdivision "b" of section 23 of the act. The ultimate question, therefore, is: What is the effect of the amendments so made? Do they preclude this court from entertaining jurisdiction of this suit? That is, from compelling the appearance of the defendant to this suit in this court without her consent. This identical question received the consideration of the distinguished district judge for the Eastern district of Missouri in Gregory v. Atkinson (D. C.) 127 Fed. 183, in which case the jurisdiction of the court was denied, the reasoning there employed being that the whole act must be so construed as to give effect, if possible, to each of its parts, and as the Congress has had the whole act under consideration when engaged in the determination of what amendments should be made thereto, and as it expressly excepted the provisions of subdivision "b" of section 60 and subdivision "e" of section 67 from the operation of the general provisions of subdivision "b" of section 23 of the act, and did not except subdivision "e" of section 70, under which this suit is brought, therefore that subdivision, as amended, should be so construed as to confer full jurisdiction on this court over the subject-matter of this suit, to be exercised, however, only on consent to jurisdiction of the person of the defendant being given by her. This is also the argument employed by solicitors for defendant in support of her plea.

I fully recognize the rule of construction which requires an act to be considered as an entirety, complete in all its parts, so that, if possible, effect may be given to each of its separate sections or parts. I also recognize the force of the argument made in support of the construction claimed, but from a careful study of the original act, the amendments made thereto, and the decision of the Supreme Court which led to the adoption by Congress of the amendments made I must decline to accept the views stated; and for these reasons:

First. This construction would amount to the absolute nullification of the amendment made to subdivision "e" of section 70 of the act now under consideration, and leave it standing precisely as it did prior to the attempted amendment, for it cannot be doubted this suit might, with the consent of the defendant, have been brought and prosecuted

in this court before the act was amended. This was the identical question submitted to and settled by the Supreme Court in Bardes v. Hawarden Bank, supra. Hence it should not be thought the Congress intended to do an entirely useless thing in its attempt to amend the subdivision of section 70 in question (Conger v. Kennedy, 26 Can. Sup. Ct. 404), and such conclusion does violence to the very rule of construction for which defendant's solicitors contend with so much insistence.

Again, the language of the amendment is, "For the purpose of such recovery." The language is not for the purpose of jurisdiction over the subject-matter of the suit or action, for that, as has been seen, by consent of defendant, the court already possessed prior to the amendment, but it is for the purpose of such recovery. Before any "recovery" may be had, as that word is here employed, there must be jurisdiction, not only over the subject-matter of the suit, but as well over the person of the defendant. Full, complete, and absolute jurisdiction over both the persons to and subject-matter of a suit must precede the right to a recovery.

Again, the defendant resides in this state and county, and may be served with compulsory process directed from the District Court of this state sitting within this county, and she might, if the complainants had brought this suit in that court, have been compelled to litigate with complainants the issues raised by their bill of complaint in such court of this state regardless of her consent and in the face of her fiercest opposition. Prior to the amendment complainants would have been compelled to resort to that forum; the defendant not consenting to this court entertaining jurisdiction over her person and her cause. This is also the precise effect of the ruling of the Supreme Court in Bardes v. Hawarden Bank, supra. But the further language of the amendment is:

"This court [in such a suit as this] for the purpose of such recovery * * * shall have concurrent jurisdiction [with] any state court which would have had jurisdiction if bankruptcy had not intervened."

That the state court has full, complete, and ample jurisdiction over the persons and subject-matter of this suit, if brought therein by complainants without consent of defendant, is not disputed, cannot and will not be denied, because it would have had jurisdiction if bankruptcy had not intervened. This court, under the amendment made, has concurrent; that is, the like or the same full, complete, absolute, compulsory jurisdiction possessed by the state court for the purpose of the recovery sought by complainants in this court. This is the express language of the amendment. It is the latest expression of the legislative will. Later under the rules governing the construction of statutes than that employed in the amendment to subdivision "b" of section 23, because later in point of time; consideration being had to the manner of adopting and amending legislative acts. The provisions of this subdivision of section 70, it is true, is not expressly excepted from the operation of the general provisions found in subdivision "b" of section 23 of the act, but, in my judgment, it is excepted by such necessary implication as to render the construction here given absolutely imperative.

Again, if further reason for the holding here made should be thought necessary, I might add the language found in section 23 is general in its nature, and is intended to apply to all classes of cases not excepted from its operation. The language employed in the amendment to subdivision "e" of section 70, under consideration, is special, and applies to a particular class of cases therein comprehended. It is a well-settled rule of construction of statutes that the general provisions of an act, when in conflict with special or particular provisions, must yield, and the special or particular provisions prevail.

For these and other obvious reasons which might be urged, I am of the opinion the clear, positive, and unambiguous language employed in the amendment to subdivision "e" of section 70 of the act should stand and be given effect by the courts, although not excepted in express terms from the operation of the general provisions of subdivision "b" of section 23 of the act.

It follows the plea to the jurisdiction of this court must be overruled, and it is so ordered.

In re SANDERSON.

HORSKINS v. SANDERSON.

(District Court, D. Vermont. December 21, 1906.)

1. BANKRUPTCY—ASSETS OF BANKRUPT—INTEREST IN REAL ESTATE—EVIDENCE.
Evidence *held* insufficient to justify a finding that a bankrupt had an interest in a farm, the title of which was in his father, which could be subjected to the payment of the bankrupt's debts.

2. SAME—PREFERENCES—PERSONS BENEFITED—SURETIES.
Bankr. Act 1898, c. 54, § 60, subd. B, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], declares that if a bankrupt shall have given a preference, and the person receiving it, or "to be benefited thereby," shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property, or its value, from such person. A bankrupt borrowed funds from certain foreign lenders, his father becoming surety on the notes given to secure the same, and later the bankrupt, while insolvent to the knowledge of his father and under his advice, used the proceeds of the bankrupt's business to pay such notes within four months before the bankruptcy proceedings were instituted. *Held*, that the bankrupt's father was a person "benefited" by such transaction within such section, and was therefore liable for the return of the money so paid.

F. C. Smith and Lee S. Tillotson, for petitioner.
C. G. Austin & Sons, for petitionee.

MARTIN, District Judge. The trustee, by petition, alleges in substance: That Lynn J. Sanderson was duly adjudged a bankrupt May 20, 1904, upon his creditors' petition. That thereafter the petitioner was elected trustee. That the petitionee is the father of the bankrupt and is the owner of a farm, consisting of 235 acres of land, situated on the "Gore Road," so called, in Franklin county. That the bankrupt carried on said farm for many years just preceding his bankruptcy, and increased its value, improved the buildings, and increased the amount of stock on said farm. That he had paid the taxes and inter-

est on a mortgage that existed on said farm, which mortgage was executed by the petitionee, and had shipped the petitionee large quantities of hay. That said bankrupt made said improvements and payments with the understanding that he was to own an interest in said farm. That the bankrupt engaged in the creamery business about the 1st of January, 1902, under some arrangement with the petitionee. That said creamery business was dishonestly managed, whereby the products thereof were invested by the bankrupt in making said improvements, increasing the stock on the farm, and that within four months of the filing of the petition in bankruptcy the said bankrupt and the petitionee entered into a conspiracy to defraud the patrons of said creamery, who were also creditors of the bankrupt, and to fraudulently use the money received from the sales of the products of the creamery to make preferred payments to certain creditors who held the notes of the bankrupt, which notes were signed by the petitionee as surety, and by others to whom the petitionee had furnished collateral security for so signing said notes, and did, in pursuance of said conspiracy, make preferred payments thereon within four months preceding said proceedings in bankruptcy. That the said bankrupt and the petitionee collusively formulated a letter and mailed it to the patrons of the creamery for the purpose of prevailing upon said patrons to continue their patronage, and thus enable the bankrupt to accumulate more money with which to make payments to preferred creditors, which letter read as follows:

"Maplewood Creamery.

"Highgate Center, Vt., Aug. 25, 1903.

"I regret to say to you that on account of financial losses that I am compelled to suspend payment of my creditors for the time being. I have struggled against adverse circumstances for a long time, and paid a hundred cents on a dollar that I owed until I have become deeply involved, and am unable to meet my obligations as they become due. No one will regret the situation more than myself, for I am anxious to pay every honest dollar that I owe, and hope to do so if my creditors will give me an extension and forbear with me. I find myself in debt from $7,000 to $10,000, but I hope to be able in the future to pay all I owe, if I have my health and strength. If I can avoid the disgrace of bankruptcy and secure the confidence of my creditors, so that they will forbear payment with me, I feel confident that I shall be able to pay all in the future. I am advised that, in view of the circumstances, I cannot safely make payment to any of my creditors until it is ascertained what attitude they take in the premises. Shall be pleased to advise with you, or any of my creditors, in regard to the best method to pursue, and will be glad for your co-operation and advice in the premises.

"Very respectfully yours, L. J. Sanderson."

That the bankrupt testified before the referee in bankruptcy, and on this testimony, which is set out in the petition at some length, it is charged that the bankrupt and the petitionee were partners in said creamery business. That at the time of making said preferred payments the petitionee knew that his son, the bankrupt, was insolvent, and therein prays the court to appoint a receiver to take possession of said farm. That the bankrupt's interest in said farm be carved out for the benefit of the bankrupt's estate. That the petitionee account at length to the trustee of the bankrupt. That the petitionee be ordered to pay such sum or sums and to surrender any and all property that

shall be found due the petitioner, or to which he is equitably entitled, by some short day to be fixed by the court. That such orders be made as may be necessary to define and protect the interests of the respective parties in the real and personal property described in the petition, and for such other and further relief as to the court may seem meet. The answer, in effect, denies the material allegations of the petition. The matter was referred by my predecessor to Hon. H. C. Royce as special master. The special master heard the parties and such evidence as they chose to submit, and from his report it is found in substance that the said Lynn J. Sanderson was duly adjudged a bankrupt May 20, 1904, upon his creditors' petition; that thereafter the petitioner was duly elected trustee of said Lynn J. Sanderson's bankrupt estate; that the petitionee is the father of the bankrupt, and is and was the owner of real estate as alleged in said petition; that the bankrupt carried on said farm for many years just preceding his bankruptcy, and during that time the farm materially increased in value, and there was a large increase in the amount and value of the stock on said farm. He also finds that during that time the petitionee furnished large sums of money for its improvement; that the bankrupt made substantial improvements; that the bankrupt first took possession of the petitionee's farm in 1892, and down to the fall of 1898 he and his wife, being hard-working people, rendered valuable services upon said farm, and that their services together were fairly worth $450 a year over and above their living expenses; that during that time the bankrupt had the support of himself and wife, clothing, spending money, traveling expenses, doctor's bills, etc.; that he did no other business, except in connection with the creamery, than that of carrying on the petitionee's farm; that the accounts between the petitionee and the bankrupt were not well kept, but his conclusion is that, under all the circumstances, he is unable to find that the petitionee should account to the petitioner as trustee of Lynn J. Sanderson in bankruptcy for any sum or sums of money unless by reason of facts "hereinafter set forth." Those facts relate to payments to preferred creditors within the four months just preceding the bankruptcy. The referee carefully states many facts and circumstances connected with the transactions between the bankrupt and the petitionee that are not material to repeat here, in view of the fact that he concludes that there should be no accounting relating to the carrying on of the farm. He finds that the bankrupt expected that he would have some interest in the real estate of the petitionee, but that the petitionee did not so understand it.

In the opinion of the court, the facts set forth by the master are not sufficient to justify the court in ordering a receiver to take possession of said farm, or decree to the trustee in bankruptcy an ownership in any part or fractional part of the petitionee's real estate. It well enough appears that the bankrupt and the petitionee procured loans at the Eastern Townships Bank at Bedford, province of Quebec, Canada; that they procured one J. M. Hill, Jr., and other parties, to sign some of said notes as sureties, and the petitionee gave to those surety signers collateral security in some instances; that within four months of filing said petition in bankruptcy several of said notes were paid, and payments made upon other notes at said bank. It is claimed by the

petitionee that these preferred payments were made to creditors of the bankrupt who then were and are now domiciled in Canada, and thus without the jurisdiction of this court, and that any preferment that was made to them, although within the four months, cannot be reached in this proceeding. The master finds that the petitionee was a surety signer upon those notes; that he was benefited by those payments; that he is within the jurisdiction of this court; that before said payments were made it was talked over and understood between the bankrupt and the petitionee that said obligations should be paid, with the understanding between them that, the situs of the debts and the residence of the creditors being in Canada, payments made on said notes could not be recovered back in the event of bankruptcy proceedings; and that the petitionee then knew, or ought to have known, that said Lynn J. Sanderson was heavily in debt, in failing circumstances, and was, in fact, insolvent. He also finds that it was the intention of the bankrupt and the petitionee to prefer said creditors to whom such payments were made.

Section 60 of the national bankruptcy act, subdivision B (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), provides:

"If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting thereunder, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property, or its value, from such person."

It is the opinion of the court that the words "such person" refer either to the person receiving such preference or the person who is benefited thereby. If the party receiving such preference is without the jurisdiction of this court, and the person benefited thereby is within the jurisdiction of the court, the trustee may proceed against the latter. It appears that the bankrupt collected money from the sale of the products of the creamery, and, instead of paying it to the patrons, to whom it belonged, he, through the advice of the petitionee, used it in paying obligations that he was owing to parties in Canada; that his father, the petitionee, who then knew that his son was insolvent, might be relieved from liability as a surety or indorser. Also, it is claimed that he paid the petitionee several hundred dollars on account.

It was claimed in argument, by counsel for the petitionee, that in a case where such payments are made to a foreign creditor there is no precedent for the recovery, as herein prayed for. See Landry v. Andrews, 6 Am. Bankr. Rep. 281, 48 Atl. 1036. Whether there is a federal court precedent or not, justice demands it, wherefore there should be a decree for the petitioner to recover of the petitionee all sums of money that were paid by the bankrupt, or paid by the petitionee out of the funds of the bankrupt, or out of funds received from the sale of the products of the creamery, within four months of filing said petition in bankruptcy, to the petitionee or upon the notes and obligations of the bankrupt whereby the petitionee was benefited by such payments, as above indicated.

The cause is recommitted to the master to more definitely report the amount of such payments and the interest thereon, that a decree may be made accordingly.

UNITED STATES v. LOUIS et al.

(Circuit Court, S. D. New York. December 27, 1906.)

1. BAIL—FEDERAL OFFENSES—BAIL PENDING APPEAL.

Rev. St. § 1015 [U. S. Comp. St. 1901, p. 718], provides that bail shall be admitted on all arrests in criminal cases where the offense is not punishable by death, and in such cases it may be taken by any of the persons authorized in the preceding section to arrest and imprison offenders. *Held*, that such section authorized admission to bail at any stage of the proceedings before or after hearing, indictment, or conviction, and pending appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 145.]

2. SAME—UNITED STATES COMMISSIONERS—POWERS.

Act Cong. Sept. 24, 1789, c. 20, § 33, 1 Stat. 91, provided that an offender against the United States might be let to bail by any justice of the peace or other magistrate of any of the United States, where he was found, arrested, or imprisoned, and Act March 2, 1793, 1 Stat. 334, c. 22, § 4, declared that bail for appearance in any United States court in a criminal case in which bail is allowed by law might be taken by any person having authority from the Circuit Court. Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], provided that an offender against the United States might be let to bail by any commissioner of the Circuit Court; and section 1015 [U. S. Comp. St. 1901, p. 718] declared that bail should be admitted upon all arrests in criminal cases where the offense is not punishable by death, and might be taken by any of the persons authorized by the preceding section. Thereafter Act Cong. May 28, 1896, c. 252, 29 Stat. 184, abolished the office of commissioners of the Circuit Court and substituted United States commissioners, with all the powers of commissioners of the Circuit Court. *Held* that, where bail on appeal had been fixed by the court or judge, a United States commissioner had jurisdiction to cause the proposed sureties to justify before him and accept bail tendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 174.]

At Law. Motion to set aside verdict and for a new trial, on the ground the bond sued upon was not valid, because taken by a United States commissioner, who, it is alleged, was without authority to take a bail bond after the conviction of the accused, the principal in the bond, Charles C. Browne, on appeal to the Circuit Court of Appeals, and on the further ground that, assuming the bond to be valid, there was no proof the condition had been broken, and also that no interest is recoverable.

Judson G. Wells (Edwin L. Kalish, of counsel), for the motion.

Henry L. Stimson, U. S. Atty., and H. Hickham Smith, Special Asst. Atty. Gen., opposed.

RAY, District Judge. The facts stated and conceded upon the trial and those appearing in the stenographer's notes are as follows:

(1) The principal in the bond sued upon, Charles C. Browne, having, on trial in the Circuit Court of the Southern District of New York, been convicted of the crime of conspiracy to defraud the United States, and duly sentenced, took a writ of error to the Circuit Court of Appeals of the Second Circuit to review the judgment of conviction. On granting the writ, and pending such appeal and hearing, and on application of said defendant, Judge Edward B. Thomas,

duly designated and holding such Circuit Court, criminal term, made an order that said Browne be admitted to bail, and fixed such bail in the sum of $12,500. John A. Shields then was the clerk of said Circuit Court, and also a duly appointed United States commissioner of the Southern District of New York.

(2) Thereupon, pursuant to such order of the court and judge holding the term, the said defendant Browne, with the defendants here, Charles H. Louis and Isaac Schlesinger, as his proposed sureties, appeared before said Shields for the purpose of executing and entering into the bond or recognizance required and fixed by said order. The said Shields thereupon examined said proposed sureties as to their sufficiency, and, they being sufficient, the bond in suit was duly executed, signed, and acknowledged, whereby said Browne, as principal, and said Louis and Schlesinger, as sureties, bound and obligated themselves in the usual manner and by the usual terms of such instruments to pay said $12,500 in case of default in the condition of such bond. Said bond or recognizance contained the following:

"Whereas, the said Circuit Court did thereupon order the said Charles C. Browne to find sufficient bail in the sum of $12,500 for his appearance at the opening of the United States Circuit Court of Appeals for the Second Circuit, on the third Tuesday of October, 1904, at the opening of court at 10:30 a. m., and to continue in force until the remitittur or mandate has been ordered and handed down, and that in default of finding such bail the said Charles C. Browne should stand committed: Now, therefore, the condition of this recognizance is such that, if the said Charles C. Browne shall personally appear as above stated and required and abide the order of the court, then this recognizance to be void; otherwise, to remain in full force and virtue."

The obligation was to appear as stated and also to "abide the order of the court"; that is, the order of the court having power and jurisdiction to pronounce and enforce judgment. This was the Circuit Court, criminal term, of the Southern District of New York. Said Shields, as United States commissioner, took the acknowledgments, etc., to this bond or recognizance, and accepted same, and filed it with the records of such Circuit Court, of which he was the clerk.

(3) It was stated and conceded on the trial, and should appear in the record of the trial, that the appeal was heard and the conviction affirmed. This court so noted in its minutes. Whether or not a remitittur was handed down did not appear from any evidence given or record put in evidence on this trial, except in the minute book of the Circuit Court, pages of which were in evidence, but not read, the handing down of the remitittur was recited, and such order fully entered. This court understood it was in evidence, and so understands now.

(4) Thereafter, and on the 19th day of January, 1906, at the regular criminal term of the Circuit Court of the Southern District of New York, Judge Thomas again presiding, the said defendant Charles C. Browne was by the court duly called and ordered to the bar of the court and to deliver himself to the custody of the United States marshal to execute his sentence. He was duly called and failed to respond, whereupon the court ordered that the said sureties on his

bond be called upon to produce him. This order was complied with in open court, and said sureties failed to respond or produce their principal. Thereupon the said bond was ordered forfeited, and a bench warrant was ordered to be issued. The said defendant Browne not having surrendered himself and not having been produced, this action upon the bond was commenced.

The court and judge having jurisdiction of the matter and of the defendant Browne having allowed and fixed bail at the request and on the application of the defendant, it is clear that such bail could be taken by any officer having authority to take bail in such a case. I find no statute restricting the power to take bail in such a case to the court or to a judge of the court. By section 627 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 499] the appointment of commissioners of the court was authorized, and they were to have and "exercise the powers which are or may be expressly conferred by law upon commissioners of Circuit Courts." Subsequently the office of commissioners of the Circuit Court was abolished, and United States commissioners were substituted, with all the powers of commissioners of the Circuit Court. U. S. Comp. St. 1901, p. 499; Act May 28, 1896, c. 252, 29 Stat. 184.

By section 1015, of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 718], it is provided:

"Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section [section 1014, Rev. St. (U. S. Comp. St. 1901, p. 716)] to arrest and imprison offenders."

This provision, in different language, however, and section 1014, in different language, constituted section 33 of the act of September 24, 1789, "An act to establish the judicial courts of the United States" (1 Stat. 73–91, c. 20). But section 1015 extends the power to take bail to persons not included in the act of 1789. It is clear that section 1015 authorizes the admission to bail at any stage of the proceeding—before a hearing, or after; before indictment, or after; before conviction, or after; and, of course, pending an appeal. This is apparent when we read section 33 of the act of 1789. We are not to give the language of this section a narrow construction, and confine the power to admit to bail to the time of the arrest and bringing the offender before the court, judge, or commissioner, and thus defeat its beneficent purpose. Hoeffner v. United States, 87 Fed. 185, 30 C. C. A. 610, sustains this proposition. And again section 1014 expressly provides for bail on arrest or at the inception of the criminal proceeding, and section 1015 was not intended as a repetition. By section 1014 it is provided:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be

into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case."

As these United States commissioners have the same power to admit to bail the commissioner of the Circuit Courts possessed, United States Commissioner Shields had the jurisdiction and power to take the bail in question; for that power was expressly conferred upon commissioners of the Circuit Court by chapter 188, Act Aug. 23, 1842 (5 Stat. 516), by the following language:

"That the commissioners who now are, or hereafter may be, appointed by the Circuit Courts of the United States to take acknowledgments of bail * * * shall and may exercise all the powers that any justice of the peace or other magistrate of any of the United States may now exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning or bailing the same," etc.

Section 33 of the act of September 24, 1789, entitled "An act to establish the judicial courts of the United States" (1 Stat. 91, c. 20) provided:

"That for any crime or offense against the United States, the offender may * * * or by any justice of the peace or other magistrate of any of the United States where he may be found, * * * be arrested and imprisoned or bailed," etc.

This act, however, restricted the right to take bail after commitment to a judge of the court or to a judge of the supreme or superior court of the state.

By section 4 of the act of March 2, 1793, "An act in addition to the act" above referred to, it was provided:

"That bail for appearance in any court of the United States, in any criminal cause in which bail is by law allowed, may be taken by * * * and by any person having authority from a Circuit Court to take bail, which authority, revocable at the discretion of such court, any Circuit Court * * * may give to one or more discreet persons learned in the law in any district for which such court is holden: * * * Provided that nothing herein shall be construed to extend to taking bail in any case where the punishment for the offense may be death; nor to abridge any power heretofore given by the laws of the United States, to any description of persons to take bail."

This led to the designation of commissioners of the Circuit Court to take bail. See 1 Stat. 334, c. 22.

An interesting and instructive note on the subject of the powers of the commissioners of the Circuit Courts will be found in 48 Fed. 638–640. This investigation was made by Judge Coxe, now of the Circuit Court of Appeals, in deciding the case of United States v. Hom Hing, where the power of United States commissioners in Chinese cases was in question. It will be noted that the amendment or addition to the judiciary act passed March 2, 1793 (1 Stat. 333, c. 22), conferred authority on commissioners of the Circuit Court to take bail in criminal cases, while the act of February 20, 1812 (2 Stat. 679, c. 25), cited by Judge Coxe, conferred upon them this power in civil causes.

A careful examination of the powers of the commissioners of the Circuit Courts of the United States, as they existed when the office of United States commissioner was created, discloses that they pos-

sessed the power to take bail in criminal prosecutions, and the statutes quoted and referred to conferred this power on United States commissioners. In short, when section 1015 of the Revised Statutes became a law, the commissioners of the Circuit Court were authorized to take bail in such cases; and hence United States commissioners, who take their place and succeed to their powers, may take bail where bail is authorized by section 1015. It was under this provision or section that Browne was admitted to bail, same having been authorized and its amount fixed by the order of the court itself. Commissioners of the Circuit Court were by the statutes quoted authorized to take bail, limited, we may assume, to certain cases, but still they were authorized to take bail; and by section 1014 of the Revised Statutes offenders may be arrested and bailed by any "commissioner of a Circuit Court to take bail"; and by section 1015 any such commissioner—that is, his successor in power, a United States commissioner —can take bail in a criminal case at any stage of the proceeding, where the court has decided that the offender is to be admitted to bail and the amount thereof has been fixed.

The court or judge decided that Browne should be admitted to bail, in effect directed that he be admitted to bail and fixed the amount thereof, and, as there was no statute requiring it to be taken by any specific or specified officer, such bail was lawfully and properly taken by Commissioner Shields, who possessed the general power to which attention has been directed. The bond or recognizance in suit was, therefore, properly taken, and is valid. It was taken in pursuance of law and the order of a competent court, and by an officer authorized by law to take the same. United States v. Horton, 2 Dill., 94 Fed. Cas. No. 15,393, is not an authority to the contrary, nor are United States v. Dunbar, 83 Fed. 154, 27 C. C. A. 488, and United States v. Harden (D. C.) 10 Fed. 805.

That the condition was broken cannot be questioned. He was "to abide the order of the court." As already stated, this referred to the Circuit Court, not the Circuit Court of Appeals. The regularity of the proceedings in the Circuit Court is presumed. If that court was without authority to make the orders it did make January 19, 1906, this was matter of defense. Browne was duly ordered to the bar of the court, and, being duly called, did not respond. His bail were thereupon duly called, and required to produce him, which they failed to do.

It is settled that interest is not recoverable, and it will be stricken out, and the verdict reduced to $12,500, the amount of the bond.

The motion to set aside the verdict and grant a new trial is denied, and judgment will be entered on the verdict, as reduced, for the sum of $12,500 and costs.

PELTOMAA v. KATAHDIN PULP & PAPER CO.

(Circuit Court, D. Maine. December 3, 1906.)

No. 43.

1. NEW TRIAL—GROUNDS FOR SETTING ASIDE VERDICT.

It is not the duty of the court to set aside a verdict rendered on conflicting evidence, unless it finds that the jury were governed by prejudice, passion, or corrupt motives; and it will not do so in the exercise of its discretion, where it does not appear that the jury disregarded the instructions or failed to consider any part of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 144 145.]

2. SAME—EXCESSIVE VERDICT—DAMAGES FOR PERSONAL INJURY.

A verdict awarding $4,200 damages for a personal injury *held* not so excessive as to warrant the granting of a new trial under evidence tending to show that the injury was permanent, and that plaintiff had suffered and would continue to suffer therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 153–156.]

At Law. On motion for new trial.

William A. Pew and William H. Gulliver, for plaintiff in error.
E. C. Ryder and George E. Bird, for defendant in error.

HALE, District Judge. This is an action of tort to recover damages for personal injuries alleged to have been caused by the defendant's negligence in not using reasonable care in providing a suitable guy rope to support a derrick used in unloading a car of water pipe.

The case now comes before the court on the defendant's motion for a new trial. Upon that motion, learned counsel for the defendant have argued mainly upon the points that the verdict is against the weight of evidence and that the damages, $4,208.33⅓, are excessive.

The plaintiff is a Finn. The witnesses which he has introduced are, for the most part, Finns. A large part of the testimony in the record was taken by means of an interpreter. As counsel have suggested, there was hardly a proposition of fact raised in the whole trial of about a week's time that was uncontradicted. There is seldom a case heard in court where there is so much conflict of testimony. Each side charges that much of the testimony upon the other side is founded upon perjury. The defendant urges that the plaintiff received little or no injury, but has "put up" his whole case. After a long trial the jury were but 40 minutes in arriving at their verdict. It is not the duty of the court to set aside that verdict, unless it finds that the jury were governed by prejudice, passion, or corrupt motives.

No judicial expression upon the subject of granting a new trial has added much to what Chief Justice Shaw has said in the early case of Cunningham v. Magoun, 18 Pick. (Mass.) 14:

"The great principle which is at the basis of jury trial is never to be lost sight of—that to all matters of law the court are to answer, to all controverted facts, the jury. The verdict of a jury is practically to be taken for truth.

"Formerly this distinction was effectually preserved by special pleading, whereby juries were compelled to answer 'Yes' or 'No' to a precise fact. * * * But by the prevailing use, in modern practice, of general declara-

tions and general issues, the jury is in most cases left to find a general verdict. * * * The mode of trial, therefore, necessarily is, when the evidence is out, for the court to direct the jury hypothetically, adapting the instructions in point of law to the state of evidence, putting it to the jury to return a verdict for the plaintiff or defendant, as they shall find certain facts proved to their satisfaction or otherwise by the evidence. The consequence obviously is that the jury, in finding a general verdict, do in form return a verdict embracing the matter of law as well as fact; and therefore, as they may mistake the instructions of the court, or may take the law into their own hands, imagining it to be severe or inequitable, they may return a verdict manifestly against the law and truth of the case. To render such a mode of trial safe and tolerable, there must exist a power somewhere to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty, by mistake, prejudice, or even by an honest desire to reach the supposed equity, contrary to the law of the case, it will be the duty of the court to set the verdict aside. When, therefore, the evidence is clear, plain, and strong, and the law has been clearly and explicitly stated to the jury, and they decide against the law, it imposes upon the court the duty of interfering, because it must be apparent that the jury have either intentionally erred, by mistaking the terms of their instructions, or misapprehended the weight of the evidence, or that they have mistaken their duty or abused their trust. * * * Where there is evidence for the minds of the jury actually and fairly to weigh and balance, where presumptions are to be raised and inferences drawn, and the jury may be presumed fairly to have exercised their judgment, a court will not feel at liberty to set a verdict aside, although upon the same evidence they would have decided the other way."

The decisions of the courts of Maine and Massachusetts have been consistent with the above statement of the law relating to this subject. In Reeve v. Dennett, 137 Mass. 315, the Supreme Court of Massachusetts quotes the language of Chief Justice Shaw, and says:

"A judge has a right to set aside a verdict which, in his opinion, is against the weight of the evidence, and in some cases it is his duty to do so; but whether he shall do so in any given case is a question addressed to his judicial discretion. To require him as a matter of law to set aside every verdict which is, in his opinion, against the weight of the evidence, would result practically in the trial of facts by the court, instead of the jury."

Federal courts have followed no different principle. Schuchardt v. Allens, 1 Wall. 359, 17 L. Ed. 642; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224.

In some personal damage cases in the federal courts the judge has told the jury that, in his opinion, the evidence of the defendant was entitled to greater weight than that of the plaintiff; but, after the jury has found for the plaintiff, the court has then refused to set the verdict aside. Southern Pacific Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416; Sargent v. Home Benefit Ass'n (C. C.) 35 Fed. 711.

The Circuit Court in this district set aside two verdicts in the recent case of Morse v. Insurance Co. (C. C.) 124 Fed. 451, and 129 Fed. 233, because it was evident that the jury failed to consider certain uncontradicted evidence in the case, or gave no heed to the instructions of the court touching a certain question of law. In the case at bar I find no reason for holding that the jury disregarded the instructions given them by the court; nor do I find that they failed to consider any part of the testimony in the case. They certainly cannot be held to have disregarded any uncontradicted testimony in the case, because

there was no uncontradicted testimony; for every material fact testified to by a witness on the one side was contradicted by some witness on the other side. It is apparent, then, that the jury simply believed the plaintiff and his witnesses, and that they did not believe the testimony of the defense so far as that testimony contradicted the plaintiff.

I was careful to state to the jury precisely the issues submitted to them, and to give them, as clearly as I could, the law touching the several propositions presented, leaving to them the clear duty of deciding upon the questions of fact submitted. Whether or not I should have come to the same conclusion that they did is of no consequence. A recent philosophical text-writer has said that it is often unwise for judges to say whether or not they would have decided as the jury did. After hearing all the testimony of the witnesses, after endeavoring to give full and distinct instructions, I cannot say that the jury came to a decision from any corrupt motives, or from prejudice or passion.

On the question of the amount of damages, I instructed the jury, if they came to that question, that they must come to it as reasonable men, and added:

"More often than otherwise juries give excessive damages. Courts often have to deal with verdicts and set them aside when damages are excessive. You must be reasonable on all these questions. If you find the man has been injured, he should be made whole; it is your duty to be just. You are not permitted to be generous."

I further charged them to give to the question of damages "careful thought; not guessing." There was testimony in the case tending to show that the plaintiff had suffered, and would continue to suffer, from concussion of the brain. It seems clear that the jury believed this testimony. If they believed it, and disbelieved the testimony of the defendant on this point, their verdict should not be disturbed.

After fully hearing counsel upon the matter, and carefully examining the record, I come to the conclusion that it is clearly the duty of the court to deny the motion. Counsel for the defendant company have presented so clear, logical, and forcible an argument and analysis of the testimony in the matter that I felt it my duty briefly to state my reasons for denying the motion.

Defendant's motion for a new trial denied.

UNITED STATES v. CHISOLM.

(Circuit Court, S. D. Alabama, N. D. November 19, 1906.)

1. CRIMINAL LAW—INSANITY—SEPARATE ISSUE—TRIAL—DISCRETION.

Where, pending a trial of a criminal case, it is suggested that the prisoner is so insane as to be unable to make a rational defense, etc., the manner in which such suggestion should be disposed of rests entirely in the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1392–1398.]

2. SAME—EVIDENCE.

Whether a prisoner's departure from general rules governing human action demonstrates such aberration of mind as exempts him from criminal responsibility, or shows unfitness on that account to be placed on

trial, depends on the circumstances in each case, to be gathered not merely from the act for which he is arraigned, but to be tested in view of every fact and circumstance showing the condition of his mind at the time to which the inquiry relates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1285–1288.]

3. SAME—EVIDENCE—EXPERTS—OPINIONS—WEIGHT.

On an issue as to the insanity of accused, the jury is not bound by the opinions of experts, provided the jury is convinced from all the evidence that the experts' opinions and conclusions are incorrect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1081.]

4. SAME—TRIAL—BURDEN OF PROOF—OPENING AND CLOSING ARGUMENT.

On trial of an issue as to a prisoner's inability by reason of insanity to properly make a rational defense and intelligently aid his counsel, the burden of proof being on the prisoner, he is entitled to the opening and concluding argument.

On Inquiry as to Sanity of Prisoner.

Alexander R. Chisolm, paying teller of the First National Bank of Birmingham, was indicted for embezzlement of its funds, and, on being arraigned, pleaded not guilty. After the trial had proceeded for several days his counsel suggested that the prisoner was not then in a fit mental condition to make a rational defense, and asked the court to suspend the trial and make inquiry upon that point before proceeding further, stating that the facts upon which they based the suggestion had only come to their knowledge the day before. Thereupon the court took a recess and heard in detail, in chambers, the reasons upon which counsel based their suggestion; the district attorney and assistants being present. It then developed that an eminent expert who had been summoned in behalf of the government, in anticipation of the defense of insanity at the time of the commission of the offense, had given the opinion that the prisoner was now suffering with incipient paresis, and possessed of delusions, which rendered him unfit to aid his counsel in conducting a rational defense, and that thereupon other experts had been summoned by the government, who had also examined the prisoner. The presiding judge then called these experts and others before him at chambers, and, finding that they differed radically as to the mental condition of the prisoner, suspended the trial, and directed an inquisition before the jury which had been trying the prisoner, as to his present mental condition. A number of expert and nonexpert witnesses testified. Some of them gave it as their opinion that the prisoner was entirely sane. Others testified to the contrary, and that his present mental condition was such that he could not rationally aid his counsel in making defense. After the testimony was all in, and before argument of counsel, which both sides asked, the court delivered its charge to the jury.

Thos. R. Roulhac, Dist. Atty., and Lee R. Bradley, Special Asst. Dist. Atty., for the United States.

Frank S. White and John London, for the prisoner.

JONES, District Judge (charging jury). You understand from the instructions given you at the beginning of this inquisition that the inquiry now submitted to you in no way involves any decision as to the prisoner's guilt or innocence of the charge upon which he was arraigned. He can neither be convicted nor acquitted by any finding you may make on this issue. The question the court submits to you is whether the prisoner at this time is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental faculties, and the requisite power of memory, as will enable him to testify in his own behalf, if he so de-

sires, and otherwise to properly and intelligently aid his counsel in making a rational defense.

The defendant, as you know, had been arraigned and pleaded not guilty, and the trial had proceeded on the merits some days, when the counsel for the prisoner suggested, for reasons then partially stated in open court, that the prisoner was insane or partially so, and in such mental condition that it would be unjust to further proceed with the trial now. How such a suggestion should be disposed of rests entirely in the conscience and discretion of the court. Finding on conference with eminent experts who had examined the prisoner that they differed radically whether his present mental condition was such that it would be just to proceed with the trial, the court, having doubts as to his real mental condition, submitted the issue to you. In doing so, it only followed the pathway marked out by courts of the highest authority, which have frequently declared that in such a case "a just judge will not fail to relieve his own conscience by submitting the facts to a jury."

Much latitude has been allowed in the evidence as to the family history of the defendant, his career from youth to the present time, the nature of the occupations in which he has been engaged, the manner in which he has discharged his duties, his personal characteristics and habits, the means by which the offense charged is alleged to have been committed, his declarations and statements at various periods, and his actions from the time he was confronted with the charge up to the present hour. You have also had the variant opinions of the experts, for the reasons they have severally stated, as to the prisoner's present mental condition and fitness for trial. This broad investigation was permitted, because, after all, we cannot safely apply general experience as to the workings of the human mind in determining the condition of a particular individual's mind at any given time, unless we look also to the personal character of the individual, to the grade of his mental powers, to the motives by which he is governed, to his view of things, and finally to the course of his whole life and the nature of the particular act with which he is charged, and the circumstances under which it was committed. While we are not directly concerned on this inquiry whether or not the defendant was insane at the time of the commission of the offense charged, the period elapsing between that date and the present occasion is so recent that his then condition, as you may find it to have been at that time, may shed some light in forming your opinion as to what his mental condition is at this time.

Finite man at last gropes but darkly into the conditions of the human mind, and it is impossible for any court to lay down any fixed rule, as a matter of law, as to any particular state of facts which will unerringly demonstrate sanity, or the contrary condition of the human mind, or the degree of aberration which, when found to exist, exempts an accused person from criminal responsibility, or unfits him to rationally aid in his defense when arraigned for crime. An approved text-writer has said:

"All men are erring. Mere errors, therefore, do not excuse from punishment. All men have vicious propensities. Therefore a propensity to do a certain evil thing does not excuse the doer. All men are only in a limited degree deterred

from wrongdoing by fear of the consequences. The mere fact, therefore, that a defendant was not fearful of punishment when doing an act does not show him to have been insane. All men are more or less regardless of the claims of conscience. So the mere fact that a prisoner showed a hardened heart does not prove him insane. But all sane men act with a uniformity of plan, varied and winding, indeed, sometimes, yet uniform in the manifestations of the mind. All derive their knowledge of visible things from what is really tangible to their outward senses. All love the friends who sincerely do them good. All manifest affection, under ordinary circumstances, for their offspring. All obey, in short, certain laws which we recognize as belonging to the mind of a sane man. When, therefore, a person is found acting, either at times or habitually, contrary to these known laws, we may say that he is more or less insane."

But whether or not an individual's departure from general rules governing human action demonstrates such aberration of mind as exempts him from criminal responsibility, or shows unfitness on that account to be placed on trial, depends upon the circumstances of the particular case, and is to be gathered not merely from the act for which he is arraigned, but must also be determined and tested in view of every other fact and circumstance which sheds light upon the condition of the defendant's mind at the period as to which the inquiry is directed. Each particular case, therefore, presents a practical question, in the decision of which general statements of the theories of medical men and the reasoning of jurists furnish only partial, and sometimes little, if any, practical help.

A person may be insane or partially so at one time, and subsequently be restored to sanity, and afterwards be a responsible being in the eyes of the law. The precise question you have here, as you understand, is to determine whether at this time the prisoner is in such possession of his mental faculties as enables him to rightly comprehend his condition with reference to the proceedings against him, and to rationally aid in the conduct of his defense. The reason why an insane person, or one who though not insane, is laboring under such mental infirmity as to prevent his rationally aiding in his defense, should not be put to trial, is, in the language of the old books, "because he is disabled by the act of God" from making a just defense if he has one, and "because there may be circumstances lying in his private knowledge which would prove him innocent or his legal irresponsibility, of which he can have no advantage, because they are not known to persons who undertake his defense." Nevertheless, a person, though not entirely sane, may be put upon trial in a criminal case if he rightly comprehends his own condition with reference to the proceedings, and has such possession and control of his mental powers, including the faculty of memory, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal act charged against him and material to repel the criminating evidence, and has such poise of his faculties as will enable him to rationally and properly exercise all the rights which the law gives him in contesting a conviction.

It is proper that I should say to you that the defense of insanity, or mental inability to properly conduct a defense, is frequently resorted to without any just basis, and that in passing upon such questions you may give that consideration such weight as in your opinion

it may deserve in connection with all the facts in this particular case. It would be a reproach to justice if a guilty man escaped the penalty for a crime upon a feigned mental irresponsibility, or postponed his trial upon a feigned condition of mind, as to his inability to aid in his defense. On the other hand, it is also my duty to caution you with earnestness that it would be likewise a reproach to justice and our institutions, if a human being "made in God's own image," while suffering as the old books put it "under a visitation of God," were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity. As said by the Supreme Court of the United States, with reference to feigned defenses of mental weaknesses, and the consequences which may result to society:

"It seems to us that undue stress is laid in some of the cases upon this consideration. The possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the court to depart from principles fundamental in the criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice."

You are human beings and cannot altogether shut your eyes to the things you see around you. This case naturally and rightly has excited great interest. The crime charged involves a very serious offense. The law very properly throws all the safeguards it can around the honest keeping of the accumulations of the well to do and the savings of the poor, when placed in the national banks of the country. The prevention of offenses like that here charged is of grave concern to the public. Yet, on the other hand, as I earnestly caution you, it is of equal, if not of greater, public concern that in the disposition of such an issue as that now submitted to you no supposed public exigency for speedy trial, to prevent the repetition of such offenses, should induce the trial of a human being on such a charge, if he be, in fact, in such mental condition that he cannot fairly and rationally make his defense. Our duty and province are to hold the scales of justice even, in view of all these considerations, in order that justice, and nothing but justice, as defined by the law of the land, may be done in this particular case, as to holding this defendant on trial at this time. No feeling of sympathy or regard for individuals should move your judgment a hair's breadth. Neither, on the other hand, ought you to allow your conclusions to be influenced in the remotest degree by any thought as to what the public may say or think of the effect or justice of the conclusion at which you arrive. You 12 men alone, out of all the millions of American freemen, administer their justice here, and in the last analysis are the only authoritative advisers of the court on this issue. In the discharge of that duty, the responsibility and sacredness of which I know you appreciate, you are answerable only to your Creator and your consciences.

What are the facts which must govern your decision? Having no personal knowledge, you must ascertain the facts largely from the mouths of witnesses. There are many rules for determining the amount of credence which the jury should give a witness. The most important of them are that you may look at the relationship of the witness by blood or family ties, or of business, to the person affected by the inquiry, or any other fact which may show bias or motive to misstate the facts of a transaction, or to color them. You may look also to the intelligence of the witness, his manner and demeanor on the stand, and his experience with regard to matters about which he gives his opinion; and, if such be the case, that a witness has made statements out of court inconsistent with those he testifies to in court. You should also look at the interest of the witness, if any, in the event of the decision of the particular matter under investigation. These and other rules on this subject are mere guides to enable the jury to gather the truth of the matter about which the witness testifies, and are of no further consequence whenever the jury reaches the conclusion that the particular witness has told the truth.

You are not bound by the opinions of experts. If your common sense, reason, judgment, and observation, in view of all the evidence, produce the conviction in your minds that the expert is wrong in his opinions and conclusions, you must be governed by your own opinion, and not by his. A jury should not capriciously or recklessly disregard the advice of medical men of experience in dealing with diseases of the human mind, and the advice of physicians as to such matters should be carefully weighed, but the final responsibility in arriving at a decision as to the mental condition of the prisoner rests upon the jury.

You have observed the defendant and heard the testimony. Most of the medical witnesses have spoken of the prisoner's delusions, which some of them are of the opinion are real, and some believe to be feigned. All the testimony of the medical experts seems to agree that the prisoner has neurasthenia. One of them gave the opinion that he is suffering from incipient paresis. The name of the mental disease, if the prisoner be, in fact, suffering from such disease, is not important. Physicians may disagree as to the diagnosis of the disease, but we have little to do with mere names. The real question is: Does the mental impairment of the prisoner's mind, if such there be, whatever it is, disable him, under the rules I have already given you, from fairly presenting his defense, whatever it may be, and make it unjust to go on with his trial at this time, or is he feigning to be in that condition, which, if true, renders him unfit to be kept on trial at this time?

In the absence of any proof on the subject, the law presumes that every ordinary being of mature age is responsible in all respects, and the government in prosecuting a defendant for crime is not bound to offer any evidence on that point, but may rest upon the presumption. When, however, any facts are developed which go to rebut the presumption of responsibility, it becomes a question of fact in the particular case. While the force of the presumption of innocence until guilt is found beyond a reasonable doubt has no field of operation whatever in solving such an issue as that now submitted to you; yet the humanity of the law is such that no man should be considered a proper subject

for criminal prosecution, of whose ability to fairly and rationally make a defense there is just ground for reasonable doubt in the minds of the judge or jury which passes on that issue.

In short, the inquiry you have to solve is this: Is the mind of the defendant at the bar, in view of the instructions I have given you on this point, so far from normal and so impaired by disease as to make it improper and unjust to keep him on trial for the offense for which he has been arraigned? The form of your verdict will be: We, the jury, find the prisoner at the bar is, or is not (according to the view you take of the evidence), of sufficiently sane mind and in such possession of his mental faculties as make it proper to hold him on trial.

To aid you in arriving at a right determination of this important issue, counsel for the government and the prisoner will now call your attention to such considerations, as, in their conscientious judgment, point to the proper verdict. As the burden rests upon the prisoner, in view of the general presumption of sanity, to generate a fair, reasonable doubt upon the whole evidence as to his fitness to be further tried at this time, and as that is the only issue now before the court, counsel for the prisoner will open and conclude the argument. If, at its conclusion, further instructions seem called for, the court will then give them.

NOTE.

The jury found that the prisoner was of sufficiently sane mind, and in such possession of his mental faculties as made it proper to proceed with his trial.

PETERS v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Circuit Court, D. Massachusetts. December 28, 1906.)

No. 381.

1. REMOVAL OF CAUSES—EQUITY SUIT—DIVERSITY OF CITIZENSHIP.

In order to deprive a defendant of its right to remove a bill in equity filed in a state court to the Circuit Court of the United States on the ground of diversity of citizenship, the complainant must show that he has no remedy in equity in the federal court, that he has a remedy in equity in the state court, and that the existence of his remedy in the state court is based on a state statute, and not on a view of the ordinary jurisdiction of a court of equity different from that entertained by the federal court.

2. COURTS—FEDERAL COURTS—EQUITY JURISDICTION.

A Circuit Court of the United States sitting in equity has no jurisdiction of a bill by insured under a tontine policy against the insurance company for an accounting.

3. SAME—STATE COURTS—EQUITY JURISDICTION—STATUTES.

St. Mass. 1857, p. 548, c. 214, conferred on the Supreme Court "full equity jurisdiction according to the usage and practice of courts of chancery, in all cases where there is not a full, adequate and complete remedy at law," and Rev. Laws, c. 159, § 3, cl. 6, declares that the Supreme Judicial Court and the superior court shall have original and concurrent jurisdiction in equity of suits on accounts, the nature of which is such that they cannot be conveniently and properly adjusted and settled in an action at law. *Held*, that the latter section gave to the Massachusetts state courts equitable jurisdiction in an action by insured against the insur-

ance company for an accounting of profits on a tontine policy, which was beyond the jurisdiction of the Circuit Court sitting in equity in such state.

4. REMOVAL OF CAUSES—ADEQUATE REMEDY AT LAW—REPLEADING.

Where a state court had jurisdiction in equity of a suit by a tontine policy holder against the insurer for an accounting which was not possessed by a federal court sitting in equity in such state, and complainant could not obtain adequate relief in a suit at law in the federal court, he would not be ordered to replead on the removal of the cause for diversity of citizenship, but the cause would be remanded to the state court.

In Equity.

Gaston, Snow & Saltonstall, for complainant.
Brandels, Dunbar & Nutter and J. Butler Studley, for defendant.

LOWELL, Circuit Judge. The complainant brought a bill in equity in the Supreme Judicial Court of Massachusetts against the defendant, alleging: That he held a so-called "semitontine" insurance policy in the latter. That he was entitled to a share in the accumulations of the tontine fund, for which the defendant refused to account, offering him only a part of that to which he was entitled. That the defendant agreed with the complainant to apportion the surplus equitably; to keep an accurate account of dividends accruing; to produce upon demand an account showing the complainant's interest in the tontine dividend fund; to deal honestly with the dividends retained by the defendant; to use due care in their investment; to expend them for proper purposes only; and to administer honestly and prudently the tontine fund and the general business of the corporation. That the defendant had failed to perform these obligations. Wherefore, the complainant prayed that the defendant be ordered to furnish an account; that the amount to which the complainant was fairly entitled might be ascertained by the court and decreed to him, together with his damages sustained by reason of the defendant's violation of its obligation.

The defendant removed the cause to this court, and the complainant has filed a petition to remand it to the state court, basing himself upon Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804. In order to deprive the defendant of the right which it has to remove a bill in equity to this court on the ground of diversity of citizenship, the complainant must show: (1) That he has no remedy in equity in this court; (2) that he has a remedy in equity in the state court; and (3) that the existence of his remedy in the state court is based upon a state statute, and not upon a view of the ordinary jurisdiction of a court of chancery different from that entertained by the federal court. That the complainant has here no remedy in equity was decided by this court in Hunton v. Equitable Life Assur. Soc. (C. C.) 45 Fed. 661. That the complainant has a remedy in equity in the state court was decided by that court in Pierce v. Equitable Life Ins. Co., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. In each of these cases the policy was substantially like that now before this court, and the bill was substantially like this.

Notwithstanding that the state court would entertain jurisdiction in equity of the case presented by this bill, while this court deems the cause outside its jurisdiction in equity, yet the defendant contends that

the case should not be remanded to the former court for the following reason: As was observed by this court in Mathews Slate Co. v. Mathews (C. C.) 148 Fed. 490:

"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."

The defendant contends that the difference between the decision of the state court in the Pierce Case and the decision of this court in the Hunton Case depended, not upon an enlargement of the ordinary jurisdiction of a court of chancery given to the state court by the state statute, and thus not shared by the federal court, but rather upon a different view of the allegations of the bill, as they invoked the ordinary jurisdiction of a court of chancery; in other words, the defendant contends that the state court took jurisdiction, not because of the state statute, to be cited presently, but because the state court conceived that the bill before it sufficiently invoked the ordinary jurisdiction of a court of chancery, while this court deemed a similar bill insufficient for that purpose.

In one sense, all the equitable jurisdiction of the Massachusetts courts rests upon statute. Originally these courts had no jurisdiction in equity, and this jurisdiction has been created and extended from time to time by specifying particular matters, some of ordinary equitable jurisdiction, and others outside of it, which the Legislature intended to make cognizable by the state courts sitting in equity. Into which of these two classes does the subject-matter of this bill fall?

Rev. Laws Mass. c. 159, § 3, cl. 6, here relied on by the complainant, reads as follows:

"The Supreme Judicial and the superior court shall have original and concurrent jurisdiction in equity of the followng cases * * * suits upon accounts, the nature of which is such that they cannot be conveniently and properly adjusted and settled in an action at law."

This re-enacts Rev. St. 1836, c. 118, § 43, which reads as follows:

"The action of account is hereby abolished; and when the nature of an account is such, that it cannot be conveniently and properly adjusted and settled in an action of assumpsit, it may be done upon a bill in equity, to be brought in the Supreme Judicial Court, and the said court shall hear and determine the cause, according to the course of proceedings in chancery, and may award an execution, in the common form, and such other process, as may be necessary or proper to carry into effect their final decree or judgment in the case."

Of the last-mentioned section (referred to in their report as section 39) the commissioners to revise the statutes observed that they—

"have proposed to abolish the action [of account] altogether, supposing that in all common cases an action of assumpsit will furnish an adequate remedy. When a case is complicated, by having three or more parties with different interests, neither an action of account nor of assumpsit would afford a suitable remedy. In those and other complicated cases it is proposed to resort to the chancery powers of the Supreme Court."

In Bartlett v. Parks, 1 Cush. (Mass.) 82, 85, the Supreme Court of Massachusetts observed, referring to the Revised Statutes:

"The language of the statute is comprehensive, and in terms gives this court jurisdiction in equity in all cases where an account is to be settled which cannot be conveniently settled in an action of assumpsit, whether in such cases an action of account would lie before the statute or not. And this construction of the statute would not give to the court a more ample jurisdiction than courts of equity have in England, where a bill for an account is sustained in many cases in which an action of account would not lie."

And it is well settled in this court that complication of accounts is good reason for the exercise of equitable jurisdiction. Fenno v. Primrose (C. C.) 116 Fed. 49. The defendant contends, therefore, that complication of accounts is recognized alike by the federal courts and by those of Massachusetts to be a reason for the interposition of a court of equity, and that the statute cited, like some others, gave to the state courts no more than a part of the ordinary jurisdiction of a court of chancery. If this be true, the jurisdiction of this court is as broad as is that of the state court, and the motion to remand must be denied.

On the other hand, St. Mass. 1857, p. 548, c. 214, conferred upon the Supreme Judicial Court "full equity jurisdiction, according to the usage and practice of courts of chancery, in all cases where there is not a full, adequate and complete remedy at law." If the defendant's contention just referred to is sound, the courts of Massachusetts after 1857 had no need to refer to the statute first mentioned, inasmuch as the passage of the statute of 1857 made it superfluous. Yet Rev. St. 1836, c. 118, § 43, has been retained in all subsequent compilations—that of 1860, that of 1882, and that of 1902—and the state court has continued to base its jurisdiction thereupon. Hallett v. Cumston, 110 Mass. 32, 33. In the Pierce Case the Supreme Court of Massachusetts said:

"Our statute gives jurisdiction in equity upon account 'when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action of law.' Pub. St. 1882, c. 151, § 2, cl. 10. Even if the amounts kept back from the plaintiff and those of his class of policy holders by the retention of those dividends which would otherwise have been received, or of those sums accruing from the forfeiture of policies either in whole or in part, do not constitute a trust fund, or place the defendant in a strictly fiduciary capacity, the defendant was bound to keep accurate accounts of them, and of all interest and profit thereon, if any." 145 Mass. 56, 60, 12 N. E. 858, 1 Am. St. Rep. 433.

To the same effect Judge Colt said in the Hunton Case:

"The plaintiffs rely in this case upon a provision of the Public Statutes of Massachusetts (chapter 151, § 2, cl. 10) which confers equity jurisdiction in cases where 'the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law.' * * * Now, what is the effect of the Massachusetts statute? It takes a certain class of cases that under federal procedure would have to be brought on the law side of the court, and transfers them to the equity side. It enlarges the equity jurisdiction of the court in relation to accounts. In this very case, where equity jurisdiction would not attach under the rules which prevail in the United States courts, it permits a party to bring a bill in equity. * * * The Massachusetts statute does not create a new remedy, but it does withdraw a certain class of cases from a court of law into a court of equity, and the federal courts are to adopt it only so far as it is consistent with the mode of procedure in equity cases established by the courts of the United States." 45 Fed. 662, 663, 664.

These expressions indicate that both the state court and this court, in their recognized difference of opinion, each thought that it arose from the state statute, and not from an error committed by the other in determining the limits of the ordinary jurisdiction of a court of chancery. This coincident construction of the statute I shall follow, even if it be not strictly binding upon me. The state court will give, and this court will not give, the complainant a remedy in equity, and I prefer to hold that the action of the two courts involves no difference of opinion concerning the equitable jurisdiction which is common to both. It follows that this case, like Cates v. Allen, is one "where diverse citizenship might enable the parties to remove a case, but for the objection arising from the nature of the controversy. It is the duty of the Circuit Court," therefore, "under such circumstances, to remand the case." 149 U. S. 460, 13 Sup. Ct. 977, 37 L. Ed. 804.

The defendant further contends that, even if it be admitted that the state statute has given the complainant a remedy in equity enforceable in the state courts, but unenforceable in a court which, like this, is unaffected by the statute, yet that the complainant may here be ordered to replead, and so may have here an adequate remedy at law. If this court deemed the complainant's remedy obtainable at law to be adequate, doubtless it would retain jurisdiction of the cause, and would direct the complainant to replead; but, upon the whole, the remedy at law which this court can give to the complainant appears to be materially less effective than is the remedy obtainable in the state court through his bill in equity. That the Legislature of the state, by extending the equitable jurisdiction of the state courts to matters in which an adequate remedy at law is given to the suitor by the federal courts, cannot thereby deprive the citizen of another state of his right of removal to this court is plain. But, on the other hand, if a state statute gives to any suitor a remedy in equity in the state courts better and more complete than that which this court can give him at law, and if, furthermore, the remedy thus given is one which this court cannot enforce in equity, the suitor has the right to carry on his litigation in the state court of equity, undisturbed by removal here.

Cause to be remanded.

CAFFYN v. PEABODY et al.

(District Court, W. D. Washington, N. D. December 13, 1906.)

No. 3,093.

1. SEAMEN—SUIT FOR WAGES—WRONGFUL DISCHARGE.

Evidence considered, and *held* insufficient to justify the discharge of an engineer of a steamer before the expiration of his term of service on the ground that he was incompetent by reason of excessive drinking.

2. RELEASE—VALIDITY—SEAMEN—DISCHARGE.

A release in full signed by a seaman on his wrongful discharge is not binding on him where it was not voluntarily given, but was required by the vessel owners, and he was at the time of his discharge in Alaska, at a place where he could not obtain legal redress and without money, and received no more than the amount of wages admittedly due him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 33.]

3. SEAMEN—WAGES—ALLOWANCE FOR WRONGFUL DISCHARGE.
By analogy to Rev. St. § 4527 [U. S. Comp. St. 1901, p. 3077], a court of admiralty may, when equitable, award a seaman wrongfully discharged an additional month's wages, although he served more than a month, and is not therefore within the terms of the statute.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 76–85.]

Libel in personam to recover wages and traveling expenses under a written contract by which the libelant was hired as chief engineer of a steamer on the Yukon river for the season of 1905, with wages at the rate of $250 per month, and traveling expenses for return from the Yukon river to Seattle. Decree for libelant.

James Kiefer, for libelant.
John F. Miller, for respondents.

HANFORD, District Judge. The pleadings admit the execution and validity of the contract sued on, and that the libelant served as chief engineer of the steamboat Schwatka on one trip from St. Michael to Dawson and return, and that on the 8th day of August, 1905, he was discharged and paid the full amount of wages earned at the contract rate up to that date, and that the respondents refused to pay him any additional sum either on account of wages or for traveling expenses.

Two defenses are pleaded and relied upon, viz: (1) The answer alleges that libelant after his employment became addicted to the excessive use of intoxicants, and by reason thereof he was incompetent to perform the duties of chief engineer of the steamer, and irresponsible. (2) Upon receiving the amount of wages earned at the date of his discharge the libelant gave a receipt for the same as full payment and satisfaction of all claims under his contract.

The evidence proves to my satisfaction that the libelant is a competent marine engineer, and that, while he was in the service of the respondents as chief engineer of the Schwatka, he took good care of the engines and machinery, and that there was no delay nor mishap attributable to negligence on his part. The steamer was delayed by other causes at Ft. Gibbon, and at Tanana, and while not required to be on duty the libelant went ashore and drank whisky, and was intoxicated. This I find to be true, notwithstanding a general and explicit denial in the testimony given by the libelant as a witness for himself. I also find, upon his own admissions, that he drank two glasses of beer daily during the time of his service as engineer of the Schwatka. As a witness the libelant is impeached by reason of statements in his testimony which are inconsistent with his own admissions and with established facts. I have not stated the case as strongly against the libelant as the preponderating evidence justifies. There is an issue, raised by conflicting testimony, as to whether the libelant was partially intoxicated at different times when he was on duty. The affirmative testimony of one of the respondents on this issue is controverted by the testimony of the libelant. The burden of proof is on the side of the respondents, and to decide in their favor the evidence should be sufficient to create a positive belief in the mind of the court. This is so for the reason that a finding adverse to the libelant may ruin his professional reputation and create an impediment which will prevent

him from obtaining employment as an engineer. With these considerations in mind, I have carefully weighed all the evidence, and I deem it insufficient to convict the libelant of drunkenness when on duty.

Besides the libelant and one of the respondents, only two other witnesses were examined. I consider Capt. Green and Mr. Edwards to be competent, disinterested, and truthful witnesses. The former was the Schwatka's pilot on the trip referred to. He was called as a witness in behalf of the libelant; and, although he gave only negative testimony to the effect that he had no knowledge of drunkenness on the part of the libelant, I deem it important because, if the Chief Engineer had been habitually drunk, or partially drunk when on duty, the pilot would certainly have acquired definite knowledge of that important fact. Mr. Edwards was called to testify in behalf of the respondents, and gave testimony to the effect that he was watchman on the trip referred to; that he had a pretty good idea of what was going on aboard; that he knew of the libelant's drinking, and being drunk on shore, when the boat was not under way, and on his cross-examination he said: "I did not see Mr. Caffyn drunk on duty; it was when the boat was stopped." It is not shown that the libelant was at any time reprimanded or admonished, nor that his indulgence in the use of intoxicants was in any way taken notice of by the captain or owners of the boat, until used as a pretext for his discharge. The gravamen of the accusation against the libelant is that by excessive drinking he became and was incompetent and irresponsible, and it is my conclusion that this has not been proved by a preponderance of the evidence. When the libelant was discharged and paid at St. Michael, he gave a receipt in the following words:

"St. Michaels, Alaska, August 8, 1905.

"Received of Steamer Schwatka the sum of three hundred seven dollars and forty five cents ($307.45) in full payment of all wages and claims of whatsoever nature against Steamer Schwatka.

"[Signed] F. J. Caffyn [Seal.]"

This was exacted by respondents; that is to say, the libelant was required to sign it in order to get any money on account of his wages, notwithstanding he protested against any relinquishment of his rights under his contract, and it was not understood as a voluntary waiver on his part of any rights. The evidence shows that he was destitute of money and was unable to obtain judicial process at St. Michael for the protection of his legal rights. According to the testimony, he was given an option to take the amount tendered and sign this receipt or litigate, but under the circumstances he did not have an option because he did not have the means to litigate. Tested by common-law principles, the receipt is not binding upon the parties as a release of any debt or liability, because by the answer it is not pleaded as a contract by specialty, and, in fact, it is not a sealed instrument. At most, it can only be considered as written evidence of an accord and satisfaction, which may be contradicted, and it has been contradicted and its falsity clearly established. The evidence proves that the libelant did not assent to any agreement canceling the contract under which he went to work, or varying its terms. Furthermore, the amount paid

was no more than the amount admitted to be due for services up to the date of the payment, and there was no consideration to support an agreement abridging rights stipulated for in the contract.

It has been proved by uncontradicted evidence that the libelant's expenses returning to Seattle amounted to $75, which he is entitled to recover by the terms of his contract, and, having been discharged without his consent, and without fault on his part justifying such discharge, the court allows him as compensation one additional month's wages. I hold this award to be legal and just, by analogy to the measure of compensation prescribed by section 4527, U. S. Rev. St. [U. S. Comp. St. 1901, p. 3077].

UNITED STATES v. LAVARRELLO.

(Circuit Court, S. D. New York. November 27, 1906.)

1. SHIPPING—TRANSPORTATION OF IMMIGRANTS—REGULATION—POWER OF CONGRESS.

Congress had power to pass Act Aug. 2, 1882, c. 374 [U. S. Comp. St. 1901, p. 2931], making it an offense for the master of a foreign vessel to omit to provide tables and seats at regular meals for immigrants or passengers, other than cabin passengers, bound to the United States and actually brought to a port of landing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 2, 527, 533.]

2. INDICTMENT—CERTAINTY—BILL OF PARTICULARS—NEW BILL.

An indictment against the master of a vessel transporting immigrants to a port of discharge within the United States, charging that there were no sufficient tables and seats provided for the use of such passengers, in violation of Act Cong. Aug. 2, 1882, c. 374 [U. S. Comp. St. 1901, p. 2931], though objectionable for failure to allege in what respects the insufficiency consisted, was not fatally defective, but the charge should be made more definite and certain by a bill of particulars or by a new indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 266–268.]

Henry L. Stimson, U. S. Atty., and William Michael Byrne, Asst. U. S. Atty.

Kellogg & Rose (Abram J. Rose and Alfred C. Pette, of counsel), for defendant.

THOMAS, District Judge. The indictment is drawn under section 1 of the act of August 2, 1882 (22 Stat. 186, c. 374 [U. S. Comp. St. 1901, p. 2931]), which, so far as applicable to this action, provides:

"That it shall not be lawful for the master of a steamship or other vessel whereon immigrant passengers or passengers other than cabin passengers have been taken at any port or place in a foreign country or dominion (ports and places in foreign territory contiguous to the United States excepted), to bring such vessel and passengers to any port or place in the United States unless the compartments, spaces and accommodations hereinafter mentioned have been provided, allotted, maintained and used for and by such passengers during the entire voyage."

And the provision about tables and seats as mentioned in the indictment is found in section 4 of the act [U. S. Comp. St. 1901, p. 2935] as follows:

"Tables and seats shall be provided for the use of passengers at regular meals."

The indictment charges:

"That the steamship Citta Di Napoli, at the times hereinafter mentioned, was engaged in the business of conveying immigrant passengers across the Atlantic Ocean from the kingdom of Italy to the United States of America, and that Eugenio Lavarrello was the master of said steamship; that on the first day of August, in the year of our Lord, one thousand nine hundred and five, the said steamship commenced a voyage from Italy aforesaid to the said United States and completed the same on the 18th day of August of the same year, at the port and Southern district of New York, and the said Eugenio Lavarrello was master and in command of said vessel during said voyage, and there were then in and on board of the said steamship under his command and control no less than 929 immigrants, as steerage passengers, every one of whom by law, on each day, was entitled to be served on shipboard with three meals at regular and stated hours, and the said immigrant passengers were also by law entitled to tables and seats, for their use, at the meals aforesaid; but during the said voyage, on each and every day thereof, there were not sufficient tables and seats for the use of the said passengers at their regular meals aforesaid, as the law required; and on the said 18th day of August, in the said year, at the Southern district of New York, within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the United States, on the day of the arrival of the said steamship at the said port of New York, the said Eugenio Lavarrello, master of the said steamship as aforesaid, did still unlawfully and willfully fail, omit, and neglect to provide tables and seats as aforesaid for the use of the said steerage passengers at the regular meals, or at any and all meals served to them on that day, in and upon the said steamship, as required by law."

The most important question raised by the demurrer relates to the power of Congress to make penal an omission by a foreign vessel to provide tables and seats, at regular meals, for passengers bound to the United States, and actually brought into a port of landing. However vaguely or ineffectively Congress has exercised the power, it is considered that the power exists, and it is unnecessary in reaching this conclusion to follow the history of passenger acts from an early time in the last century, or the decisions pertaining thereto. The brief for the government carefully informs in such regard. The act directs that "tables and seats shall be provided for the use of passengers at regular meals." If it be kept in mind that this provision is penal, the indefiniteness of its command excites instant and grave attention. What does it mean? What does it require? It conveys primarily the idea that the master shall not bring passengers to port unless there be tables at which, and seats upon which, the passengers may sit at their regular meals; that they shall not be obliged to sit on the floor, or stand up while eating their meals, or to hold in their laps plates and provisions.' But the statute makes no attempt to state how ample the facilities shall be, or what the ratio of seats to passengers shall be. But common sense aids in interpretation. The direction plainly means that tables and seats, reasonably adequate for the passengers carried, shall be provided for use at proper times. The carrier knows the ship's capacity, the number of passengers to be carried, and can make provision therefor before sailing. If it fails in this duty, the master entering upon the voyage and bringing the ship to port is punishable. The great variety of circumstances under which passengers are carried makes it impossible, and also undesirable for the carrier, that specific

detail as to the exact provision of tables and seats should be given in the statute. Hence, it is concluded that the pleader was justified in charging that "there were no sufficient tables and seats for the use of the said passengers." In what respects were the seats insufficient? Number, construction, or in what other respect? An indictment may be valid, but yet require amplification for the purposes of the trial; and, while it is considered that it is technically supportable, it informs neither the court nor the defendant in what particulars the master was at fault. Therefore the defendant should be informed in what respect the tables and seats were insufficient. The government may do this by a bill of particulars, but preferably to introducing that practice a new indictment is advised.

Demurrer overruled, with leave to the government to nolle the present indictment, or to serve a bill of particulars, and with leave to the defendant to move or plead, as he shall be advised, after the service of such bill of particulars.

BARTLESON v. FEIDLER et al.

(Circuit Court, W. D. Washington, N. D. November 26, 1906.)

No. 1,209.

1. JUDGMENTS—RES JUDICATA—ORDER OF DISTRIBUTION OF PROBATE COURT.
An order made by a probate court of Alaska distributing property to the heirs of a decedent as a part of his estate is not a conclusive adjudication that a partnership did not exist between decedent and another to which the property belonged, as against a creditor of the alleged partner who seeks to follow the property into the hands of the heirs; the probate court not being vested with jurisdiction to bring in parties and adjudicate such question.

2. PARTNERSHIP—EVIDENCE TO ESTABLISH—CREDITORS' SUIT AGAINST HEIRS.
Evidence considered, and *held* to sustain the allegation of a creditors' bill that the judgment debtor and his deceased brother, whose property passed to the other defendants, were partners, and that the property was that of the partnership, and the judgment defendants' interest therein subject to application on the judgment.

In Equity. Creditors' bill founded upon a judgment against F. J. Feidler, and return nulla bona, of a writ of execution. Heard on the merits, the issues raised by the pleadings being whether the judgment debtor and E. L. Feidler, who died in Alaska, were copartners, and whether money which through probate court proceedings in Alaska had come into the hands of the widow of the deceased belonged to the alleged firm. Decree for complainant.

James A. Snoddy, for complainant.
Bo Sweeney and G. E. Steiner, for administratrix.

HANFORD, District Judge. Preliminary to the consideration of the main controversy, the court must dispose of the defendants' contention that the United States commissioner at Nome, in the exercise of the powers of a probate court made an order of distribution of the estate of E. L. Feidler, which is a final determination of the rights of

the parties to this action. The only ground upon which this claim can be maintained is the legal proposition that all matters which have been or might have been litigated in a court of competent jurisdiction are deemed to have been by a final judgment adjudicated, and that all parties who appeared in the proceedings or were required to appear, and their privies, are bound by the adjudication. In this view a very simple test may be applied by which to judge whether by the rule of res adjudicata the complainant is precluded from maintaining this suit in this court. The order of distribution, if it may be considered as a final judgment, is potent only to the extent of the lawful power of the court to give it force and virtue. By this I mean to invoke the principle often expressed in the phrase "that a stream cannot rise higher than its source." The test to be applied is in a correct answer to the inquiry, did the commissioner's court have jurisdiction to bring the parties before it, require them to frame their issues, hear their evidence and arguments, and decide the question whether or not E. L. Feidler, the deceased, and the defendant, F. J. Feidler, were copartners in carrying on the business of the Progresso Trading Company, and whether they as copartners owned the property, and the money which came into the custody of the administrator appointed by the commissioner's court? On this point I hold that the laws do not confer upon the probate courts of Alaska the chancery powers necessary to be exercised in hearing and deciding such questions. I deem this ground sufficient for overruling the defendants' objection, and will refrain from further discussion of the question, except merely to cite the decision of the Supreme Court of the United States in the case of Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532, which supports the complainant's argument on this branch of the case, and the conclusion that a creditor has the right to follow into the hands of their holders, in one state, the assets of his debtor, distributed by order of the probate court of a different state.

Were the Feidler brothers copartners in the business of the Progresso Trading Company at the time of the death of E. L. Fiedler? That is the main question in this case. The defendant F. J. Feidler is probably the only living witness who actually knows the facts. It is denied that he is a competent witness to give evidence, adverse to the administratrix of the estate of E. L. Feidler, relating to transactions with the deceased; but his testimony, if admitted, would be superfluous. I say this for the reason that the facts and circumstances proved by competent and disinterested witnesses lead necessarily to the conclusion that there was a partnership commenced and carried on in the year 1900, and continuously thereafter until E. L. Feidler died, and in deference to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Rush v. Lake, 122 Fed. 561, 58 C. C. A. 447, I would be constrained to decide that the partnership did exist, even if F. J. Feidler should testify positively to the contrary. To fairly appreciate the opinion of the Circuit Court of Appeals in the case referred to, it should be read in connection with the opinion of the lower court reported in 111 Fed. 893. The facts and circumstances of this case, briefly stated, are as follows: Previous to the year 1900 F. J. Feidler commenced trading and dealing in merchandise under the name and style

of the Progresso Trading Company, and he transacted his banking business with a bank in Seattle under his brother's name. There is an obvious reason for not doing business in his own proper name in the fact that he had previously been engaged in business in the state of Indiana and left a large number of creditors behind him when he came West. In the year 1900 E. L. Feidler, having obtained a discharge from liability to his creditors under the bankruptcy law, came to Seattle and joined his brother in the business of the Progresso Trading Company. They went to Nome together, with a stock of merchandise, and during that year and the year 1901, were both actively engaged as merchants at Nome, under the name of the Progresso Trading Company. Their stock of goods was mostly, if not entirely, purchased at Seattle, and subsequently to 1901 an office was maintained at Seattle, with F. J. Feidler in charge, who attended to the business of the copartnership at Seattle. Large sums of money were remitted to him from Nome, and he purchased goods, which were shipped to Nome and sold there by E. L. Feidler, and the business appears to have been profitable.

There is not a scintilla of testimony, by any witness claiming to know the facts, tending to prove that at any particular time or place there was a dissolution of the partnership or a severance of interests, and there is no evidence tending to prove that there was any public announcement of such dissolution or severance. The negative evidence relied upon by the defendants is mainly the testimony of witnesses acquainted with the Feidlers and the business they were engaged in, who say that they did not know that the Feidler brothers were partners; that subsequently to 1901, and until his death, E. L. Feidler alone appeared to be sole manager of the business at Nome, and testimony to the effect that the deceased at different times subsequent to 1901 said that he was sole proprietor of the Progresso Trading Company, and that he was paying his brother for his services as purchasing agent; but all such statements by E. L. Feidler, if made, are incompetent, for the reason that they were not made in the presence of F. J. Feidler, and are not shown to have been communicated to him, nor that he at any time previous to his brother's death knew that such statements had been made.

F. J. Feidler's share of the assets which have come into the hands of the other defendants exceeds in amount the judgment recovered by the complainant, and I direct that a decree be entered in his favor for the full amount of said judgment, with interest and costs.

UNITED STATES v. NEWTH.

(District Court, W. D. Washington, N. D. November 27, 1906.)

No. 3,349.

1. CRIMINAL LAW—OFFENSES COMMITTED ON HIGH SEAS—DISTRICT OF JURISDICTION.

A District Court of the United States is not deprived of jurisdiction to try a defendant, arrested within the district, charged with the commission of an offense on board an American vessel on the high seas, under Rev. St. § 730 [U. S. Comp. St. 1901, p. 585], which provides that such offenses shall be cognizable in the district where the offender is found or into which he is first brought, because such defendant was first arrested in Alaska, the courts of which are not vested with jurisdiction to try offenses not committed within their territorial jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 183.]

2. COURTS—DISTRICT COURTS FOR ALASKA—JURISDICTION.

The District Court for the District of Alaska, created by Organic Act 1884, c. 53, 23 Stat. 24, if not abolished, was supplanted by the courts created by the Alaska Code (Act June 6, 1900, c. 786, 31 Stat. 321), and their jurisdiction is limited by the provisions of such Code.

Indictment for a Crime Committed on the High Seas. Founded upon Act Cong. February 9, 1889, c. 120, 25 Stat. 658 [U. S. Comp. St. 1901, p. 3630]. Heard on special plea and objection to the jurisdiction on the ground that the defendant was first arrested in Alaska. Plea overruled.

Potter C. Sullivan, U. S. Dist. Atty., and Henry M. Hoyt, Sp. Asst. U. S. Atty.

Bard & Fenton, for defendant.

HANFORD, District Judge. The indictment in this case charges the commission of a crime on board an American vessel on the high seas within the admiralty and maritime jurisdiction of the United States, out of the jurisdiction of any particular state or district, and that this is the district into which the defendant was first brought and arrested. After his arraignment, the defendant filed a plea in abatement, alleging that he was arrested in Alaska and there charged with the same crime, and that the District Court for the Second Division of Alaska is the only court which has jurisdiction of the case.

Section 730, Rev. St. U. S. [U. S. Comp. St. 1901, p. 585], prescribes that offenses committed on the high seas and within the admiralty and maritime jurisdiction of the United States shall be cognizable in the district where the offender is found or into which he is first brought, and I hold that a district, within the meaning of this law, is not a mere geographical division of country, but a judicial district defined by an act of Congress, pursuant to the constitutional requirements that criminal prosecutions shall be in the state and district in which the offense shall have been committed, which district shall have been previously ascertained by law; but, when the offense was not committed within any state, the trial shall be at such place or places

as the Congress shall have directed. Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691. By the record it appears that on a preliminary examination before a United States commissioner in Alaska, the defendant was held to answer before this court for the crime for which he is here charged, that he gave bail for his appearance, and that he was arrested in this district for the same crime on a warrant issued by this court, upon the record transmitted from the commissioner in Alaska, and that in obedience to an order of this court he has given additional security for his appearance, when required, until he shall be discharged. He has not been arrested in, nor brought into, any other judicial district of the United States. The existing courts in Alaska are not by any act of Congress vested with jurisdiction to try accused persons for crimes defined and made punishable by the general laws of the United States, not committed within the territorial limits of Alaska, and the plea fails to allege that the place of the offense specified in the indictment is within Alaska. I must hold the plea to be insufficient, for the reason that the facts alleged therein are, if true, insufficient to authorize any court in Alaska to take cognizance of the case; that is, to try the defendant and punish him if he should be convicted.

In saying that the existing courts of Alaska are not vested with jurisdiction of the case, I have not overlooked the argument made in behalf of the defendant, based upon the act of Congress of 1884, providing a civil government for Alaska. 23 Stat. 24, c. 53, 1 Supp. Rev. St. U. S. 1891, p. 430. This statute, for convenience, will, when hereafter mentioned, be called the "Organic Act." The third section provides:

"That there shall be, and hereby is, established a District Court for said district, with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with this act, as may be established by law."

That court, however, was supplanted, if not intentionally abolished, by the Alaska Code, enacted by Congress June 6, 1900 (31 Stat. 321, c. 786), which divided Alaska into three divisions, and created a new District Court, with a judge to preside in each of the three divisions, and defined the jurisdiction of the new court. The last section of the Code repeals all laws inconsistent with its provisions, and as the broader provisions of the organic act by which jurisdiction was conferred are inconsistent with the more limited jurisdiction defined by the Code, there can be no justification for assuming that the jurisdiction vested by the organic act was transferred to the existing courts by judicial construction of the laws. The opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Tornanses v. Melsing, 106 Fed. 779, 45 C. C. A. 615, expresses the view of that court on the point, to the effect that the Code abolished the District Court for Alaska created by the organic act.

The crime charged is cognizable in this court, and, as the Alaska courts have not jurisdiction of the case, it follows that by virtue of section 730, Rev. St. U. S., this is the proper district for the defend-

ant's trial, and this court cannot avoid the responsibility of proceeding with the case according to law to a final determination on its merits.

The plea in abatement is overruled.

SWAN & FINCH CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 22, 1903.)

No. 3,173.

CUSTOMS DUTIES—CLASSIFICATION—REFINED WOOL GREASE.

The provision for "wool grease" in paragraph 279, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], includes a refined wool grease, from which the natural odor and mineral matter have been removed by a superior process, and which is commercially known as "wool grease."

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

For decision below, see G. A. 4,864 (T. D. 22,804), which affirmed the assessment of duty by the collector of customs at the port of New York.

The article in controversy was assessed with duty under the provision for rendered oil in paragraph 3, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], and was claimed by the importers to be dutiable as "wool grease," under paragraph 279, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652]. The Board of General Appraisers found it to consist of refined wool grease, being a product of wool grease from which the mineral matter and the natural odor had been eliminated, and affirmed the assessment. In the Circuit Court the importers introduced the testimony of several witnesses, showing that the article was a high grade of grease that was dealt in commercially as wool grease; its superior quality being due to the improved process by which it was obtained.

Jacob Fromme, for importers.
Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The decision of the Board of General Appraisers is reversed.

CLEMENT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1906.)

No. 2,377.

1. GRAND JURY—SELECTION—FEDERAL COURTS—"JUDICIAL DISTRICT."

Act Cong. May 11, 1858, c. 31 (11 Stat. 285), created the state of Minnesota into one federal judicial district, and Act March 3, 1859, c. 76 (11 Stat. 402 [U. S. Comp. St. 1901, pp. 316, 446]), provided for the holding of terms of court in three different cities. Act April 26, 1890, c. 167, § 1, 26 Stat. 72 [U. S. Comp. St. 1901, p. 374], declared that, for the purpose of holding terms of court, the district of Minnesota was divided into six divisions, and section 6 that grand and petit juries should be summoned for each of the terms of such court, and the petit jury should be competent to sit and act as such jury in either the Circuit or District Court at such terms. Act Cong. July 12, 1894, c. 132 (28 Stat. 102 [U. S. Comp. St. 1901, p. 376]), provided that all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had, and prosecuted in the division of the district in which the offenses were committed. *Held*, that a federal grand jury was not required to be drawn from the division of the district in which the offense to be investigated was committed, but might be properly summoned from any portion of the state constituting "the district," regardless of the place where the prosecution was triable.

2. JURY—PETIT JURY—SELECTION—FEDERAL COURTS.

Act Cong. April 26, 1890, c. 167, § 1, 26 Stat. 72 [U. S. Comp. St. 1901, p. 374], divides the judicial district of Minnesota into six divisions, and section 6 provides that the grand and petit juries shall be summoned for each of the terms of Circuit or District Court, and that the petit jury shall be competent to sit and act as such jury in either of such courts. Act July 12, 1894, c. 132, 28 Stat. 102 [U. S. Comp. St. 1901, p. 376], requires all criminal proceedings instituted for the trial of offenses against the United States arising in the district of Minnesota to be brought, had, and prosecuted in the division of the district in which the offenses were committed. Rev. St. § 563 [U. S. Comp. St. 1901, p. 455], confers on District Courts of the United States jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their districts, and Const. Amend. 6, declares that in all criminal proceedings the accused shall enjoy the right to a trial by a jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. *Held*, that a petit jury for the trial of federal offenses arising in Minnesota might be properly summoned from any portion of the state, and that accused was not entitled to a jury exclusively summoned from the division of the district in which he was triable.

3. CRIMINAL LAW—APPEAL—CONTINUANCE—DISCRETION—REVIEW.

The denial of an application by accused for a continuance will not be reviewed on a writ of error, in the absence of a showing that the trial court's discretion was abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3045–3049.]

4. SAME—CONTINUANCE—INFIRMITY OF ACCUSED—DISCRETION.

Accused, an aged bank president, was arrested February 6, 1905, charged with violating the national banking law, and was indicted on June 9th. In the meantime he was in his usual state of health, but was quarantined because of a contagious disease in his family. After an unavailing demurrer to the indictment and the entry of a plea of not guilty, he applied for a continuance on physicians' affidavits that he was in such a feeble and weak condition that he was unable to endure the strain attendant on a protracted trial, and his own affidavit that he was so infirm as to be unable to make the requisite preparation for trial.

A counter affidavit alleged that the government's witnesses were all aged and infirm, and for that reason their attendance at the next term of court was uncertain. The court denied the continuance, reciting in its order that the trial could be conducted in short sessions, and set the case for trial on June 21st. On that day a similar motion was unsuccessfully made before another judge, and after the government had closed its case on June 30th the hearing was adjourned to July 5th. *Held*, that the denial of the continuance was not an abuse of discretion.

5. SAME—INDICTMENT—DEMURRER—PREJUDICE.

Accused was indicted for violating the national banking act under an indictment containing 27 counts. He demurred unsuccessfully to 10 counts, and was found guilty on 24, and sentenced to a term of 8 years in the penitentiary on each count, with a provision that time should run on all concurrently. *Held* that, as the sentence did not exceed that which might rightfully have been imposed on any one count, defendant was not prejudiced by the overruling of his demurrer to 10 counts of the indictment.

6. SAME—MOTION IN ARREST—TIME.

While accused may raise the question of the sufficiency of the indictment to charge a public offense by motion in arrest of judgment, it is better practice to raise the question by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2454.]

7. INDICTMENT—SUFFICIENCY—STATUTES.

Under Rev. St. § 1025 [U. S. Comp. St. 1901, p. 702], providing that, so far as possible, consistent with assuring accused a fair and impartial trial, the court shall disregard form, imperfection of statement, and unimportant defects which do not reasonably tend to prejudice accused, an indictment is sufficiently certain if it alleges facts sufficient to enable accused to make his defense, and to plead the judgment in bar of any further prosecution for the same offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 177–179.]

8. SAME—CONSTRUCTION OF.

Technical accuracy must yield to the fair and obvious meaning of the language employed, when tested by the ordinary rules of construction, and regard must be had to the necessity of punishing the guilty, as well as acquitting the innocent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 174.]

9. BANKS AND BANKING—NATIONAL BANKING ACT—VIOLATION—INDICTMENT.

A count in an indictment for violating the national banking act alleged that accused, as president of the bank, made an entry in the bank's daily journal of the words and figures following: "Other Real Estate, A. Barton Farm, $3,350.00;" that the entry indicated that the south half of a specified quarter section of land was a certain 80-acre tract known as the "Barton Farm," and was an asset of the bank in the sum of $3,350.00; that the entry so made was false, in that the same described land was not then and there an asset of the bank of the value of $3,350.00, or of any sum whatsoever. *Held*, that such count was not defective as failing to charge that the A. Barton farm was known or described in accordance with the description recited, or was identified therewith, or because it was not charged that the A. Barton farm was not an asset of the bank.

10. SAME—FALSE REPORTS.

Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], provides that every president of a national bank who makes any false entry in any book or report of the association, with intent to injure or defraud it or any other person, company, or body politic or corporate, shall be guilty of a misdemeanor, etc. *Held*, that an indictment under such section, alleging that

accused, while acting as president of a national bank, made a false entry in a report to the Comptroller of Currency, that the lawful money reserve in the bank, consisting of gold coin, was $23,955, when in fact the bank only had $21,955 in gold coin as lawful money reserve, was not objectionable for want of an allegation that the lawful reserve exceeded the amount the bank actually had on hand; the gist of the offense being the making of false entries in the report.

11. SAME—INTENT TO DECEIVE.
Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], provides that, if any president of a national bank makes any false statement concerning the association with intent to injure or defraud the association or any other company, body politic, or any individual person, or to deceive any officer of the association, or any agent selected to examine the affairs of any such association, he shall be guilty of a misdemeanor. *Held* that, where the president of a national bank made a false report to the Comptroller of the Currency with intent to deceive an examiner who might be appointed to make an examination of the bank, as provided by section 5240 [U. S. Comp. St. 1901, p. 3516], such act constituted an offense, irrespective of the existence of any other incidents disjunctively mentioned in section 5209.

12. SAME—EVIDENCE.
In a prosecution of the president of a national bank, evidence *held* sufficient to justify a conviction for willfully misapplying the bank's funds, and converting the same to the use of himself or others, in violation of Rev. St. § 5209 [U. S. Comp. St. 1901, pp. 3491, 3497].

13. SAME—EVIDENCE—CERTIFICATE OF COMPTROLLER OF CURRENCY.
Where a certificate of the Comptroller of the Currency recited that a certain bank had complied with all the provisions of the act of Congress of July 12, 1882, authorizing an extension of the corporate existence of such banks, and declared that the bank was authorized to have succession until November 21, 1908, such certificate was conclusive evidence, in a prosecution of the president of the bank for violating the national bank act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter.

14. SAME—NATIONAL BANK CHARTER—EXTENSION—ACCEPTANCE.
Where a national bank continued its existence and performed the functions of such an association after the expiration of its original corporate existence for a long period of time, it would be presumed to have accepted the benefit of a certificate executed by the Comptroller of Currency extending its corporate existence.

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

The defendant, Clement, was indicted in the District Court of the District of Minnesota for the Third Division for making false entries and willful misapplications of the funds and credits of the First National Bank of Faribault, of which he was at the time president, in violation of section 5209 of the Revised Statutes [U. S. Comp. St. 1901, p. 3497]. He in due time challenged the panels of the grand and petit juries because they were drawn from the district at large, and were not composed of persons who resided in the Third Division of the district. He demurred to some counts of the indictment on the ground of duplicity. He moved for a continuance of the case at the time it was first set for trial on the ground that physical infirmities disabled him from preparing for trial at that time. He interposed at the close of the case a demurrer to the evidence, on the ground that it failed to establish the commission of any of the offenses charged. He filed a motion in arrest of judgment on the ground that the indictment charged no criminal offenses. These challenges, demurrers, and motions were overruled, the trial was had, and defendant found guilty on 24 of the 27 counts of the indictment, and sentenced to a term in the penitentiary of 8 years on each count, with the provision that time should run on all concurrently. Exceptions having

been duly saved to the foregoing rulings, the case is brought here for review by writ of error.

George N. Baxter (Daniel W. Lawler, on the brief), for plaintiff in error.

Paul A. Ewert (Charles C. Houpt, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

Was the grand jury properly summoned? By the act, admitting Minnesota into the Union, of May 11, 1858 (chapter 31, 11 Stat. 285), and by other provisions of law, Minnesota was made to constitute one judicial district. Provision was made for the appointment of a district judge for the district, and for the holding of terms of court at Preston (later at Winona) and St. Paul. Sections 531, 551, Rev. St. [U. S. Comp. St. 1901, pp. 316, 446]; Act March 3, 1859, c. 76, 11 Stat. 402. By the act of April 26, 1890 (chapter 167, § 1, 26 Stat. 72 [U. S. Comp. St. 1901, p. 374]), it was enacted as follows:

"That for the purpose of holding terms of court the district of Minnesota is hereby divided into six divisions to be known as the 1st, 2d, 3d, 4th, 5th, and 6th divisions."

The counties constituting these divisions, the terms and places for holding the court therein were then designated, and section 6 of the act provides as follows:

"That the grand and petit jury shall be summoned for each of said terms, which petit jury shall be competent to sit and act as such jury in either or both of said courts [circuit or district] at such terms."

By the act of July 12, 1894 (chapter 132, 28 Stat. 102 [U. S. Comp. St. 1901, p. 376]), it was enacted as follows:

"That all criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota shall be brought, had and prosecuted in the division of said district in which offenses were committed."

From the foregoing acts, which constitute all the legislation bearing on our present inquiry, it seems clear that only one judicial district has ever been established in the state of Minnesota; that this district has been divided for the convenience of suitors in the trials of causes into six divisions, not as general or separate judicial districts, with an independent court for each, but for the limited purpose disclosed by the act of 1890, "of holding terms of court" in the district of Minnesota.

The Revised Statutes (section 563 [U. S. Comp. St. 1901, p. 455]) give to the District Courts of the United States jurisdiction "of all crimes and offenses cognizable under the authority of the United States committed within their respective districts"; in other words, the jurisdiction of a district court is by law made coextensive with the territorial area of the district, and, unless limitations are found in the congressional acts, the right to draw a grand jury from the district as a whole would seem to be unquestionable. We are, however, not left

without controlling authority on this proposition. The Supreme Court in Logan v. United States, 144 U. S. 263, 297, 12 Sup. Ct. 617, 36 L. Ed. 429, considering similar legislation for the state of Texas, decided adversely to the contention of the defendant in this case. Referring to a provision of that legislation similar to that found in the act of June 12, 1894, supra, Mr. Justice Gray, speaking for the court, says:

"This provision does not affect the authority of the grand jury for the district sitting at any place at which the court is appointed to be held to present indictments for offenses committed anywhere within the district. It only requires the trial to be had and writs and recognizances to be returned in the division in which the offense is committed. The finding of the indictment is no part of the trial."

In Post v. United States, 161 U. S. 583, 587, 16 Sup. Ct. 611, 40 L. Ed. 816, the Supreme Court had under consideration the legislation to which attention has already been called relating to the creation and division of the district of Minnesota, and, after citing with approval the extract just quoted from the Logan Case, Mr. Justice Gray, again speaking for the court, says:

"Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate."

In Rosencrans v. United States, 165 U. S. 257, 260 and 261, 17 Sup. Ct. 302, 304, 41 L. Ed. 708, Mr. Justice Brewer, speaking for the Supreme Court, after calling attention to sections 563 and 629 of the Revised Statutes [U. S. Comp. St. 1901, pp. 455, 503], giving to District and Circuit Courts jurisdiction of the crimes and offenses committed within their respective districts, says:

"These statutes declare the general rule that jurisdiction is coextensive with district. That being the general rule, no mere multiplication of places at which courts are to be held or mere creation of divisions nullifies it. Indeed, the place of trial has no necessary connection with the matter of territorial jurisdiction. * * * We find many acts, some increasing in a district the places of trial, and others in terms subdividing the district into divisions. The former have no effect on the matter of jurisdiction. Some of these latter acts specifically limit the jurisdiction in criminal actions of the courts held in a division to the territory within that division [giving instances], while, on the other hand, some contain no such provision, as in the case of Minnesota (Act April 26, 1890)."

In Barrett v. United States, 169 U. S. 218, 18 Sup. Ct. 327, 42 L. Ed. 723, the Supreme Court, construing acts of Congress relating to South Carolina, held that a division of the state into "two districts," geographically speaking, did not divide the state into two judicial districts, so as to confine the jurisdiction of the Circuit Court to the territorial limits of each separate "district."

The foregoing authorities are conclusive of the proposition that the finding of the indictment against Clement by a grand jury drawn from the body of the district of Minnesota for a crime committed in the Third division of the district is not a violation of the provisions of the act of July 12, 1894, but, on the contrary, in harmony with them.

Was the petit jury lawfully summoned from the body of the district, or should it have been summoned from the counties composing the

Third division of the district? Argument is drawn from the rule of the common law requiring juries to be summoned from the vicinage where the crime is committed, so that the accused can have the benefit of his own good character and standing, if he has such, and of such knowledge as the jury may possess of the character of witnesses who may testify for and against him. A full recognition of this rule still leaves the question, what is the vicinage, open. We think the sixth amendment to the Constitution answers it. It ordains that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

By the judiciary act of 1789, and afterwards by acts providing for the admission into the Union of states other than the original 13, Congress, from time to time, ascertained and divided the several states into judicial districts, in harmony with the requirement of the constitutional provision just referred to. In the exercise of its delegated power, Congress, as seen in the legislation already referred to, created but one district out of the state of Minnesota.

In discussing this article of the Constitution, learned counsel for defendant has ingeniously argued that, even if the entire state is one district for some judicial purposes, it is not the district previously "ascertained by law *for the trial of indictments for criminal offenses.*" It may not be the district ascertained by law for the trial of such indictments, and at the same time it may be the judicial district ascertained by law from which an impartial jury is to be summoned. The sixth amendment does not use the italicized language; it stops with the provision requiring the district from which the jury is to be taken to be ascertained by law. There is obviously a distinction between the purpose of ascertaining the district, as contended for by defendant's counsel, and the purpose of ascertaining the district contemplated by the amendment. Article 3, sec. 2, of the Constitution, provides that the trial shall be held in the state where the crime was committed. The sixth amendment, among other things, conferred the right of trial by jury, and guarantied that the jury should be taken from the state if composed of only one district or from that particular district in the state containing more than one wherein the crime was committed; and for the purpose of rendering certain that particular district, provision was made for its being previously ascertained by law. The Logan, Post, Rosencrans, and Barrett Cases, supra, are ample authority that different places provided as a matter of convenience for the trial of offenses committed within a district may be and frequently are fixed by law without affecting the general jurisdiction of the courts over the whole district. The district for the latter purpose, according to the command of the sixth amendment, as construed by the foregoing cases, must be ascertained and fixed by law as a judicial district; and when so ascertained and fixed, and not till then, it bounds and limits the territory from which a jury may be summoned to try cases originating therein. If acts establishing separate courts within a given district for the convenience of suitors should by clear provision limit their jurisdiction and the area from which juries are to be summoned to

smaller territory, such acts would doubtless create separate judicial districts, and require juries to be summoned therefrom. But there is no such purpose manifested in the acts relating to Minnesota. Although they subdivide the one judicial district, clearly and unambiguously created, into six subdivisions "for the purpose of holding terms of court," they evince no purpose to establish those subdivisions as separate judicial districts, within the meaning of the sixth amendment.

There was no error in overruling defendant's challenge to the panel of petit jurors.

Did the court below err in refusing defendant's application for a continuance? It is settled by the uniform current of authority that the decision of the trial court upon such an application is purely discretionary, and not subject to review unless its discretion was abused. Isaacs v. United States, 159 U. S. 487, 489, 16 Sup. Ct. 51, 40 L. Ed. 229; Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. The question is, therefore, do the facts of the case show that the learned trial judge acted in the exercise of a sound and reasonable discretion in denying the motion for a continuance, or do they show that he abused that discretion? Clement was arrested February 6, 1905, charged in the complaint with some of the offenses afterwards charged in the indictment found against him on June 9th. Between these last-mentioned dates he was in his usual state of health, but was quarantined at home for a period of about one month by the presence in his family of a contagious disease. After an unavailing demurrer to the indictment and the entry of a plea of not guilty the motion for a continuance was made. It was supported by affidavits of physicians and others, tending to show that Clement was in a feeble and weak condition, and unable to endure the strain attendant upon a protracted trial, and his own affidavit to the same effect, and also to the effect that he was unable, by reason of his infirm condition, to make the requisite preparation for his trial. A counter affidavit was filed by the United States attorney, tending to show that the cashier and directors of the Faribault bank, upon whom the government relied for evidence in the case, were all aged and infirm, and for that reason uncertain to attend court at its next term. The court below, then presided over by Judge Lochren, after considering the motion, on June 14, 1905, denied it, assigning the following reasons:

"That the defendant is feeble is apparent from his appearance, and that condition is the result of his age, for one thing, and of his mental disturbance on account of his misfortunes and the charges that are made against him at this time. The serious question is whether there is a probability of his being in any better condition if the case should be adjourned or continued until the next term of court. There is no special physical disability, except age, and that certainly would not be mended. The defendant does not appear physically unable to be in court, and the testimony shows, and I think it was apparent from his appearance, that he ought not to be subjected to the strain of long-continued mental work connected with this matter without opportunities to rest; at least, it would be hard for him. But in that respect, the manner of trial can be conducted so as to obviate any severe strain, by not having very long sessions in a day. It is not clear to me that he will be in any better condition six months from now than he is now. I do not think the showing makes that clear. I think the motion should be denied."

The case was then set for trial on June 21st. On that day a motion for a continuance was again made, reinforced by the same and other similar affidavits. That motion was heard by Judge Morris, who then presided, and was denied by him for the reasons stated by Judge Lochren. On June 22d, after an unsuccessful challenge of the panel of petit jurors, the trial began. On June 30th the government closed its case, when, after an unsuccessful demurrer to the evidence, the further hearing was continued to July 5th. After the verdict a motion for a new trial was made, and the court's attention again called to the defendant's physical condition and inability to properly prepare for trial as important grounds of the motion.

We are impressed by the careful and repeated consideration given to defendant's application by the trial court that the judges acted with great deliberation and consideration for defendant, and decided adversely to him out of a deep sense of the demands of public justice, as well as with due regard for his own welfare. In view of the reasons assigned for overruling the motions for continuance, the assurances then given that the trial would be conducted so as to obviate any severe strain by not having long sessions in a day, the length of the trial, the postponement of it for about a week after the government closed its evidence before the defendant was required to proceed, the refusal to grant a new trial to defendant, and the well-earned reputation for fairness and impartiality of the two district judges who acted on the respective applications for continuance, we think it is fair to presume that the trial was actually conducted with due regard to the age and physical condition of the defendant, and certainly that there was no abuse of the discretion lodged in the trial judges in denying the motions for continuance. It was held at an early day that the ruling of a trial court on an application for a continuance could not be assigned as error. Woods v. Young, 4 Cranch (U. S.) 237, 2 L. Ed. 607. The doctrine of that case has, however, been modified to the extent already indicated, that abuse of the discretion can be assigned for error.

The cases of Goldsby v. United States, supra, and Youtsey v. United States, 38 C. C. A. 562, 97 Fed. 937, present facts very similar in many of their phases to those now before us. The Supreme Court in the one case and the Circuit Court of Appeals for the Sixth Circuit in the other held that the denial of a continuance in such circumstances did not constitute abuse of discretion. Those cases, by reason of their close similarity to this, are interesting and instructive on the question now before us. In view of all the facts which we have carefully considered, and in the light of the authorities referred to, we have reached the conclusion that no error was committed in denying the motions for continuance, and that substantial justice required no postponement of the trial.

Does the indictment sustain the judgment? Defendant at the outset demurred to 10 counts of the indictment on the ground of duplicity. An examination of them discloses that they were not obnoxious to that objection. Moreover, the sentence on each of the 10 counts was the same as that imposed on each of the other 14, and all ran concurrently.

Even if the 10 should have been held bad on demurrer, the same judgment and sentence, based on each of the other 14 counts, which did not exceed that which might lawfully be imposed on any one, cannot be disturbed for that reason. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Ballew v. United States, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388; Putnam v. United States, 162 U. S. 687, 704, 16 Sup. Ct. 923, 40 L. Ed. 1118; Peters v. United States, 36 C. C. A. 105, 94 Fed. 127; Gardes v. United States, 30 C. C. A. 596, 87 Fed. 172, 182.

A motion in arrest of judgment challenged the sufficiency of all the counts on the ground that they did not set forth facts constituting a public offense. No timely demurrer was filed before the expense and trouble of a protracted trial had occurred, but after an adverse verdict the defendant for the first time raised the question of the legal sufficiency of the indictment by a motion to arrest the judgment. This is not good practice. It imposes an unnecessary burden in many cases upon the court, upon the government, and upon the accused. It may also be prejudicial to the latter. While he may, by a motion in arrest, raise the question whether the substance of the crime is charged against him, he may also, by delaying till after verdict, deprive himself of advantages which he might have secured by timely application. Dunbar v. United States, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; Rosen v. United States, 161 U. S. 30, 33, 16 Sup. Ct. 434, 40 L. Ed. 606.

Learned counsel for defendant, in arguing the legal sufficiency of the present indictment, urges us to recognize and apply the criterion of the hornbooks of the law that certainty to a common intent is not sufficient, but that a high degree of certainty in every particular is required. This was anciently the fixed rule of criminal pleading, but of late years its rigidity has been somewhat relaxed. The well-known canons of construction employed to ascertain the meaning of written instruments should not be ignored to secure mere technical accuracy, when that is unnecessary for the legitimate protection of the accused. Language should not be strained either to convict or to acquit; it should receive a reasonable and fair interpretation to accomplish, on the one hand, the indispensable purpose of fairly apprising the accused of the charge against him, so that he may intelligently prepare to meet it, and be enabled to make use of an acquittal or conviction to protect himself against another charge for the same offense; and, on the other hand, to enable the government without unnecessary embarrassment to effectually enforce its laws and bring the guilty to punishment. We must so far as possible, consistently with insuring an accused person a fair and impartial trial, guarantied to him by the Constitution and laws, disregard form, imperfection of statement, and unimportant defects, which do not reasonably tend to the prejudice of the accused. This we are commanded to do by positive law (section 1025, Rev. St. [U. S. Comp. St. 1901, p. 702]) as well as by repeated admonitions of the Supreme Court.

Mr. Justice Harlan, in the case of Rosen v. United States, supra,

speaking for the Supreme Court concerning the meaning of our constitutional provision requiring the accused to be "informed of the nature and cause of the accusation," says as follows:

"The defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same offense."

In the same case he shows that reasonable inferences should be indulged in construing the language of indictments. One of the objections to the indictment involved in that case was that the government failed to allege that the defendant knew that the matter alleged to have been mailed was obscene, etc. On this subject he observes as follows:

"The indictment on its face implies that the defendant owned or managed the paper. * * * He must have understood from the words of the indictment [that he unlawfully, willfully, and knowingly deposited and caused to be deposited the alleged obscene paper] that the government imputed to him knowledge or notice of the contents of the paper so deposited. * * * The ordinary acceptation of the words 'unlawfully, willfully, and knowingly,' when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing."

He concludes that the case before him "was not one of total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of fact."

Mr. Justice Brewer, in Dunbar v. United States, supra, was discussing a criminal offense which by law consisted of "smuggling opium prepared for smoking," but which was by the indictment alleged to consist of "smuggling prepared opium." He held in that case that by referring to the tariff schedules the words "prepared opium" could be seen to be essentially the equivalent of the words "opium prepared for smoking." He uses the following language:

"The pleader is at liberty to use any form of expression, provided only that he thereby fully and accurately describes the offense, and the entire indictment is to be considered in determining whether the offense is fully stated."

He lays down a broad general rule in the following language:

"Any words of description which make clear to the common understanding the articles in respect to which the offense is alleged are sufficient."

He then says:

"There can be no doubt that the defendant knew exactly what he was charged with having smuggled, and that the description was so precise and full that he could easily use a judgment under these indictments in bar of any subsequent prosecution."

Mr. Justice Brown, in Evans v. United States, 153 U. S. 584, 590, 14 Sup. Ct. 934, 937, 38 L. Ed. 830, says:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the government may be intrapped into making allegations which it would be impossible to prove."

Likewise Mr. Justice Brown in Cochran v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630, 39 L. Ed. 704, says:

"Few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel; few which might not be made more definite by additional allegations. But the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

In the light of the foregoing reasonable and practicable rules, we have examined the several counts of the indictment in the case now before us, and do not hesitate to say that, tested by them, every count is good; in fact, the counts sufficiently state offenses within the strict rule of certainty advocated by learned counsel for the defendant.

The second count, so far as it is necessary to state it to bring out the points of objection to it, charges: that the defendant, while president of the bank, made in its daily journal a certain entry in words and figures following: "Other Real Estate, A. Barton Farm, $3,350.00." That the entry purported to show, and did, in substance and effect, indicate and declare, "that the south ½ of the N. W. ¼ of sec. 27, town 109, range 22, was a certain 80-acre tract of land, and was known as the 'Barton Farm,' and was an asset of the said bank in the sum of $3,350." That the entry so made was false in this: "That the said south ½ of N. W. ¼ of sec. 27, town 109, range 22, was not then and there an asset of the said bank," of the value of $3,350, or of any sum whatsoever. It is argued that this count fails to charge the commission of a criminal offense, because there is no allegation that the "A. Barton Farm" referred to in the entry was known or described as the S. ½ of N. W. ¼ of sec. 27, township 109, range 22, or was identical with it, and also because there is no allegation that the "A. Barton Farm" was not an asset of the bank. This contention is without merit. The count charges that the entry made by the defendant purported to show, and did in substance declare, that the land so described by fractions of section was known as the Barton farm, and was an asset of the bank in the sum of $3,350. Afterwards the meaning of the entry as so averred was falsified by the unequivocal statement that the land as so described was not an asset of the bank. It is true it is not averred in words that the "A. Barton Farm" was known or described as the S. ½ of N. W. ¼, etc.; neither is it averred in words that the "A. Barton Farm" was not an asset of the bank, but it is averred that the described land which was by the accused declared in his false entry to be the "A. Barton Farm" and to be an asset of the bank was not such an asset. We cannot perceive any substantial difference between an averment that the described land was known as the Barton farm and was an asset of the bank and an averment that the Barton farm was known as the described land and was an asset of the bank. There can be no doubt the accused well knew with what he was charged. The fair meaning of the charge is that the Barton farm was known to be the same thing as the described

land, and that it, under that name or otherwise, was not an asset of the bank. This certainly would so appear to the common understanding, and that is sufficient.

There is no specification found in defendant's brief of reasons why the third count does not state an offense, and we, after careful scrutiny of it, fail to find any.

The fourth count charges that the defendant, while acting as president of the bank, made another false entry in a report to the Comptroller of the Currency, showing the condition of the bank at the close of business on the 9th of June, 1904; that the false entry in that report was in the words and figures following: "Lawful Money Reserve in Bank, Specie viz.: Gold Coin, $23,955.00." The averment is then made that the false entry purported to show, and did, in substance and effect, show, that the sum of $23,955 in gold was in the actual possession of the bank at the close of business on the evening of June 9, 1904, as a part of its lawful money reserve. It is then averred that that entry was false in this: That on the 9th day of June, 1904, the bank had only the sum of $21,955.00 of gold coin as lawful money reserve. It is argued that this count fails to state a criminal offense for want of an allegation that the lawful reserve exceeded the sum of $21,955. This, in our opinion, is not a sound criticism. It is not an offense in purview of section 5209, and certainly not the offense charged in this indictment, for a national bank to have more or less gold on hand than that which equals the required reserve. The offense consists in making a false entry in a report. The Comptroller requires certain reports from national banks in order to show their true condition. As a matter of practice he indicates in blanks, furnished to the banks by him, what facts he wishes information about; and one of them is the amount of gold coin on hand constituting the lawful money reserve. His discretion and his subsequent action largely depend upon the truth of such reports and the facts disclosed thereby. Their falsity alone constitutes the gist of the offense.

It is next urged that the allegation that the entry was made in the report "with intent to deceive the Comptroller of the Currency and any agent who might be appointed to examine the affairs of the bank" was immaterial. That is quite correct so far as the allegation concerning the intent to deceive the Comptroller is concerned. Such intent is not one of those requisite under section 5209 to constitute an offense. But the contention is not correct in so far as the allegation relates to the intent to deceive an agent who might be appointed to examine the affairs of the bank. The act in terms contemplates the appointment of such agents as specifically provided for by section 5240, Rev. St. [U. S. Comp. St. 1901, p. 3516], and, although the report is made to the Comptroller, yet if the intent in making a false entry is to deceive an examiner who, every officer of a bank knows, may be appointed to make an examination for the information of the Comptroller, it is sufficient by itself to constitute an offense, irrespective of the existence of any of the other intents disjunctively mentioned in the act. United States v. Allis (C. C.) 73 Fed. 165;

McKnight v. United States, 38 C. C. A. 115, 97 Fed. 208. We think the fourth count sufficiently states a criminal offense.

The objection to the fifth count is the same as that made to the fourth, and needs no further consideration.

The sixth and seventh counts charge the defendant with having misapplied funds of the bank by drawing against them two drafts (one for $10,000 and the other for $8,250) in favor of one Rogers, with intent to injure and defraud the bank, and to convert the proceeds of the drafts to the use of Rogers and other persons to the grand jury unknown. The counts clearly state offenses, and it is so admitted by defendant's counsel in his brief. His only objection to the conviction under them relates to the sufficiency of the evidence to support them. The eighth and subsequent counts charge false entries and misapplication of funds in favor of the Minnesota Lumber Company. The objection to them is that their allegations lack the required degree of certainty. A careful examination convinces us that they are not obnoxious to that objection.

Does the proof sustain the conviction? We have carefully examined all the evidence bearing on the several counts on which the defendant was found guilty, and unhesitatingly conclude that the verdict on each and all of them is well sustained by the proof adduced; but, in view of the rule applicable to this case, already adverted to, we shall, for the purposes of this opinion, confine our treatment of the evidence to that bearing on the sixth and seventh counts only. These counts charge the misapplication of $10,000 and $8,250, respectively, by the process of defendant's drawing drafts on depositories of his bank in favor of A. C. Rogers, and thereby permitting him and others to appropriate those sums of money to their own purposes, without any consideration moving to the bank therefor. The evidence tending to support the verdict on these counts is substantially as follows: The De Soto Fruit, Agricultural & Manufacturing Company was a corporation organized and existing under the laws of the state of Georgia. It does not appear what its capital was, but it does appear that only 93 shares, of the par value of $100 per share, had been issued. Clement personally owned 90 of these shares. Conceding them to have been paid in full, as to which there is no evidence, the company had only $9,300 of capital. It authorized an issue of bonds aggregating $100,000, secured by deed of trust conveying to trustees "all and singular its real and personal property in said state"; but what that real and personal property consisted of does not appear. The bonds were issued and delivered to the Royal Trust Company of Chicago, it being one of the trustees named in the deed of trust required to certify something (probably that the title to the real estate conveyed was clear, but this does not distinctly appear), and to deliver the bonds upon the order of A. C. Rogers, who was the president of the De Soto Company. Rogers does not appear to have owned any stock of the De Soto Company, and could not possibly have owned over three shares, as the balance belonged to Clement. He gave Clement an order in writing upon the trust company, requesting it to certify and deliver all the bonds to him. This the trust company

declined to do until a certain incumbrance, amounting to $18,250, upon the real estate of the De Soto Company should be extinguished. Thereupon Clement, acting as president of the Faribault bank, drew the two drafts mentioned in the fifth and sixth counts of the indictment, aggregating $18,250, upon its correspondents in New York and Chicago, which had funds of his bank sufficient to meet them. The drafts were payable to the order of Rogers, who had no money or funds to his credit in the Faribault bank. Neither he nor Clement nor any one else paid the bank anything for the drafts. Rogers at the request of Clement took the drafts to Cincinnati, and with them, or their proceeds, extinguished the incumbrance held by a trust company located there. Thereafter the Royal Trust Company certified and delivered the entire issue of $100,000 bonds to Clement, on the order which he had formerly secured from Rogers. No record or entry of any kind was made in the books of the bank concerning the drawing of the drafts, except what appeared on the stub of the draft book, until 10 days after they were drawn; when on January 30, 1904, Clement "caused to be entered on the books of the bank as its assets $30,000 face value of the bonds of the De Soto Company, and as an offset against the same charged the bank with the said sum of $18,250." The evidence does not show that Clement ever in fact delivered any such bonds to the bank, unless that fact may be implied from the quotation just made. It may, however, be assumed for the present purposes that it was done.

The following further facts appear by the proof: The balance of the issue of bonds by the De Soto Company, $70,000 in face value, were on February 20, 1904, delivered by defendant to the bank to balance its account occasioned by Clement's discounting for the benefit of the Minnesota Lumber Company certain drafts claimed by the government, and found by the jury in its verdict on other counts to be bogus, amounting to $68,270. The bank failed, and was taken in charge by a receiver appointed by the Comptroller on January 3, 1905. Its funds were actually depleted by the payment of the two drafts in question in the full amount of their face value, namely, $18,250.

Rogers appears from the foregoing to have been only a tool of Clement, financially irresponsible, but willing to do his bidding. The aspect of this case most favorable to the defendant is that he, without authority from his board of directors or other officers, used about $100,000, including the $18,250 involved in counts 6 and 7 of the indictment, of the money of his bank, either for his own benefit or that of his friends, and after doing it undertook to thinly disguise his wrongful purpose by delivering to his bank, unsolicited, and, so far as this record shows, undesired by it, $100,000 in face value of bonds of a corporation organized in Georgia, with a capital of $9,300 only, all of which was probably invested in lands of unknown and doubtful value. The value of these bonds, even if delivered by Clement to his bank for the purpose of satisfying its claim against him for moneys taken by him, amounted to nothing in fact. The proof shows that the funds of the bank were by reason of the two drafts in question actually depleted to the full extent of the face value of the drafts.

We are seriously asked to say that this evidence, taken in connection with all reasonable inferences deducible from it, and taken in connection with the fact disclosed by the judgment below that Clement was engaged at or about the same time in similar transactions involving false entries and misapplications of other funds of the bank, does not support the verdict of guilty rendered on the fifth and sixth counts; that it might be evidence of bad judgment or maladministration of a trust, but no further. To this we cannot consent. In our opinion the evidence discloses a corrupt purpose on the part of Clement to willfully misapply the funds of the bank, and great success in accomplishing his purpose. It is altogether sufficient, not only to justify the conviction on the counts under consideration, but to imperatively require it. The offense of misapplication denounced by section 5209 of the Revised Statutes consists "in the conversion to his own use or to the use of some one else of the moneys and funds of the bank by the party charged." United States v. Briton, 107 U. S. 655, 666, 2 Sup. Ct. 512, 27 L. Ed. 520. If the facts of this case do not respond to the definition of the crime just given, we are unable to conceive of those that would.

Some other questions require consideration. The government at the outset of the case produced proof showing the original incorporation and organization in 1868 of the First National Bank of Faribault under the provisions of the act of June 3, 1864 (chapter 106, 13 Stat. 99), and later offered the original certificate, signed by the deputy and acting comptroller with the seal of the Comptroller impressed upon it, certifying to the extension of its corporate existence under the provisions of the act of July 12, 1882 (chapter 290, 22 Stat. 162 [U. S. Comp. St. 1901, p. 3457]), until November 21, 1908. This was objected to for several reasons: First. Because no preliminary showing was made of the consent of the requisite number of stockholders to the extension, or of other prerequisite facts found in section 2 of the act of 1882. This objection was without merit. The certificate of the Comptroller was to the effect that the bank had complied with all the provisions of the act of July 12, 1882, to enable it to extend its corporate existence, and in terms it certified that the bank was authorized to have succession until November 21, 1908. Such a certificate, under powers conferred upon the Comptroller of the Currency by the act of 1882, is conclusive evidence, in a case like this, of compliance by the bank with all necessary prerequisite conditions. Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307.

An objection to the introduction of the certificate was also made because it was not shown to have been physically accepted or received by the bank. The bank continued its existence, performing the functions of a national bank, after the expiration of its original corporate existence. It will be presumed to have accepted the benefit conferred by the certificate in its favor, and to have acted under the authority of the only instrument which entitled it to act at all.

It was also objected, that the certificate was signed by the deputy and acting comptroller and not by the Comptroller himself. That is immaterial. Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531. It was also objected that there was no proof of the authenticity

of the certificate. The seal of the Comptroller was impressed upon it, and we take judicial knowledge of what that seal is. It is in daily use, authenticating many of the most important financial transactions of the executive department of our government. See Pierce v. Indseth, 106 U. S. 546, 549, 1 Sup. Ct. 418, 27 L. Ed. 254, for analogous case. Moreover, the regular and constant enforcement of the laws providing for supervision by the Comptroller over national banks, the frequent reports from and examinations of such banks, and the proof of the actual performance by the Faribault bank of the functions of a national bank for 15 years or more after the certificate of extension was given, afford full recognition of the authenticity of the certificate in question. There was no error in overruling any or all of the objections to the introduction of the certificate.

Error is assigned of certain rulings on evidence, refusal by the District Court to charge the jury as requested, and to portions of the charge as made. To these we have given that diligent and careful attention required by the gravity of this case, and, in view of the rule that a lawful judgment and sentence pronounced without error on any one count requires the affirmance of the judgment even if error was committed in respect of other counts, we refrain from the unprofitable detail necessarily involved in discussing the challenged rulings on the materiality and competency of evidence, the exceptions to instructions refused, and to the charge as given by the court. It is sufficient to say that in our opinion the conviction on the second, third, sixth, and seventh counts was unaffected by any possible irrelevant or incompetent testimony challenged by defendant's counsel; that as to them no prejudicial error was committed by the court in refusing to instruct in the language as requested or in the charge as given. The charge as a whole was fully as favorable to the defendant as the case warranted, and presented every proper and lawful consideration conducing to his acquittal. We are impressed by the record as a whole that he was given a fair and impartial trial, and that his guilt was established beyond any reasonable doubt. The judgment should therefore be affirmed, and it is so ordered.

SANBORN, Circuit Judge (concurring). In my opinion there was no evidence to sustain the verdict on the second count of the indictment, there was fatal error in the charge of the court relative to the trial of the third count, and I am unable to assent to the view that the defendant was lawfully convicted upon any count in the indictment except the sixth and seventh. I concur in the judgment of affirmance upon the sole ground that there was substantial evidence in support of the verdict of guilty on these two counts, and that the record fails to disclose any material error in the trial of the charges they set forth.

BRYANT BROS. CO. v. ROBINSON.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,543.

1. REMOVAL OF CAUSES—SUITS AGAINST FEDERAL OFFICERS.

Where suit was brought in a state court against defendant as "the duly qualified and acting postmaster at Dallas, Tex.," and sought relief against certain official acts performed by the defendant under orders of the Postmaster General, it was a suit against an officer of the United States in his official capacity, and removable to the federal courts, under Act Cong. Aug. 13, 1888, c. 866, § 2, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], authorizing the removal of cases arising under the laws of the United States of which the Circuit Courts of the United States are given original jurisdiction by section 1.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 49.]

2. SAME—PROCEDURE.

The proper procedure for removing a cause from a state to a federal court as authorized by act Cong. Aug. 13, 1888, c. 866, §§ 1, 2, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], is for the defendant to file a petition for removal in the state court, together with a bond conditioned that the defendant will enter in the federal Circuit Court on the 1st day of its next session, a transcript of the record from the state court, and will pay costs awarded in case it shall be determined that the suit has been wrongfully removed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 165, 189.]

3. SAME—REMAND.

Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], provides that when a case is removed from a state court to a Circuit Court of the United States, it shall be remanded whenever it shall appear to the satisfaction of the Circuit Court at any time after removal that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such Circuit Court. *Held* that, where a cause was properly removable, and was actually removed, it would not be remanded because of an irregularity in the proceedings for removal or because such proceedings were taken under the improper statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 221.]

4. SAME—PROCEEDINGS AFTER REMOVAL.

Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], provides that after removal of a cause from a state to the federal courts, it shall proceed as a cause originally commenced in the federal court. Section 914 [U. S. Comp. St. 1901, p. 684] declares that the practice, pleadings, forms and modes of civil procedure other than equity and admiralty causes in the federal and District Courts shall conform as near as may be to the practice in the state courts, and section 913 [U. S. Comp. St. 1901, p. 683] requires that the forms and modes of procedure in suits in equity shall be according to the rules and usages which belong to courts of equity and to rules of court made in conformity to law. *Held*, that where a suit in equity is removed from a state to a federal court, it must thereafter conform to the equity practice and rules in force in such court, regardless of the forms of practice in equitable proceedings in the state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 246.]

5. EQUITY—PLEADING—DEMURRER—CERTIFICATE OF COUNSEL—AFFIDAVIT.

A demurrer to a bill not accompanied by a certificate of counsel that it was well founded in point of law, nor supported by the affidavit of the

defendant that it was not interposed for delay as required by equity rule 31, was fatally defective.

[Ed Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 613, 627.]

6. SAME—ANSWER—FILING—TIME.

Equity rule 32 authorizes a defendant to demur to a part of the bill and answer as to the residue, and rule 37 declares that no demurrer or plea shall be held bad and overruled only because the answer of the defendant may extend to some part of the same matter covered by such demurrer or plea. *Held*, that a defendant was not entitled to file a demurrer and answer at the same time both attacking the entire bill, and that the simultaneous filing of such answer operated as a withdrawal of the demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 488.]

7. COURTS—FEDERAL COURTS—EQUITY RULES.

Equity rules adopted by the federal courts, as authorized by Rev. St. § 917 [U. S. Comp. St. 1901, p. 684], have the force and effect of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 274, 294, 911.]

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

This suit was begun by the plaintiff, Bryant Bros. Company, a corporation organized under the laws of Texas, filing its petition in a district court of Dallas county, Tex., against the defendant, D. A. Robinson, the duly qualified and acting postmaster of Dallas, Tex. The petition was verified by plaintiff's affidavit, and its allegations are substantially as follows: That plaintiff was engaged in the business of selling a mineral rod, which was a legitimate article of commerce, and which had been thoroughly tested many times and found efficient; that plaintiff's business as a seller of said rods yielded it a net revenue of about $5,000 per annum. the average selling price of the rods being about $8, and the average profit being about $3 each rod: that plaintiff and its predecessors had been engaged in the business at Dallas for about eight years, during which time they always had been solvent and responsible financially, and never had been sued or otherwise disturbed by persons who had purchased rods; that plaintiff had been summoned to appear before the Assistant Attorney General for the Post Office Department at Washington, to show cause why a fraud order should not issue against it; that it had appeared before said Assistant Attorney General of the Post Office Department, and had filed its answer and introduced evidence, both of which showed without contradiction that plaintiff was not using the mails for the conduct of a scheme devised to defraud; that the evidence offered by the plaintiff was all the evidence produced on the hearing; that the Assistant Attorney General never had before him any other evidence than that introduced by the plaintiff (all the evidence aforesaid being attached as exhibits to the petition); that the Assistant Attorney General, whose name was R. P. Goodwin, made the order without any evidence proving or tending to prove that the plaintiff was engaged in a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, and that the order was made by the said R. P. Goodwin, but was signed by George B. Cortelyou, Postmaster General, who had never heard nor considered any evidence bearing on the fact as to whether or not the plaintiff had been conducting a scheme or device for obtaining money through the mails by false or fraudulent pretenses, representations, or promises; that the order so made was what is usually known as a "fraud order," the bill setting up the terms and legal effect of the order; that plaintiff's business was largely conducted through the post office, and could not be conducted successfully without using the mail and postal facilities; that the defendant, as postmaster, was enforcing said order; that letters containing checks, drafts, money orders, and money, addressed to the plaintiff, had been detained, and were then being held in the post office at Dallas, and would within a few days be returned by the postmaster to the senders with the envelopes marked

"Fraudulent," the effect of all of which would be to destroy the business of the plaintiff.

An injunction was granted by the state judge. The defendant presented his petition to the United States Circuit Court for the Northern District of Texas, in which he described the suit which had been brought against him, and alleged that the suit for injunction seeks "to restrain him from performing his duties as the postmaster of the United States of America, at Dallas, Tex., to wit, his duty and duties under the laws and regulations of the Post Office Department of the United States of America, which said laws and regulations are a portion and a part of the revenue laws of the said United States government, and to prevent him, as aforesaid, from carrying into effect the lawful orders of the said George B. Cortelyou, Postmaster General of the United States, as aforesaid, which said orders were made under the laws of the United States of America; that all of the acts sought to be restrained and enjoined in the said suit are the acts and duties required of this petitioner as the said officer of the United States of America, and under color of his said office, and by authority of the said postal laws of the United States of America." The defendant concluded his petition with a prayer that the suit be removed from the state court to the Circuit Court. The cause having been removed to the Circuit Court, a motion was made by the plaintiff to remand it to the state court. The Circuit Court overruled this motion. Afterwards, a final decree was made, sustaining demurrers to the bill, and the bill was dismissed. The plaintiff appealed to this court. A further statement of the procedure in the cause appears in the opinion.

J. M. McCormick, for appellant.

Wm. H. Atwell, U. S. Atty., for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after making the foregoing statement of the case).

We first consider the assignment that the court erred in refusing to remand the cause to the state court. The petition beginning the suit in the state court shows that it was brought against the defendant "as the duly qualified and acting postmaster at Dallas, Tex." The relief sought is against certain official acts of the postmaster performed by him under the orders and directions of the Postmaster General. It is a suit against an officer of the United States, and the official character of the defendant appears from the plaintiff's petition. The first section of the act of August 13, 1888, confers jurisdiction on the Circuit Courts of the United States, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States. It is provided by the second section of the same act that any suit of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, may be removed by the defendant or the defendants therein to the Circuit Court of the United States for the proper district. Act Aug. 13, 1888, c. 866, 25 Stat. 433, 1 Rev. St. Supp. (2d Ed.) p. 611 [U. S. Comp. St. 1901, p. 508]: A suit against an officer of the United States for acts done in the performance of official duties is a case arising under the laws of the United States. Bachrack v. Norton, 132 U. S. 337, 10 Sup. Ct. 106, 33 L. Ed. 377; Sonnentheil

v. Christian Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492. The case was, therefore, clearly removable under this statute. Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; Eighmy v. Poucher (C. C.) 83 Fed. 855; New Orleans National Bank v. Merchant (C. C.) 18 Fed. 841; Black's Dillon on Removal of Causes, § 124. The proper procedure for removal under this act was for the defendant to file a petition in the suit in the state court, and to file a bond with surety, with condition for his entering in the Circuit Court on the 1st day of its next session a transcript of the record from the state court, and for the payment of costs that may be awarded by the Circuit Court if that court should hold that the suit was wrongfully removed. It does not appear from the record that the defendant filed any such petition or bond in the state court. The record shows that he made application to the federal court under section 643 of the Revised Statutes [U. S. Comp. St. 1901, p. 521] and under the provisions of that section obtained the removal of the cause. Although no petition was filed in the state court, that court, on receiving notice of the proceeding in the federal court to remove the cause, made the following order:

"It is ordered by the court that the above-styled and numbered cause be removed to said United States court. and the clerk is directed to transmit the filed papers, together with copies of all orders made by this court in said cause, or a transcript of the same, and together with a bill of all costs incurred in said cause in this court, duly certified. * * *"

Pursuant to this order of the state court, a transcript of the record in the case was duly filed in the Circuit Court. The plaintiff moved the Circuit Court to remand the case to the state court, contending that it appeared from the record that the cause was not removable under the provisions of section 643 of the Revised Statutes. The Circuit Court refused to grant this motion, and its refusal is assigned as error.

Section 643 of the Revised Statutes provides that:

"When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under, or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of such officer on account of any act done under color of his office, or of any such law, on account of any right, title or authority claimed by such officer, or other person under such law * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial in the Circuit Court," etc.

The cause was properly removable under this section if the postmaster can properly be called an "officer appointed under, or acting by authority of any revenue law of the United States." It is said in Black's Dillon on Removal of Causes, § 41, that "the post office laws of the United States are 'revenue laws,' within the meaning of this statute." In Warner v. Fowler, 4 Blatchf. 311, Fed. Cas. No. 17,182, a suit against a postmaster for an alleged wrongful refusal to deliver a letter to the plaintiff was held removable under this statute, the court deciding that the post office laws of the United States are "revenue" laws within its meaning. In Ward v. Congress Const. Co., 99 Fed. 598, 39 C. C. A. 669, it was held that a corporation, in the performance of a contract made with the Secretary of the Treasury for the build-

ing of an addition to a post office authorized by an act of Congress, is a person acting by authority of a revenue officer of the United States, given under color of his office; and a suit in the state court against the corporation to enjoin the building of such addition is removable into the Circuit Court of the United States, under Rev St. § 643. The court said: "The provision of section 643 for the removal of causes has been liberally construed, as, for manifest reasons, it should be," and Warner v. Fowler, supra, is quoted and approved. In United States v. James, 13 Blatchf. 207, Fed. Cas. No. 15,464, it was held that "while the post office laws are revenue laws, within the meaning of the statute cited, they are not laws for raising revenue, within the provision of the Constitution."

There is no decision of the Supreme Court decisive of the question as to whether this cause is removable under section 643. In Public Clearing House v. Coyne, 194 U. S. 497, 506, 24 Sup. Ct. 789, 48 L. Ed. 1092, the Supreme Court speaks of the Post Office Department as not being "a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice, are; but is a public function assumed and established by Congress for the general welfare, and, in most countries, its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a public and efficient method of taxation." United States v. Norton, 91 U. S. 566, 23 L. Ed. 454, is cited as an authority against the application of the statute to this case. It holds that the act entitled "An act to establish a postal money-order system," approved May 17, 1864, c. 87, 13 Stat. 76, is not a revenue law within the meaning of the act entitled "An act in addition to the act entitled 'An act for the punishment of certain crimes against the United States,'" approved March 26, 1804, c. 40, 2 Stat. 290. United States v. Hill, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, contains expressions which confine the phrase "revenue law," when used in connection with the jurisdiction of the United States courts, to laws imposing duties on imports or tonnage, or a law providing in terms for revenue; but the case is one in which the question before the court was whether a clerk of a court, not a United States officer, but a person appointed by a court independent of the executive department of the government, who was bound to pay his surplus earnings into the United States Treasury, was a revenue officer; and the question was decided in the negative.

The contention in behalf of the motion to remand is that section 643 relates only to laws providing in terms for revenue—laws traceable directly to the constitutional power granted to Congress to levy and collect taxes, duties, imposts, and excises, and that it has no application to laws passed under the authority conferred on Congress to establish post offices and post roads. Const. art. 1, § 8. Counsel for the defendant in error, in United States v. Bromley, 12 How. 88, 96, 13 L. Ed. 905, urged the same limitation upon the meaning of "revenue law," and pointed out that the constitutional source of power to pass

postal laws was separate and distinct from that to pass revenue laws. Responding to that contention, the court said:

"That the act which prescribes the offense charged is a revenue law, there would seem to be no doubt. In its title, it is declared to be an act to reduce the rates of postage, and for the prevention of frauds on the revenue of the Post Office Department. In its character and object it is a revenue law, as it acts upon the rates of postage and increases the revenue by prohibiting and punishing fraudulent acts which lessen it. Under the act of 1836, the revenue of the Post Office Department is paid into the Treasury. Revenue is the income of a state, and the revenue of the Post Office Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports."

This language strongly indicates that postal laws may be revenue laws within the meaning of section 643, but the expressions we have quoted from United States v. Hill, supra, may point to a different conclusion.

When the Circuit Court was moved to remand the case, the motion, we think, involved more than the mere question as to whether or not the cause was removable under section 643. When a case is removed from a state court to a Circuit Court, it should be remanded to the court from which it was removed whenever "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court. * * *" Act March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511]. It appears from the record that the case does substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court. The difficulty is as to the regularity of its removal. If a petition had been filed in the state court in due form, accompanied by the proper bond, and the transcript of the cause filed in the Circuit Court, the jurisdiction of the Circuit Court would have attached, although the state court had refused to make the proper order. Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354; Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 579, 16 Sup. Ct. 389, 40 L. Ed. 536. The record does not show the filing of a petition and the giving of a bond, but it does show that the state court made an order that the case be removed to the Circuit Court, and that the transcript was duly filed in the Circuit Court.

In Osgood v. Chicago D. & V. R. Co., 6 Biss. 330, Fed. Cas. No. 10,604, it was held by Drummond, Circuit Judge, that a case is to be remanded only "when it shall appear to the satisfaction of the federal court that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties have been improperly or collusively made, or joined, for the purpose of creating a case cognizable under the act. It is true that the act prescribes the manner in which the removal shall be made, and the directions that the law should be complied with. But the fifth section does not authorize the court to remand or dismiss the cause for the reason that it may appear that there was any irregularity in the means taken to procure the removal. The purpose obviously was, if the rec-

ord was filed in the federal court under the law, and the court could see that it had jurisdiction of the case, that it should retain it, notwithstanding there might be defects in the manner of removal."

In Ruckman v. Ruckman (C. C.) 1 Fed. 587, 591, the court said:

"The question in this court is not whether the counsel for the petitioners comprehends and assigns the true reasons for the removal, but whether the whole record reveals a case over which the court has jurisdiction. No matter how irregularly the petition brings up the suit, when it is here, the only question is whether it involves a controversy properly within the jurisdiction of the court. If it does, it will not be remanded because a mistake is made by the counsel of the petitioners in assigning grounds for the removal which prove to be untenable."

In Northern Pacific Terminal Company v. Lowenberg (C. C.) 18 Fed. 339, 343, Judge Deady said:

"Besides, the case having been brought here, the question upon the motion to remand is not whether there are any irregularities in the proceedings for removal, but whether on the face of the record it satisfactorily appears that the action does not involve a controversy within the jurisdiction of this court. That there is such a controversy in this case is too plain for argument; and therefore the right of the petitioners to have this cause remain within the jurisdiction of this tribunal for trial is clear beyond cavil or doubt."

In Dennis v. County of Alachua, 3 Woods, 683, Fed. Cas. No. 3,791, it was held that:

"When a cause is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects in the bond for removal, insufficiency of sureties thereon, or other irregularities which can be remedied or have not worked any prejudice to the opposite party."

In Woolridge v. McKenna (C. C.) 8 Fed. 650, 667, Judge Hammond said:

"There seems to be the recognition of a general principle that where a cause has been removed and falls within the act of Congress, it will not be remanded for irregularities which can be remedied and have worked no injury to the adverse party."

Where there is substantial doubt about the jurisdiction of the Circuit Court, it has been often held that it should be solved against the jurisdiction and that the cause should be remanded (State v. Bradley [C. C.] 26 Fed. 289, 18 Ency. Pldg. & Prac. p. 378, note 5, and cases there cited); but where there is no doubt about the case being one of which the Circuit Court has jurisdiction, and the only doubt is as to the regularity of the removal, or as to whether the application for removal has been made under the proper statute, the motion to remand should be overruled. We think the Circuit Court ruled correctly in refusing to remand the cause.

We now consider the assignment that the court erred in sustaining the demurrers to the bill. The record from the state court was filed in the Circuit Court on December 28, 1905. The respondent, David A. Robinson, on January 8, 1906, filed in the Circuit Court three demurrers to the whole bill, and an answer to the whole bill. Each demurrer and the answer is signed by respondent's solicitor, but no certificate of counsel nor affidavit of respondent is attached to the demurrers. The cause having been removed to the federal court, its further

progress was governed by the law of that court. Ex parte Fisk, 113 U. S. 713, 726, 5 Sup. Ct. 724, 28 L. Ed. 1117. The statute under which the application to remove the case was made provides that, after its removal it "shall proceed as a cause originally commenced in that court." Rev. St. U. S. § 643.

The practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts are made to conform as near as may be to the practice in the state courts. Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684]. The section of the statute just cited expressly excludes equity cases from its operation, and the exclusion is emphasized by the preceding section, which provides that the forms and modes of proceedings in suits of equity jurisdiction shall be according to the rules and usages which belong to courts of equity and to rules of court made in conformity to law. Rev. St. U. S. § 913 [U. S. Comp. St. 1901, p. 683]. While the practice in cases at law in the federal courts follows as near as may be that of the state in which a federal court is held, the practice and procedure in equity cases in the federal courts, being governed by federal law and uniform rules, is the same, no matter in which state the court is sitting. 1 Bates, Eq. Proc. § 20.

The thirty-first rule in equity provides that:

"No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact."

In National Bank v. Insurance Company, 104 U. S. 54, 26 L. Ed. 693, it was held that a plea that did not conform to this rule could be "disregarded on that account." In Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 576, 13 Sup. Ct. 936, 37 L. Ed. 853, the court said that:

"Inasmuch as the so-called demurrer was fatally defective in lacking the affidavit of defendant and certificate of counsel, required by rule 31, there was no error in disregarding it, and entering a decree pro confesso."

Referring to demurrers that did not conform to the rule, Judge Maxey said, in Preston v. Finley (C. C.) 72 Fed. 850, 854, "the demurrers, as such, cannot be regarded;" and in American S. & W. Co. v. Wire Drawers' & Die Makers Unions etc. (C. C.) 90 Fed. 598, Judge Hammond said, of such a demurrer, that "it must be wholly disregarded." See, also, Secor v. Singleton (C. C.) 9 Fed. 809.

In Brazoria County v. Youngstown Bridge Co., 80 Fed. 10, 25 C. C. A. 306, the irregularity in the demurrer was held waived by the complainants going to trial on it without objection. In that case there was an affidavit of counsel that the demurrer was not interposed for delay. Whether the affidavit of counsel would be received as a substitute for the affidavit of the defendant and the certificate of counsel, was mooted, but not decided; but it was held that the defect was waived. In the case at bar, there is no effort whatever to comply with the rule; and, besides, here, unlike the case just cited, the defendant has attached to his demurrer to the whole bill an answer to the whole bill. Foster says that, by setting the demurrer down for argu-

ment, any irregularity in filing it would probably be waived, "except the omission of the affidavit and certificate of counsel." 1 Foster's Fed. Prac. (3d Ed.) § 119. A defendant may demur to part of a bill and answer part of it (Equity rule 32), but he is not permitted to demur to the whole bill and at the same time answer the entire bill. When such pleadings are filed, the effect of the answer is to overrule or withdraw the demurrer, and the answer alone should be regarded. 1 Bates Fed. Eq. Proc. § 207; Story's Eq. Pldg. § 442; 6 Ency. Pldg. & Prac. p. 38, § 3. It was formerly the rule that an answer to any part of a bill demurred to would overrule the demurrer, even though the part answered was immaterial. 1 Daniell's Chan. Pldg. & Prac. (4th Ed.) 589. The severity of that rule, operating against a defendant who in framing his answer to part of the bill made it inadvertently extend to parts of the bill to which he had demurred, caused it to be abandoned in this country and in England.

The practice which now prevails is prescribed by Equity rule 37:

"No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

Construing this rule in Crescent City, etc., v. Butchers', etc. (C. C.) 12 Fed. 225, Pardee, Circuit Judge, said:

"We notice that with the demurrer to the whole bill and four separate pleas, each going to the whole bill, there is also filed an answer to the whole bill, in which all the matters averred in the pleas are again set forth. Under the equity rule 32, a defendant may demur to part of a bill, plead to part, and answer as to the residue. Under the equity rule 37, no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea. But we do not understand that there is any rule that allows a defendant to demur to the whole bill, plead to the whole bill, and answer to the whole bill at the same time. The effect of such pleading is that the plea is taken as waiving the demurrer, and the answer as waiving the plea."

In Huntington v. Laidley (C. C.) 79 Fed. 865, Goff, Circuit Judge, held that "a plea containing a full defense to the bill is waived by an answer which goes to the whole bill." And the learned judge held that rule 37 "only applies in cases where the demurrer or plea extends to only a part of the bill, and the answer is intended to cover the residue." We are aware of the fact that the rule was given a more extended application in Hayes v. Dayton (C. C.) 18 Blatchf. 425, 8 Fed. 702, but we think that the words of the rule, construed in connection with rule 32, prevents its application to cases where the defendant has both demurred to and answered the whole bill. There is, of course, no doubt, under the authorities, that the court below could have entirely disregarded the demurrer, and, if no answer had been filed, could have entered a decree pro confesso for the complainant. The answer being on file overruled the demurrer—even if it had complied with rule 31—and the plaintiff could have filed a replication and proceeded to take evidence under the rules. The case, however, was tried on the demurrer without objection, except that the plaintiff noted an exception to the ruling on the demurrer.

The question is, whether or not this court should notice on this appeal the fatal defect in the demurrer and its withdrawal, waiver, or overruling by the answer which was filed with it. The answers and demurrers were framed in accordance with the practice in the state courts of Texas, where the procedure in law cases and equity cases is the same. There are fundamental objections to such practice being adopted in federal courts, where equity cases and law cases are kept separate by law. We do not think the federal courts should permit the adoption of a state practice which involves an entire abandonment of the law of procedure in the federal courts of equity, even when solicitors fail to make objection. Congress has conferred power on the Supreme Court to make the equity rules we have quoted, and they have the force and effect of law. Rev. St. U. S. § 917 [U. S. Comp. St. 1901, p. 684]. They produce a uniformity in the equity practice that is very desirable. The rules we have cited are efficient factors in preventing frivolous demurrers being filed, and in preventing demurrers for delay. If the courts permit them to be entirely ignored, it would lead to a want of uniformity in the practice and to augmenting the evils the rules were intended to suppress and prevent. The departure from the proper procedure is so great in this case that we think it should not be permitted to pass unnoticed. It was error to sustain the demurrer and dismiss the bill.

The decree sustaining the demurrers and dismissing the bill is reversed, and the cause remanded, with instructions to entirely disregard the so-called demurrers, or to strike them from the file if motion be made for that purpose, and to proceed in the case in conformity with the usual procedure in equity.

MILLER v. TERRITORY OF OKLAHOMA (two cases).

(Circuit Court of Appeals, Eighth Circuit. December 13, 1906.)

Nos. 2,398, 2,470.

1. COURTS—CIRCUIT COURT OF APPEALS—CRIMINAL APPEALS—JURISDICTION.
Judiciary Act March 3, 1891, c. 517, § 15, 26 Stat. 830 [U. S. Comp. St. 1901, p. 554], provides that the Circuit Court of Appeals, in cases in which its judgment is final, shall have appellate jurisdiction to review judgments of the Supreme Courts of the several territories within their particular circuits, etc. Section 5, as amended by Act Cong. Jan. 20, 1897, c. 68, 29 Stat. 492 [U. S. Comp. St. 1901, p. 549], declares that appeals or writs of error may be taken from the District Courts or existing Circuit Courts direct to the Supreme Court in cases of conviction of a capital crime. Section 6 (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) provides that the Circuit Court of Appeals shall have appellate jurisdiction to review any final decision in a District Court or existing Circuit Courts in all cases other than those provided for in the preceding section, unless otherwise provided by law, and that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases arising under the criminal laws, except, etc. *Held*, that the Circuit Court of Appeals has jurisdiction on writ of error to review a conviction for grand

larceny, in violation of the laws of a territory, which has been affirmed by the Supreme Court of the territory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1101.

Jurisdiction of Circuit Court of Appeals in general, see notes to Law Ow Bew v. United States, 1 C. C. A. 6, and United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

2. CRIMINAL LAW—WRIT OF ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY.

An assignment that the court erred in not reversing a conviction on account of misconduct of the presiding judge in making prejudicial remarks, insinuations, etc., with reference to accused, his counsel, etc., as appeared from the record of the proceedings in the district court, was fatally defective for failure to point out in the record the alleged prejudicial remarks, rulings, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2956.]

3. SAME—EXCEPTIONS.

Where the printed record on a writ of error in a criminal case failed to disclose that any exception was saved to certain alleged objectionable conduct on the part of the trial judge, the objection could not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2665, 2667.]

4. WITNESSES—CROSS-EXAMINATION—INTEREST.

It was competent for the defense in a criminal prosecution, for the purpose of impairing the testimony of a witness for the territory, to show his interest by asking him if he had not contributed money to aid in the prosecution, and what his purpose was in so doing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1195.]

5. SAME.

Where an attorney was offered as a witness for the territory in a criminal case, it was competent for the defendant to show that the witness had received a retainer in the case to assist in the prosecution, and also to show in what capacity he was retained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1201.]

6. SAME—IMPEACHMENT.

A witness was asked if stolen property had not been found in his possession and if witness had not been forced to pay for the property. *Held*, that the question was inadmissible, even to affect the credibility of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1125, 1126.]

7. CRIMINAL LAW—WRIT OF ERROR—PREJUDICE.

In a prosecution for larceny, defendant was not prejudiced by certain questions asked a witness by the court concerning a conversation had between witness and defendant, in which witness told defendant that the matter could be fixed up by an explanation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3129, 3133.]

8. WITNESSES—CREDIBILITY—IMPEACHMENT.

In a prosecution for cattle theft, the credibility of a witness could not be impeached by proof that he had a "sweetheart" who was the niece of a fugitive from justice for murder, or that witness at times had consorted with persons reputed to have been charged with horse theft, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1125.]

9. CRIMINAL LAW—ERROR—PRESUMPTION—PREJUDICE.

Where an error is shown in a criminal case, it will be presumed to have been hurtful to the party against whom it has been committed, until it appears to have been rendered innocuous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3090–3099.]

10. LARCENY—DEFINITION.

Where a territorial statute defined larceny as a taking with a felonious intent to deprive the owner of the property taken, and with intent to appropriate the same to the use and benefit of the taker, an instruction authorizing a conviction if the property was taken by defendant with the felonious intent to deprive the owner thereof was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 191.]

In Error to the Supreme Court of the Territory of Oklahoma.

For opinion below, see 85 Pac. 239.

S. H. Harris (D. P. Marum, on the brief), for plaintiff in error.

W. O. Cromwell, Atty. Gen. (Don C. Smith, Asst. Atty. Gen., on the brief), for defendant in error.

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

PHILIPS, District Judge. The plaintiff in error (hereinafter for convenience designated as the defendant) was indicted, convicted, and sentenced to the penitentiary in the district court of Oklahoma Territory for the offense of grand larceny in stealing cattle, alleged to be the property of William Louthers. This judgment having been affirmed on appeal to the Supreme Court of the territory, the defendant sued out a writ of error from this court to have said judgment reviewed. The explanation of the two numbered cases is that the first writ of error was sued out from the Supreme Court of the Territory and attested by its clerk. To correct this a second writ of error was taken out in due form from this court, with the proper teste.

The jurisdiction of this court to review the decision of the Supreme Court of the territory is challenged by the Attorney General of the territory. The case of Folsom v. United States, 160 U. S. 121, 16 Sup. Ct. 222, 40 L. Ed. 363, was certified from this court to the Supreme Court to have determined the question as to whether the Circuit Court of Appeals had jurisdiction to review the decision of the Supreme Court of the territory of New Mexico affirming a judgment of the district court in a criminal proceeding, the punishment for which was imprisonment in the penitentiary. As such punishment brought the case within the definition of an infamous crime, as employed in section 5 of the act creating the Circuit Courts of Appeals of the United States, the Supreme Court answered the question submitted in the negative. Thereupon Congress, by Act Jan. 20, 1897, c. 68, 29 Stat. 492 [U. S. Comp. St. 1901, p. 549], amended the act establishing the Circuit Courts of Appeals by striking out the words "or otherwise infamous" from section 5 of the act; the purpose being to confer jurisdiction on the Courts of Appeal to review the decisions of the Supreme Court of the territory in criminal cases, including infamous crimes. In Ex parte Moran (C. C. A.) 144 Fed. 599, Judge Sanborn, speaking for the court, said:

"This court has the power to review in that way final decisions of the Supreme Court of Oklahoma in all cases in which the jurisdiction below is dependent upon the citizenship of the opposite parties to the suit, in all admiralty cases, in all cases arising under the patent laws, the revenue laws, and the bankruptcy laws, and in all cases arising under the criminal

laws except in cases of the conviction of a capital crime. [Authorities cited.] The fact may be noticed in passing that this court has the same jurisdiction by writ of error or appeal to review the judgments and decrees of the Supreme Court of Oklahoma that it has to review the judgments and decrees of the Circuit Courts of the United States within its circuit in which its judgments are final. Neither the Supreme Court nor this court has any jurisdiction to review in this way the judgments of the Supreme Court of Oklahoma in cases of a conviction of a capital crime."

The Supreme Court in New v. Oklahoma, 195 U. S. 252, 25 Sup. Ct. 68, 49 L. Ed. 182, has decided that writs of error from the Supreme Court of the United States to the Supreme Court of Oklahoma do not lie even in capital cases.

Counsel for the territory makes the contention that the jurisdiction of the Circuit Court of Appeals lies to review the decisions of the Supreme Court of the territory in criminal cases only where the United States is a party, and consequently where the criminal offense is denounced by federal statute, and not, as in this case, where the crime is proscribed by legislative act of the territory. In support of this proposition the case of Aztec Mining Company v. Ripley, 151 U. S. 79, 14 Sup. Ct. 236, 38 L. Ed. 80, is cited. It is true that in the opinion in that case the learned Chief Justice used the following language:

"By the fifteenth section of the judiciary act of March 3, 1891 (26 Stat. 830, c. 517 [U. S. Comp. St. 1901, p. 554]), the Circuit Courts of Appeals, in cases in which their judgments were made final by the act, were empowered to exercise appellate jurisdiction over the judgments, orders, or decrees of the Supreme Courts of the several territories; but as this case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, * * * it did not belong to either of the classes defined by section 6 of that act (26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), as cases in which the judgments or decrees of the Circuit Courts of Appeals should be final."

It is evident that the words "of the United States" were either a mere inadvertence or that it was intended to apply alone to patent or revenue laws. The structure of the clause in the statute is, "in all cases arising under the patent laws, under the revenue laws, and under the criminal laws." There is nothing in the language employed by the statute to indicate that a review would not apply to cases arising under the criminal laws of the territory, as well as those of the United States. All statutes enacted by the territorial government are under authority of the organic act; and decisions of the territorial courts, in the absence of some words of negation or manifest omission in the organic act, are reviewable either by the Supreme Court or by the United States Courts of Appeal; and such has been the practice on appeals and writs of error from the Indian and Oklahoma Territories since the creation of the Courts of Appeal.

Turning to the matters sought to be reviewed under this writ of error, they are largely directed to the alleged misconduct of the trial judge in the treatment accorded to counsel for the defendant and his witnesses, and to alleged improper statements made by the judge in the presence of the jury. It is to be confessed that in some respects the trial of the case was conducted in a disorderly manner. It partook too much of a personal altercation among the respective counsel, in which, at times, the court participated. But, after reading the con-

nection in which the matters complained of occurred, we are impressed with the fact that complaining counsel are not so blameless for the disagreeable incidents as to entitle them to cast the whole responsibility therefor upon the trial judge. It is a method sometimes resorted to, as reprehensible as it ought to be infrequent, that in defenses deemed possibly desperate, for counsel by their course of conduct to so annoy and exasperate the judge as to make him, now and then, forget the pedestal on which he sits, and by retaliation display an unjudicial temper and lose his equipoise, in the expectation that thereby he may be led into the commission of some reversible error. One of the surest methods for counsel to inspire a proper dignity on the part of the court and to obtain fair treatment is by their own respectful deportment and fairness to impress the court with a belief in their intellectual honesty and sincerity, rather than by persistent contention, contradiction, and wrangling with the court, and at times injecting improper matters into the trial, invite antagonism from the court and drive it from its propriety. To many of the unpleasant and reprehensible incidents of the trial complained of by counsel for defendant, the maxim might well be applied: "Communis error facit jus."

There were three attorneys engaged in the defense. Instead of the examination and cross-examination of the witnesses being conducted by one of them at a time, frequently all three interjected questions and objections, and when discussions arose in the progress of the trial the three would seem to be on their feet simultaneously, cross-firing at the opposing counsel and contending with the court. At times they would interrupt the court in the midst of a sentence being uttered by him, and, when reproved, the apology offered was after a fashion but to add to the offense. Had the court asserted its authority by commanding ruling and a determined adherence to orderly procedure, rather than by engaging in wrangling debate and recrimination, both jurors and spectators doubtless would have been better impressed with the fact that the courtroom is the sanctuary of justice, always calculated to promote calm consideration and an unbiased judgment.

Many of the assignments of error discussed in the argument and briefs are in such disregard of the rules of this court, for the lack of specifications and reference to where the incidents complained of may be found in the record, as to disentitle them to consideration. The following is an example:

"The court erred in not reversing the cause on account of the misconduct of the presiding judge in making prejudicial remarks and insinuations, orders and rulings with reference to the defendant, his counsel, witnesses and persons not connected with the cause, as appears from the record of the proceedings in said district court."

Thus leaving this court to search out through the record the instances sought to be reviewed.

Error is assigned to the action of the court in permitting reference by the prosecution, before the jury, to the fact that the defendant below did not testify on the preliminary hearing before the committing commissioner; but the printed record before us fails to show that any exception was saved to this objectionable conduct, and therefore it is unavailing to the defendant.

The same is true of the error assigned respecting the conduct of the court in threatening, in the presence of the jury, the arrest of one Hodges, a witness in the case, who, contrary to the order of the court for the separation of the witnesses during the taking of the testimony, had re-entered the courtroom. If there was any error committed by the court in this occurrence, no exception to its action is disclosed by this record.

In the cross-examination of the witness Downs, introduced on behalf of the prosecution, the following occurred:

"Q. You are the man that contributed to this prosecution?
"A. Yes, sir.
"Q. You contributed to this prosecution for the purpose—
"Mr. Dunn (the prosecutor): Now, if your honor please—
"By the Court: Oh, I know it, Mr. Dunn; I know it. I have asked counsel to try this case like men and like lawyers, but I can't get them to do it. It is apparent to everybody in this room, to the jury and everybody, that we are not trying this case like lawyers, or like men, or like anything else. I don't see how counsel can do it, or why they do it."

To this action of the court an exception was saved. It was certainly competent for the defense, for the purpose of impairing the force of this witness' testimony, to show his interest by asking him if he had not contributed money to aid in the prosecution, and what his purpose was in so doing. It is remarkable that the prosecution should have interposed and cut off the full answer. The contribution made by the witness may have been to engage the services of assistant counsel to aid in the prosecution, and his purpose may have been a commendable one in the advancement of the cause of public justice. These were matters for the consideration of the jury in weighing the motives of the witness and judging of the probity of his conduct and measuring the weight of his testimony. There was nothing immediately connected with this episode to warrant the reproof given by the court to defendant's counsel. As all error committed in the progress of a trial is presumptively hurtful to the party against whom it is committed, until it appears to be rendered innoxious, the defendant has just cause to complain of this action of the court as prejudicial.

The action of the trial court on the cross-examination of the witness Mountell by the defendant is criticised. It seems that the witness is a lawyer, who was present at the preliminary hearing before the commissioner, but did not testify therein. Since the preliminary hearing he has been employed to assist in the prosecution. Having gone upon the witness stand to testify in behalf of the territory touching certain inculpatory statements of the defendant, it was sought on cross-examination to make the witness, in effect, admit that he had accepted $250 to testify in the case. The court interposed with a reprimand for thus insulting the witness. As this case is to be remanded for a new trial, it is sufficient to say that it is competent for the defendant to show that the witness has received a retainer in the case to assist in the prosecution, and to show in what capacity he was so retained; but this, like everything else connected with a judicial inquiry and investigation, should be done decently and respectfully, by proper questions developing the facts, without counsel interjecting

the assertion imputing corruption on the part of the witness without proper foundation therefor.

Criticism is made of the action of the trial court while the witness Johnson, who was a deputy sheriff, was being cross-examined by defendant's counsel. The first gross offense against legal propriety and professional conduct was committed by counsel for the defendant. Questions were propounded to the witness in a manner to put words in his mouth which he did not utter; and the witness seems to have become frightened or embarrassed, at which the court reproved him for not speaking out and testifying. Thereat one of the counsel for the defendant bluntly asked the witness if stolen property had not been found in his possession not a great while ago; and, when the court started to say he would not permit this, the said counsel, in utter contempt of the court's interposition, continued, "in which you were forced to pay for the property." The court then observed:

"There is no reason here why this witness should be insulted because he comes on the witness stand. If Mr. Johnson stands convicted of any act, or accused of it in any manner that would make it competent, that, of course, would be allowed to be shown. Mr. Johnson, what do you mean when you told the defendant that it wasn't too late to fix this matter up with an explanation?"

The witness then proceeded to state the meaning of what he said in that connection, whereat the court said:

"You mean to state you meant to tell him, if there was an explanation that there was no crime in it, that would be the end of it?"

Thereupon one of counsel for defendant excepted to the question of the court, and another of counsel for defendant interposed by saying:

"His intentions were evident. You are taking the wrong view of what—
"By the Court: Did you intend to convey the idea to him that you in any way would be instrumental in fixing up the case?
"By Defendant's Counsel: Wait.
"A. No, sir."

One of the counsel objected to the evidence as incompetent, irrelevant, and immaterial, and another co-counsel said: "We desire to reserve our exceptions." The witness then said:

"Well, am I allowed to explain further in regard to that?
"By the Court: I understand what you have said. If you have any other explanation, you may state it."

Further colloquy and wrangling ensued between counsel and the court. It would be discredible to counsel's competency as lawyers to impute to them lack of knowledge of the inadmissibility of such evidence even to affect the credibility of the witness. See Glover v. United States (C. C. A.) 147 Fed. 426, recently decided by this court. As the question should have been excluded, and the explanation given by the witness was not even inculpatory, the question put to him by the court as to the effect of his meaning furnished no ground of error of which the defendant can be heard to complain.

On cross-examination by the prosecuting attorney of the witness George Hodges, an alleged accomplice of the defendant on trial, the

prosecuting attorney, over the objection of defendant, was permitted to interrogate the witness as to whether he did not have a "sweetheart" by the name of Chaplain, who stayed at a certain hotel where the witness boarded, and whether she was a niece of one Sam Green. This was followed up, against the protest of defendant's counsel, with the following question:

"He is a fugitive from justice, isn't he, charged with the murder of the sheriff of Custer county?"

The objection to this was at first sustained. Then there occurred the following:

"Q. She [the witness' sweetheart] is a sister of Bud Chaplain, who was a member of the Perkins gang, was she not?"

This was objected to; but, without ruling by the court, the prosecuting attorney followed with this question:

"Q. And who was a fugitive from justice from Woods county, is that true?"

The court at first sustained the objection to this question. After argument pro and con in the presence of the jury, in which the prosecuting counsel assumed that said Green and Chaplain and others were thieves or murderers and fugitives from justice, the court took a recess for consideration, after which it admitted the questions and required the witness to answer. He denied any knowledge that Chaplain was a fugitive from justice for cattle or horse stealing. He was then required to answer if he did not know that Chaplain was a member of the Perkins gang, which he denied, but in answer to further interrogation admitted that he knew Perkins and that he knew Sam Green. Then the question was renewed if he did not know that Green was a fugitive from justice for cattle stealing and murder, to which the witness answered that he did not know of his being a fugitive for cattle stealing, but he had heard that he was for murder. A similar inquiry was permitted as to whether the witness did not know a man by the name of Bishop, to which he answered that he did. The following then occurred:

"Q. Were you not pursued and chased by Mr. Bishop—
"By Mr. Noah (of counsel for defendant): Now, that is objected to.
"Q. And charged with larceny of his horses?
"By Mr. Noah: That is objected to as incompetent, irrelevant, and immaterial; not proper cross-examination.
"By Mr. Snoddy (another of defendant's counsel): There is no evidence that he was chased by somebody.
"By Mr. Noah: That would come under the rule which the courts lay down of persons convicted of a crime. That may be inquired into after conviction, but the conviction only works that.
"By the Court: That is the rule upon which the courts seem to be hopelessly divided. I don't know what our Supreme Court holds."

The court, after further colloquy, said:

"I believe I will sustain the objection to this particular question."

Counsel for the prosecution then passed to another matter:

"Q. Do you know Pete Whitehead?
"A. Yes, sir.

"Q. He also worked out there, when you did, with you, didn't he?
"A. No, sir.
"Q. You know that he is a fugitive from justice for stealing horses, don't you?
"A. I have heard—
(Here objection was interposed.)
"By the Court: I don't think it is competent unless you show the association.
"Q. Where did he stay?
"A. I never seen the man but a very few times in my life.
"Q. Didn't he stay there at Cooley's and at Mr. Lee Gray's ranch?
"A. No, sir; he never—"

This was, to say the least of it, an extraordinary proceeding. Even were it conceded that the credibility of a witness might be attacked because of his association with criminals, no foundation whatever was laid as a basis for the question. For aught that appears, the witness' sweetheart may have been as pure and spotless as the driven snow; and forsooth she might have been the niece of a fugitive from justice for stealing cattle or murder would not disentitle her to reap the reward of her own virtue or to enjoy the respect of good people. There was no proof offered whatever to sustain the imputation conveyed in the questions and the argument of counsel before the jury that Sam Green, Chaplain, and others were theives, or murderers, or fugitives from justice. They were not shown to be bad men, much less outlaws. An accused person might flee from arrest and yet be innocent. His flight would only be a circumstance to add to the sum of other inculpatory facts in evidence where he is on trial. The important and essential fact of guilt the prosecuting attorney was permitted by his questions to assume. The only conceivable purpose of such inquiry was to affect the credibility of the witness. The proper limitation placed upon such inquiry by the courts, recognizing an attack upon the character of a witness for gross immorality, is that it must pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth. In his treatise on Evidence (volume 2, pars. 923, 924), Mr. Wigmore, after asserting the better rule to be that the veracity of the witness is the only proper subject of inquiry, and, therefore, no question can arise as to admitting character for any other trait, says:

"But in jurisdictions where bad general character may be used, the question must also arise whether some other specific vice or group of vices is not as significant as bad general character in indicating a degeneration of the truth-telling capacity. One of the objections, indeed, urged against the use of bad general character, is that it necessarily brings in its train a number of consequential difficulties such as this. The better opinion, and the one usually reached, is that, in spite of logic's demands, policy requires that the line be drawn at bad general character, and that no specific quality other than that of veracity be considered."

It is certainly without authoritative precedent that a witness' credibility may be impeached by proof tending to show that he has at times consorted with persons reputed to be theives, and the like. If this

were the law, we apprehend few men who have stayed on cattle ranches in Oklahoma, among an indiscriminate lot of what is known as "cow boys," might safely go upon the witness stand without being subjected to just such an attack as was made upon the witness Hodges. Such license of attack upon witnesses would make the courtroom a terror to honest men, and would justify their flight from the summoning officer. The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should sometimes be placed, instead of imputing the reversal of convictions by the appellate courts to what is popularly termed "mere technicalities." The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.

In its charge to the jury, in defining what facts the jury should find to constitute the offense of larceny, the court in the last division of this submission said:

"That the property was taken by the defendant with the felonious intent to deprive the owner thereof."

The statute of Oklahoma adds to this definition the requirement that the caption must have been "with the intent to appropriate the same to his own use and benefit." The instruction, therefore, fell short of the statutory definition, and was erroneous.

Criticism is made in the brief of counsel for defendant upon other portions of the charge of the court to the jury, to the giving of which the record before us fails to show that any exceptions were taken, and, if the objections had been properly saved, the charge as a whole properly cured the alleged defect.

For the foregoing errors, the judgment of the Supreme Court of the territory must be reversed, and the cause remanded to the district court, with directions to set aside its judgment and the verdict, and grant a new trial.

EXCHANGE BANK et al. v. MOSS.*

SAME v. DAVIS.

(Circuit Court of Appeals, Eighth Circuit. November 26, 1906.)

Nos. 2,349, 2,358.

1. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.
It is not the duty of a court to reform a requested instruction and to cast out such parts as render it improper as a whole.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 660, 668, 671.]

2. CONSPIRACY—ACTION FOR CONSPIRACY TO DEFRAUD—EVIDENCE.
Where the petition in an action to recover money alleged to have been obtained from plaintiff by means of a conspiracy between defendant bank and others alleged that such conspiracy covered an extended period of time, both before and after the transaction in suit, and was organized for the purpose of swindling all strangers who could be induced to enter into similar transactions, evidence of acts of the cashier of defendant bank in respect to similar transactions while conducting the business of the bank, or declarations made by him to other persons similarly defrauded tending to show the bank's complicity, whether such acts and declarations were before or after the transaction in issue, are admissible to establish the guilty intent and motive of the bank in the transaction involved in the case on trial.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 25.]

Sanborn, Circuit Judge, dissenting.

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

W. R. Robertson (A. E. Spencer, on the briefs), for plaintiffs in error.

Hiram W. Currey (Willard W. Padgett, on the brief), for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. These writs of error challenge judgments obtained by Moss and Davis in actions brought by them against the Exchange Bank and James P. Stewart to recover money of which they were defrauded at Webb City, Mo., by means of pretended foot races. The actions were consolidated for purpose of trial upon the authority of section 921, Rev. St. [U. S. Comp. St. 1901, p. 685], and were tried to a jury, which returned verdicts in favor of the plaintiffs. The complaint of each plaintiff was that he was a victim of a conspiracy between the bank, Stewart, its cashier, Boatright, and others, to entice strangers to Webb City and there to swindle them out of their money by false and fraudulent pretenses. The cases are like that of Stewart v. Wright (decided at the last term) 147 Fed. 321. If there is any noteworthy difference, it consists in more ample evidence in the records before us of the complicity of the defendants. Therefore neither the facts in detail nor the principles of law applicable to the cases in their general aspects need be stated here.

Some matters, however, that occurred during the trial, require notice. Two witnesses, Mantey and Wright, who were also victims of

* Rehearing denied January 10, 1907.

the same swindling organization, described their transactions with the bank and narrated their conversations with James P. Stewart the cashier, and it appeared that their experiences were similar to those of the plaintiffs. The defrauding of the plaintiff Moss occurred April 14th, of plaintiff Davis on August 2d, of witness Mantey the latter part of August, and of witness Wright September 6th—all in the year 1901. It will thus be perceived that the witnesses were allowed to testify to matters that occurred after the transactions charged in the petitions. The defendant bank asked the court to instruct the jury "that none of the acts or declarations of any of its officers or agents, made after the transactions charged in either of these consolidated cases was closed, would bind these defendants." The instruction was refused, and each of the defendants excepted. It is to be noted that the instruction asked by the bank was directed against subsequent acts and declarations generally, without any indication of their character, and also that it was not so framed as to be for the protection of the bank alone, but extended to and embraced its codefendant, James P. Stewart. In one of its phases the instruction may be read as follows:

"None of the acts or declarations of James P. Stewart, the cashier of this bank, made after the transactions with the plaintiffs were closed, can bind him, the said Stewart."

As a proposition of law this is objectionable. As to Stewart personally, it was immaterial when his acts and declarations occurred, if they related to the transaction out of which his liability arose. For this reason, if for no other, the entire instruction was properly refused; for it is not the duty of a trial court to reform a requested instruction and to cast out such parts as render it improper as a whole. It is also to be observed that the instruction requested reads that the subsequent acts and declarations would not bind the defendants. If it was meant by this that such acts and declarations would not be conclusive, it is sufficient to say that the court instructed the jury that the evidence of subsequent transactions was received as tending to show the intent of the defendants in doing what they did. This was made plain at the trial. There was in the case no assertion or suggestion of a conclusive effect of any such acts or declarations. But it was probably the design of the instruction to challenge the admissibility against the bank for any purpose of testimony concerning other similar, but subsequent, transactions, such as those with Mantey and Wright. Assuming that to be a proper method of attacking evidence previously received during a trial, we are yet of the opinion that the trial court was right. It was alleged in the petitions that on the days the plaintiffs were defrauded, and for a long time prior and subsequent thereto, the bank, Stewart, Boatright, and others conspired and confederated for the purpose of swindling strangers who were enticed to the city where the bank was located. The charge was of an organized scheme to defraud all whom they could, that it was systematically pursued, and covered an extended period of time. The proof received was in harmony with the theory of the pleadings, and some of the victims who lost their money before the plaintiffs and others afterwards were allowed to

testify to the participation of the defendants and the similarity of the methods employed. It was important in the actions on trial to discover the motive of the defendants, whether what they did at the time in question was the casual conduct of innocent parties intent upon their own lawful affairs, or whether it was inspired by the fraudulent purpose of assisting in the spoliation. It is the settled rule that in such a case evidence of similar acts at other times is admissible. The theory of the rule is that a succession of like instances tends to illustrate the character of the act under investigation and to negative innocence in the particular case. It is especially applicable where there is a charge of complicity in a scheme to defraud pursued as a vocation. Such a scheme is naturally conceived in secrecy, and the part of the defendant may be the performance of some act which furthers the accomplishment of the unlawful design, but which, when isolated from that which preceded and followed, may bear the aspect of innocence. Yet proof of a recurrence of similar acts in other cases where like frauds were perpetrated may be persuasive proof of a guilty purpose and so disclose the true character of the whole. The rule applies as well to corporations as to individuals, and therefore the acts and conduct of a corporation in collateral instances that may be shown in evidence must necessarily be the acts and conduct of its officers and agents in the course of the corporate business and of their employment. A corporation can speak and act in no other way.

In the application of the rule there is no distinction between those acts that were committed before and those that were committed after the one involved in the case on trial. The latter may be as significant of the intent of the defendant in the particular case as the former, and that is the quality which justifies the admission of the evidence. It is sometimes said that the collateral instances, evidence of which is admissible, are those that occurred at or about the time of the one in question, yet in practice the proximity in point of time is largely left to the discretion of the trial court. The same is true of the degree of similarity. There are cases in which such evidence was held admissible, though it related to acts preceding the one in question by several years. As was observed by the Circuit Court of Appeals of the Sixth Circuit in Mudsill Min. Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163:

"Remoteness in point of time may weaken their evidential value, but will not justify exclusion."

The doctrine announced is well illustrated in the following cases:

In Wood v. United States, 16 Pet. 342, 10 L. Ed. 987, there was a question whether fraud had been practiced upon the customs revenue law by undervaluing importations. Evidence was received of other similar undervaluations, some of which occurred before and others after those directly involved. Concerning the general rule, Mr. Justice Story, in delivering the opinion of the court, said:

"The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judg-

ment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but, when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

And of the specific objection to the evidence of the later occurrences he said:

"The other objection has as little foundation; for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party as fraud would be in the last importation from prior fraudulent importations. In each case the quo animo is in question, and the presumption of fraudulent intention may equally arise and equally prevail."

Butler v. Watkins, 13 Wall. 456, 20 L. Ed. 629: Butler sued Watkins and an English company of which he was managing agent to recover damages for fraudulently pretending in a series of negotiations that the company would conclude an arrangement for the manufacture and sale of certain articles under a patent which Butler held; the real purpose, as alleged, being to keep him by protracted negotiations from beneficial use of his invention during the season. No contract was concluded between the parties, and Butler lost the season. The charge in the petition was not upon contract, but for fraud in leading plaintiff to believe that a contract would be made. The defendants prevailed in the trial court. The jury were charged that if the corporation never gave any authority to Watkins to assent in its behalf and in its name to the proposal or to the draft of agreement submitted by Butler, and never sanctioned the same as a corporate act, the suit could not be maintained against it. The Supreme Court said, however, that, if it was meant by this that no suit upon the contract could be maintained, the instruction was correct; but it could not have been so understood by the jury, as no such question was before them. The court observed:

"It does not follow, because the corporation never authorized or sanctioned a contract, that they may not be responsible for such a fraud as was alleged in the petition."

At the trial evidence offered by the plaintiff of a similar deceit practiced by Watkins and his company was rejected. This was held to be error. The Supreme Court said:

"Deceit in effecting such a purpose lay at the basis of the action. But how can such a purpose be shown when it has not been avowed? Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time and in relation to a like subject, was actuated by the same spirit. If, therefore, it be true that in the spring or early summer of 1868 the defendant had similar negotiations with Walley respecting his cotton tie, and conducted towards him deceitfully in order to keep his tie out of the market that year, the fact tends to show that in their conduct toward the plaintiff there was the same animus, and that they had the same object in view. That the evidence offered was admissible for that purpose is abundantly proved by the authorities."

The general rule also found expression in Lincoln v. Claflin, 7 Wall. 132, 19 L. Ed. 106, a case of fraudulently obtaining plaintiff's property through combination and prearrangement upon false and fraudulent representations; in Castle v. Bullard, 23 How. 172, 16 L. Ed. 424, where commission merchants were charged with fraudulently selling plaintiff's property entrusted to them to irresponsible parties; and in Insurance Company v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, where the question was whether a life insurance policy secured at the instance of an assignee was with intent on his part to cause the death of the assured. In all of these cases proof of similar conduct at other times was admitted. In Moore v. United States, 150 U. S. 57, 60, 14 Sup. Ct. 26, 37 L. Ed. 996, the court held that where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.

In Dow v. United States, 27 C. C. A. 140, 82 Fed. 904, officers of a national bank and a depositor were charged with willful misapplication of funds with intent to injure and defraud the bank. Evidence of prior transactions was received. The court held that, where the issues involved the intent with which certain acts were done, a trial court is justified in giving a reasonably wide latitude to the introduction of evidence tending to show it.

Bacon v. United States, 38 C. C. A. 37, 97 Fed. 35: An officer of a national bank was charged with making a false report of its condition, with intent to injure and defraud the bank and to deceive any agent who might be appointed by the comptroller to examine its affairs. Other reports containing false statements made during the preceding 18 months and testimony that his attention was directed to them 4 months before the commission of the act charged was held by this court to be admissible on the question of defendant's fraudulent purpose.

In Mudsill Min. Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163, there was a suit to rescind the sale of a silver mine on the ground of fraud. It was charged that samples of ore taken from the mine had been "salted" to induce complainant to purchase. Evidence was admitted to show that defendant had "salted" samples used in prior negotiations with other persons for the sale of the same mine. One of these instances occurred about three years before.

Penn. Mut. Life Ins. Co. v. Trust Co., 19 C. C. A. 286, 72 Fed. 413, 38 L. R. A. 33: Upon the question of intent with which an untrue answer in an application for insurance was made, it was held that evidence of similar answers in other applications made within three months thereafter was competent. The court said:

"But it is suggested that the fact that the instances sought to be proven were subsequent to the instance in issue destroys their relevancy, because the fraudulent intent present in them might have been formed after an innocent mistake. This possibility, of course, affects the probative force of these

subsequent instances to show fraud; but we do not think it makes them inadmissible."

In Spurr v. United States, 31 C. C. A. 202, 87 Fed. 701, the collateral transactions of which evidence was received to show defendant's intent in certifying certain checks as a bank officer extended back more than six years. It was said:

"The objection that the collateral transactions were too remote is not tenable. It goes only to the weight of the testimony. The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission is largely discretionary with the court."

Complaint is also made of the admission of the testimony of other witnesses than Mantey and Wright upon the same grounds. The dates of the occurrences which some of them related as set forth in the brief of counsel do not correspond with the dates in the record; but, assuming that he is correct, the contentions are disposed of by what has already been said.

It is contended that the trial court erred in permitting to be read in evidence the cross-examination of Joseph C. Stewart, the president of defendant bank, as contained in a bill of exceptions in another case of the same character previously tried in a state court. It was admitted that the document was the bill of exceptions. The part sought to be read was proved to be a true transcript of the original stenographic notes of the cross-examination of Joseph C. Stewart. This was shown by a witness who was the official stenographer at the time and who was prepared to read from his notes. Defendant's counsel said he made no point that the reading should be from the notes, instead of from the transcript. The objection was to the cross-examination as a whole. Joseph C. Stewart was at the time a defendant in the cases then on trial, though afterwards discharged by the court at the close of the evidence. We see no error in this.

The remaining assignments of error do not require special mention. Some are disposed of by the opinion in Stewart v. Wright (C. C. A.) 147 Fed. 321, and such of the others as are set forth, identified, and discussed in accordance with the rules have been examined and found untenable.

Affirmed.

SANBORN, Circuit Judge (dissenting). The plaintiffs in these cases, as did the plaintiff in Stewart v. Wright (C. C. A.) 147 Fed. 321, have recovered judgments for moneys they lost in gambling transactions which involved their own moral turpitude, which were violative of the general laws of public policy of the nation and state, and in which they knowingly engaged for the purpose of defrauding others. For the reasons stated in my dissenting opinion in that case, I am unable to concur in the affirmance of these judgments. I think they should be reversed.

CLEAGE v. LAIDLEY et al.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1906.)

No. 2,413.

1. BANKRUPTCY—INVOLUNTARY BANKRUPT—NATURAL PERSON NOT ENGAGED IN MANUFACTURING OR TRADING MAY BE.

A natural person may be adjudged an involuntary bankrupt, although he is not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits." The quoted clause qualifies "any corporation" only. U. S. Comp. St. 1901, p. 3423, § 4b, 30 Stat. 547, c. 541, § 4b.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 40.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

2. GAMING—WAGERS—CONTRACTS FOR FUTURE DELIVERY VALID—INTENTION OF PARTIES TO SETTLE BETWEEN THEMSELVES ON DIFFERENCES MAKES WAGERS AND VOID.

Contracts for the purchase and sale for future delivery of grain or other personal property are lawful and valid. But the intention of the parties to such a contract to discharge their obligations under it by the payment by one of the parties to the other of the difference between the contract price and the market price of the commodity sold, and never to make or accept any delivery, renders the agreement a wager and makes it void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 22, 25.]

3. SAME—INTENTION TO SELL CONTRACT BEFORE TIME OF PERFORMANCE DOES NOT AVOID.

A sale of a contract for future delivery, or of rights under it, before the time of delivery, is not unlawful. An intention by the parties to such a contract to sell it, or to sell their rights under it before the day of delivery, so that they will not deliver or receive any of the contracted commodity does not make the contract a wager nor avoid it. Ponder v. Jerome Hill Cotton Co., 40 C. C. A. 416, 420, 100 Fed. 373, 377.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 22.]

4. SAME—INTENTION TO SETTLE BY SET-OFF AND RINGING OFF DOES NOT MAKE CONTRACT WAGER NOR AVOID IT.

The settlement of the obligations of such contracts by set-off and by ringing off and by paying the differences according to the rules and practice of the Board of Trade of Chicago is not unlawful. The intention of the parties to such contracts to discharge their obligations under them as far as possible by set-off and by ringing off in this way, and to receive or to deliver only that portion of the contracted commodities for which they may be unable to settle in that way, is not illegal, and does not render the contracts or transactions wagers or void. Board of Trade v. Christie Grain & Stock Co., 25 Sup. Ct. 637, 198 U. S. 236, 248, 249, 49 L. Ed. 1031.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 22.]

5. EVIDENCE—PROOF OF WRONG TO AVOID CONTRACTS MUST BE CLEAR—FACTS—CONCLUSION.

The legal presumption is that parties to contracts valid on their faces intend in good faith to perform them. One who would avoid his contracts and escape their obligations by his own wrong should establish it by clear proof. A speculator dealt in about 14,000,000 bushels of grain, and less than 2 per cent. of it was delivered. He made contracts valid on their faces for the purchase of grain for future delivery through brokers who were members, respectively, of the Board of Trade of Chicago or of the Merchants' Exchange of St. Louis and became indebted to them for balances of account. He testified that he did not intend to deliver or to receive any grain under his contracts unless forced to do so in order to prevent his contracts from being closed out under the rules of the

board or the exchange. *Held*, this evidence did not establish an illegal intention, because it did not disclose a purpose to settle the obligations of his contracts by paying to, or receiving from, the other parties thereto the differences between the contract prices and the market prices at the times of delivery, but it was consonant with an intention to settle the obligations of his contracts as far as possible by set-off and by ringing off and by the payment of differences in accordance with the rules of the board and to deliver and receive that portion of the contracted grain for which he could not thus settle, and this was not an unlawful intention, and did not render the transactions wagers or void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 84.]

6. INSOLVENCY—EVIDENCE—SUFFICIENCY.

Proof that one had property of the value of only about $50 and that he owed more than $25,000 in July, and that he paid no part of this indebtedness during the succeeding four months, is sufficient evidence that he was insolvent in the following October and December. A condition of insolvency is presumed to continue as long as such conditions usually continue under similar circumstances.

(Syllabus by the Court.)

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

Chester H. Krum, for appellant.

Richard A. Jones (Nathan Frank and David W. Voyles, on the brief), for appellees.

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

SANBORN, Circuit Judge. T. A. Cleage, Jr., was adjudged a bankrupt upon the petitions of W. H. Laidley, Thomas E. Price, and the W. C. Lamping Grain Company, upon the ground that, while insolvent and within four months before the filing of the petition against him, he paid to the C. H. Albers Commission Company, one of his creditors, $3,000, and thereby preferred it. This adjudication is assailed because, as counsel for the defendant insists, he was a speculator in grain, and was not engaged in trading or in mercantile pursuits, because he was not indebted to any of these alleged creditors for the reason that their claims are founded upon transactions with him in the purchase and sale of grain wherein he never intended to deliver or to receive the articles which he bought or sold, but meant to settle his contracts by the payment or the receipt of the differences between the contract prices and the market prices at the times of the performance of the contracts, and because he was not insolvent when he made the payments to the Albers Commission Company. The bankruptcy law of 1898 reads:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." 30 Stat. c. 541, § 4b, p. 547, 3 U. S. Comp. St. 1901, p. 3423, § 4b.

The clause "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" is limited in its qualifying effect to the words "any corporation." Any unincorporated company may be adjudged an involuntary bankrupt, although it is not engaged in manufacturing or trading, and is engaged chiefly in farming or in the tillage of the soil, and any natural person who is not a wage-earner or engaged chiefly in farming or the tillage of the soil may be adjudged an involuntary bankrupt, although he is not "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits." Cleage was not a wage-earner or a person engaged chiefly in farming or the tillage of the soil, and he was therefore liable to an adjudication as an involuntary bankrupt whether or not he was principally engaged in manufacturing, trading, or any other pursuit. In re Seaboard Fire-Underwriters (D. C.) 137 Fed. 987, 988; In re Taylor, 42 C. C. A. 1, 3, 102 Fed. 728, 730; In re Lake Jackson Sugar Co. (D. C.) 129 Fed. 640, 642; Lovelands' Law & Proceedings in Bankruptcy, p. 142.

The creditors whose claims are challenged were brokers who bought and sold grain for future delivery for the defendant, Cleage, either on the Board of Trade of Chicago or upon the Merchants' Exchange of St. Louis, and their claims are for amounts which they paid for the defendant in excess of the amounts which they received for him in the settlement or performance of contracts which they made or assumed on his behalf, and also for expenses, commissions, and interest. There is no doubt that the defendant owes these balances unless the transactions from which they sprang were illegal and Cleage's contracts were void for the reason that he did not intend to receive the grain he purchased nor to deliver the grain he sold, but to settle his obligations by the payment of differences.

Before entering upon the discussion of this question under the evidence, we lay aside certain purchases and sales of puts and calls, privileges, or options to deliver or to take grain at specified prices which appear in some of the accounts, because the master and the court below eliminated these from the claims allowed and held that such purchases and sales were wagers. The claims of the petitioners and of the Albers Commission Company which were sustained are for balances of moneys expended by the brokers above the amounts they received in the settlement or performance of contracts for the purchase and sale of grain for future delivery, which the brokers had made for the defendant by his direction upon the Board of Trade or the Merchants' Exchange. These contracts were not options, but by their terms complete agreements of both parties, of the one to buy and to take, and of the other to sell and to deliver, the commodity. The only option contained in them was that the seller had the right to select the day in the future month in which the delivery was to be made when that should be done. The transactions of the defendant with these four brokers were, in all respects material to the question to be determined, of the same character. Each of the brokers was a member either of the Chicago Board of Trade or of the Merchants' Exchange of St. Louis, and was governed by its rules which were

known to the defendant. Cleage deposited with the broker a sum of money termed a "margin" to secure the latter against any loss that might be occasioned by the fluctuations of the market price of the commodities in which the defendant dealt. Cleage directed the broker to buy or to sell grain to be delivered in some future month. The broker purchased of, or sold to, another broker as directed by Cleage upon the board or the exchange in accordance with its rules, which forbade dealing in differences on the fluctuations of the market without a bona fide purchase and sale of the article for an actual delivery. The brokers who were parties to these purchases and sales made written contracts in their own names whereby they agreed that one would buy and receive and the other would sell and deliver in the future month specified the grain which the defendant ordered his broker to buy or to sell. These contracts were in writing, were signed by the brokers, and bound them and the defendant, the undisclosed principal who ordered them, unless they were rendered void by the unlawful intent of the defendant. As soon as they were made and as often as any sale or substitution or settlement or modification of any of them was made, the defendant was notified and he ratified them.

The rules of the Board of Trade and of the St. Louis Exchange were such that, where one had bought and had also sold large quantities of grain upon the board or upon the exchange to be delivered in a certain future month, these purchases and sales might be set off against each other so that he would be required to pay the difference in the price of the grain thus set off and to deliver or receive only that portion of the grain which was not thus set off. This was accomplished in two ways, by the direct method and by ringing off. In Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 247, 25 Sup. Ct. 637, 49 L. Ed. 1031, Mr. Justice Holmes describes these methods in this way:

"The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time against contracts to sell a like amount at the same time, and paying the difference of price in cash at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set off against each other by eliminating those between—as, if A. has sold to B. 5,000 bushels of May wheat, and B. has sold the same amount to C., and C. to D. and D. to A. Substituting D. for B. by novation, A.'s sale can be set off against his purchase, on simply paying the difference in price."

The only effect of the use of these methods is to avoid the useless expense and trouble of the physical delivery of the grain, and still to preserve the legal rights and remedies of the parties. If A. has sold to B. 5,000 bushels of grain at 75 cents per bushel to be delivered on a certain day, and B. has sold to A. the same quantity at 74 cents per bushel to be delivered on the same day, it is evident that the legal, financial, and actual result is the same whether A. delivers the grain to B., B. pays 75 cents per bushel for it to A. and delivers it back to A., who pays to B. 74 cents per bushel for it, or they set off the two contracts and B. pays to A. the difference in price or 1 cent per bushel. In either event, the grain ultimately remains in A.'s posses-

sion, and he gets one cent per bushel from B. and no more. The setting off of the contracts has all the effects of a delivery of the grain. The same thing is true of a ring settlement. This method is more complex, but, if it is followed carefully through, it will be found that the results are the same whether the contracts are all specifically performed by actual delivery of the grain according to the terms of each contract or they are settled by ringing them off. There is a slight difference in the rules of the Board of Trade of Chicago and of the Merchants' Exchange of St. Louis. The rules of the former provide for settlements by ringing off, while the rules of the latter provide a method of accomplishing the same result in a slightly different way. As the difference is immaterial the indirect method of settling will be termed "ringing off" in this opinion.

The defendant was operating through his brokers under these rules, and was trying to run a corner. He bought through his brokers during the years 1902 and 1903 immense quantities of grain for future delivery amounting to about 14,000,000 bushels, and he sold nearly as much as he bought, so that more than 98 per cent. of his contracts were settled by set-offs and by ringing off without any actual delivery of grain. All the transactions which the defendant had with Laidley were disposed of in this way, and there remained a balance of $3,650 due from him to Laidley on account of the payments the latter had made of differences upon contracts thus set off, commissions, expenses, etc., for which he gave to Laidley his promissory note. Through the Lamping Grain Company he bought about 3,000,000 bushels of grain for future delivery. Most of this grain was sold or other grain was sold to offset it, but 50,000 bushels of wheat were delivered to the Lamping Company under the defendant's contracts in July, 1903, for which that company was compelled to pay the contract price, and in July, 1903, there was due to it on account of these transactions $3,922.97. He was also indebted in July, 1903, to the petitioner, Thomas E. Price, in the sum of $18,235.85 on account of similar transactions. In October, 1903, he owed C. H. Albers Commission Company upon a like account a debt of several thousand dollars, and he paid thereon $2,000 in October and $1,000 in December.

Under the rules of the board and of the exchange, when one fails upon the delivery day to take and pay for the grain which he has purchased under a contract which has not been settled by set-off or by ringing off, all his trades are closed up and thrown upon the market. Cleage had no elevator or warehouse, and he testified that he did not intend to receive any of the grain he bought, but intended to settle on differences. On cross-examination he said:

"I expected to have to take some of this corn or wheat, as the case might be, but I would only take that amount that was forced on me in order to keep my trades from being thrown over, as I knew very well that if I failed to take cash wheat or corn that they delivered to me that my contracts would all be closed up and thrown on the market."

Under the common law and under the statutes of Illinois a contract for the sale for future delivery of grain or other commodities, the parties to which intend that the goods shall not be delivered, and that the obligation of the contract shall be discharged by the payment

of one party to it to the other of the difference between the contract price and the market price of the goods at the date fixed for their delivery, is void, because the contract evidences a wager. Irwin v. Williar, 110 U. S. 499, 508, 4 Sup. Ct. 160, 28 L. Ed. 225; Embrey v. Jemison, 131 U. S. 336, 345, 9 Sup. Ct. 776, 33 L. Ed. 172; Bibb v. Allen, 149 U. S. 481, 492, 13 Sup. Ct. 950, 37 L. Ed. 819; Ponder v. Jerome Hill Cotton Co., 40 C. C. A. 416, 419, 100 Fed. 373, 376; Pixley v. Boynton, 79 Ill. 351. And under the statutes and decisions of the state of Missouri such a contract is void if either of the parties to it has such an intention. Rev. St. Mo. 1889, §§ 3837, 3838; Connor v. Black, 132 Mo. 150, 33 S. W. 783; Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 527, 61 S. W. 617. In this state of the evidence and of the law the master found, and the court below affirmed his finding, that neither the brokers nor the defendant ever had such an intention in the transactions which are the subject of this litigation, and this finding is assigned as error. So far as it concerns the intention of the brokers, it is supported by their testimony and by the fact that they received and paid for several thousand bushels of grain which were delivered to them upon contracts which they had made for the defendant upon his orders. But counsel insist that the testimony of the defendant, the immense quantities of grain which he bought and sold, the small percentage of it actually delivered and the public policy of the nation to suppress wagers establish his illegal purpose, convey notice of it to his brokers, and avoid his obligations to pay them for the money which they advanced on his behalf and the commissions they sought to earn. Let us see. He testified that he did not intend to receive the grain which he bought, but that he intended to take and pay for that portion which was forced upon him for the reason that, if he did not do so, all his contracts would be closed. What is the true signification of this testimony in the light of the rules of the board and of the exchange and of the practice of settlement by set-off and by ringing off, to which attention has been called? It is that he intended to sell so many of his contracts of purchase and so much other grain that all his contracts of purchase would be either sold or discharged by set-off or by ringing off, so that, when the times of delivery came, he would be under no obligation to receive. This was not an unlawful intention, and it did not avoid his obligations under the late decision of the Supreme Court. "Set-off" says Mr. Justice Holmes in Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, at page 248, 25 Sup. Ct. 637, at page 639 (49 L. Ed. 1031), "has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small. The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and, if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between

the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. 'Hedging,' for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired."

In other words, contracts for future delivery made with the intention of settling them by paying to the other parties to the contracts the difference between the contract prices and the market prices at the times of delivery are wagers and are void. But contracts for future delivery made with the intention of settling them by set-off or by ringing off and by the payment of differences in accordance with the rules and practice of the Board of Trade are valid and enforceable agreements under this decision.

Nor does the fact that the defendant dealt in 14,000,000 bushels of grain, and that the contracts for more than 98 per cent. of this property were settled by set-off or by ringing off and by the payment of differences, demonstrate an illegal intention. Since the intention to settle in this way is not unlawful, the fact that contracts were so settled cannot evidence an illegal purpose. "In the view which we take," says the Supreme Court, "the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession; the less being needed the more rapid the circulation is." Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031.

It is the public policy of the United States to suppress wagers, but it is also its policy to enforce the obligations of valid contracts, and one who would avoid his agreements and escape his obligations by his own wrong should be required to establish it by clear and convincing proof. Contracts for the future delivery of grain and other personal property are lawful and valid. The legal presumption is that the parties who make them intend to perform them, and the burden is on him who avers that the illegal intention of one or more of these parties has made them void to establish his allegation by plenary proof. Clews v. Jamieson, 182 U. S. 461, 489, 21 Sup. Ct. 845, 45 L. Ed. 1183; Pixley v. Boynton, 79 Ill. 351. An intention by one or both of the parties to sell such an agreement, or their rights

under it, before the time of delivery, does not avoid it. Parties have the same right to buy contracts for the future delivery of personal property with the intention of selling them that they have to buy the property with such an intention. Ponder v. Jerome Hill Cotton Co., 40 C. C. A. 416, 420, 100 Fed. 373, 377. An intention to discharge a contract for the future delivery of personal property by set-off or by ringing off under the rules and practice of the Board of Trade and by the payment of differences is not illegal, and does not render the agreement void. The contracts which form the foundation of the claims of the brokers which are here in question were made and ratified by the defendant. They were legal contracts per se. There was no evidence that either the defendant or the brokers intended to settle them without the delivery of any grain by the payment to, or receipt from the other parties to the agreements of the difference between the contract prices and the market prices at the times of performance. The intention not to receive grain unless forced to do so to protect his contracts to which the defendant testified is consonant with the lawful intention to sell like quantities of grain and to settle his obligations as far as possible by set-offs and by the use of rings, so that he would be obligated to receive but little or none of the commodities. From the lawful contracts the legal presumption arose that the parties thereto intended in good faith to perform them. It was the opinion of the master and of the court below that this presumption was not overcome by the evidence. Their opinion raises a strong presumption in support of this conclusion. Where the court below and its master have considered a question and made a finding on conflicting evidence, their conclusion is presumptively correct, and it ought not to be disturbed unless an obvious error has intervened in the application of the law or some serious mistake has been made in the consideration of the facts. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Stearns-Roger Mfg. Co. v. Brown, 52 C. C. A. 559, 563, 114 Fed. 939, 943; Dodge v. Norlin, 66 C. C. A. 425, 433, 133 Fed. 363, 371. A careful review of the evidence in this case and a thoughtful consideration of the law applicable to it has failed to convince that there was any mistake in the finding of the master and of the court below that neither the defendant nor the brokers had any illegal intent in the making or in the performing of the contracts upon which the claims of these brokers rest. Our conclusion is that they constitute just obligations of the defendant, and that the payment of the $3,000 to the Albers Commission Company wrought a voidable preference, and was an act of bankruptcy.

In reaching this conclusion the claim of counsel for the defendant that there was no competent evidence of insolvency has not been overlooked. It is true that there was no evidence of the amount of the assets of the defendant at the times when the payments were made to the Albers Commission Company in October and November, 1903. But it is also true that the defendant admitted in July of that year that he was "broke," and that he had no property except the furniture in his offices, which was not worth more than $50. There was uncontradicted evidence that he owed the petitioners more than $25,000, and that

he had never paid any part of these debts. It may be that a state of insolvency once proved is not presumed to continue forever, but it is presumed to continue as long as such a state of affairs usually continues under similar circumstances. A man who has property of the value of only $50 and who owes over $25,000 in July, which he does not pay, does not usually accumulate assets worth more than $25,000 by the next December, and there was no mistake in the finding of the court that the defendant's poverty in July had not turned into wealth in December.

The findings of the master and of the court are sustained by the evidence, the facts warrant the adjudication, and the decree below is affirmed.

FRANCISCO v. CHICAGO & A. R. CO.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1906.)

No. 2,225.

1. APPEAL AND ERROR—REQUESTED JUDGMENT OF NONSUIT NOT REVIEWABLE.
No writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit or dismissal rendered in a national court at his request or with his consent. Such a judgment, however, rendered on the motion of the defendant and against the objection and the protest of the plaintiff is reviewable at the latter's instance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 717–723, 883.]

2. SAME—CALLING AN INVITED NONSUIT "INVOLUNTARY" IS FUTILE—FACTS—CONCLUSION.
At the close of a trial the defendant moved the court to instruct the jury to return a verdict in its favor, and its motion was granted. But before the instruction was given the plaintiff asked, and was granted, leave by the court to take an involuntary nonsuit, and a judgment was rendered accordingly. *Held*, the nonsuit was entered with the consent and at the request of the plaintiff, and no writ of error could be maintained at his suit to review it. Describing it by a false epithet did not change its character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 883.]

3. COURTS—APPEAL AND ERROR—ACT OF CONFORMITY (REV. ST. § 914) INAPPLICABLE TO APPELLATE COURTS AND PROCEEDINGS FOR REVIEW.
The act of conformity (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]) has no application to the practice or proceedings of appellate courts or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to secure a review of the judgments or decrees of the Circuit or District Courts. Its effect is limited to the practice and proceedings in the trial courts to secure their judgments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 914.]

4. SAME—POWER AND PRACTICE OF NATIONAL APPELLATE COURTS UNAFFECTED BY STATUTES OF STATES OR PRACTICE OF THEIR COURTS.
The power and practice of the federal appellate courts are derived exclusively from the Constitution, the acts of Congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they are neither controlled nor affected by the statutes of the states or the practice of their courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 937.]

(Syllabus by the Court.)

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

I. N. Watson and D. V. Herider, for plaintiff in error.

Edward L. Scarritt, William C. Scarritt, and Elliott H. Jones, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff below is the plaintiff in error here. He brought an action against the defendant to recover $5,000 damages for the negligent killing of George L. Gerew. The defendant denied its liability. There was a trial of the issues before a jury. At the close of the evidence the defendant moved the court to instruct the jury that under the pleadings and evidence they must find a verdict for the defendant. The court granted the motion, and the plaintiff excepted. But before the jury were actually instructed the plaintiff prayed leave of the court to take an involuntary nonsuit. The court granted him permission and a judgment was rendered accordingly. Subsequently the plaintiff moved the court to set aside this judgment of nonsuit and to grant a new trial of the action, and this motion was denied. He has sued out this writ of error to secure a reversal of this judgment of nonsuit on account of numerous alleged errors in the trial of the action, and especially because the court held that the evidence was insufficent to sustain his cause of action and that the defendant was entitled to a verdict thereon.

But invited error is irremediable. If the court erred in the rendition of the judgment of nonsuit, it erred at the plaintiff's request and to the prejudice of the defendant, and that error can form no ground for the reversal of the judgment at the suit of the plaintiff who procured it. A judgment of nonsuit upon the motion or request of the defendant and against the objection or protest of the plaintiff is reviewable by writ of error. Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 29, 39, 40, 11 Sup. Ct. 478, 35 L. Ed. 55; Meehan v. Valentine, 145 U. S. 611, 614, 618, 12 Sup. Ct. 972, 36 L. Ed. 835.

But a judgment of nonsuit on the motion, at the request or with the consent of the plaintiff, is not reviewable by writ of error at his suit, because he is estopped from convicting the trial court of an error which he requested it to commit. U. S. v. Evans, 5 Cranch (U. S.) 280, 3 L. Ed. 101; Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 39, 11 Sup. Ct. 478, 35 L. Ed. 55; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 606, 14 Sup. Ct. 458, 38 L. Ed. 279; Avendano v. Gay, 8 Wall. (U. S.) 376, 377, 19 L. Ed. 422; U. S. v. St. Louis, etc., Trans. Co., 184 U. S. 247, 249, 22 Sup. Ct. 350, 46 L. Ed. 520. In U. S. v. Evans, 5 Cranch (U. S.) 280, 3 L. Ed. 101, the trial court rejected certain evidence offered by the attorney of the United States. He took a bill of exceptions, became nonsuit, and moved the court to set aside the nonsuit and to grant a new trial. His motion was denied, and he sued out a writ of error to reverse the judgment. Chief Justice Marshall said that in such a case, where there has been a nonsuit, and a motion to reinstate overruled, the court could not interfere, and

the judgment was affirmed. In Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516, the plaintiff submitted to a nonsuit in the court below and the Supreme Court held that he could not secure a review of that judgment because he had consented to it, and dismissed the writ. In Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 29, 38–40, 11 Sup. Ct. 478, 35 L. Ed. 55, and Meehan v. Valentine, 145 U. S. 611, 614, 618, 12 Sup. Ct. 972, 36 L. Ed. 835, the defendants moved for, and secured, judgments of nonsuit against resisting plaintiffs, and the Supreme Court held that the latter might maintain writs of error to review them. But in rendering this decision that court was careful to distinguish these cases from those in which the plaintiffs themselves consent to or procure the judgments, and it said:

"It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. United States v. Evans, 5 Cranch (U. S.) 280, 3 L. Ed. 101; Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516; Cossar v. Reed, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error." 139 U. S. 39, 11 Sup. Ct. 478, 35 L. Ed. 55.

In Koons v. Bryson, 16 C. C. A. 227, 69 Fed. 297, the Circuit Court of Appeals of the Fourth Circuit failed to note this radical distinction and to observe that the conformity act (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]) has no application to methods of review or to proceedings in the federal appellate courts, and was thereby led to the conclusion that a plaintiff might maintain a writ of error to review a judgment of nonsuit which he had himself requested—a conclusion which the decisions of the Supreme Court to which reference has been made and the reasons for the rule thereby established forbid us to follow. But the same court in later decisions in Huntt v. McNamee, 141 Fed. 293, 72 C. C. A. 441, and Parks v. Southern Ry. Co., 143 Fed. 276, reversed its former holding and recognized the rule adopted by the Supreme Court and the fact that the act of conformity has no application to the practice or proceedings of the federal appellate courts. In the former case Judge Goff, speaking for the court, said:

"Where the record disclosed that the plaintiff had voluntarily become nonsuited, a writ of error was refused him. Evans v. Phillips, 4 Wheat. (U. S.) 73, 4 L. Ed. 516; Cossar v. Reed, 17 Q. B. 540; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 39, 11 Sup. Ct. 478, 35 L. Ed. 55."

In Parks v. Southern Ry. Co., 143 Fed. 276, a case which arose in North Carolina, where, in the state courts, a plaintiff may take a nonsuit at any time before verdict, the defendant at the close of the evidence had moved the court to instruct the jury to return a verdict in his favor, and the court had sustained the motion. Plaintiff then moved for leave to take a nonsuit. The court denied his motion and instructed the jury to return a verdict for the defendant. The Circuit Court of Appeals held that, when the motion to instruct the jury for the defendant was made, the plaintiff was put to his election to then take his nonsuit or to submit the whole case upon the motion to instruct, that the motion for leave to take a nonsuit after the decision upon the motion to instruct came too late,

and that there was no error in the subsequent refusal of the court to grant the nonsuit. While a different rule has been established in this circuit in cases coming from Missouri, in deference to a statute of that state and in conformity to the practice in its trial courts (Chicago, M. & St. P. Ry. Co. v. Metalstaff, 41 C. C. A. 669, 101 Fed. 769), the opinion in the Parks Case contains a statement of the duty of courts to respect the rights of defendants, as well as plaintiffs, to a lawsuit, to make an end of litigation and to prevent the abuse of the means of administering justice by the trial of experiments upon the courts with defective causes of action, which strongly appeals to our judgment and presents a persuasive argument in support of the rule under consideration. Judge Pritchard said:

"It is highly important that the court in the exercise of its discretion should not only see that equal and exact justice is done between litigants, but it is equally important that needless litigation should be speedily determined, and in the trial of cases the court should consider the rights of the defendant as well as those of the plaintiff, and, where it appears that all the evidence which it is possible to obtain has been offered and the case has been submitted to the jury or to the court, it is the duty of the court, if in its opinion the evidence is not sufficient to justify a verdict in favor of the plaintiff, to direct the jury to return a verdict in favor of the defendant. The courts are not organized for the purpose of permitting the plaintiff in an action to experiment with a certain state of facts for the purpose of ascertaining the opinion of the court as to the law applicable to the same and then permit him to withdraw from the scene of conflict and state a new cause of action and mend his licks in another direction. Such policy, if adopted, would be productive of much mischief, and should not be tolerated."

The difference between a judgment upon an instructed verdict and a judgment of nonsuit is that the former prevents, while the latter permits, the maintenance of another action for the same cause. When the evidence was closed in the suit before us, each party had established rights in the trial of this action. The plaintiff had the right to elect whether he would take a nonsuit (section 639, Rev. St. Mo. 1899; Chicago, M. & St. P. Ry. Co. v. Metalstaff, 41 C. C. A. 669, 101 Fed. 769), or would submit the whole cause upon the motion to instruct and endeavor to secure a verdict in his favor. The defendant had a right to elect whether it would endeavor to obtain a nonsuit or a verdict on the merits in its favor. It chose the latter alternative and moved the court for a directed verdict. This motion the plaintiff opposed and submitted the cause to the court for decision. The court granted the motion, and the plaintiff excepted. He then had the right to elect whether he would take a nonsuit and bring another action on the same cause, or would take a verdict against himself and secure a review of the rulings of the court by a writ of error. He chose the former remedy. He moved the court for leave to take an involuntary nonsuit. The parties then stood in this situation: The defendant asked and pressed for an instructed verdict and thereby necessarily objected to the nonsuit which gave the plaintiff an opportunity to bring another action. The plaintiff prayed for the nonsuit and thereby necessarily objected to the instructed verdict and to a judgment which would prevent his maintenance of another action. The court granted the request of the plaintiff and denied that of the

defendant. Plaintiff thereby secured his right to maintain his action for the same cause, and the defendant lost the judgment in its favor and the entire benefit of a trial in which it had succeeded. The nonsuit was obtained by the act and request of the plaintiff against the motion and objection of the defendant, and it may not be successfully challenged by a writ of error procured by the former.

It is said that this was an involuntary nonsuit because the plaintiff was forced to take it by the decision of the trial court that he had proved no cause of action, and that the Supreme Court of Missouri has often so decided and has reviewed cases from the inferior courts of that state upon writs of error to such judgments. Williams v. Finks, 156 Mo. 597, 57 S. W. 732; Ready v. Smith, 141 Mo. 305, 42 S. W. 727; English v. Mullanphy, 1 Mo. 780; Collins v. Bowmer, 2 Mo. 195; Bates County v. Smith, 65 Mo. 464; Schulter's Adm'r v. Bockwinkle's Adm'r, 19 Mo. 647; Dumey v. Schoeffler, 20 Mo. 323; Greene Co. v. Gray, 146 Mo. 568, 48 S. W. 447. The answer is (1) that whether the nonsuit was voluntary or involuntary in the conception of the Supreme Court of Missouri, and whether or not it would have been reviewable by that court, if it had been granted by an inferior court of that state, an indispensable condition of its review at the instance of a plaintiff in error in a national court is that it was granted "without his consent and against his objection," and this judgment lacks this condition, for the nonsuit was granted at his request and by his active procurement; (2) that the plaintiff was not forced by the decision of the court below that he had failed to prove his case to take a nonsuit, but he had the option to take the verdict and judgment against him and to review it, and if it was erroneous to reverse it by writ of error, or to take the dismissal of the action and try again; and (3) that his choice of the latter alternative cannot be made involuntary by placing that deceptive adjective before it in the face of the record that he was free to proceed to verdict, judgment, and review, or to a judgment of nonsuit, and that of his own free will and against the motion and objection of his opponent he asked and secured the dismissal. The real character of this nonsuit cannot be reversed or concealed by applying to it a false epithet.

The decisions of the Supreme Court of Missouri cited above, wherein it has reviewed by writs of error judgments of nonsuit of the character of that in hand, are urged upon our attention, and section 914 of the Revised Statutes of 1899, the act of conformity, which requires the forms and modes of proceeding in civil actions at law in the Circuit and District Courts to conform as near as may be to those in the courts of the state in which the actions arise, is invoked to induce us to follow the practice of that court. But the power and practice of the national appellate courts and the means of reviewing the judgments of the Circuit and District Courts therein are neither conditioned, affected, or controlled by the statutes of the states, the practice of their courts, or the act of conformity. Section 914 is limited by its express terms to the practice and proceedings in the Circuit and District Courts to procure their judgments. It has no application to the practice or proceedings of the federal appellate courts

or to any matters relating to bills of exceptions, motions for new trials, or any other means adopted to review the judgments of the Circuit or the District Courts. The power and practice of the federal appellate courts are derived exclusively from the Constitution, the acts of Congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they may not be extended, diminished, controlled, or affected by the statutes of the states or the practice of their courts. Chateaugay Iron Co., Petitioner, 128 U. S. 544, 554, 9 Sup. Ct. 150, 32 L. Ed. 508; Hudson v. Parker, 156 U. S. 277, 281, 15 Sup. Ct. 450, 39 L. Ed. 424; City of Manning v. German Ins. Co., 107 Fed. 53, 55, 57, 46 C. C. A. 144, 146, 148; Hooven, Owens & Rentsehler Co. v. John Featherstone's Sons, 49 C. C. A. 229, 235, 111 Fed. 81, 87; Louisville & N. Ry. Co. v. White, 40 C. C. A. 352, 356, 100 Fed. 239, 243; West v. East Coast Cedar Co., 51 C. C. A. 411, 415, 113 Fed. 737, 741; St. Clair v. U. S., 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Boogher v. Ins. Co., 103 U. S. 90, 95, 26 L. Ed. 310; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; Kentucky Life Acc. & Ins. Co. v. Hamilton, 63 Fed. 93, 98, 11 C. C. A. 42, 47; Elder v. McClaskey, 17 C. C. A. 259, 278, 70 Fed. 529, 556.

It has been a fixed rule of practice of the appellate courts of the United States for almost 100 years that no writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit which has been rendered at his request or with his consent, and that no judgment will be reversed for an error which the plaintiff in the writ has invited the court to commit, and the fact that the Supreme Court of Missouri calls such a nonsuit "involuntary" and reviews it presents no persuasive reason why one of the national appellate courts should depart from this salutary rule while there are many why it should abide by and enforce it. Courts are established and maintained to settle and terminate controversies between citizens and to enforce their rights, not to furnish debating societies for the trial of legal experiments. The chief reason of their being is to end, not to perpetuate, disputes. "Interest reipublicæ ut sit finis litium." A practice which permits a plaintiff to experiment with the courts and to harass the defendant interminably at will runs counter to the basic purpose of legal tribunals and of all civilized governments, and, instead of assisting to wisely administer justice, it inflicts and perpetuates wrong. Yet this is the practice which a grave review of such nonsuits as that in hand would establish. Under it a plaintiff could introduce his evidence and try the Circuit Court to see whether or not it would sustain his action. If it granted a motion to instruct a verdict against him, he could procure from the court an involuntary nonsuit, then sue out a writ of error and try the appellate court, and, if it would not sustain his action, he could pay the costs, bring another action for the same cause, and continue his actions and experiments interminably. The federal courts ought not to permit themselves to be made the subjects of such experiments. The only material interests involved in the review of such judgments are the costs of the actions, for the plaintiffs may try their causes again whatever the decisions of the appellate courts, and the demands upon these

courts for the decision of real and important issues are too grave and pressing to permit them to devote their time to litigation so frivolous.

There is a more compelling reason why proceedings of this nature should not be sustained. The plaintiff is not the only party to a lawsuit who has rights. The defendant has some, and one of them is the right, not only to a fair and impartial trial of the action against him, but to a final adjudication of the alleged cause which the plaintiff presents and to a termination of the litigation upon it. This right he can never enforce, this termination he can never secure under the practice here proposed, for there is no limit to the number of actions on the same cause, or on the want of it, which the plaintiff may bring, review, and dismiss under it.

The conclusion is that a writ of error will not lie in a national appellate court at the suit of the plaintiff to review a judgment of nonsuit or dismissal which has been rendered at his request or with his consent after the court has held at the close of the trial that the defendant is entitled to a verdict.

This case has been considered and determined upon the theory that the evident intention of the plaintiff and of the court to render a judgment of nonsuit had been effected. But the form of the judgment is such that a claim may be made that it was a judgment on the merits. For this reason alone the judgment will be reversed, the defendant in error will recover its costs in this court, and the case will be remanded to the Circuit Court, with directions to render a judgment that the action be dismissed without prejudice to the right of the plaintiff to maintain another for the same cause, and that the defendant recover its costs of the plaintiff, and it is so ordered.

McDONALD et al. v. KANSAS CITY BOLT & NUT CO.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1906.)

No. 2,324.

1. SALES—CONTRACT FOR SUCCESSIVE DELIVERIES—VENDOR'S BREACH IN FIRST MAY RELIEVE VENDEE FROM LIABILITY FOR SUBSEQUENT.

   In an entire contract for successive deliveries of goods sold, a vendor's breach in the earlier deliveries may relieve the vendee from liability for subsequent deliveries, if prompt notice of refusal to perform is given by the latter.

2. SAME—VENDEE HAS OPTION TO PERFORM OR REFUSE WHICH IS LOST BY DELAY.

   Upon discovery of the vendor's breach, the vendee has the option to perform, or to refuse to perform, the remainder of the contract. But silence, delay, or failure to give notice of his choice to refuse is a choice to perform, and it destroys the option.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 318, 319.]

3. SAME—IMMEDIATE NOTICE OF REFUSAL INDISPENSABLE TO VENDEE'S RELEASE FROM LIABILITY TO SUBSEQUENTLY PERFORM.

   Immediate notice to the vendor, upon the discovery of his default in the earlier deliveries, that the vendee will not receive subsequent deliveries, or will not further perform, is an indispensable condition of

the latter's release from liability for subsequent deliveries which comply with the contract.

4. DAMAGE—BREACH OF CONTRACT—MEASURE.
Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case, which are known to them when the contract is made, and those only, may be recovered in actions upon contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 58.]

5. SALES—BREACH OF CONTRACT—ORDINARY RULE.
The difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of damages the vendee is entitled to recover for a failure to furnish articles of an agreed character, in the absence of knowledge of special circumstances which make other damages natural and probable, because these are the only damages that would naturally flow from the breach of such a contract in the usual course of events.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1174–1201.]

6. DAMAGES—BREACH OF CONTRACT—KNOWLEDGE OF SPECIAL CIRCUMSTANCES.
Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those ordinarily implied by the contract and naturally flowing from it the natural and probable effect of its breach will warrant the recovery thereof.

7. SAME—PROXIMATE AND REMOTE DAMAGES—FACTS—CONCLUSION.
A manufacturer sold steel pipe-bands, which it knew at the time it made the contract were to be used by the purchaser to bind together staves in wooden pipes for the purpose of conducting water to a city. There were latent defects in the bands made under this contract, which were not discoverable until an attempt was made by the purchaser to bend them around and to fasten them upon the pipes.

Held, the loss of the expense of hauling the bands, which were defective, from the railroad station to which they were sent under the contract to the place of their use, a few miles distant, of loading, unloading, distributing, gathering, counting, painting, and of placing them upon and taking them off the pipes when broken, was the natural and probable effect of such defects, which a person of ordinary prudence in the circumstances of the manufacturer would have anticipated, and the vendee was entitled to recover it as damages.

But alleged damages, in addition to those above specified on account of delay, loss of time, trouble, and extra work of superintendence, were too remote and speculative for allowance.

(Syllabus by the Court.)

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

John Q. Dier (John P. Brockway, Charles J. Hughes, Jr., and Gerald Hughes, on the brief), for plaintiffs in error.

Edwin Van Cise and Walter Littlefield (Frank L. Grant, on the brief), for defendant in error.

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

SANBORN, Circuit Judge. The Kansas City Bolt & Nut Company, a corporation, brought an action against R. P. McDonald, who had agreed to purchase from it nine car loads of steel bands, rods, nuts, and shoes, and against John S. Worthington and Thomas Keely,

who had guarantied McDonald's performance of his contract, for the purchase price of the last four car loads of the goods which the vendor delivered, but which McDonald had refused to receive. Five car loads of the material had been received and paid for by him before these four car loads were shipped. The defendant answered the complaint for the price of these cars that the articles furnished failed to fulfill the terms of the contract, that the bands, which were made for the purpose of encircling and holding together wooden pipes made of staves for the purpose of conducting water from a reservoir in the mountains to the city of Golden, had latent defects, which caused many of them to break and become worthless when they were bent around the pipes and secured in place, but which were not discoverable by inspection, and that the defendant, McDonald sustained damages by his attempt to use the bands in the five car loads which he received in the sum of $3,687.29, for which he asked to recover upon a counterclaim. There was a verdict for the plaintiff, in which the jury allowed to the defendant a portion of this counterclaim, and at the hearing in this court counsel for the defendants below, the plaintiffs in error, conceded that the judgment should be affirmed unless there was error in the refusal of the Circuit Court to submit to the jury the first instruction which they requested, or in its rulings upon the measure of damages which McDonald was entitled to recover on account of the failure of the plaintiff to comply with the contract. This was the requested instruction:

"If the jury believe from the evidence in this case that the pipe-bands first shipped to defendants by plaintiff did not comply with the terms of the written contract between the parties hereto, and that the defendants were thereby damaged; that the defendants had a right to presume that the four car loads of pipe-bands thereafter shipped to them were of the same kind as those previously shipped, and that they had a right to refuse to accept them."

The facts disclosed by the evidence which were material to the determination of the question of the legality of this instruction are these: The contract was made in April, 1903, and by its terms the goods were to be shipped between June 1st and September 1st in that year to the city of Golden, Colo., free on board the cars at Kansas City, Mo., where the plaintiff was to manufacture them. The contract did not require the plaintiff to bend the pipe-bands, and the first two car loads were delivered about the last of July, 1903, without bending them. Some of these pipe-bands broke in the process of securing them around the pipes, and McDonald immediately complained to the plaintiff that they were defective and that they broke. Thereupon the plaintiff bent the bands which it subsequently shipped, at its factory, and promised to replace free of cost those that had broken. In August, September, and October McDonald received and paid for three car loads of these bent bands. The bands in these car loads were much better than those in the first two loads, so much better that out of 7,655 half-inch bands which broke in the entire five car loads about 7,600, according to the testimony of McDonald, were in the two or three car loads first shipped, and only about 55 in the last two or three car loads he used. It was in this state of the case

that in the latter part of October and in November, 1903, the plaintiff shipped the four remaining car loads of pipe-bands and other materials which its contract required it to furnish, and after they had arrived at Golden, and in December, 1903, McDonald, without any examination or trial of these articles, refused to receive them because the pipe-bands he had obtained from the previous car loads were defective. The question is, had this purchaser the right to presume that the four car loads last shipped were of the same character as those previously shipped, and to refuse to accept them because those first shipped did not comply with the terms of the agreement? The question is divisible, and it involves these two issues: Had the purchaser the right to presume that the pipe-bands in the last four cars were of the same kind as those previously shipped, and the right to reject them on account of this presumption? And had the purchaser the right to reject them regardless of the presumption because those first shipped did not fulfill the stipulations of the agreement? Conceding, without deciding, that from the fact that 7,600 half-inch bands in the first three cars broke a presumption arose that bands subsequently shipped would be of the same character and would fail to comply with the contract, that presumption was destroyed before the four car loads were sent by the fact that only about 55 of the bands of this kind in the two intermediate car loads broke; and if any presumption on this subject existed, it was the counter presumption that the pipe-bands in the four subsequent car loads would be of the same better quality as those last received by McDonald, which appear to have substantially complied with the contract. Hence, he had no right to reject those in the last four car loads on account of the alleged presumption claimed in the requested instruction, and the first question must be answered in the negative.

Counsel insist, however, that the purchaser had the right to refuse to take the articles in the last four car loads regardless of their presumptive character, because the goods furnished by the plaintiff in its first deliveries were not in accordance with the terms of the contract, and in support of this proposition they cite Norrington v. Wright, 115 U. S. 188, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Pope v. Allis, 115 U. S. 363, 371, 372, 6 Sup. Ct. 69, 29 L. Ed. 393; Husted v. Craig, 36 N. Y. 221; Campbell Printing Press & Mfg. Co. v. Marsh, 20 Colo. 22, 36 Pac. 799; Filley v. Pope, 115 U. S. 213, 219, 220, 6 Sup. Ct. 19, 29 L. Ed. 372; National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623, and other cases of like character. The decisions in these cases hold that, where the vendor is required by an entire contract, as in the case at bar, to make successive deliveries of the articles sold, and the first deliveries fail to comply with the terms of the agreement either in the quality or quantity of the goods or in the times or places of delivery, the vendee by prompt notice of his refusal to further perform upon the discovery of the failure may relieve himself from liability for subsequent deliveries. This, however, is not his only remedy. He has the option, upon the discovery of the

seller's default, to refuse to receive and pay for further deliveries, and thus to terminate the contract, or to permit its performance to proceed, and to rely upon his damages for the vendor's breach. But he may not delay his exercise of this choice. Delay, vacillation, silence, or the absence of an immediate notice that he will not further perform is an election by the vendee that the performance of the contract shall proceed, and that he will rely upon his claim against the vendor for damages for the breach, and upon that claim alone, for his remedy. He is met here by the principle of estoppel, by the rule that he who by his acts or statements, or by his silence when he ought to speak out, intentionally or negligently induces another to so act that he will sustain injury by the former's denial of his acts, statements, or silence or of their natural effect, is estopped to repudiate them. If he remains silent after he discovers the fault of the vendor, and permits him to incur the trouble and expense of the subsequent preparation and delivery of the contracted goods, he is thereby estopped from claiming a release from his obligation to receive and to pay for them on account of the defects in the earlier deliveries. Immediate notice to the vendor, upon the discovery of his default in the earlier deliveries, that the vendee will not further perform the contract, is an indispensable condition of the latter's release from his liability to accept and to pay for subsequent deliveries which comply with the terms of the agreement. Pullman Car Co. v. Metropolitan Ry. Co., 157 U. S. 94, 110, 111, 15 Sup. Ct. 503, 39 L. Ed. 632; Clark v. Wheeling Steel Works, 53 Fed. 494, 498, 3 C. C. A. 600, 604; German Sav. Inst. v. De La Vergne Refrig. Mach. Co., 70 Fed. 146, 154, 17 C. C. A. 34, 37.

The chief failure of the plaintiff was in the character of the pipe-bands in the first two car loads of materials, which were delivered about the last of July, 1903. McDonald discovered this default in August of that year, and immediately complained of it. The plaintiff thereupon furnished three more car loads of better bands, which it bent at the factory, and promised to replace all that had been broken free of charge. McDonald received, used, and paid for the three latter car loads. The plaintiff was a manufacturer. It was making and shipping these bands for the specific purpose of binding the wooden pipe that was to be used to conduct water to the city of Golden. The pipe-bands were not worth their contract price in the open market for any other purpose. McDonald gave the manufacturer no notice that he would not accept and pay for the remaining four car loads which the vendor was required to make and deliver, and the plaintiff manufactured and shipped them in the belief that he would do so. It was not until after these four car loads had arrived at Golden, and not until December, 1903, that he first gave notice to the plaintiff that he would not accept them because the bands previously shipped had been defective. The notice came too late. The vendee was estopped by his receipt of the three car loads after his knowledge of the vendor's default, by his failure to notify it of his intention not to receive the remainder of the contracted articles, and by the fact that the plaintiff had made and shipped them in reliance upon the contract which required it to do so, and upon the vendee's acts and silence, in the full belief that he would accept and pay for them, from relieving himself

from liability for them on account of any previous defaults of the vendor. The second question must therefore be answered in the negative, and there is no ground upon which the requested instruction can be sustained.

We turn to the question of the measure of McDonald's damages. He claimed: (1) The contract price of the broken bands; (2) the freight on them from Kansas City to Golden; (3) the expense of loading, of hauling from the station at Golden to the place of use, and of unloading them; (4) the expense of distributing, gathering, and counting them; (5) the expense of painting them and of putting them on and taking them off the pipes; and (6) his loss by delay, trouble, and extra work of superintendence caused by the breaking of the bands. The Circuit Court allowed evidence of the first two items, and refused to allow any evidence of the others, to be considered by the jury. The rules of law by which the measure of damages in this case must be ascertained are no longer open to discussion. Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case, which are known to them when the contract is made, and those only, may be recovered in an action upon a contract. Rockefeller v. Merritt, 22 C. C. A. 608, 617, 76 Fed. 909, 918; Central Trust Co. v. Clark, 92 Fed. 293, 297, 34 C. C. A. 354, 358.

In the absence of proof aliunde of knowledge by the defaulting party at the time an ordinary contract of sale is made of special circumstances which make other damages the natural and probable effect of its breach, the difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of the damages which the vendee may recover for a failure to furnish articles of the agreed character, because this is the only damage implied by the contract, the only damage that would naturally flow from its breach in the usual course of events. Central Trust Co. v. Clark, 34 C. C. A. 354, 358, 92 Fed. 293, 297; Drug Co. v. Byrd, 92 Fed. 290, 34 C. C. A. 351; Railroad Co. v. Bucki, 16 C. C. A. 42, 46, 68 Fed. 864, 868; Hadley v. Baxendale, 9 Exch. 341, 354, 356; Primrose v. Telegraph Co., 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; The Ceres, 19 C. C. A. 243, 72 Fed. 936, 943; Boyd v. Brown, 17 Pick. (Mass.) 453, 461; Ingledew v. Railroad, 7 Gray (Mass.) 86, 91; Railway Co. v. Mudford (Ark.) 3 S. W. 814, 816; Kempner v. Cohn, 47 Ark. 519, 527, 1 S. W. 869, 58 Am. Rep. 775.

Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those implied by the contract and naturally flowing from it the natural and probable effect of its breach will warrant the recovery thereof. Boutin v. Rudd, 27 C. C. A. 526, 82 Fed. 685; Central Trust Co. v. Clark, 92 Fed. 293, 298, 34 C. C. A. 354, 359; Accumulator Co. v. Dubuque St. Ry. Co., 12 C. C. A. 37, 42, 64 Fed. 70, 79.

The bolt company admits in its answer that at the time it made the contract with McDonald he claimed that he had entered into a contract with the city of Golden to construct for it a system of waterworks; that it knew that the material it was to furnish was to be

used in the manufacture of a pipe line of some kind at or for the city of Golden, in accordance with certain blue prints which were furnished to it; and that before it executed the agreement it had caused an investigation to be made of some proceedings of the city of Golden antecedent to the date of the contract of the city with McDonald, and had doubted the legality of any contract between him and the city. The defects of the broken bands which the plaintiff furnished were latent, and were discoverable by the purchaser, in the ordinary course of events, by actual application to the wooden pipe only. A vendor who knew that these pipe-bands were to be used by the purchaser in the construction of wooden pipes would reasonably anticipate that such latent defects which caused the bands to break when an attempt was made to bend them around and to fasten them upon the wooden pipes would entail upon the purchaser who bought them the useless expense of hauling them from the station at Golden to the place where they would be used upon the pipes; of loading and unloading them for the purpose of this transportation; of distributing, gathering, and counting them; of putting them on and taking them off the pipes, and perhaps of painting them, if painting was necessary and customary before such bands were applied to such a purpose. This expense was the natural and probable effect of these latent defects—an effect which a person of ordinary prudence and foresight, possessed of the knowledge of the plaintiff, might well anticipate, because he must know that in the ordinary and natural course of events the bands could not be applied to the pipes, and their defects would not be discoverable until they had been loaded, hauled, unloaded, and put upon the pipes. The court should therefore have received the evidence in support of the third, fourth, and fifth items of damages specified above, which amounted, in the aggregate, according to the claim of McDonald, to $673.02.

The sixth item of damages claimed is $1,500 for delay, loss of time, trouble, and extra work of superintendence occasioned by the breaking of the bands and the substitution of others in their place. In view of the fact that the time and labor, and hence the delay, of the men and of the teams in hauling, loading, unloading, putting on, and taking off the bands is specified and allowed in the preceding items, this claim is too remote and speculative to sustain a recovery or to permit of an allowance. The damages here claimed are not the natural and probable effect of the defects in the bands, and they could not have been reasonably anticipated therefrom by a person of ordinary prudence in the circumstances of the vendor. There was no error in the rejection of the evidence which related to this item.

The result is that the only error in the trial of the case was the rejection of the evidence in support of the third, fourth, and fifth items of damages. Since the entire amount claimed on account of these items is $673.02 and interest, and the defendant cannot possibly secure the allowance of more on account of them, but may upon a new trial obtain less than this amount, all error to the prejudice of the defendants may be extracted from this case by the reduction of the judgment against them by the amount of $673.02 and interest. The judgment below will accordingly be reversed, and the case will

be remanded to the Circuit Court, with instructions to grant a new trial unless within 40 days from the filing of this opinion the plaintiff remits from and satisfies the judgment below as of the date of its rendition to the extent of $673.02, and interest thereon at 6 per cent. per annum from October 27, 1903, to May 27, 1905, and files a transcript of its remittitur and satisfaction in this court, in which case the judgment will be affirmed, with costs against the defendant in error, and it is so ordered.

WESTERN UNION TELEGRAPH CO. v. CASHMAN.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1906.)

No. 1,540.

1. LIBEL—TELEGRAPH MESSAGES—COPIES.

S. handed a libelous telegraph message directed to a newspaper published by plaintiff in Vicksburg to a boy who assisted defendant's agent in its office at Oxford, Miss., in the agent's absence. The boy forwarded the message by telegraph to Memphis, Tenn., where it was received by sound, and forwarded by another agent to defendant's agent in Vicksburg, where it was written out, handed to a messenger boy, who took a letter press copy thereof, and inclosed the message in an envelope and delivered it to plaintiff. *Held*, that the message delivered to plaintiff was not the original libelous message delivered by S., but was a mere copy of a copy thereof, so that the only libel was the message actually written out by the telegraph company's agent at Vicksburg and delivered to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 107.]

2. TELEGRAPHS—LIBELOUS MESSAGES.

A telegraph company should not receive for transmission a message which is libelous on its face.

3. LIBEL—MALICE—TELEGRAPH MESSAGES.

Where an alleged libelous message got into the way of transmission over defendant telegraph company's wires without any preliminary reception and authorization by defendant or its authorized agent, and thereafter was handled as a matter of routine business by agents acting in the regular line of business, who were bound to secrecy both by the statutes of the state and by rules of the company, and who had neither knowledge of the parties nor any particular knowledge of the contents of the message, or interest or improper motive, there was no sufficient evidence of malice to sustain an action for libel against the telegraph company.

4. SAME—PUBLICATION.

There is no publication of a libel when the words are only communicated to the person defamed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 107, 108.]

5. SAME.

Where a boy in the office of a telegraph company made a letter-press copy of a libelous telegram, such act did not constitute a publication of the libel without evidence that he read the libel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 107, 108.]

6. SAME—INSTRUCTIONS—DAMAGES.

Ann. Code Miss. 1892, § 1301, makes it a misdemeanor for a clerk, operator, messenger or other employé of a telegraph company to use or suffer

to be used, or willfully divulge the contents of a telegraph message to any one but the person for whom it was intended. *Held*, in an action against a telegraph company for publishing a libelous telegram, that it was error for the court to refuse to charge that as there was no evidence that any one knew the contents of the message except four employés of the telegraph company, who, under such section, could not disclose the contents without being guilty of a misdemeanor, and as there was no evidence that any of such employés ever had disclosed the contents of the message, the jury should take that fact into consideration in assessing damages, if any.

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

The defendant in error is the editor and publisher of a newspaper in Vicksburg, Miss., called the "Vicksburg Evening Post." On October 31, 1901, he published in said paper a special telegram from Jackson, Miss., as follows:

"Jackson, Miss., Oct. 31.—Word reaches here from Oxford that Miss Lucy Leeton, the woman who filed a sensational breach of promise suit against former United States Senator W. V. Sullivan several months ago, will leave Washington in a few days to prosecute case, and that she will be represented in the proceedings by one of the ablest attorneys in the National Capital.

"Miss Leeton has been spending the last several weeks in the town of Oxford. Ex-Senator Sullivan's home, and an exciting affair occurred in the justices courtroom at that place Saturday, in which both of the participants in the breach of promise suit were parties.

"A civil proceeding against Miss Leeton was being tried, and, somewhat in contrast to his former attitude toward the woman, Ex-Senator was in the role of an attorney prosecuting the claim of a local drygoods firm for debt. Miss Leeton was represented by Hon. C. L. Sivley. The main point at issue was whether she was a nonresident, and therefore liable for attachment. During the proceedings one of the witnesses questioned the chastity of Miss Leeton, provoking some sulphurous language from her lips, and the witness drew a gun and threatened to kill her. Miss Leeton attempted to borrow a gun, evidently with the purpose of shooting her traducer, who had in the meantime been taken in charge by friends, and there was great excitement in the courtroom for several minutes, effectually breaking up the proceedings. Miss Leeton declared that the gun pointed at her by the witness belonged to Ex-Senator Sullivan, and of this she was positive, having kept the weapon for him three years."

On the 2d day of November, 1901, Ex-Senator W. V. Sullivan, of Oxford, Miss., handed in to the office of the Western Union Telegraph Company at Oxford, to be forwarded over the company's lines to Vicksburg, Miss., the following written message:

"Vicksburg Evening Post: Your article in issue of Thursday is a dirty lie as you know. Who is responsible? You nasty dog. Answer.

"W. V. Sullivan."

At the time this message was handed in to the office, there was no agent of the company present, but there was present one Scott Nichols, a boy, who assisted the agent in other lines of business. Nichols received the message and forwarded it by sound over the wire of the company to Memphis, Tenn. At Memphis the message was received by sound, there written out and placed on the transmission book from which it was taken by an agent of the company and forwarded to the agent at Vicksburg. In Vicksburg it was written out by the agent who received it, and handed to a messenger boy, who took a letter-press copy of the same, and inclosed it in a sealed envelope and thus delivered it to the defendant in error, who two days afterwards exploited the message as one from Sullivan, and gave his reply thereto in his evening paper.

This suit is one brought by Cashman, editor and publisher, against the telegraph company to recover damages to his fame, business, reputation, mental suffering, etc. The declaration, as amended, contains two counts, in

the first of which it is charged that "the telegraph company did wickedly and maliciously write and publish and cause to be written and published of and concerning the plaintiff a false, scandalous, malicious, and defamatory libel;" and in the second count the same charge is made with the same indefiniteness, but added thereto is the following: "Plaintiff says that the said false, scandalous, malicious, and defamatory libel was published by defendant contrary to the statute of the state of Mississippi with a view to insult the plaintiff, and to lead him to commit violence and a breach of the peace." The bill of exceptions contains all the evidence submitted on the trial of the case, showing substantially as above set forth.

After the evidence was all in, before the jury retired, plaintiff in error, through his counsel, requested the court to give to the jury, among other charges, the following special instructions: "(1) The court instructs the jury to find a verdict for the defendant. (2) The court instructs the jury for the defendant, that in fixing the amount of damage to be awarded to the plaintiff, by reason of contents of message complained of being made known to the employés of defendant, as hereinbefore stated, they should also take into consideration the fact that under section 1301 of the Annotated Code of Mississippi it is a misdemeanor for a clerk, operator, or messenger, or other employé of a telegraph company to use, or suffer to be used, or willfully to divulge to any one but the person for whom it was intended, the contents of a telegraphic message intrusted to him for transmission or delivery, or the nature thereof, punishable by a fine of not more than $200, or by imprisonment in the county jail not exceeding three months, or both; and, further, that the evidence fails to disclose that the contents of the message complained of was ever disclosed by any clerk, operator, or messenger or any other employé of the defendant. (3) The law presumes that every one acts rightfully and in accordance with law, and there is no evidence in this case to show that any one knew of the contents of the message in question, except four employés of the company, who, under section 1301 of the Annotated Code of Mississippi, could not disclose the contents of said message without being guilty of a misdemeanor, and upon conviction could be fined not more than $200, or by imprisonment in the county jail not exceeding three months, or both, and that there is no evidence in this case that said employés ever disclosed the contents of this message to any one, and the jury should take that fact into consideration in assessing damages, if any were suffered by it."

The court refused to give these instructions, and exceptions to such refusal were seasonably taken. There was a verdict and judgment for the plaintiff for $5,000 damages, and the defendant sued out a writ of error.

Murray F. Smith and J. Hirsh, for plaintiff in error.

O. W. Catchings and J. C. Bryson, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The case shows that the defendant in error published in his paper in Vicksburg a libel on Ex-Senator Sullivan, just as a matter of news and a matter of general interest as he says, and having no reason to doubt its truth. Ex-Senator Sullivan, at Oxford, Miss., vigorously denying the truth of the article, and apparently thinking himself well informed as to his facts, responded with the telegraphic message heretofore set out. The defendant in error took time to deliberate and then published in his newspaper the two libels, with characteristic comments from his standpoint for the general information of the public. This seems to have ended the matter between the long distance belligerents, but not as to the telegraph company, whose agents Sullivan had made a tool of; for, on more deliberation, the defendant in error found that his feelings had been sore wounded, because the telegraph company's agents

carried the message that Sullivan sent and which he himself had published in his newspaper. Hence this suit against the only innocent party in the matter.

The first count is for libel, and the second for publishing a libel in violation of a statute of Mississippi with a view to insult, etc. The effect of the statute of Mississippi, found in section 10, c. 2, of the Annotated Code of Mississippi of 1892, is as follows:

"All words which, from their usual construction and common acceptation are considered as insults, and lead to violence and breaches of the peace, shall be actionable; and a plea, exception, or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trials, as in other cases."

Although the same is made the basis of the second count in the declaration, it has not been argued either orally or in the briefs. The statute seems to be an innovation of the common law to the extent of making all words, which, from their usual construction and long acceptance, are considered insults and lead to violence and breaches of the peace when addressed to a person, actionable, although spoken without witnesses or other publication. If the statute applies to libels, which is doubtful—see Crawford v. Mellton, 12 Smedes & M. (Miss.) 328, where it is held that the insulting manner of saying the words is the gravamen of the action, it can be applied in this case only to the message actually written out by the company's agent at Vicksburg, and delivered to the defendant in error.

In the standard work of Townshend on Libel & Slander, we find the following:

"The subject-matter of a writing may be many times published at the same or at different and distinct places, and may have many publishers and many persons may be liable as publishers at one and the same time or at several times. The subject-matter of a writing cannot be republished apart and separate from a republication of the writing—the material written upon. Apart from the material on which the matter is inscribed it is impossible to republish the same subject-matter of a writing as it is to publish the same sound or original language or speech. If one copies the subject-matter of a writing upon another piece of material, the copy is no more the same subject-matter as the subject-matter copied from than is the republication of a sound an uttering of the same sound. The copy is not the same writing but another—a second and independent writing having the like but not the same subject-matter. A publication of this copy would have no other connection with the original than to contain the like subject-matter. The person who is liable for the publication of the first writing would not be liable for the publication of the second or copy, and the persons responsible for the publication of the second writing would not be responsible for the publication of the original writing. The publication of the second writing is neither a necessary nor a natural and proximate consequence of the publication of the first writing, nor is a publication of the first writing a necessary or a natural and proximate consequence of the publication of the second writing." Townshend on Libel, pp. 159, 160, § 117.

Now the libelous message of Sullivan was not delivered to, nor transmitted by, an agent for which the company is responsible. It was received by the agent in Memphis the same as if it had been read aloud by Scott Nichols. The message as transmitted and received and written out at Memphis was not the original libelous message, but a copy of

the same more or less exact. The same may be said of the message transmitted from Memphis to the agent at Vicksburg. That was a copy of a copy of Sullivan's original message, therefore the message written out in Vicksburg, copied by the messenger boy and delivered to Cashman in a sealed envelope, was the only libelous message for which the telegraph company, if liable at all, is responsible; and, in fact, that was the message declared on, and the only one offered in evidence on the trial of the case. The only circulation of this message other than delivery to the defendant in error was such as resulted from the copying of the same by the messenger boy in the company's office.

The question then presented by the first assignment of error is whether, under the facts proved, the telegraph company is liable either under the statute or at common law for the action of its agents at Vicksburg in writing out, copying, and delivering to the defendant in error the libelous message complained of. The telegraph company is a corporation engaged in the business of receiving and transmitting written messages for hire; and, like other common carriers, is liable for the acts of its agents in conducting its business. Its agents are bound to secrecy by rules of the company, and, in Mississippi, by statute with penalties. The company has no right to receive and transmit libelous messages. Its agents are limited in the same way. Like other common carriers, the telegraph company is bound to care and diligence in carrying on its business, and to take reasonable care, at least, not to injure others. If a message offered for transmission is anonymous or is libelous on its face, it should not be received and transmitted. The company should so instruct its agents, and the agents should so act.

We think that these propositions are not only sound, but that the good of society requires their full recognition. At the same time, it must be recognized that malice is an essential ingredient to the action of libel. See White v. Nicholls, 3 How. 286, 11 L. Ed. 591. Without malice express or implied the case fails.

The facts of the present case show that the libelous message complained of got into the way of transmission over the company's wires without any preliminary reception and authorization by the company or its authorized agent, and thereafter was handled as a matter of routine by agents acting in the regular line of duty and business, who are shown to be bound to secrecy by the statutes of the state, and who are not shown to have had any knowledge of the parties or any particular knowledge of the contents of the message or any interest or improper motive, and from these circumstances it seems impossible to impute malice to the telegraph company. The law is well stated by Chief Justice Bronson, in Washburn v. Cooke, 3 Denio (N. Y.) 110. We quote as follows:

"In the common case of a libelous publication or the use of slanderous words, a charge of malice in the declaration calls for no proof on the part of the plaintiff beyond what may be inferred from the injurious nature of the accusation. The principle is a broad one. In all cases where a man intentionally does a wrongful act without just cause or excuse, the law implies a malicious intent towards the party who may be injured; and that is so even though the wrongdoer may not have known at the time on whom the

blow would fall. But, in actions for defamation, if it appear that the defendant had some just occasion for speaking of the plaintiff, malice is not a necessary inference from what, under other circumstances, would be a slanderous charge; and it would often be necessary for the plaintiff to give every evidence of a malicious intent. There may be many of these privileged communications; as where the charge is made in giving the character of a servant, or in a regular course of discipline between members of the same church; in answering an inquiry concerning the solvency of a tradesman or banker, or where the communication was confidential between people having a common interest in the subject to which it relates. In these and other cases of the same nature, the general rule is that malice is not to be inferred from the publication alone. The plaintiff must go further and show that the defendant was governed by a bad motive, and that he did not act in good faith, but took advantage of the occasion to injure the plaintiff in his character or standing."

It is well settled that there is no publication when the words are only communicated to the person defamed. Newell on Slander & Libel, 228.

Was the delivery to the office boy who copied the message a publication? The evidence is that the boy made a letter-press copy—whether he could read or did read the message does not appear. The presumption is that he did not read it. To take a letter-press copy of a writing does not imply a reading of the writing. It is a purely mechanical process. See Odgers on Libel & Slander (4th Ed.) pp. 154, 155. In a copy made by hand the reading would seem to be necessary, and this we understand to be the case of Kiene v. Ruff, 1 Clark (Iowa) 482. As neither the delivery to the defendant in error nor the press-copying by the office boy was a publication of the libelous message, no publication was proved, and, considering that all malice, express or implied, in respect to the handling and transmitting of the libelous message of Sullivan, is rebutted and disproved by the facts in evidence, we conclude that the plaintiff in error was entitled on the trial in the court below to the instructed verdict requested.

If it be contended that this is a technical view of the case, it may be answered that the action seems to be one for a technical libel in which the real responsible offender is left out and an apparently innocent party is pursued, and, further, that if we take the case as one where Sullivan concocted the libel and delivered it to the company's agents for transmission, who transmitted it, the publication to all of the company's agents who handled the message in the strict line of business and duty was Sullivan's publication, contemplated by him, and was not in any just sense a publication by the company. The only way the company could receive, reject, transmit, or handle the message was by and through its agents. A libelous postal card is not published by the post office department when it permits or requires different agents to handle the same. All such handling is contemplated by the writer and the publication is his. And even if there was a technical publication of Sullivan's libel by transmitting the same after it was foisted into the company's business, there was an entire absence of malice, and in justice the plaintiff in error should not be mulcted in damages.

As there may be another trial of this case, we deem it proper to consider the assignment of error in regard to the Mississippi statute (section 1301, Ann. Code 1892), making it a misdemeanor for a clerk,

operator, or messenger, or other employé of a telegraph company to use or suffer to be used or willfully divulge to any one but the person for whom it was intended the contents of a telegraphic message, etc. This statute binds under penalties telegraphic operators and employés to secrecy as to messages intrusted to the telegraph companies for transmission. The presumption is that the law will be respected and observed. In case a libelous message shall be received and transmitted, the law puts bounds to the publication of the same. The extent of publication of a libel affects directly the quantum of damages. Under the peculiar and particular facts in this case, we are clear that the statute in question should have been given to the jury substantially as requested in the second instruction asked, as noted in the statement of the case.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to grant a new trial.

PETERS v. MERCHANTS' & FARMERS' BANK OF PONCHATOULA, LA.

(Circuit Court of Appeals, Sixth Circuit. November 27, 1906.)

No. 1,538.

1. GUARANTY—CONSTRUCTION OF CONTRACT.
   Defendant became guarantor of loans to be made by plaintiff bank to a third party to the amount of $10,000. When plaintiff had in fact lent such party an amount in excess of $10,000, defendant by telegram and letters authorized a further extension of credit on his guaranty to the extent of $2,000, "making $12,000, all told." It did not appear that he had any knowledge that the amount then owing exceeded the $10,000 guarantied by him. *Held*, that the second guaranty did not cover such excess, but only such amount as was thereafter lent, not exceeding $2,000.

2. SAME—CONSIDERATION.
   The making of further loans by a bank to a debtor, at the request of a guarantor, is a sufficient consideration for a guaranty of the prior indebtedness.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 14.]

3. SAME—RIGHTS OF GUARANTOR—APPLICATION OF MONEY COLLECTED FROM PRINCIPAL.
   Where a bank, which held a mortgage securing a part of a customer's indebtedness, another part being secured by defendant's guaranty, and still another part being unsecured, obtained a judgment against the principal debtor for the whole indebtedness, reserving its right to proceed on the mortgage, the fact that it sold the mortgaged property under an execution on the judgment, instead of foreclosing the mortgage, was not prejudicial to defendant, and did not deprive the bank of the right to apply the proceeds in payment of the mortgage debt; but it was required to apply any surplus pro rata on the entire remaining indebtedness.

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

S. E. Knappen, for plaintiff in error.

C. M. Wilson, for defendant in error.

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

SEVERENS, Circuit Judge. Thompson and Ackley united in a partnership under the style of the Ponchatoula Lumber Company, and on or about November 17, 1903, engaged in the business of manufacturing and selling lumber and kindred products at Ponchatoula, La., and for those purposes required money. They borrowed, at some date prior to January 12, 1904, the sum of $200 of the Merchants' & Farmers' Bank of Ponchatoula, for which they gave their note payable on demand. On the said 12th of January the bank being unwilling to make further loans to the lumber company without security, R. G. Peters, the plaintiff in error, telegraphed to the bank as follows:

"Chicago, Ill., January 12, 1904.

"Merchants' & Farmers' Bank, Ponchatoula, La.

"I will guarantee $10,000 credit to Ponchatoula Lumber Co.

"R. G. Peters."

On the faith of this telegram, the bank, prior to the 19th of that month made further loans to the lumber company to the extent of $1,600. On that day Peters, in confirmation of his telegram, as the declaration alleges, executed a more formal guaranty to the bank as follows:

"Ponchatoula, La., Jan. 19, 1904.

"The Merchants' & Farmers' Bank, Ponchatoula, La.

"Gentlemen: I hereby guaranty to you the payment to the extent of $10,000.00 of any and all notes, drafts, bills of exchange, checks, credits, discounts, overdrafts, etc., of the Ponchatoula Lumber Company, or bearing their endorsement, which have been or may be accepted by you and credited to their account. This guaranty to remain in full force and effect until you shall have received from me notice of its withdrawal, which notice however, shall not affect any notes, drafts, bills of exchange, checks, credits, discounts, overdrafts, etc., not paid at the time of the receipt by you of such notice.

"Yours respectfully, R. G. Peters."

And on the faith of these guaranties the bank made further loans to the lumber company until March 10, 1904, when the amount, including the $1,600, and also including the $200 loaned before the first guaranty was given, had reached $10,000 as the declaration states, but as the finding of the judge is, $10,682. On the day last mentioned, Peters sent to the bank the following telegram:

"East Lake, Mich., 3—10—1904.

"Merchants' & Farmers' Bank, Ponchatoula, La.

"Extend credit Ponchatoula Lumber Company to $12,000 temporary.

"R. G. Peters."

On the day following he sent this letter:

"Manistee, Mich., March 11, 1904.

"Merchants' & Farmers' Bank, Ponchatoula, La.

"Gentlemen: Confirming my telegram of yesterday, you are authorized to grant Mr. Thompson credit upon my guaranty for two thousand dollars more as he requests it, temporarily, making $12,000 all told.

"Yours respectfully, R. G. Peters."

And on March 15, 1904, he sent to the bank the following letter:

"Manistee, Mich., March 15, 1904.

"Merchants' & Farmers' Bank, Ponchatoula, La.

"Gentlemen: In reply to yours of 11th inst., will say that my guaranty for $2,000 more credit to the Ponchatoula Lumber Company, making $12,000, will hold good until they are able to pay the $2,000 as you outline in your letter.

"Yours respectfully, R. G. Peters."

The declaration states that the bank accepted the last-mentioned telegram and these two letters of March 10th and March 15th "as the guaranty of said defendant for loans to said Thompson and Ackley doing business under the name of the Ponchatoula Lumber Company, to the amount of two thousand dollars ($2,000.00) in addition to the said loans to the amount of ten thousand dollars ($10,000.00)." After this extension the bank loaned the lumber company $1,500 more. None of the loans mentioned in the foregoing statements were repaid. This suit was brought on the guaranties of Peters to recover the amount of said loans. It further appears that another series of loans, quite independent of the loans guarantied by Peters as above stated, were made by the bank to the lumber company, commencing November 17, 1903, which were secured by the assignment to the bank of bills of lading on shipments of lumber to customers. These securities did not yield enough to satisfy the loans they were given to secure, and on August 8, 1904, the lumber company gave the bank a mortgage on its mill property for the balance due on this line of indebtedness, then estimated at the sum of $3,000. The sum actually due proved eventually to be $2,209.01. Prior to the giving of the last-mentioned mortgage, the lumber company had mortgaged the property to Peters for his indemnity; but, for the purpose of enabling the mortgagor to sell the property, Peters had released the mortgage. The sale was not effected, and, when Peters heard of the mortgage to the bank, he wrote to the latter a notification as follows:

"That must be applied on the guaranty loan; also any surplus that he [meaning Thompson] may be able to get for the mill in selling it."

There is nothing to show that the bank assented to this. Finally, the bank brought suit in a Louisiana court against the Ponchatoula Lumber Company to recover the balance due on both lines of indebtedness, and in its petition the bank noted, in connection with the averments touching the balance due on the line other than that guarantied by Peters, that the note for that balance was secured by a mortgage. The judgment of the court in favor of the bank was for $14,394.62 and interest, with costs. The judgment further provided that "the plaintiff's right to proceed on the $3,000 mortgage be reserved." Execution was issued, and the property sold; the net proceeds being $2,390.79. In the sheriff's return to the execution, he stated that:

"The mortgage in favor of plaintiff in execution for $3,000, extinguished by confusion, is canceled; but the plaintiffs reserve all their rights against defendant in execution so far as not satisfied by this execution."

The bank applied the proceeds of the sale as follows: Paid itself the $2,209.17 balance due on the mortgage debt, and applied the re-

maining $181.78 to the excess of the lumber company's debt over the $12,000 guarantied by Peters.

The questions submitted to us on the hearing were these: (1) Was the $200 loaned to the lumber company before the original guaranty covered by either of the guaranties? (2) Was the excess beyond $10,000, which the bank had already loaned to the lumber company at the time of the further guaranty of March 10, 1904, covered by such further guaranty? (3) Had the bank the right to apply the proceeds of the sheriff's sale to the satisfaction of the balance due on the debt secured by the bills of lading? (4) Had the bank the right to apply the remaining $181.78 to the excess over $12,000 due on the other loans to the lumber company? The court below found all of these questions in the affirmative, and rendered judgment for the amount of $12,000, with interest and costs.

As to the $200 loan, whatever we might have said in regard to the guarantor's liability, if the question had been saved, we think we cannot examine it on this record. The only point made by the defendant below on this item was that there was no consideration for it. The exception to the court's conclusion of law was to the holding that "the loaning of further sums of money to the Ponchatoula Lumber Company pursuant to defendant's guaranty of January 12, 1904, was a sufficient consideration for the guaranty of the payment by the defendant of the $200 loaned to the company before the guaranty was made," which impliedly concedes that there was in fact a guaranty for that sum. It nowhere else appears that the contention that the item came within the scope of the guaranty was disputed. The objection actually made could not be maintained. The making of further loans was a sufficient consideration for a promise to pay a sum already advanced as well as the further loans.

With respect to the excess beyond $10,000 which the bank had loaned to the lumber company before March 10, 1904, we are constrained to think that the additional guaranty of that date was not intended to cover it. It is not found that Peters knew that such excess had been loaned, and what is not made to appear should be treated as not existing. In the absence of such information, he would reasonably have supposed that his guaranty had not been exceeded. In his telegram of March 10th he said: "Extend credit to Ponchatoula Lumber Company to $12,000." This language would seem to import future loans, which, with what he had already guarantied, might go to $12,000. The court below, not having regard to the letters which followed it, construed the telegram to cover former advances, whether they had been made upon a guaranty or not. This suggestion, however, might not be decisive. But in his letter of the following day, confirming his telegram, he makes it clear, as we should think, when he said:

"You are authorized to grant Mr. Thompson credit for two thousand dollars more as he requests it, making $12,000 all told."

This imports a guaranty upon a credit thereafter to be given. Then, in reply to a letter of the bank written on the day after the receipt of the telegram, he further says:

"My guaranty for $2,000 more credit to the Ponchatoula Lumber Company, making $12,000, will hold good until they are able to pay the $2,000."

And we think the bank correctly interpreted the telegram, with the explanatory letters, when in its declaration it averred that it accepted them "as the guaranty of said defendant for loans to said Thompson and Ackley, doing business under the name of the Ponchatoula Lumber Company, to the amount of two thousand dollars ($2,000.00) in addition to the said loans to the amount of ten thousand dollars ($10,000.00)," and that the judge erred in ignoring the letters and holding that the telegram indicated a purpose to cover former advances not covered by his former guaranty. There is nothing in this correspondence to indicate that it was intended to cover previous loans, as was done in the guaranty given on January 19th, which was so expressed as to cover the advances which had been made before that date.

Then, as to the appropriation made by the bank of the proceeds of the sale on execution, the bank had a mortgage upon the property, and it obtained a judgment directing a sale, reserving to the bank the right to proceed upon the mortgage. But we are of opinion that the bank might waive this reservation and allow the sale to be made of the property without it, and appropriate the proceeds to the debt secured by the mortgage. The right of no one would be prejudiced by this course, and the indications from the sheriff's return and the appropriation of the proceeds of the sale by the bank are that the sale was of the entire estate in the property. If that was so, the appropriation was justifiable, if the mortgage was a valid one. Counsel for plaintiff in error argued in a somewhat vague way that, the release of the mortgage by Peters having been done for the purpose of enabling the lumber company to sell the property, it was inequitable for the bank to take advantage of the release and get a mortgage for its own benefit. But the failure to sell the property did not restore the mortgage, and there is no ground for holding that the mortgage to the bank is affected by the mortgage which Peters had, but released without reservation. His motive or object did not effect the consequences of the release.

In respect to the item of $181.78, it was misapplied. It should have been applied to all the indebtedness remaining unpaid, pro rata; that is to say, upon the sum loaned and guarantied by Peters, which was $11,500, and the sum loaned by the bank in excess of $10,000 before the guaranty of March 10, 1904, was given, which was $682. It was proper to include interest in the judgment rendered by the court below.

The judgment will be reversed, with costs, and with directions to enter a judgment in conformity with this opinion.

CARSON et al. v. THREE STATES LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

No. 1,536.

JUDGMENTS—DECISIONS OF STATE COURTS—RES JUDICATA.

Plaintiffs, having conveyed the timber on certain land in 1893-94, without fixing a time for the removal thereof, instituted a suit in 1901 against defendant which had acquired such timber rights to restrain it

from removing the timber, on the theory that defendant was only entitled to a reasonable time to remove the same, which had then elapsed. The bill prayed that, in case a reasonable time had not elapsed, the court should fix a time within which the timber should be removed. The state Supreme Court, reversing a decree sustaining complainant's contention that a reasonable time had elapsed, *held* that, under the evidence disclosed, a reasonable time would not elapse until November 1, 1903, and dismissed complainant's bill. *Held* that, though the decision fixing the time was contained only in the state court's opinion and not in its decree, it was, nevertheless, within the issues tendered by the bill, and was res judicata of complainant's right to recover the value of timber cut from the land by defendant prior to the date so fixed.

[Ed. Note.—Conclusiveness of judgment as between state and federal courts, see Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468.]

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

For opinion below, see 142 Fed. 893.

B. Pierson, for plaintiffs in error.

W. A. Percy, for defendant in error.

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

COCHRAN, District Judge. This was an action brought November 6, 1905, by the plaintiffs in error against the defendant in error, to recover the value of the merchantable timber growing on a certain tract of land in Lake county, Tenn., cut and removed therefrom by the latter between September 1, 1902, and November 1, 1903, alleged to be $65,000. The defendant claimed title thereto through the plaintiffs. By deeds dated, respectively, February 14, 1893, and July 5, 1894, plaintiffs, being then the owners of the land and timber both, conveyed the latter to certain vendees, and title thereto, prior to its being cut and removed, had passed from said vendees, mediately, to the defendant by proper deeds of conveyance. The deeds from plaintiffs contained no provision as to the time in which the timber should be cut and removed. They were silent on the subject of its being cut and removed. Plaintiffs, notwithstanding their deeds, claimed title to the timber at the time it was cut and removed, and in this way: It was an implied condition of them that the timber was to be cut and removed in a reasonable time. By September 1, 1902, after which the cutting and removal began, a reasonable time had elapsed. Upon the lapse thereof the title to the timber reverted to plaintiffs.

The declaration, besides setting forth plaintiffs' claim of title to the timber, graciously alleged facts that might be claimed by defendant to operate against their claim. Those facts are these: May 11, 1901, plaintiffs brought a suit in equity in the chancery court of Lake county, Tenn., against defendant. At that time the timber had not been touched. In the bill plaintiffs asserted title thereto on the ground that a reasonable time for it to be cut and removed had then elapsed and prayed an injunction against defendant, restraining it from cutting and removing the timber. They prayed also that, "if the complainants should be mistaken as to the defendants having had a reasonable

time in which to remove the said timber from the said land, then will the court fix and determine what will be a reasonable time in which they must remove the timber." The defendant answered, denying that a reasonable time had then elapsed, and claiming the right to cut and remove the timber whenever it pleased. Proof was taken and upon submission of the cause. Said chancery court rendered a decree upholding plaintiffs' contention and enjoining defendant from cutting and removing the timber. An appeal was taken from that decree by defendant to the Supreme Court of Tennessee. That court on May 24, 1902, handed down an opinion holding that the decree of the lower court should be reversed, and thereupon entered a decree dismissing the plaintiffs' bill. The opinion is reported in 108 Tenn. 681, 69 S. W. 320. It was handed down by Judge Beard on behalf of the court. In it, after considering the question as to whether those claiming under plaintiffs' deeds had an unlimited or only a reasonable time in which to cut and remove the timber, and holding the latter and noting, but passing by the question as to the effect on the title thereto of their failure to cut and remove it in such time, he concluded as follows:

"We are satisfied, after a careful examination of all the evidence in the record, a reasonable time within which the grantees and their assigns could remove the timber covered by the contract had not expired when the present bill was filed. It is estimated that in 1893 there was standing on the land from 16,000,000 to 18,000,000 feet of timber. The land, or the greater part of it, was low and swampy, and subject to overflow from the Mississippi river. At the time of the making of the contract, and until their sale in 1896 to Fitzhugh, Hull and Polhemus looked alone to periodic overflows to float out the logs they cut. In the winter of 1893–94 they succeeded in getting out about 1,000,000 feet, and, in anticipation of having another overflow, they had cut additionally 2,000,000 or 3,000,000 feet, but were not able to get it out on account of its failure. Mr. Hull says this timber was lost to his firm, and lying on the ground, worm-eaten and worthless, when they made their sale in 1896. The evidence shows that to haul this timber to the Mississippi river would have entailed a heavy loss to these parties, and at the time they were operating floating logs in an overflow was regarded as the only feasible plan of getting them to market. Since then tramways and steel roads for that purpose have come into use. In 1898 the Three States Lumber Company contracted with their codefendant Peck to erect a sawmill near the land, and cut the trees remaining on it, and convert them into lumber, and when this bill was filed he was constructing a steam railroad into the body of this timber, and was actively engaged in fulfilling his contract. Many witnesses qualify as persons having long and large experience in such work, and their estimates of a reasonable time for removing timber under this contract was from 6 to 13 years. After weighing all the testimony, we have concluded that a period of 10 years from the 1st of November, 1893—this date being midway between the two deeds—is, in view of all the conditions developed in the evidence as existing or likely to exist, a reasonable period. There, however, will be excluded the time which has been lost to the defendants by reason of the pendency of the injunction in this case. This bill is therefore dismissed, at cost of complainants."

It was held, therefore, not only that a reasonable time had not elapsed when the bill was filed, but also that 10 years from November 1, 1893—i. e., by November 1, 1903—was a reasonable time. In this latter particular the prayer of the bill that the court in the event it should hold that a reasonable time had not elapsed when the bill was filed should fix and determine what was a reasonable time was an-

swered. The decree entered by said court pursuant to said opinion is in these words:

"This cause came on to be heard upon the transcript of the record from the chancery court of Lake county, Tennessee, and it appearing to this court that in the decree of the chancellor there is manifest error, this court being of the opinion that complainants' bill should have been dismissed, it is therefore ordered, adjudged, and decreed by the court that the decree of the court below be reversed and the bill dismissed, and that the defendant company have and recover of complainants, S. B. Carson and wife and Mat Pate, and J. B. Carson and G. F. Carson, sureties on prosecution and injunction bonds, all the costs of this court for which let execution issue."

The plaintiffs claimed that, notwithstanding these facts, they were the owners of the timber and entitled to recover its value. They alleged them in the declaration in order that their effect might be raised by and determined by demurrer. The defendant demurred to the declaration, and the lower court, upon consideration of the demurrer, sustained it and dismissed the declaration. It is to this judgment that the writ of error herein is taken.

The writ presents for determination by this court the question as to the effect of said facts on plaintiffs' claim to said timber. By reason of them were or not plaintiffs estopped to assert that they had title to the timber at the time it was cut and removed? Is or not it res judicata that at that time a reasonable time had not elapsed in which to cut and remove it? It is certain that the Supreme Court of Tennessee in its opinion in said former suit held that a reasonable time would elapse by that time, and not until then. Upon what ground, if any, is it to be said that that holding is not res judicata?

Had the bill contained no prayer that the court, if it held that a reasonable time had not elapsed when the bill was filed, should fix and determine what was a reasonable time, it might be claimed, with some plausibility at least, that such holding was not res judicata. In that contingency the holding would have gone beyond the requirements of the case. It would have required no more than that it should be determined whether a reasonable time had elapsed when the bill was filed. At most, a holding as to what was a reasonable time would have been incidental merely to the holding that a reasonable time had not then elapsed.

It cannot be urged that said holding is not res judicata on the ground that, even though plaintiffs prayed for a determination of what was a reasonable time, they were not entitled to any such determination. It it not certain that they were not entitled to it. Possibly a vendor of growing timber under circumstances such as existed with reference to the timber in question at the time said suit was brought may, before a reasonable time has elapsed, have a right to bring a suit against his vendee or subvendee to have it determined what is a reasonable time in which to cut and remove the timber. His right to do so may come within the second class of the fourth group of equitable remedies pointed out in Pomeroy on Equity Jurisprudence, vol. 5, § 7, characterized in section 5 as "suits by which some general right either legal or equitable is established." But it is not necessary for us to say whether plaintiffs were entitled to any such determination. The defendants did not

claim that they were not entitled thereto, but litigated the question with them as to what was a reasonable time. The holding by the Supreme Court of Tennessee on the subject was not void. It cannot be claimed, therefore, that said holding is not res judicata on this ground. Plaintiffs in error do not so claim. The sole ground upon which they claim that said holding is not res judicata is that it is contained in the opinion only, and not embraced in the decree. The terms of the decree are limited to a dismissal of the bill. The necessities of this case do not require that we should consider this position on principle. It is disposed of by a decision which is controlling upon us. That decision was by the Supreme Court of Tennessee. It is State v. Bank of Commerce, 96 Tenn. 591, 36 S. W. 719. An irrevocable provision in the charter of the Bank of Commerce, a Tennessee corporation doing business in Memphis, Shelby county, Tenn., was to the effect that it should pay a certain specific tax on its shares of stock, and that such tax should be in lieu of all other taxes. The bank claimed that by virtue of this provision it was exempt from the payment of general or ad valorem taxes on its capital stock or surplus, and that its shareholders were exempt from payment of such taxes on their shares of stock. The state brought separate suits for the use of the city of Memphis and the county of Shelby against the bank and its shareholders, the latter by consent being represented by one of their number, in which it sought to recover ad valorem taxes for certain years on either the capital stock or the shares thereof; and, in any event, on the surplus. These suits were brought in the chancery court for Shelby county. That court held that the exemption covered all these taxes and dismissed the bill. On appeal to the Supreme Court of Tennessee that court held that it covered only the taxes on the capital stock, and did not cover those on the shares of stock or surplus. State v. Bank of Commerce, 95 Tenn. 234, 31 S. W. 993. The decree entered pursuant to the opinion was that the shareholders should pay the taxes sought to be recovered on the shares of capital stock, and the bank those sought to be recovered on its surplus. Nothing was said in the decree as to the capital stock not being liable to the taxes sought to be recovered on it. The case was taken on error to the Supreme Court of the United States by the shareholders and the bank. That court held that the exemption was limited to the shares of stock, and did not cover either the capital stock or surplus. It therefore reversed the decree of the Supreme Court of Tennessee as to the shareholders, and affirmed it as to the bank in so far as the surplus was concerned. It took no action as to said court's holding in regard to the capital stock, because so much of its holding had not been brought there on error and could not have been so brought. Bank of Commerce v. Tennessee, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645.

On the return of the case to the Supreme Court of Tennessee, the state, on behalf of the city and county, moved that court for a decree against the bank for ad valorem taxes on its capital stock. This motion was denied notwithstanding it had been held by the Supreme Court of the United States that the capital stock was liable thereto and its own decree was silent on the subject. As to the decree being silent, Judge Gilham said:

"In the decree no reference is made to the capital stock, nor does it in terms adjudicate that the capital stock is not subject to general or ad volorem taxation; but the opinion there delivered goes fully into this question, and the court undoubtedly held that the capital stock was not subject to general taxation."

It did so because it had so held in its opinion. Judge Gilham said:

"The principal questions now raised are: (1) Was the liability of the capital stock to general taxation by this court at the last term adjudicated? (2) If so, can we now readjudicate that question, and tax the capital stock? The decree is silent on the subject, but the opinion is full and clear. No one can read the opinion without understanding that this was one of the leading questions debated, considered, and by the court decided. In Fowlkes v. State, 82 Tenn. 19, this court, Judge Cooper delivering the opinion, has said: 'And even if the presumption, as stated by the referees, was that the dismissal was on the merits, if the record leaves the matter in doubt, this court may look to the opinion of the court then delivered, which is also a record, to clear up the doubt.' The Supreme Court of the United States in a recent case (In re Sanford Fork & Tool Co., 160 U. S. 256, 16 Sup. Ct. 291, 40 L. Ed. 414) say that the opinion delivered by the court may be consulted to ascertain what was intended by its mandate. Upon authority we think it clear that we may look to the opinion, in connection with the decree, to ascertain what was intended to be and was by the court decided. These suits were instituted to obtain a construction of the bank's charter and to settle the question whether the charter tax was on the capital stock or on the shares of stock in the hands of the shareholders, and to collect the general tax from the one or the other, as the court might construe its charter and locate the charter tax. The exemption of the capital stock from ad valorem taxation was therefore necessarily involved, and was a vital issue of the case. We understand it to be well settled that all the issues which might have been raised and litigated are concluded the same as if they had been directly adjudicated and included in the judgment or decree. Lindsley v. Thompson, 1 Tenn. Ch. 272; 21 Am. & Eng. Enc. Law, 216. We need not, however, rest our opinion on this doctrine; for, in the present case, the very question was litigated both in the court below and in this court. We are of the opinion, and therefore hold, that the decree of the last term, construed in connection with the opinion, adjudged that the capital stock of the Bank of Commerce was not subject to general taxation."

We gather from this decision that resort may be had to an opinion of the Supreme Court of Tennessee, not only to ascertain the reasons for the decree entered pursuant thereto, but also what has been decreed. In view of this decision, there can be no doubt that, if the action below had been brought in the state court of appropriate jurisdiction, the holding of the Supreme Court of Tennessee in the former suit as to what was a reasonable time in which to cut and remove the timber in a certain time would have been held by the state court to have been res judicata. If it was res judicata there, it is res judicata here.

In the case of Union & Planters' Bank v. Memphis, 189 U. S. 72, 23 Sup. Ct. 604, 47 L. Ed. 712, Chief Justice Fuller, affirming this court in same case reported 111 Fed. 561, 49 C. C. A. 455, said:

"What effect a judgment of a state court shall have as res judicata is a question of state or local law."

But, besides this, there is room to hold that the Supreme Court of the United States was of the same opinion as the Supreme Court of Tennessee as to the point decided in the case of State v. Bank of Commerce, 96 Tenn. 591, 36 S. W. 719. The record of the case of State v. Bank

of Commerce, 95 Tenn. 234, 31 S. W. 993, when before it in Bank of Commerce v. State, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645, showed that the holding of the Supreme Court of Tennessee that the capital of the bank was not liable to the tax sought to be recovered was in its opinion and not in its decree, and yet it was recognized that it was binding on the city and county, and by virtue thereof and its holding both the capital stock and the shares of capital stock for the years in question would escape taxation. Mr. Justice Peckham said:

"We cannot, therefore, review the decision of the state court allowing the claim of exemption from general taxation of the capital stock of the bank, although the consequence is that in these cases both the capital stock and the shares of stock thereof in the hands of the shareholders escape all taxation other than the charter tax."

In thus limiting the consideration of the point made on behalf of plaintiff in error to this decision of the Supreme Court of Tennessee, with such support as it has from this remark of Mr. Justice Peckham, we would not be understood as intimating that we have any doubt on the subject on principle. This decision relieves us of the necessity of considering the matter on principle, or searching for decisions of other jurisdictions covering the question as to how far resort may be had to the opinion of an appellate court to determine what it has decreed or adjudged, or as to whether a holding in such an opinion not covered by the decree is res judicata.

The judgment of the lower court is affirmed.

McBATH et al. v. JONES COTTON CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1906.)

No. 1,559.

1. SALES—CONTRACT—TIME FOR DELIVERY—ANTICIPATORY BREACH.

Plaintiff contracted to deliver 1,000 bales of cotton, of specified grades and at specified prices, on or before October 15, 1905, to a carrier, according to shipping directions to be furnished by defendants; plaintiff to pay cost and freight to Liverpool. About October 3d the point of delivery was changed; plaintiff agreeing to deliver at its warehouses in Birmingham and Decatur, Ala. On October 4th defendants sent an agent to Birmingham to receive cotton to be tendered there, and he, after accepting 100 bales, refused to examine or accept more, because the cotton tendered was not equal in staple to the contract quality. The agent was requested to go to Decatur and examine cotton to be tendered there, but refused, and on October 7th defendants, claiming a violation of the contract, gave notice of cancellation and thereafter refused to accept any further tenders. *Held*, that plaintiff had until October 15th in which to tender cotton complying with the contract, and that defendants' refusal to inspect and accept was premature, and entitled plaintiff to recover damage as for a breach of contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 222, 223, 362.]

2. SAME.

The rules applicable to an anticipatory breach of a contract apply as well to one party as to the other. The general rule applicable to a contract for sale and future delivery of articles not specifically designated is that a

buyer cannot reject a delivery conformable to the contract, when made in time, merely because there had been a prior tender of goods not conformable and rejected on that ground.

3. CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE.
Plaintiff, an Alabama corporation, with no warehouse, office, or domicile in Tennessee, contracted through a broker in Tennessee to sell cotton to defendants, to be delivered to a carrier in Alabama for foreign transportation and delivery. *Held*, that such transaction constituted interstate, and not local, commerce, and that plaintiff was not, therefore, doing business in Tennessee, within a statute of that state regulating foreign corporations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2520–2527.

Foreign corporations "doing business" in state, see Wagner v. J. & G. Meakin, 33 C. C. A. 585; Ammons v. Brunswick-Blake-Collender Co., 72 C. C. A. 622.]

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

W. A. Percy, for plaintiffs in error.
Thos. M. Scruggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The plaintiffs on September 29, 1905, contracted to sell to the defendants 1,000 bales of cotton, deliverable on or before October 15th to a carrier according to shipping directions to be furnished by the buyer; seller to pay cost and freight to Liverpool. The cotton was sold by samples of type and was described as follows: 200 bales fully good middling at 11⅛ cents per pound; 500 bales good middling at 11 cents per pound; 300 fully middling at 10⅞ cents per pound, "mutual allowance in weight"—a term signifying a reweighing at Liverpool, seller to be credited with gains over weights when delivered to carrier and charged with loss. Shipping instructions were sent October 3d. But about the same date the buyers requested a delivery of the cotton to a representative here. After some objection the seller agreed to deliver what they could at their warehouse in Birmingham, Ala., and the rest at Decatur, Ala. On October 4th the buyers sent an agent to Birmingham to receive cotton there to be tendered. The agent brought with him samples, and claimed that the cotton to be received must correspond in staple. He proceeded very leisurely and with much circumspection. The first day, out of a much larger number of bales, he accepted less than 100 and declined the rest sampled for him. The next day he selected less than 50 bales, and upon the third day still less. In all, he accepted and marked something more than 100 bales. Most all of the cotton tendered upon these three days, and rejected, was refused upon the contention that it did not come up in staple to the cotton agreed to be delivered.

Cotton began to decline a day or two after this sale was made, and it continued to decline day by day. After the buyers' agent had spent parts of three days in inspecting cotton tendered upon the contract at Birmingham, he refused to inspect more and declared he would receive none; that the seller breached the contract by tendering cotton which was not deliverable in respect to staple; and that his principal

canceled the contract. He was urged to go on with the inspection, and asked to go to Decatur, where the seller had other cotton which would be tendered. This he absolutely declined to do and declared the contract off. This was on October 6th. The same night the buyers, upon information from this agent, wired the sellers as follows:

"Jones Cotton Co., Decatur, Ala:

"Your conduct as to my contract for one thousand bales is unjust, as you well know, and is a violation of the contract. I therefore cancel same.

"W. P. McBath & Co."

This wire was received on the morning of October 7th. On October 10th, Mr. Phillips, acting for the sellers, went to office of the buyers and told Mr. McBath that he had come for the purpose of tendering him the cotton. Mr. McBath said "there was no use in talking about it, that he was not going to take up the cotton." Mr. McBath substantially agrees by saying that he told Phillips that the agent he had sent to Birmingham was an experienced man; "that Phillips said, 'Will you go, and I will let you receive the cotton,' and I said that, if he did not agree with Mr. Whitman, he could not agree with me, and I told him I did not have the time to go down there and have another squabble with him, and I refused to go with him on those grounds. I was just as anxious to receive the cotton as he was to tender it." The decline in cotton by October 6th was $3.40 per bale; the market price in Liverpool, New York, Memphis, and Birmingham being substantially the same, with allowances for freight.

On October 20th this suit was started by the seller to recover damages for the breach. There was much evidence upon the question as to whether the sale was of any particular staple and whether the staple of the cotton tendered at Birmingham and rejected was in this respect conformable to the contract of sale. But Judge McCall, who heard the case in the court below, thought this was an immaterial question, and instructed the jury that it made no difference whether the cotton tendered upon October 6th was deliverable under the contract or not, or whether any cotton was then tendered; that the plaintiff had until October 15th to tender and deliver under the contract; and that the cancellation of the contract by the buyer on the 6th of October was unauthorized, and gave the plaintiff the right to recover damages. Accordingly the jury was directed to find for the plaintiff the difference between the contract price and the market price on October 6th. There was a judgment for $3,400.

Assuming that much of the cotton tendered at Birmingham and rejected was not receivable under the contract, the agent of the plaintiff in error did receive and mark more than 100 bales of that sampled for him. He was urged to continue his inspection—urged to go to Decatur, where part of the cotton was deliverable under the modified agreement. He arbitrarily refused to go on, canceled the contract, and went home. This action his principal ratified in express terms, and when, on the 10th, the buyers were urged to inspect other and further tenders, they stood flat upon the cancellation made on October 6th. The contract was not one for the sale of any specific bales of cotton. It could be performed by delivering any 1,000 bales which conformed to

the trade description of the cotton sold. That a delivery might have been made on or before October 15th is not disputed. That the buyers on October 6th absolutely and unconditionally canceled the contract, and, when urged to inspect further tenders, claimed the right to repudiate their obligation, is also conceded. This is defended only upon the ground that the tender made upon the 6th was of cotton which was not deliverable in performance. But, if this was so, did that cut the vender off from making other deliveries at any time, on or before October 15th, of cotton which was receivable? A seller of chattels, who binds himself to deliver within a definite time, cannot excuse himself for not tendering a delivery when due, unless the buyer, in anticipation, makes the clearest announcement of his repudiation of the agreement and refusal to go on. The refusal must be absolute and unequivocal. Smoot's Case, 15 Wall. 37, 21 L. Ed. 107; Dingley v. Oler, 117 U. S. 490, 502–503, 6 Sup. Ct. 850, 29 L. Ed. 984. When the claim is that one party is relieved from performance by the conduct of the other before the time of performance, we must look to all the circumstances to see whether that conduct amounts to an out and out repudiation of the contract and an unequivocal refusal to perform his part. Michigan Yacht & Power Co., v. Busch (C. C. A.) 143 Fed. 939, 932; Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569, 572. 12 C. C. A. 306; Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. The rules applicable to an anticipatory breach apply as well to one party as to the other. It may be that a tender of chattels not receivable may be made in such final and unequivocal terms as to justify the other party in acting upon it as a breach and canceling the agreement. But the general rule is that a buyer may not reject a delivery of goods conformable to the contract, when made in time, merely because there had been a prior offer of goods not receivable and rejected upon that ground. Tetley v. Shand, 25 Law Times, 658, and Borrowman v. Free, 41 L. R. Q. B. D. 500, are expressly in point.

In Borrowman v. Free, cited above, the facts were that the defendants agreed to buy of the plaintiffs a cargo of maize. The plaintiffs tendered the cargo of the C., which the defendants refused to accept. The plaintiffs insisted that the tender was valid. The dispute was referred to an arbitrator, who decided that the tender was invalid. The plaintiffs then, within the time limited by the contract, tendered the cargo of the M. This the defendants refused, upon the ground that they were not bound to accept any cargo in substitution for that of the C. The court held that the defendants were bound to accept the cargo of the M., and that the plaintiffs were entitled to recover damages as for a breach. In Tetley v. Shand, cited above, the plaintiffs tendered, before the expiration of the time for delivery, cotton which was not up to the contract. On defendants rejecting same, they, before expiration of the time fixed for delivery, tendered other cotton which was in accordance with the agreement. Held, that the plaintiffs had not, by the first delivery, broken the contract, so as to justify the defendants in refusing to accept the cotton subsequently tendered.

To justify a cancellation of a contract for purchase of so many bales of cotton of a certain type or quality before the time for delivery by the seller has passed, upon the ground of a tender of cotton not receivable, the purpose of the seller to make no other tender and to stand irrevocably upon the tender of delivery made must be absolute and unmistakable. There must be no locus penitentiæ. Here there was no standing by the sufficiency of the tender made of bales which had been rejected. The buyers' agent was urged to go on and examine other cotton, and to go to Decatur where cotton was deliverable under the modified agreement. Still later the seller showed his purpose not to abide by the actual tender made, and that he wished to show other cotton. The cancellation by the buyer was premature, and the plaintiff below had a right to maintain its suit for the difference between the contract price and the value on October 6th, at which date the defendants below elected to absolutely repudiate the contract. It may be that upon the 10th, when defendants reaffirmed their repudiation made upon the 6th, or upon the 15th of the month, the final day for delivery, there had been some change in market prices, or some gain or loss over the price upon the 6th of October. But the plaintiff had a right to accept the repudiation of the contract made upon the 6th in most unequivocal terms, and the defendants cannot complain if the damage is estimated as of that date. Roehm v. Horst, 178 U. S. 1, 21, 20 Sup. Ct. 780, 44 L. Ed. 953.

It is next said that the plaintiff below, the Jones Cotton Company, was an Alabama corporation, which had not complied with the Tennessee statute prescribing the terms upon which foreign corporations may do business within the state, and that the contract for the breach of which it sues is an invalid contract, because made by a corporation not authorized to do business in Tennessee. Cary-Lombard Lumber Company v. Thomas, 92 Tenn. 587, 22 S. W. 743; Harris v. Water & Light Company, 108 Tenn. 245, 67 S. W. 811. The Jones Cotton Company had no warehouse or office in Memphis. They had no cotton there. Their warehouse and office were in Alabama, and the cotton contracted to be sold was to be delivered to a carrier in Alabama for delivery in Liverpool or Havre. The sale was through a broker upon a commission, who sold for all who sought his services. It had not domiciled itself in Tennessee, and was not doing business in that state, within the meaning of the statute. The commerce, moreover, was interstate, and not local, commerce. The Tennessee court has limited the Cary-Lombard Case in Milan Milling Company v. Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135, in which case the court said:

"The court, in the Cary-Lombard Case, was not dealing with interestate commerce. No such question was presented by the record in that case. On the contrary, it distinctly appeared in evidence that the Cary-Lombard Lumber Company had an office and lumber yards in the city of Memphis, and was actually engaged in carrying on business in this state. It had acquired a situs and domicile in the state, and was, of course, subject to the regulations of our statute. In the case at bar, the Maish & Gordon Manufacturing Company, a foreign corporation, had simply contracted with citizens of Tennessee to furnish certain milling machinery and to adjust it in position in the mill. This company was in no sense engaged in carrying on its business in this state, but was engaged in an act of interstate commerce."

The other errors assigned are without merit. Judgment affirmed.

BURTON v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,574.

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff while in the employ of defendant railroad company, caused by the blowing out of a plug which had been placed in the crown sheet of a locomotive on the inside of the fire box, evidence *held* to require submission of the question of defendant's negligence in inserting the plug, etc., to the jury.

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

Geo. E. Wallace and J. A. L. Wolfe, for plaintiff in error.

Geo. Thompson, W. L. Hall, Peyton F. Edwards, Peyton J. Edwards, and P. R. Price, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was an action by the plaintiff in error, E. E. Burton, against the defendant in error, the Texas & Pacific Railway Company, to recover damages for personal injuries claimed to have been received by him while in the employ of the defendant in error, and proximately caused by its negligence. The accident was occasioned by the blowing out of one of the plugs which had been placed in the crown sheet on the inside of the fire box of the engine, whereby steam and boiling water was thrown on the plaintiff and inflicted serious injury on him. When the plaintiff had introduced all of his evidence, the defendant moved the court to give to the jury the general charge for the defendant, which the court thereupon did, and there was verdict and judgment in accordance with this instruction. The plaintiff brings this writ of error.

We will notice only the (2) error assigned, which is as follows:

"(2) The court erred in instructing a verdict for the defendant and in refusing to submit the question of negligence to the jury, for the reason of the preponderance of the evidence introduced showed that the plug which blew out of said engine was defective, unsafe, and dangerous, and had been improperly placed and maintained in the crown sheet of said engine, and was known to said defendant, or could have been known by the exercise of ordinary care; that defendant was guilty of negligence in the manner and way in which said plug had been inserted and maintained, and was also guilty of negligence in not inspecting said plug and crown sheet and discovering the unsafe condition of said plug and repairing said crown sheet by inserting a new plug, which said negligence and negligent acts and omissions on the part of defendant was a proximate cause of plaintiff's accident and injury."

The defendant corporation operates a line of railway from El Paso, Tex., to Toyah, Tex. At the time of the accident plaintiff was working as brakeman on what is known as a "dead freight train," which was being pulled by engine No. 257 and was then near a station known as "Malone." The proof shows that this engine (and numerous other engines used by defendant on that part of its line) was originally con-

structed and equipped with brick arches for the protection of flues and other appliances therein; that there were four pipes connecting the crown sheet with the flue sheet, through which pipes steam and water was conveyed; that prior to plaintiff's injury this engine (and others) was remodelled, and these arches and piper were removed or abandoned and the holes or places where the pipes were originally located were filled up with plugs which were screwed and fastened into the crown sheet for the purpose of closing the openings therein made by the removal of the pipes and in order to retain water and steam in the boiler. The witness Fred Fahrenkamp, who at the time of the injury, and at the time of the trial, was in the employ of the defendant corporation in the capacity of locomotive fireman, and who had charge of the engine No. 257 pulling the dead freight train at the time of the injury, testifies that it was one of the plugs that had been put in one of the holes in the crown sheet above mentioned, that blew out, and when it blew out, the door was thrown open and the steam, water, cinders, and everything else blew out at the door and the plaintiff was badly scalded. At the time the accident happened there were two gauges of water in the boiler, which was a safe quantity to have; that it was one of his important duties to watch the water, keep plenty of water in the boiler, and, at the same time, not to have too much. At the time of the accident there was between eight and nine inches of water over the top of the crown sheet, that he was carrying between 195 and 200 pounds of steam, which was a safe head of steam, these engines being supposed to carry 200 pounds; that they were running at the rate of 8 or 10 miles per hour going uphill.

A. B. Powers, a witness for plaintiff, testified in substance that, in June, 1904, at the time the injury was received, he was working for the defendant railway company as a boiler maker, and that he did some work at that time on engine No. 257; that originally there were four pipes in the fire box of this engine, which, before he commenced to work for the company in 1901, had been taken out, and the holes plugged up with iron plugs by tapping them out, and screwing plugs in instead; that almost all of the engines on that division originally had pipes in them which were cut out and the holes plugged up as above mentioned. There were eight holes—four in the crown sheet, and four in the flues; these plugs had to be renewed all along by cutting new threads on the sheet where the pipes came out and putting in new plugs. We had to tap the sheet here. By tapping, I mean cutting threads through the crown sheet and the flue sheet. After cutting threads in these sheets we used iron plugs with corresponding threads to fill up the holes. When these threads were first cut on there, there were four and a half threads to the sheet. The sheet is three-eighths of an inch in thickness and there are 12 threads to the inch. When the plug was screwed in, there were about 4½ threads on the plug corresponding to the threads on the sheet. When this engine came back after the accident, I do not know that I examined the threads, because I was in a hurry, working at night, and I and my helper just retapped the sheets and screwed a new plug in. Of course the sheet had to have a new thread put in it. I could not tell at that

time how many threads were in the sheet; I did not count them; I never paid much attention to it. It was in bad shape, and had to be repaired, but I could not say how many threads were there. I never saw the plug, but the sheets had been calked. That is all I know. It had been calked several times, I know. All the evidence there would be of this would be a little ring around the sheet to show where it had been pulling against the plug. Every time you calk it, it would be a little thinner, a litle bit thinner—cut out a little more of it next to the plug. This calking thins the sheet out a little every time and makes it a little thinner. Calking it takes a little of it off and this shortens the threads up. We had to cut new threads in this hole because the plug blew out "and this kinder stripped the threads off." I could not tell whether the boiler plates around that hole was thinned from having been calked one time or more. It might have been made by the first calking, or it might have been made by more calkings. The sheet was thinner than the original sheet fom the calking. The calking made it thinner. I do not know whether it was the first, second, or third calking, but I know it had been calked and was thinner than the original sheet when it was first put on. This crown sheet was originally three-eighths of an inch thick. I would say it was about one-eighth of an inch thinner—just by estimating it.

N. C. Mace, a witness introduced by the plaintiff, testified in substance: I am a boilermaker; foreman of the El Paso Foundry & Machinery Company; have had 11 years' experience; am familiar with the construction and repairing of locomotive boilers, having served my apprenticeship in a locomotive engine shop where they repair locomotive boilers. Since this time I have had 11 years' experience. I am foreman of the boiler department of the shop where I work. My work has been general boiler repairer and the construction of new boilers. From my experience I know the manner and way in which holes in boilers should be plugged or stopped up. I am familiar with the construction of crown sheets and flue sheets connected by pipes for the purpose of supporting brick arches, and know how these pipes are fitted in the boilers. The openings made by the removal of these pipes are usually stopped by tapping the holes, and screwing plugs on the inside of the firebox. By tapping, I mean cut threads in the hole to be filled with the plug. This can be done so as to make the boiler reasonably safe. I would say that if the plug is put in in the proper manner, under ordinary circumstances, it is impossible for it to blow out. If the plug is put in in the proper manner, and kept in proper repair, it is impossible for it to blow out. I know what is meant by calking. I understand that term as applied to boiler making. It is proper when the plug is inserted to calk. This is done by taking the peen of the hammer—that is, the reverse side or round end of the hammer—and tapping around the edge of the plug so as to make it lap over onto the sheet. You tap the plug and not the sheet, for the reason that the blow striking that way on the plug has a tendency to expand it, make it tighter, drive the particles of matter together, and the calking of the sheet would have a tendency to the reverse to a certain extent; that is, it would have a tendency to

loosen it up or drive the sheet further from the plug. It would not enlarge the hole very perceptibly, but the jarring of the hammer on the sheet would have a tendency to disturb the mesh of the threads. If, when a new plug is put in one of these original pipe holes, the man who put it in (the boiler maker) should calk the sheet (not the plug, but the sheet) so as to cut off one-third of the sheet—in other words, make it one-third thinner—in my opinion as a boiler maker that plug would not have been properly put in; because he has weakened the sheet by one-third. Ordinarily, crown sheets are three-eighths of an inch thick. This is the common thickness of an average locomotive. If a plug 2 inches in diameter is placed in the crown sheet of an engine carrying 2 (200?) pounds steam pressure, the plug would of course carry 200 pounds to the square inch, and the area of a 2-inch plug is 3.1416, or 3⅛, and a little more than 600 pounds of pressure carried on that plug. If the crown sheet had been calked so as to do away with one-third of it, it would be considered reasonably safe if the calking process had not disturbed the threads, but you could not take away one-third of the sheet without disturbing the threads. So I would say that its efficiency had been lessened by one-third. An engine which is built to carry 200 pounds of steam will be considered safe until the steam pressure has reached seven times the amount carried; in other words, seven is considered the factor of safety in locomotive boilers. It is not considered that a boiler is in danger of eruption until the pressure is seven times what the steam gauge registers. After these pipes are removed and the plug is properly put in, I should not say it would equal the capacity; that is, carry the same pressure that a new sheet would. In my opinion that would be reduced to something like five—the factor. If the plug is properly put in, it would be reasonably safe. I base this statement on my own experience. I have put in numbers of these plugs. During some six years of my time, I have had some experience off and on with this class of engines that had these pipes, and during this time have put in several of these plugs. The more general cause of these plugs blowing out is that they begin leaking; the mud gets in around the meshes of the threads and has a tendency to destroy them, and as they are calked it generally loosens them up and destroys the meshes of the thread. Another reason that may be assigned would be an excessive steam pressure, which is very seldom. It might be that the water had been low on the crown sheet and the sheet become heated to a higher temperature than it would be if the water were on it, and in that case the hole would be expanded and it would allow the meshes of the thread to separate with the pressure. I would say that it was not possible that 195 pounds of steam on an engine that carries the pressure of 200 pounds to blow out one of these plugs, if it was properly put in and in proper repair.

M. H. Gibbs, a witness for the plaintiff, testified in substance, that he had been employed as a boiler inspector by railway companies. Had about nine years' experince working for the Santa Fé, was familiar with the construction of locomotive boilers and the manner in which an inspection of them is made, knows what is understood by

flue sheets and crown sheets, and is familiar with the manner in which holes that were left by the removal of pipes are stopped in these crown and flue sheets.

T. J. Maloney, a witness for the plaintiff, testified that he was a machinist, had had 25 years' experience as such, had worked for the G. H. Railway Company in El Paso as a machinist and afterwards as foreman. His duties required him to look after the repair of locomotives. He had charge of that work. He was familiar with the manner in which openings in the crown sheets and the flue sheets are closed, and knew how to do that work. These witnesses, Gibbs and Maloney, were examined fully, and thoroughly cross-examined, and their testimony was substantially to the same effect as that of the witnesses whose testimony has been recited. As is not unusual in such cases, all of these witnesses for the plaintiff were examined by able counsel with the ingenuity acquired by veteran experience, and some qualification in the shading of the testimony is shown in the narrative of it as given on this acute cross-examination; but the substance of the evidence, we think, is as we have stated it. The rule to determine when the evidence is such as requires that it should be submitted to the jury to find the facts as to the issue joined by the parties is so admirably discussed and clearly stated in the case of the Grand Trunk Railway v. Ives, 144 U. S. on page 417, 12 Sup. Ct. 679, 36 L. Ed. 485, that it has not been departed from or qualified in the many more recent cases, but has been expressly approved, or assumed to be correct in all of them. Some of the language of the opinion to which allusion has just been made is the following:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence" and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

We deem it unnecessary to cite other authorities. There are reported cases almost without number which have been passed upon by courts of last resort, both state and federal, illustrating the application of the rule above announced. A number of such cases have been before us on writ of error, and our views have heretofore been fully expressed in the reports of the opinions announcing the decisions of this court in such cases. Referring generally to the decisions of the Supreme Court of the United States, with which we assume that the members of the bar are familiar, and to the decisions of this court, with which the members of the bar in this circuit should be familiar,

we conclude that the trial court in the case now before us erred in withdrawing the case from the jury by his instructions to them to return a verdict for the defendant.

Therefore, the judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to award plaintiff a new trial.

FIRST NAT. GOLD MINING CO. OF NEW YORK & COLORADO v. ALTVATER et al.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1906.)

No. 2,342.

1. TRIAL—DIRECTION OF VERDICT.

A question of law arises at the close of the evidence whether there is any substantial evidence on which a verdict can be sustained in favor of the party producing the evidence, and, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 339, 376–380.]

2. MINES AND MINERALS—LOCATIONS—ASSESSMENT WORK—PERFORMANCE—EVIDENCE.

In a suit to quiet title to a mining claim, evidence *held* insufficient to establish that the persons under whom defendants claimed title to the ground under a prior location had performed the assessment work required by Rev. St. 1878, § 2324 [U. S. Comp. St. 1901, p. 1426], so as to hold the ground against plaintiff's subsequent location.

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

H. Riddell and E. W. Hurlbut, for plaintiff in error.

William H. Bryant (Charles S. Thomas and William P. Malburn, on the brief), for defendants in error.

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

PHILIPS, District Judge. The plaintiff in error, the First National Gold Mining Company of New York and Colorado, in 1901 made application to the General Land Office of the United States for a patent on what is known as the "Burroughs Lode," embracing a number of alleged contiguous mines hitherto known as the "Garrison," the "Vanderen," the "Beverly," the "Ford," the "Farmer," and on the west of said group the "Garrison," the latter embracing 233⅓ feet in length and 50 feet in width. The said mines had been located, perhaps, as early as 1859. The First National Gold Mining Company claims to have acquired said mining claims prior to 1889. There was no record evidence of the title to the said Vanderen, Beverly, Ford, and Farmer claims beyond a prior occupancy by the plaintiff in error and its predecessors. Said application for a patent was adversed by John Clear, Joseph Updegraff, and Martin Lawler, who are represented in this litigation by their respective administrator and administratrix. The said John Clear in his lifetime became the assignee of the prop-

erty in controversy under a location made thereon August 20, 1891, known as the "John Clear" location, August 20, 1891. Conformably to the provisions of section 2326, Rev. St. [U. S. Comp. St. 1901, p. 1430], the adversing claimants instituted this action to determine the rights of the respective claimants to the premises.

The statute applicable to the situation (section 2324, Rev. St. U. S. 1878 [U. S. Comp. St. 1901, p. 1426]) declares that:

"On all claims located prior to the tenth day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, 1874, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The contentions made in the pleadings on behalf of the plaintiffs below are (1) that when said Clear made his discovery location and sunk his shaft in August, 1891, the premises were public domain, subject to entry, because the defendant below had not done the required amount of assessment work thereon for the years 1890 and 1891; and (2) that even if the defendant below did any such work, it was at the easterly end of the entire strip of ground, and as it had not shown any title to the 200 feet embracing the said Vanderen, Beverly, Ford, and Farmer claims, of 200 feet in length, the assessment work done on the strip east thereof could not be regarded as sufficient to preserve the other claims. At the conclusion of the evidence the court directed a verdict for the plaintiffs below.

As the ground in controversy, where Clear and others made their alleged discovery shaft in August, 1891, had never been patented, it was subject to location if there had not been done the required amount of work thereon for the year 1890 by the applicant for the patent. Lawler and Updegraff having died before the hearing, their testimony is absent. There is no claim made that the defendant below did any assessment work in 1891 before the location of the Clear lode, but it is claimed that the required assessment work was done in 1890 on the 183-foot strip in the shafts and drifts thereon, known as the Gould Shaft. The substance of the testimony on behalf of the plaintiffs below was as follows: Said Clear testified that he had lived for many years in the immediate vicinity of the Burroughs lode, and had known it for many years; it was about 400 feet from where he lived. He saw no work done thereon in 1890, although he worked on the Camp Grove mine, 300 or 400 feet away, for three months in 1890; that in passing from the Camp Grove to his home he went within about 300 feet of the Burroughs mine; that he worked on the Kansas lode about 150 feet therefrom; that nobody did any work on the Burroughs lode to his knowledge; that he saw the Gould shaft on that part of the Burroughs lode every day in the week from his boarding house, and did not see anybody about the Gould shaft in 1890, and that he did not believe that any one could have been working there without his seeing them.

Harvey Henry, who had lived near this place since 1865, who was an engineer and miner, testified that he knew the premises ever since he went there, and that he worked on the Camp Grove in 1890; that to the best of his knowledge no work was done on the Burroughs in that year; that he would have seen the work had it been done because he was working right there close to it always. The Camp Grove claim was 450 or 500 feet away; that he worked as an engineer on that claim, which kept him on the surface and in plain view of the Burroughs; that he worked on the Camp Grove claim during the last eight months of the year, but lived in Nevadaville, close by, right along. He was satisfied that no work was done on the Burroughs for the year 1890, because he was passing back and forth all the time; that there was hardly a day but that he passed around the mine somewhere; that he worked on the Phœnix a few days, and that the parties could not have worked on the Burroughs during the first part of 1890 without him seeing them; that if anyone had worked there he must have known it. He testified that he knew the witnesses of the defendant below, William Williams and Arthur Lugg, and he knew Matthews in his lifetime, and that if these men had been working up there the first three or four months of 1890 he must have known it.

James Williams, a miner, knew the Burroughs lode about 20 years. In 1890 he worked on the Leavenworth, about a mile from the Burroughs, and passed within 600 or 700 feet of the property every day, and did not know of any work having been done thereon in 1890, and that he would have known it if it had been done. The ground he worked on was west of the Burroughs lode, about 350 feet west of the Clear Discovery shaft. Did not see anybody working in the Gould shaft; that if anybody had been working there in the spring of 1890 he would have known it because he knew where the men in the settlement worked. He knew Williams, Lugg, and Matthews. They did not work in the Gould shaft in 1890. In that year they worked in the shaft 78 feet west of the Ophir shaft, 108 feet east of the Gould monument, off of the ground in controversy. That he walked by the shaft where Williams and others were working twice a day in 1889 and 1890. This testimony is not obnoxious to the criticism that it is negative in character. As to whether the locator has done the necessary amount of assessment work to entitle him to hold his claim, when contested, the evidence of the assessment necessarily is more or less in form negative. The witnesses ordinarily can only testify that they did not see the work done. The value of their testimony is conditioned upon their opportunities for observation and their relation to the situs of the mine, so as to enable them to see it and to say whether it was probable that they would have observed such a physical fact as the working of the mine had it been done before their eyes. These witnesses were miners. From the very habits of their vocation they would take notice of the presence of their fellows engaged in such work within the range of their vision, where they were daily passing, doing like work in close proximity. It is a noteworthy fact that Clear and others who lived in the immediate vicinity of this mining claim, familiar with it many years prior to 1890, passing by it during

that year, should in 1891 express their confident assurance in its being public domain, based upon the absence of any work having been done on the ground in 1890, by entering thereon and making the location shaft.

To meet this persuasive proof, the defendant below introduced William Williams, who testified that he was living in that vicinity in 1889 and 1890 and knew the Burroughs lode and the Gould shaft, and worked in the shaft in 1889 and a part of 1890; that he was working about 100 feet down in the shaft; that he was working under a lease from Messenger, who was defendant's agent; that Matthews was interested in the lease with him and Arthur Lugg drove the whip; that he thought they did $200 or $300 worth of work in the shaft. Matthews is dead. The cross-examination of this witness demonstrated beyond any reasonable contestation that if he worked there at all it was in 1889. His statements were so confused and contradictory as to destroy the effect of his testimony as to his work there in 1890. The cross-examination further developed the fact that he had for some time been out of the country where this mine was located, and was living at Idaho Springs. He could not tell the year he left the locality of the mine. It further developed the suggestive fact that W. C. Matthews, brother of Thomas Matthews, who seems to have been acting in behalf of the defendant below, hunted up this witness at Idaho Springs, who, though he had never worked on the premises, had refreshed the witness Williams' mind as to the circumstances. In response to the question: "Will you swear you ever struck a pick in that ground in 1890?" He answered: "No, sir, I won't."

"Q. Don't you know that you didn't? A. I don't believe I did. Q. Now, you are certain, aren't you, that you began to work in the spring of 1889, and worked about two months? A. Worked two or three months. Q. You are also certain you went back there about three months later and then went to work again and worked about three months? A. Yes, sir. Q. Never worked there after that, did you? A. No, sir."

When inquired of, if as a matter of fact he had not forgotten all about the matter when William Matthews came to see him, this question was asked him:

"If he hadn't come to see you you would have never remembered anything more about it? A. Yes, sir."

Arthur Lugg, a witness for the defendant, testified that he lived at Nevadaville, which is near the Gould shaft, until he was about 15 years old; that he knew the Gould shaft, and worked there one Saturday driving the whip horse (used for hoisting) when he was 13 years old; that being 13 years before the trial. This witness was also approached by said William Matthews, who asked him if he did not work for Tom and William, and he said, "Yes."

The last witness for defendant below was Mrs. Eliza Matthews, widow of the man who is alleged to have done the work. She testified that she remembered her husband to have worked there in 1890 on account of the birth of her son; but she testified that he worked alone there that year, and that Williams worked with him the previous year, and she also put the boy Lugg there with him in 1889. It was further

developed on cross-examination that from the time of the alleged work to a few days previous to the trial she had never thought of the matter; and she said her husband never worked there after September, 1890, and when confronted with his affidavit to his having done work there in 1893, she admitted that she did not remember dates, because she never interested herself with the mining at all. If she is to be credited the other two cannot be, since she testified to work done by her husband along in 1890, and she is the only one who does so testify. In this she is flatly contradicted by three witnesses, to say nothing of the remarkable circumstance of a man working unaided in a mine 100 feet below the ground.

Judge Riner, who presided at this trial, after the argument on the motion for an instructed verdict, said:

"I have watched this testimony with a good deal of care. My own view is that you have not shown the amount of assessment work over there to entitle you to that. As to the work you did in the Gould shaft, you bring in here a woman who testified her husband worked there a certain time, and a boy who said he worked there one Saturday driving a horse; and against this testimony we have the testimony of Mr. Williams, who testified that he passed there every day. I think the plaintiff has the preponderance of the evidence as against you, so that I am inclined to grant the instruction. I do not think the testimony showing the amount of your assessment work is at all satisfactory; it would not be to me, and I think it fails in that, so far that it brings the case within the rule that obtains in this court, viz.: When the court is satisfied that the verdict should be but one way, it is its bounden duty to instruct that way. I think the preponderance of the evidence is in favor of the plaintiff's contention that you did not do the assessment work."

No right-minded, self-asserting judge, with a proper sense of duty, will permit a judgment, subject to his supervisory control, to be entered which his intelligent conviction advises him is unsustained by sufficient evidence. While abstaining from an undue assumption of the province of the jury to determine where the truth lies in conflicting evidence, and the reasonable inferences to be drawn therefrom, as said by Mr. Justice Brewer, in Patton v. Texas & Pacific Ry. Co., 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361:

"The judge is primarily responsible for the just outcome of the trial. * * * He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In Cudahy Packing Company v. Marcan, 106 Fed. 645, 45 C. C. A. 575, 54 L. R. A. 258, the syllabus prepared by the court lays down the proposition that:

"At the close of the evidence there is always a preliminary question for the judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly return a verdict in favor of the party who produces it, and, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him."

Conceding that, under the pleadings, the burden was upon the plaintiff below to show the failure of the defendant below to perform the essential work on the claim in question for the year 1890, we are satisfied

from an examination of all the evidence that the trial court was warranted in directing a verdict for the plaintiffs. In view of this conclusion, it is unnecessary to consider other questions raised in the assignment of errors.

The judgment of the Circuit Court is affirmed.

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

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,553.

1. RAILROADS—INJURIES TO LICENSEES—NEGLIGENCE—QUESTION FOR JURY.
In an action against a railroad company for killing the superintendent of a milling company by crushing him between certain cars and a wooden spout or chute through which grain was loaded from the mill into the cars, evidence *held* to require submission to the jury of the question of defendant's negligence in backing the cars onto the switch without notice to decedent.

2. TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.
An instruction that a witness might be contradicted, not simply by a witness swearing to the opposite, but by the improbability of his story, and by anything, either in the testimony as given or in the circumstances of the case presented, which in the judgment of the jury tended to discredit the witness' statements, the jury being required to ascertain the truth by the exercise of common sense, etc., was proper.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 531–533.]

3. DEATH—ACTIONS—PARTIES—BENEFICIARIES.
Under the Ohio wrongful death act, providing that the recovery shall be for the exclusive benefit of the wife or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused, the recovery to be apportioned among the beneficiaries with reference to their age and condition and the laws of descent and distribution of personal estates left by persons dying intestate, where decedent died leaving a father and mother and brothers and sisters, the action was properly brought for their joint benefit, and not for the benefit of decedent's next of kin, excluding his parents, though on decedent's death his personal estate would have passed to his brothers and sisters, and not to his father and mother, as provided by Ohio Rev. St. 1906, §§ 4153, 4159.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 47, 48.]

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

C. A. Schmettau, for plaintiff in error.
James M. and Walter F. Brown, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This suit was brought to recover damages for the death of Patrick Duffy through the wrongful act, neglect and default of the Toledo, St. Louis & Western Railroad Company. There was a verdict and judgment for the plaintiff below which the

railroad company seeks to have reversed principally on the ground that the court should have given certain directions in its favor.

The accident occurred on January 26, 1904, on a switch of the railroad company adjacent to the mill of the Miami Maize Company. Duffy was a foreman of the Maize Company in charge of the loading and unloading of cars. At the time of the accident, a car was being loaded by a gang of men under control of Duffy. This car stood on the switch next to the mill and was being loaded by the use of a wooden spout or chute extending from the mill into the car through its door. Standing on the switch about five feet to the west of this car, was a string of three empty cars on which the brakes were not set. There was a downgrade from the main track to the mill on this side of the switch. While Duffy was standing in the door of the car, directing his gang of five or six men, two box cars, coupled together and in charge of a brakeman, were kicked down upon the switch by the engine of a switching crew in charge of Conductor Turner. The cars, when cut off from the engine, were thrown into the switch with such force that the brakeman failed to stop them; they struck the three empty cars, forced them violently against the car being loaded, and Duffy was caught between the side of the door and the wooden spout and killed. The negligence charged against the railroad company was, first, in not giving Duffy notice that the two cars were about to be kicked down upon the Maize Company's switch; second, in failing to set the brakes on the stationary cars; third, in throwing the two cars, detached from the engine, upon the switch with such force that they could not be controlled; fourth, in failing to provide a proper and sufficient brake on one of the two cars thrown in, so they could be stopped in time; and, fifth, in not stopping these two cars in time, but negligently permitting them to collide with the cars standing on the switch.

The principal contention was with respect to the claim of negligence in failing to give Duffy notice that the two cars were about to be thrown in upon the switch. The railroad company contended it had established by the uncontradicted testimony of Conductor Turner, supported by his assistant Smith, that notice was given Duffy, and the court was requested, for that reason, to give certain charges which would have required the jury to dispose of this claim in favor of the railroad company. The court refused to do this. Notwithstanding the vigorous argument of counsel for the railroad company, we think the court below took the proper view of this matter in leaving to the jury the decision of the disputed question of fact involved. Counsel assumed that because Turner, supported by Smith, testified that Duffy, some 20 minutes before the accident, gave him a list of the cars to be taken from and the cars to be put upon the Maize Company's switch, saying, "Come right away, just as soon as you can," and he replied "All right, Pat, I will be there right away," that all the notice required had been given, and since there was no witness to contradict this statement, Duffy being dead, it must be accepted as the truth, and this claim of negligence eliminated. The court was asked to charge that

"while the jury are the judges of the credibility of the witnesses, yet the jury has no right to disregard the uncontradicted testimony of a witness whose credibility and veracity are unimpeached." This the court gave as correct in the abstract, but, applying it to the case in hand, reminded the jury that a witness might be contradicted, not simply by a witness swearing to the opposite, but by the improbability of his story, and by anything, either in the testimony as given or in the circumstances of the case presented, which in the judgment of the jury, tended to discredit his statements. "Common sense," said the court below, "is to be applied here as everywhere; and no technical rule of law harnesses your judgment or controls your common sense view of what is the truth, when it comes from the witness stand. You are the judges of that."

We find nothing to criticise, but something to admire, in the lucid definition given by the court of the word "contradicted" as applied to testimony given in the course of the trial; and we think the court was justified in view of the argument of counsel for the railroad company, in saying to the jury that the fact that Duffy, after his conversation with Turner, immediately put himself in a place of great danger, where he met his death, might be treated by the jury as a circumstance contradicting Turner's statement that he was notified they were going to throw the cars in upon the switch at once. A number of witnesses testified to the custom of the railroad company to notify Duffy or one of his men, whenever it was about to kick cars in upon the Maize Company's switch, so that, if a car was being loaded, the spout, might be removed and the men look out for themselves. Whether this custom existed, whether ordinary care required its observance, and whether any notice in compliance with it was given just prior to the time of the accident, were all questions which were properly submitted to the jury. We are clearly of the opinion that the court would not have been justified in taking this case, or the part to which we have alluded, from the jury.

Duffy left a father and mother and some brothers and sisters, and it is submitted that no testimony as to the condition of his father and mother, and the help he had been in the habit of giving them, should have been admitted, because, under the statutes of descent and distribution of Ohio, his personal estate would have passed to his brothers and sisters and not to his father and mother. Rev. St. Ohio, 1906, §§ 4153, 4159. But the Ohio statute regulating the action for injury by wrongful death, provides that it shall be "for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused." This action was properly brought for the benefit of the parents and next of kin of Duffy. The subsequent provision that the amount recovered "shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates, left by persons dying intestate," did not

make this an action simply for the benefit of the next of kin, excluding the parents. While the laws of descent and distribution of personal estates are to be considered by the court making the apportionment, the distribution is not to be made strictly in accordance with such laws, for the court is also required to consider the age and condition of the beneficiaries, a thing not taken into account in the laws of descent and distribution. Rev. St. Ohio, 1906, § 6135.

The judgment is affirmed.

DADY v. BACON.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 45.

TOWAGE—SINKING OF TOW—LIABILITY OF TOWING VESSEL.

A steamship *held* not in fault for the sinking of a barge which she was towing on one of her regular trips from New York to Cuba, because of her keeping up her regular speed until the barge was found to be in distress, where the weather was fair, and the sinking resulted from the unseaworthiness of the barge for such a voyage due to her age and structural weakness, which condition was not known to the master of the steamship nor apparent; he having the right to rely on the assumption that her owner considered her fit for the voyage when he contracted for the towage, knowing that the steamship was required to make schedule time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 11, 24, 25.]

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

For opinion below see 133 Fed. 986.

This cause comes here upon cross-appeals from a decree of the District Court, Southern District of New York, holding the respondent, who was operating the S. S. Vimeira under a time charter, liable for one-half the damages sustained by libelant by reason of the sinking and total loss of his barge James L. Ogden and her cargo.

Peter S. Carter, for libelant.

C. S. Haight, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The steamship with the barge in tow on a hawser, started from New York about 4 a. m. on June 3, 1902, bound for Cardenas, Cuba, and laid her course for Cape Hatteras. The following excerpt from the opinion of the district judge accurately sets forth the circumstances attending the sinking:

"The weather was fine [at the start] and continued so until the end. The steamship's usual speed was from 8 to 9 knots. During the day she made about 7 knots. Up to about 8 o'clock p. m. so far as the steamship was advised nothing unusual occurred on the barge, although she was sheering

badly owing to her lack of a rudder, but at that time a signal was displayed to the steamship asking her to proceed slowly. The steamship complied with the request and during the night went at the rate of about 2 knots. There is a conflict between the witnesses from the barge as to her condition at this time, one of three men on board testifying that there were then two feet of water in the hold, and another that the barge was not then leaking seriously. I am inclined to believe the former. There is no dispute between the two witnesses, who have been examined of those on board, that after the signal she leaked badly. During the night, one of her two pumps became choked and useless. By pumping all night with the other she was kept afloat, but when day broke on the morning of the fourth a sign was displayed on the barge, that she would not float more than two or three hours and the men were then taken off by a boat from the steamship. At this time the tow was opposite a point on the coast about half way between the Delaware and Chesapeake Bays. The master of the steamship so estimated, and that they were then about 50 miles from the coast and about 90 miles from Cape Henry. Under the circumstances, he did not feel bound to deviate from his course, especially as the appearance of the barge indicated that it was not probable she would last much longer, though in fact she did not sink for 8 or 10 hours. If that could have been known at the time, it does not seem that it would have made much difference, as it is doubtful if in view of her position, she could have been saved in any event. Her distance from the coast and the nearest point of refuge was such that going at the slow rate of speed she was obliged to use under the circumstances, she was practically without reasonable hope of reaching harbor, after she became partially filled with water."

The barge was an old one, built in 1864, and although she had been repaired and was no doubt fit for ordinary towing, she was in no condition structurally to withstand the strain of a long sea voyage, without a rudder, in tow of a steamship of a regular line, which was running on schedule time and had to keep up to a speed of 7 knots in order not to fall behind it, or incur liability for delay to the shippers of her cargo. She was, as the District Judge found, unseaworthy in the sense of not being in a fit condition to tow safely on the voyage which she entered upon.

The claim made in the libel, and on which libelant relied upon the trial was that there was a special contract that instead of laying the usual and direct course for Cardenas the steamship would keep along the coast, so as to be within 10 or 15 miles of shore and therefore, in a case of disaster much nearer to a port of refuge than she would be on her regular course and to tow at a lower rate of speed. On the argument, it was further contended that, even without a special contract, she should have followed the coast line as a safer course with a barge in tow. There was a sharp conflict of testimony as to what took place when the contract was made; on the part of the libelant evidence was put in tending to show such a contract; on the part of the respondent there was proof that such a contract was asked for but that it was refused, that libelant's agent was told the Vimeira would not follow the coast, and that her speed would not be reduced because she was running on a regular line, and because the sum offered for towing the barge was not sufficient to warrant her going at any less speed than ordinary—8½ to 9 knots. The District Judge heard and saw the witnesses, and found against the libelant on this branch of the case. He says:

"If the contract was as contended for by the libelant, the respondent would have incurred a liability for expenses considerably in excess of the towage returns. The improbability of such a contract being made in connection with the testimony satisfies me that the respondent's version of what occurred between the parties should be accepted."

We fully concur in this conclusion. The libelant, therefore, took the chances as he had the right to do if he so elected, of whatever increased risk there was in towing 40 or 50 miles from the coast at the speed which the Vimeira maintained, until advised of disaster, viz., 7 knots.

The District Judge held the respondent in fault because, although not advised of the structural unseaworthiness of the barge, the master of the Vimeira nevertheless could see enough about her to inform him that she was not in fit condition to tow at that rate of speed, and should therefore have reduced it. Two circumstances are relied upon:

(1) Her freeboard. There is some dispute as to what this was; one witness says 2 feet amidships and 4 to 4½ feet at the bow, another makes it between 5 and 6 feet at the bow and a foot and a half less aft. Moreover there was a bulkhead built across the bow to throw the water off when it struck her. Whatever was her actual freeboard it was amply sufficient for towing at 7 knots down to the time when signal was made and the speed reduced. The weather was fine and during her course down to the time when she was found to be making water—as the respondent's own witness testified "she rode beautifully in the sea * * * there was no washing at all over her, she acted beautiful that way." There seems to have been nothing in her freeboard to call for reduction of speed during that period.

(2) The absence of a rudder. Before starting the respondent had her rudder removed, apparently because it would be difficult to handle it in a heavy sea. In consequence, it was apparent that she would continually sheer from side to side and thus be exposed to greater strain. Because she had no rudder, the pilot who took the Vimeira down through the harbor refused to tow her, and she was brought down to the Lightship by a tug. That, however, was because of the damage she might do to other craft which would have to be encountered in a crowded harbor. In the open ocean with plenty of sea room the situation would be different. She was not heavily laden and we do not find sufficient in the evidence to warrant the conclusion that a sound, well-built craft might not be expected to withstand the added strain of towing without a rudder without incurring any particular risk. She was not in fact sufficiently sound in structure to stand that strain, but there was nothing in her appearance to convey that information to the master of the steamer, who knew she was turned over to him to tow through the open ocean at his ordinary speed. He was entitled to rely on the assumption that her owner, who knew her internal structure and condition, considered her fit to set out on such a voyage, and until something occurred to indicate that such assumption was unsound, was entitled to rely upon it. The Dis-

trict Judge, in our opinion, gave too much consideration to a remark of the master upon cross-examination that he considered "one knot was too great a speed to tow that barge." This is wisdom after the event, and manifestly an exaggerated form of expression epitomizing his general disgust at the complete break down which occurred without any untoward condition of wind or sea. He says that he did not think her "all right" to tow when she was given to him, but his testimony shows that what he meant was that he considered it a "very foolish idea" to tow without a rudder.

In our opinion, no fault is proved against the steamer. The decree is reversed, with costs, and cause remitted, with instructions to decree in accordance with this opinion.

PENNSYLVANIA R. CO. v. McCAFFREY et ux.

(Circuit Court of Appeals, Third Circuit. January 14, 1907.)

No. 27.

1. CARRIERS—INJURIES TO PASSENGERS—BURDEN OF PROOF.

In an action against a carrier for injuries to a passenger, the burden of proof of negligence is on the plaintiff, and cannot be shifted to the defendant without showing that the injury in question was caused by some person or thing connected with the carrier's railroad or business of transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1283–1294.]

2. SAME—EVIDENCE.

In an action for injuries to a passenger by a missile coming through an open car window, plaintiff's evidence was that the missile entered through an open window on the side next to a passing freight train, that it was a bolt with a nut on the end of it, and that such bolts were largely used in constructing ordinary freight cars, while, on the other hand, there was evidence that the missile was thrown through an open window on the opposite side of the car by one of several boys who were pelting the train as it went by them. *Held*, that the evidence as to whether the missile came from a source for which the carrier was responsible was insufficient to justify a verdict against it, and that a verdict should, therefore, have been directed in its favor.

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

James B. Vredenburgh, for plaintiff in error.
Edwin F. Smith, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. In this opinion the parties to the cause will be referred to in accordance with their respective positions in the court below, where Mr. and Mrs. McCaffrey were the plaintiffs and the Pennsylvania Railroad Company was the defendant.

While the plaintiffs were passengers in one of the cars of a train

operated by the defendant, Mrs. McCaffrey was struck by something which entered the car from the outside, and the defendant was averred to be liable for the injury thus caused to her, because, as was alleged, it "carelessly, negligently and improperly allowed certain of its rolling stock to become so out of repair and unsafe, and so carelessly, negligently, and unskillfully operated, managed and controlled its said railroad and the appurtenances thereto, and in particular a certain other train of cars consisting of box or freight cars, drawn by a locomotive upon the track next northerly to the track whereon was the train of passenger cars in which the said plaintiff, Mary B. McCaffrey, was, that the said plaintiff, Mary B. McCaffrey, without any notice or warning to her given, and without any fault or negligence on her part, was struck upon the head by a bolt, bar, or other piece of iron or steel, coming loose and separated from one of said box or freight cars (the same being then and there unsafe and out of repair)." The plea was the general issue, and at the close of the trial the court, though requested, refused to direct a verdict for the defendant. This refusal, amongst other things, is here assigned for error.

It is unquestionably true, as in substance was averred, that the defendant owed to Mrs. McCaffrey the duty to see to it that, while she was a passenger upon its train, no harm would come to her through any negligence in the operation or management of its railroad or of the appurtenances thereto, including "the certain other train of cars" referred to in the above extract from the declaration. But, except as against its negligence or that of its servants, the defendant did not, by accepting Mrs. McCaffrey as a passenger, become an insurer of her safety. The gravamen of her complaint—the gist of her cause of action—was negligence. She necessarily alleged that her injury was caused by lack of due care, and evidence of negligence, or of some fact or circumstance justifying the assumption of its existence, was therefore indispensable. The burden of proof in all such cases rests at first upon the plaintiff, and, even in the case of a passenger, it cannot be shifted to the defendant, without showing that the injury in question was caused by some person or thing connected with its railroad or business of transportation. Hence it was that the plaintiffs in the present case endeavored to maintain their special allegation that the thing which struck Mrs. McCaffrey had come "loose and separated" from one of the cars of a passing train, and, if the evidence they adduced had been sufficient to warrant a finding that such was the fact, nothing more, at the outset, could have been required of them, for from such a finding, if made, a presumption of negligence would have arisen, which, unless and until rebutted, would have been conclusive. When, however, the learned judge was asked to direct a verdict for the defendant, the taking of testimony had been concluded, and the question then presented was whether, upon all the evidence, the plaintiffs' hypothesis as to the source of the offending missile could reasonably be adopted, and we think this question should have been negatively determined. There was no direct testimony as to where

it came from, nor was there any proof from which, in our opinion, its nature and origin could be legitimately inferred. The evidence on behalf of the plaintiffs was, in effect, that it entered through an open window on the side next to the passing freight train, that it was a bolt with a nut on the end of it, and that such bolts were largely used in constructing ordinary freight cars; whilst, on the other hand, there was evidence tending to show that the harm-inflicting thing, whatever it may have been, was thrown through an open window on the opposite side of the car, by some one of several boys, who, as was testified, were pelting the train as it went by them.

Upon this state of the proofs the defendant's request for binding instructions should not have been denied. Undoubtedly, it commonly is within the province of the jury to decide an issue as to negligence by drawing the reasonable inference from the primary facts. But reasonable inference is one thing, and mere guess or arbitrary surmise is another and very different thing, and though it may be that the evidence for the plaintiffs, if alone considered, would have warranted a suspicion that in some way or other the moving freight train was responsible for Mrs. McCaffrey's hurt, yet it is plain that, from the evidence as a whole, no more explicit deduction could have been properly made than that the missile which struck her came either from that train or from one of the boys that have been referred to. The jury, however, was allowed to conjecture that it came from the train, and upon that conjecture merely to base the further finding, also an inferential, though a legal, one, that the defendant had been guilty of negligence.

We think this should have been prevented by granting the defendant's request for a directed verdict, and therefore the judgment of the Circuit Court is reversed.

MORRIS v. DUNBAR.

(Circuit Court of Appeals, Third Circuit. January 3, 1907.)

No. 47.

WRIT OF ERROR—FINAL JUDGMENT.

Defendant filed a general demurrer to plaintiff's statement or declaration, which demurrer was sustained with leave to the plaintiff "to discontinue on payment of costs," but it did not appear that there had ever been a discontinuance, or that defendant had ever entered judgment against plaintiff prior to the suing out of the writ of error. *Held*, that the order was not such a final judgment as would support the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 465.]

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

L. C. Barton, for plaintiff in error.
John N. Dunn and A. S. Moorhead, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge. The record submitted to us in this cause shows that the defendant filed a general demurrer to the plaintiff's statement, or declaration. After argument of the demurrer, as appears by the opinion brought up with the record, the court concluded that the demurrer should be sustained, and added that "the plaintiff will have leave to discontinue on payment of costs." A writ of error operates only on a record in which a final judgment has been entered, and the only final judgment that could have been entered against the plaintiff on this demurrer was a judgment nil capiat, or its equivalent. 2 Archbold's Practice (12th Ed.) 934; Tidd's Practical Forms (8th Ed.) 250; United States v. Leverich (D. C.) 9 Fed. 481; Gould v. Evansville, etc., R. R. Co., 91 U. S. 526, 527, 23 L. Ed. 416; Cole v. Wooden, 18 N. J. Law, 15, 20. It is a common practice, however, when a demurrer is sustained, to enter an interlocutory order in favor of the demurrant, and to allow the defeated party an opportunity to amend or to plead over. Alley v. Nott, 111 U. S., 472, 474, 4 Sup. Ct. 495, 28 L. Ed. 491. In this case, instead of allowing the plaintiff to amend his statement, or declaration, the court stated that he might discontinue. Whether he entered an order of discontinuance does not appear. Neither does it appear whether the defendant has entered any judgment against the plaintiff.

The result is that we are compelled to dismiss the writ of error. But as the defendant has argued only the points presented by the assignment of errors, and has not moved to dismiss the writ, no costs will be allowed.

In re DIAMOND.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 44.

1. BANKRUPTCY—COURT OF BANKRUPTCY—POWER TO AMEND PRIOR ORDERS.
A court of bankruptcy has power to amend an order of discharge at any time before the proceedings in the case have been closed provided such amendment will not affect vested rights.

2. SAME—DISCHARGE—PARTNERSHIP DEBTS.
Partnership creditors may prove their claims against the estate of a bankrupt partner, although entitled to share only in the surplus of his estate after his individual creditors have been paid, and where their debts have been scheduled, and they have had due notice of the proceedings, the bankrupt is entitled to a discharge from such debts as well as his individual debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 778.]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

This cause comes here upon petition to review an order made by the District Court, Southern District of New York, amending the order of adjudication and petition and order for discharge, so as to discharge the bankrupt from his debts as member of a partnership, as well as from his individual debts. The original schedule enumerated all the firm creditors, who had due notice of all proceedings.

Sol. J. Frendenheim, for petitioner.
E. J. Myers, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The amendments were such as the District Court had power to make, and the case seems a proper one for the granting of the relief prayed for. See In re Kaufman (D. C.) 136 Fed. 262, in the conclusion and reasoning of which we fully concur. The petitioning creditor contends that the case cited was erroneously decided because it held that firm creditors might present their claims against the individual bankrupt, whereas this court in Re Janes, 133 Fed. 912, 67 C. C. A. 216 held that "such proof could not be made." This is a misreading of our decision in the Janes Case. We did not hold that such claims might not be made—indeed section 5f, Bankr. Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424], evidently contemplates that they may be made—but only that when creditors of a partnership and creditors of an individual member thereof had proved their claims, they should not all share alike in the individual estate, that the individual creditors should first be paid from the individual estate, and that it was the surplus only, if any there were after such payment, which could be marshaled for distribution to the firm creditors.

The order is affirmed.

WELLS & RICHARDSON CO. v. ABRAHAM et al.

(Circuit Court of Appeals, Second Circuit. November 19, 1906.)

No. 173.

INJUNCTION—GROUNDS—INDUCING BREACH OF CONTRACTS.

An order granting a preliminary injunction restraining defendants from inducing complainant's customers to violate their contracts by selling a proprietary medicine manufactured by complainant to defendants, contrary to the terms of their said contracts, considered, and affirmed.

Wallace, Circuit Judge, dissenting.

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

For opinion below, see 146 Fed. 190.

E. E. Wise, for appellants.
F. S. Reed, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The assignments of error do not require us to decide whether the terms of the injunction are broader than the case warrants. The fifteenth assignment is the only one directed to the point, and does not specify any particulars in which the terms are too broad. For reasons stated on the argument, we are of the opinion that we are not authorized to pass upon the question of jurisdiction presented.

Upon the principal question argued we are not convinced of the unsoundness of the conclusions of Judge Thomas as expressed in his opinion in the court below, and see no reason for departing from our usual custom not to formulate an extended opinion on appeals from orders for preliminary injunctions where we affirm the court below, unless we disapprove the reasoning of its opinion.

The order is affirmed.

WALLACE, Circuit Judge (dissenting). I do not agree with the majority of the court that we are not authorized to pass upon the question of the jurisdiction of the court below. In Boston & Maine Railroad Co. v. Gokey (lately decided by this court) 149 Fed. 42, I have given the reasons why I think the court should no longer adhere to its decisions in United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299, and Fisheries Co. v. Lennen, 130 Fed. 533, 65 C. C. A. 79. I think, however, that the bill shows a case in which the requisite jurisdictional amount is involved. One of the rights sought to be protected by the complainant is its system of contracts, which is alleged to be of the value of more than $2,000, and the bill alleges that the acts of the defendant which are complained of are destructive thereof.

BULLOCK ELECTRIC MFG. CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

No. 1,550.

1. PATENTS—INVENTION—ARMATURE CORES.

The Reist patent, No. 508,637, for an improvement in armature cores designed to secure ample ventilation by the use of metal separators between the sections of laminæ of which the core is built up, discloses merely a carrying forward of the idea of prior devices by the use of the same means changed only in form or degree which did not involve invention; it is also void for insufficiency of description of the separators in respect to their thickness, form, and composition to differentiate them from those of the prior art, being described in the specification merely as "thin" and of "metal."

2. SAME.

When the novelty of an invention consists in the dimensions or the material of the new thing devised, the patentee must specify the particular dimensions or the particular material his invention contemplates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 133-135½.]

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

For opinion below, see 146 Fed. 549.

Thomas F. Sheridan and C. V. Edwards, for appellant.
W. K. Richardson, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an appeal from an interlocutory decree of the Circuit Court sustaining certain claims of a patent, awarding a perpetual injunction, and ordering a reference to a master for the ascertainment of profits and damages. The patent which is the basis of the controversy is No. 508,637, issued to H. G. Reist, as assignor to the complainant, November 14, 1893, for an "improvement in the construction of armature cores" in dynamo electric machines. The bill charged the defendant, the Bullock Electric Manufacturing Company, with infringement. The answer denied that Reist was the first inventor of the devices for which the patent was granted, averred the anticipation thereof by numerous former domestic and foreign patents and earlier publications disclosing the supposed invention of Reist, and also denied infringement. In his specification the patentee states that his object was to improve the construction of armature cores, so as to obtain ample ventilation for dissipating the heat generated therein without detriment to the inductive qualities of the core.

It was well known that in the operation of such machines, heat was generated in the core of the armature by eddies of the magnetic flux in parts remote from the conductor whereby a waste of power was incurred; and besides, the obstruction thus encountered incited heat which might become injurious to the armature. Other factors are suggested which combined to create heat in the core, but that mentioned has been recognized as the principal one. Naturally this difficulty was most serious in large armatures consisting of massive collections of iron. The core of the patent in suit is, says the patentee, to be built up in the usual manner of annular iron laminæ in layers, and is supported by a spider having arms radiating from the shaft, but instead of making the core solid from end to end, he builds it up in sections or bundles of laminæ, and between each two sections he introduces skeleton separators which consist of "ribbed castings, riveted or otherwise suitably fastened to the side of one of the laminæ, and each adapted to bear against the outside lamina of the next section." In another place, he states that, instead of the ribbed castings, he proposes in some cases to make the separators of sheet metal, having one portion turned up at right angles to the other, which latter is "riveted or otherwise secured to" the outside lamina of a section, while the edge of the turned up portion bears against the outside lamina of the next section as in the first instance. These separators, in one form, consist of thin, flat plates secured to the lamina by rivets, and are provided with thin ribs extending outwardly to the outside lamina of the adjacent section, the ribs being radial to the centre of the armature. In another form the ribs are riveted directly on the lamina, and of themselves constitute the separators. In another form several equidistant ribs are assembled on a skeleton form of separator, which are specially adapted to the toothed, or Pacinotti, style of armature; the ribs in such

case bearing against the opposite teeth of the separated sections. The material of which the separators shall be composed is "brass or other metal, cast in the shape desired." For a more complete understanding of the structure it seems desirable to exhibit the drawings (except Fig. 6, which is unnecesary) attached to the specifications, as follows:

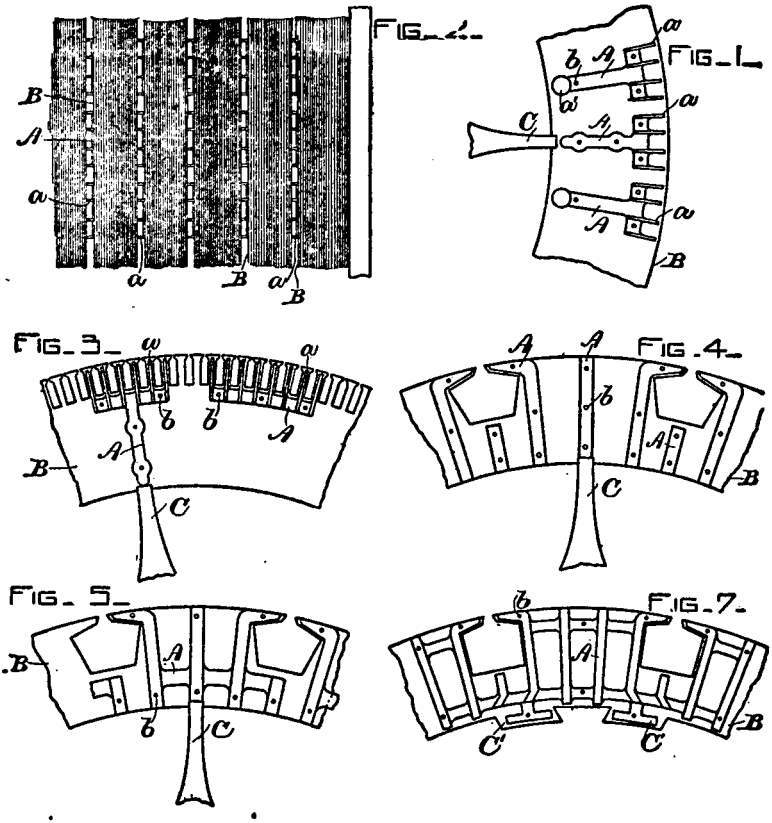


Fig. 1 shows the separators in cross-section of the armature. C is no part of the separator; B is one of the laminæ; A is the flat portion of the separator; and a is one of the ribs set up upon it. Fig. 2 is a face view showing the separated sections of the armature and the separators in place. These two figures illustrate the separators when used in the form of armature wherein the periphery is entire, and on the surface of which the conducting wire is wound. The other figures are of toothed, or Pacinotti, style of armature wherein the core is in regular spaces recessed at the periphery, and so, of course, the rings or laminæ of which it is composed. The wire is wound in the spaces between the teeth. In all the figures, b shows the holes in which the rivets are to be driven to attach the separators to the laminæ. It will be observed that in Figs. 4, 5, and 7, the separators consist only of flat pieces riveted to the laminæ. And it will be noticed also that in Figs.

1 and 3 the ribs of the separators extend outwardly to the periphery of the core, in both forms of the rings, the smooth and the toothed peripheries. The claims which it is alleged are infringed are these:

"(1) A laminated armature core built up in sections, and separators attached to the laminæ between two consecutive sections, as and for the purpose described.

"(2) In an armature core the combination with sections built up of laminæ, of separators consisting of ribs of metal between said sections, and in contact with adjacent laminæ whereby ventilating space is afforded between the inner and outer surfaces of said core, as described."

"(4) In a toothed armature core built up of laminated sections, separators consisting of ribs extending outwardly from the teeth on one of said sections to the corresponding teeth on the adjacent section, whereby said sections are mutually supported and air passages radial to the center of said core afforded, as and for the purpose specified.

"(5) An armature core consisting of laminæ arranged side by side and separators attached to certain of the laminæ to form a ventilating space or spaces in the core.

"(6) An armature core consisting of layers of laminæ built up in sections or bundles, and pronged or skeleton separators attached to an outside lamina of each of said sections, whereby ventilating space is provided between adjacent sections, as described."

"(8) In an armature a sheet or lamina having teeth or projections for the reception of the armature coils or armature conductors, and metal separators riveted or otherwise secured thereto, said separators extending toward the points or free ends of said teeth or projections."

A very comprehensive, and, as we think, extravagant, interpretation is put upon these claims by the complainant's expert in laying the foundation for his comparison with earlier structures. It is stated that the invention is principally intended for dynamo-electrical machines in which the armature revolves inside the stationary magnetic field. But it is further stated that it is also applicable if the machine is one in which the field is the revolving member and the armature is stationary. And this is apparent. But it will conduce to clearness to discuss the subject by reference to a machine organized in the first of the forms mentioned, though some of the characteristics of separators required in this first form might not be so important in the other, a circumstance resulting from the fact that in one form they are in a rapidly rotating organization while in the other that body is stationary. If this had been an original invention, first devised to secure ventilation of the armature by fixing open spaces in its organization through which currents of air could be carried, it must have been admitted that it exhibited a new and very useful device to supply a need that had been recognized in the art as a serious one. But it was not. It followed in the wake of numerous patented inventions intended to meet this need, and the defendant contends that no new idea is shown by the Reist patent, but only the mechanical skill which one conversant with the subject, and with what had already been pointed out as means for meeting the difficulty, might be expected to supply. It is contended that Reist discovered no new principle or mode of operation which is represented by the means he proposed, and that the means which he did propose effect no new result, but are the equivalent of former constructions operating in the same way, more skillfully designed perhaps, but carrying forward an old idea in better forms. This defense makes

it necessary to find out what had already been discovered and known in the art when this patentee brought out his method of constructing separators in armatures to effect their ventilation. We cannot undertake to critically analyze and exhibit in detail all the former constructions of separators shown in the patents found in the record, but shall confine ourselves to a few which seem to us most relevant and important; though there are many others in the record which illustrate the general idea of the proper method of providing for ventilating the armature, that is, by separating the core into sections and putting separators between them, to maintain the spaces for currents of air. We may preface what we have to say by stating that the necessity, or at least the great advantage, of ventilating the cores of armatures had been known and appreciated several years before Reist gave his attention to it, and that the method of doing this by dividing the core into parallel sections and interposing between them separators to hold them apart, and provide space for the circulation of air in the body of the core had been devised, and for several years practiced, in the manufacture of such machines.

In 1881, one Brown obtained a patent for improvements in armatures which showed them built up of sections of soft iron bars, a method of construction since superseded by the use of thin laminæ instead of bars. The need of ventilation was the same as in the later construction. For the purpose of securing it, Brown employed plates of sheet metal, such as Russian sheet iron, secured to the outer bar of each section. These plates were provided with flanges turned up at right angles from each edge of the plate. The edges of the flanges did not bear directly upon the opposite bar, as in the Reist patent, but contacted with the corresponding edges of a similar plate riveted to the opposite bar. These plates separated the sections and formed an air chamber. The sides of the plates were radial to the central line of the armature. Several openings were made in the flanges on both sides of the plates through which the air from the central chamber was drawn through the armature, some of it passing directly through the periphery and part sidewise through an opening in the bars, and thence out through the radial chamber. And in his third claim, he includes these plates to form, as he says, "an air chamber which communicates with the external air, whereby, during the revolution of said armature, air will be drawn into said chamber and circulate into and through the air spaces of the bobbins or sections."

In November, 1883, patent No. 288,051 was granted to Giles for an invention, the sole purpose of which was to provide for the formation of air spaces in the core of armatures. Instead of dividing the laminæ into bundles or sections, he attached separators upon "one or both" sides of each lamina (he calls them "rings") "oblique ribs uniformly arranged and spaced, and inclining away from the direction of the armature," a feature shown in other patents, evidently designed to facilitate the draft of air. The ribs were attached to the "rings" and extended the entire width of them, but were insulated from them to "prevent electrical currents from traversing the core." All his

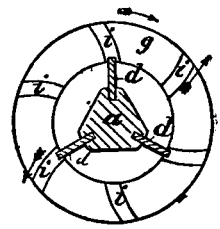
claims call for these ribs as means for separating the rings and affording ventilating spaces.

On March 3, 1884, R. E. B. Crompton obtained a patent in England for an invention of improvements in dynamo electric machines which was patented also in Belgium in 1885, and in the United States August 7, 1888, where it was numbered 387,343. He states that the objects of his invention are, referring to the armature:

"* * * Third, the arranging of the winding and its insulation so as to allow of the free access of a ventilating current of air to every part of its surface, and the providing this ventilating current by simple means."

His preferred form of armature is built up of annular rings of soft sheet iron mounted on the dove-tailed radial spokes of the spider. Corresponding dove-tails are made in the inner edges of the laminæ. Fig. 2 shows one of the rings (or "laminæ," or "washers," as they are indiscriminately called in the art) of the Gramme form of core.

FIG. 2



The rings are composed of sections arranged in parallel form with ventilating spaces between the sections. In building up the armature, he lays the rings one upon another, properly insulated, and "at regular intervals as shown at g, g1, g2, g3, etc., the washers may be spaced from one another by strips of material, i, i, which must also insulate them from one another and thus leave radial ventilating channels or space." He says "radial" ventilating channels or spaces. Reference to his drawing shows that the separators and spaces are in a general sense radial, but not quite so, for they are turned backward somewhat (having regard to the motion of the armature indicated by the arrow) so as to promote the exit of the air, as in other constructions heretofore referred to. And, he adds cautions applicable to the plain ring core and to the toothed ring core to so construct them and form the winding as not to obstruct the ventilating spaces. At this point, we remark upon a matter which will be referred to later. In his drawings Crompton shows in Fig. 2 in cross-section a smooth armature and the spacing ribs, i, i, extending to its periphery. In Fig. 4 he shows a toothed armature, but the spacing-ribs are not shown. And a question is whether in the latter form he extends the ribs along the teeth. Inasmuch as he had extended them in the smooth form to the surface, and the teeth are so thin and fragile as to require a supporting separation to prevent their collapsing into the ventilating space, and no other way of preventing it is suggested, we think it is a reason-

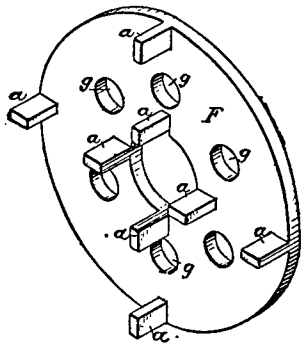
able supposition that he extended the separators back of the teeth to the periphery of the armature. He could not preserve the air space without resorting to some such expedient. In claim 3 he takes in the separators, called "spacing pieces," as follows:

"(3) In an armature for a dynamo-electric machine, the combination of a detachable spindle with radial bars and iron disks arranged with spacing-pieces and radial ventilating passages, substantially as set forth."

It is to be observed that it is not here stated of what kind of material his separators are composed. In the specification he terms them "strips of material" and, as just noted, in his claim, "spacing pieces." But it is apparent that any kind of insulating material sufficiently rigid to maintain the separation would meet the requirements. We say "insulating material" because the patentee takes pains throughout to lay stress upon the insulation of the rings.

A later patent to R. L. Cohen, No. 397,340, was granted February 5, 1889, the object of which was to so build up the armature "that ample opportunity will be afforded for the perfect ventilation of the armature during the working of the machine." In this the armature was divided into sections, at one end of which were plates extending to the periphery of the core. On these plates were projected "lugs" as they are called in one place, or "distance pieces" as they are elsewhere called, or "spacing pieces" as designated in the claims, bearing against the opposite section and providing the ventilating spaces. Fig. 3 shows one of these plates with the spacing pieces, a, a, projected thereon.

FIG. 3.



Two features of these spacing pieces may be noticed here. They are radial to the center of the armature, and they are uniformly set with their wider dimension in the line of the current of air plainly indicating that the patentee had in mind the idea of so constructing his spacing pieces as that they should economize room for the current of air in the ventilating spaces. Claim 1 in this is as follows:

"(1) The combination of the shaft of an armature with the shell comprising hollow bobbins and interposed spacing-pieces, each hollow bobbin consisting

of opposite end disks and an interposed tubular shell, all substantially as specified."

In a later patent to Cohen, of March 11, 1890, he converts the "wings or lugs" in each radial line into one wing extending across the width of the rings. In other respects the organization of the armature exhibited in the Cohen patents is unlike the forms in the other patents to which we have referred; but the difference does not materially affect the particular purpose common to all these constructions in the provision of ventilating spaces, which we are now considering.

The new thing which Reist claims to have invented is his separators, and the question is whether he made any advancement beyond the former art which partakes of the quality of invention. And if he did in what did it consist? Separators in a considerable variety of forms had, as we have seen, already been provided. There was nothing new in this general fact. Their purpose in such machines was understood. The principles and method of construction had been illustrated and were well known. If he could develop some new principle or some new means having the qualities of originality and utility, he might, if the sources of his new light were obscure and required more than the intuition and skill of those in the practice of the art to discover or recognize them, be entitled to a patent. But, if he was in the beaten path and saw only how the means already known and practiced could be improved in detail, such as by changing the form, extending the size, carrying the same thought into another part of the same structure with no change in the character of its function there, or in any like case which does not display something extraordinary, something beyond the sphere of the common intelligence of those conversant with the art, such exercise of skill would not be invention. Referring to his claims, it would seem as if Reist considered himself the originator of the idea of using separators as a device for the division of a solid armature and transmitting the air between the sections. But we have seen how far this was from the fact. It had for a number of years been embodied in various forms and put into practical use. He simply changed the form of such separators and attached them to one of the outside lamina of the sections. By this attachment before using those parts in building the armature, he made them integral as they were in Cohen's patent, and in Giles', and in the still earlier patent to Brown. As has been already shown, in some of the previous structures the separators were attached to the sections; in others they were not, and the clamping of the sections together seems to have been relied upon for holding the separators in place. And, indeed, there could be no invention in making such attachment to something, if it seemed necessary to maintain the separators in position, and prevent their flying out in the rotation of the armature; and what mode of attachment could be more obvious than securing it to the laminæ with which it was in contact in former constructions?

It is contended that there is an advantage in Reist's conception of making the strips and spaces radial to the center of the armature. Whether there is any advantage in an adherence to that form we can-

not say. It would seem so. If there is, it was so formed in Crompton's patent, and such was the form in Cohen's and in others. But the principal novel feature which Reist contemplated was that his separators should be thin; the object being to obstruct as little as possible the ventilating spaces. It seems hardly possible to say that there could have been any invention in this even if Reist was the first to advance in set form such an idea. Every electrician would appreciate that it was desirable to use as little inert material as might be, as well as that what was used should be put in the line of the current of air, and not cross-wise of it. This Crompton did to make his "radial ventilating spaces" and it was what Cohen did in both his patents when he set the sides of his spacing pieces in the direction of the air current. But Reist does not state how thin his separators shall be, nor how far they shall project toward the opposite section. If it be answered that he leaves these things to the judgment of the builder, the result would be that he appreciated that the builder would be competent to determine what would be the right dimensions for properly ventilating the armature, and this had been the only problem, if we call it such, that Reist himself had before him, for the state of the art was already advanced to that question. Supposing the artisan to take up the work of building an armature and using Reist's separators having ribs set up on a base attached to a lamina, how far shall they project? And of what thickness shall they be? Any intelligent person would say that these dimensions should be in proportion to the size of the armature, the bulk of the material to be ventilated. And so what would be thin in a large armature would be thick in a small one. Thus it is a question of degree. Or suppose the artisan wishes to construct a ventilated armature, and does not care to use Reist's separators, how shall he know in what manner he shall avoid the Reist patent? How thin must his separators be to do this? Or suppose a purchaser wishes to buy one. He must look out for the patent. By what test or comparison shall he be guided? These inquiries enforce the rule that the patentee must describe with sufficient certainty the particulars of his invention so that the artisan and the public may know the character and limits of it, and how it is to be distinguished from others which the one may make, or the other purchase, in safety. Again some of the forms which Reist suggests as embodying his invention consist only of a flat member lying on the face of the lamina. It must be obvious that in such case it must be thicker than in case he forms a rib or lug upon it. For ventilation could not be adequately secured without a considerable thickness of his flat separator. The same conditions in respect to the thickness of his separator would exist as in the Crompton patent, and in both cases the same question would arise, how thick shall the separator be? And, if in Crompton's case that question is left to the judgment of the builder, so it is in Reist's, and it follows that the latter has taken no forward step whatever. This feature of the indefiniteness of description was adverted to by the Chief Justice in delivering the opinion of the court in Guidet v. Brooklyn, 105 U. S. 550, 26 L. Ed. 1106, and influenced the decision. The patent was for an improved stone pavement. In earlier practice the blocks had been comparatively smooth but slightly rough on the sides,

and when put in place their upper edges were too near together to afford sufficient holding for the caulks of the shoes of draft horses used on the road, and strips of wood or stone had been put in the spaces or the edges of the blocks were chamfered. The patentee specified that the blocks he proposed should be sufficiently rough to hold them in composition sufficiently far apart to give the proper space between their edges, and so to relieve the objection. But the court, referring to (among other things) the fact that the patentee did not specify any degree of roughness, held that he had only carried out an old idea making a change, not definitely indicated, in degree only, and that the patent could not be sustained. The case of Preston v. Manard, 116 U. S. 661, 6 Sup. Ct. 695, 29 L. Ed. 763, is of still more direct application to this feature of the patent. The patent was for an improved fountain hose-carriage. The new element brought into combination with old elements was "a reel of large dimensions to allow the water to pass through the hose when partially wound thereon." Mr. Justice Gray, in the opinion, said:

"The requisite diameter of the reel, and its proportion to the size of the hose, are not defined in the specification, but are left to be ascertained by experiment, or from general knowledge. If the patentee had discovered anything new in the size or proportions of the reel, requisite to allow the water to flow through the hose, he should have described it with such precision as to enable others to construct the apparatus."

It was reasonable to suppose that a large reel would carry a hose giving a more direct passage for the water, than one with narrower convolutions, but the improvement was only in the form and size of the reel, and there was no specification of the size except that it should be large. And the very gist of Reist's invention was in the dimensions of his separators.

In Howard v. Detroit Stove Works, 150 U. S. 168, 14 Sup. Ct. 68, 37 L. Ed. 1039, the patent was for an improvement in stoves. The novel feature of it was a flange cast or riveted upon the inside of the lower end of the fire pot. This flange formed the support of the grate. This part of the fire pot was exposed to undue expansion by reason of excessive heat at that place. Stoves had formerly been constructed with a flange on the inside of the upper edge of the ash-basin, just under the fire pot, and the grate rested upon this. The patentee conceived that it would be an advantage to put the flange at the bottom of the fire pot and make it so wide as to gather the ashes there, and thereby minimize the heat in that part of the fire pot. And he obtained a patent embodying that idea. But, though he described the flange and the purpose of it, he failed to state what the inward projection of it should be. For this reason the patent was held void. It was also held that the transferring the flange from the ash-basin to the fire pot did not involve invention. And see, also, the Incandescent Lamp Patent, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221. These cases would seem to lead to the conclusion that the description of the separators in this patent is insufficient, and not in compliance with the requirements of the statute; and, if so, the patent is void.

But there are other considerations leading to the same result, which we think should be stated. In none of the claims of the patent in suit

is it stated whether the separators are to be of the form of a flat spacing piece lying against the lamina or of such a piece with a flange or rib upon it, and either would answer the calls of the claims. And some of the forms in earlier patents would answer just as well. In some of the forms of Reist's separators there is a web or skeleton form the function of which is to hold the ribs in proper relation to each other. But the flat sheet metal plate in the Brown patent attached to the side of the section performed that function. In Cohen's, a disk in the same form as the core of the armature held the distance pieces in place. And as we understand the patent of Giles, his "ribs" were attached to the lamina. For he says his "rings" were provided with "ribs." And in two of these patents the lamina performed the function of the web in holding the separators in place and therefore were the equivalents of a web. And in Cohen's the web to which the separators were attached consisted of a disk. But Reist makes no claim which includes the feature of a web unless it be in the projection of the separators upon the teeth of a Pacinotti armature, a matter we shall consider presently.

The eighth claim of the patent is for separators in a toothed armature extending upon the teeth and attached thereto, and this, it is contended, is a particularly advantageous feature. Referring again to the specification, we find it stated that the object of this construction is to hold the teeth of the opposite laminæ apart and prevent their collapsing into the ventilating channel when the sections of the armature are clamped and pressed tightly together. But, having understood the need of air channels between the sections, and having adopted a scheme of separators to maintain the spaces, which separators extended to the periphery of the entire rings of the Gramme form and used the same device in the body or entire portion of the rings, there could be no invention in extending the same scheme to accomplish an identical purpose in respect to the teeth in the other form. It is as plain a case as can be for the application of the rule laid down in Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566, and followed in many subsequent cases by the Supreme Court, and in several cases by this court. That rule, as applied to the facts of this case, is that the mere carrying forward a new or more extended application of the original thought, is not such invention as will sustain a patent.

An apposite case among our own decisions is Soehner v. Favorite Stove & Range Co., 84 Fed. 182, 28 C. C. A. 317, where it was held that, it having been ascertained that an advantageous form in which to build the sides of a stove was to make them curved in along the upper and lower borders so as to enlarge the oven space, there was no invention in extending a similar form to the vertical flues in the rear end of the stove to accomplish a like purpose of enlarging the flues. And in American Carriage Co. v. Wyeth, 139 Fed. 389, 71 C. C. A. 485, 488, we held that the prolongation of a flanged strip of metal, which had been used to connect and hold in place the knees of a sleigh with the rave, so as to connect and hold in place the knee and the runner was not invention, citing L. Schreiber & Son v. Grimm, 72 Fed. 671, 19 C. C. A. 67, and Dunbar v. Myers, 94 U. S. 187, 24 L. Ed. 34.

While the specification of the patent in suit states that the separator must be of metal and expresses a preference for brass castings, there is no limitation to any kind of metal in any of the claims, and in the first, fourth, fifth, and sixth claims, the separators are not required to be of metal, while in the second and eighth they are. And if some kind of metal is required, it is not stated in these claims what kind it shall be; whether it should be a kind which shall insulate the opposite laminæ, or be of a kind which shall have conductivity for the magnetic current. In some of the previous patents the material of the separators is not stated. In others it is stated to be of metal, and in one, of hard rubber. If the purpose of Reist was to introduce some kind of metal which had not been used before, as a good medium for the movement of the magnetic flux, or for insulation, or for any other purpose, he should have stated what it was. In the absence of any attempt to do this, we incline to think that he thought of metal for the material because of its greater strength and rigidity in proportion to the space it would occupy. But it is not material since he proposes no special kind of metal which would distinguish his own from former constructions. Another rule which has been only suggested thus far by the recital of the facts may now be formally stated. Among the facts it appears that all the features of the means proposed by Reist were to be found in earlier patents and that what he did was no more than selecting from them parts which in his combinations performed essentially the same functions as they did in the organizations from which they had been taken. We have often held that there is no invention in this, and such is the rule recognized by the Supreme Court. We refer to a few of our own decisions: Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 369, 53 C. C. A. 583; Burnham v. Union Mfg. Co., 110 Fed. 765, 770, 49 C. C. A. 163; Overweight Counterbalance Elevator Co. v. Henry Voght Machine Co., 102 Fed. 957, 761, 43 C. C. A. 80; Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co., 101 Fed. 282, 294, 41 C. C. A. 351. There is a recognized exception to this rule, or rather counterpart of it, when in the new combination a new mode of operation is effected which produces an original result, as we said in Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 901, 53 C. C. A. 36. But this must be something novel in principle, and not a combination operating upon a principle which was common to the old machines from which the elements were taken, as in the case at bar.

For the reasons stated, we are of the opinion that there was no patentable invention in the Reist patent. We admit that it exhibits a good, a skillful, and perhaps a more useful piece of workmanship than had before been attained. But it is in substance only an illustration of the principles discovered and applied by his predecessors by means the same as, or equivalent to, his own. It is stated and pressed upon our attention that separators like his have gone into extensive public use. But it is easy to see how this might happen without attributing to the patent anything new in principle. A thing or a combination of cooperating parts may be invented and the original embodiment of it be shown in a crude and imperfect form. The skill of the trained work-

man will develop the idea of the inventor in more refined, more delicate and more exactly suitable forms than the original. He may cut away needless bulk, he may increase the size of parts, he may make them stronger, if need be, by the substitution of one familiar material for another, make them lighter or heavier, he may divide one part into two, or combine two in one, or make any other transformation of details, so long as he is pursuing and working out the original discovery or invention by the exercise of the insight, good judgment, and expertness which he is expected to possess and apply. And this improvement may go on so long as any improvement in bringing the means already supplied to greater perfection can be made, and yet it continues to be only an embodiment of the primal idea. In all the useful arts such improvement as this is being continually carried forward. It is easy to understand that purchasers should prefer and insist on having the article, especially if it be a machine, in its best form, and the latest improvement would be likely to measurably supersede the older one. Another thing which affects the value of the presumption arising from the general acceptance and use of a thing is that in modern usages of trade such articles are often pressed upon the attention of purchasers instead of being chosen. And in many instances an article gets into general use from being pushed upon the market by energetic tradesmen with strong financial backing. No doubt the presumption still obtains, but it does not and for that matter never did, have a controlling influence, unless the question of invention hangs in doubt. And our impressions of the present case are such that we do not invoke the presumption as a helping factor.

But, if we were to hold the patent valid, it must be because of his adaptation of the separators for attachment to the adjacent laminæ for the purpose of securing them in place. In his description he enforces this point, and in all the drawings which indicate the manner of associating the separators with the laminæ, holes are shown for the riveting. And in the form of separator wherein he proposes to turn up a part of the separator to constitute a rib, it would seem to be necessary that the part lying against the lamina would be secured to it, in order to hold the ribs in proper position. In his directions for building the armature, he says: "A suitable number of laminæ are bundled together in sections, and a lamina provided with separators, as shown added thereto;" which indicates that the attachment has already been formed. It is true that in his second claim there is no requirement that the separator shall be attached to the lamina. But in others there is, which indicates an intended distinction. And a question might arise whether this claim is not broader than his invention, if the method of attachment is to be regarded as the substance of the invention as we are now supposing. But the defendant does not adopt this special feature which we are now crediting to the Reist patent. Its separators are not attached to the laminæ, but in that one of its forms which most resembles Reist's, depends upon a dove-tailed connection with the arms of the spider to prevent their being thrown out by centrifugal force during the rotation of the armature, a method of connecting the body of the core with the spider previously in use. The

defendant connects sections of the ribs together by a web to keep them in proper distances apart. But this was accomplished in a similar way in the structures of older patents, not probably by a web so thin. But, as the complainant does not limit the thickness of the web, we may dismiss that subject from further consideration, with the added remark that the web used in their separators by the respective parties is, as we gather from the record, of substantially different thickness. The other form of the defendant's separator consists of a triangular bar attached to the lamina by raising fingers cut into the body of the lamina on opposite sides of the bar and after the bar is inserted between these fingers, pressed down upon the outer surfaces of the bar; its other side resting upon the lamina. This triangular bar has no adaptation for such attachment to the lamina as would prevent it from being thrown out by centrifugal force, for the thin strips of fingers of the lamina would have little griping force of their own and the security of the bars from longitudinal displacement would depend rather on the compression of the sections in clamping them together to form the core, than on the capacity of the fingers. We do not think that this can be the attachment intended by the Reist patent, which seems to require a more integral union, one which would of itself prevent the slipping out of the separator. The separator has little or no resemblance to that of the patent unless it be to that form consisting of a flat bar thick enough to give the requisite spacing and that was the form of rib shown in the Giles patent. The complainant's expert argues, curiously enough, that this form of defendant's separator infringes the Reist invention notwithstanding it is too bulky. But he differentiates Reist's separators from the earlier ones on that very ground. And, in fine, when this separator of the defendant is brought into combination with the lamina, it constitutes a substantially different combination from anything shown by the patent in suit, if it be conceded that the separators of the latter differ substantially from those in earlier patents by reason of this attachment to the lamina. We are therefore of opinion that, if the controversy were brought to a question of infringement, the defendant's form herein first considered does not infringe, and we are strongly inclined to think that the second does not.

The decree of the court will be reversed, with direction to dismiss the bill, with costs.

WEST DISINFECTING CO. et al. v. FRANK et al.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 220.

PATENTS—INFRINGEMENT—DESIGN FOR CASING FOR DISINFECTANT.

The Taussig design patent, No. 33,633, for a design for a casing for disinfecting apparatus is valid; the attractive appearance of the casing shown rendering it popular with users, notwithstanding original structural defects. Also, *held* infringed.

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

For opinion below, see 146 Fed. 388.

L. C. Raegener, for appellants.

W. H. Kenyon, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The conclusion of the court below as to the novelty of the patented design is supported by a comparison thereof with those of the prior art. The reduction in the diameter of the annular band of perforations and its rearrangement in the upper portion of the cylindrical body, so as to leave a closed portion of said body extending above the band, and the introduction of the graceful rounded ends, which, while carrying out the outline of the cylinder, suggest a firm and substantial support, as distinguished from the Lewis structure, with its ends shaped like a coffee pot cover and its projecting shoulders, are persuasively illustrative of an artistic sense of harmonious proportion, producing a pleasing effect, which is not found in the structures of the prior art.

If there be a doubt as to whether these departures constituted invention, it should be resolved in favor of the patent, not only by reason of the presumption arising from the grant, but also because the patented construction was adopted and retained on account of the novelty of the design, notwithstanding the original objections of corrosion and leakage, resulting from its peculiar conformation, which necessitated repairs and ultimately resulted in a substitution of a new material for the bottom, and, furthermore, because of the evidence as to the much greater popularity of the new design, because of its attractive appearance, and, finally, because of the actual bodily imitation by defendants of the exact patented construction, under circumstances which indicate an inequitable attempt to appropriate the benefits shown to have resulted from the harmonious arrangement and proportions of the patented design.

The decree is affirmed, with costs.

A. B. DICK CO. v. HENRY et al.

(Circuit Court, S. D. New York. January 11, 1907.)

1. PATENTS—CONTRIBUTORY INFRINGEMENT—INDUCING PURCHASER TO VIOLATE LICENSE RESTRICTION.

Complainant manufactured a patented duplicating machine known as the "rotary mimeograph," and sold the same subject to a license restriction that it might be used only with paper and ink and other supplies made by complainant. Defendants made a special ink designed for use on such machine and similar ones and with knowledge of such restriction sold the same to the owner of one of complainant's machines for use thereon, advising that it be placed in one of complainant's cans. *Held*, that defendants were chargeable with contributory infringement of the patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 401.

Contributory infringement of patents, see note to Edison Electric L. Co. v. Peninsular Light, P. & H. Co., 43 C. C. A. 485.]

2. SAME—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

The fact that a complainant which made and sold a patented machine subject to a license restriction that it should be used only with ink made by complainant, requested a purchaser of one of its machines to give defendants an opportunity to sell her ink for use thereon does not relieve defendants from the charge of contributory infringement where they made such sale with full knowledge of the license restriction, and for the purpose of inducing and procuring its violation by the purchaser, nor does the fact that complainant suffered no damages preclude it from maintaining a suit in equity to enjoin such infringement.

This is a suit in equity for alleged contributory infringement of United States letters patent Nos. 746,931 and 749,983, issued December 15, 1903, and January 19, 1904, respectively, to complainant as assignee of Albert B. Dick.

Samuel Owen Edmonds (Edmund Wetmore, of counsel), for complainant.

A. Bell Malcomson, for defendants.

RAY, District Judge. The patents in suit cover the stencil-duplicating machine known as the "Rotary Mimeograph." In using this duplicating machine it is necessary to use ink of a peculiar make and composition if good results are to be obtained and the machine made a success. This patented machine was placed on the market in August, 1904. As to this ink the president of the complainant company says:

"The ink used on this type of machine is the result of long and protracted experiments of color-makers and experts employed for this purpose, repeated tests under varying conditions so as to adapt the ink to various climates and so as to have it work in harmony with the stencil-paper without injury. What I mean by this is, that some years ago I discovered an ink being sold for stencil use which contained a large proportion of benzine, and as benzine will dissolve the wax on the stencil-sheets it was ill adapted for the purpose and soon destroyed the stencil and rendered it useless. We made hundreds of experiments, changing the formula each time, and finally rested with an ink which is thoroughly well adapted for the purpose intended. I found in practice that each type of duplicating machine requires an ink having peculiar characteristics in order to get the best result from the machine, and it was an ink of this character which we finally developed and put on the market for use on the rotary mimeograph."

All the machines sold have been parted with under a license restriction plainly and distinctly lettered on a metallic plate and affixed in plain view on each machine. This license agreement reads as follows:

"Edison Rotary Mimeograph No. 75.
"License Restriction.

"This machine is sold by the A. B. Dick Co. with the License Restriction that it may be used only with the Stencil Paper, Ink, and other Supplies.
"Made by A. B. Dick Company, Chicago, U. S. A."

This notice was also reproduced on the feed board of the machine, so that all purchasers and users of the machine who can read are charged with notice of the restriction. Each machine has another plate giving the dates of complainant's patents. It is alleged, and not denied, and the evidence shows that defendants had actual notice of this license agreement and restriction. The evidence establishes that the complainants sell the machines at a loss, less than the actual cost of making, relying on sales of supplies therefor for a profit. The complainants have sold about 11,000 of these machines under this license restriction. The complainants sell their ink intended for this machine and other supplies at a reasonable price. As to these sales the evidence of complainant says:

"This plan enables us to furnish the purchaser exclusively with the supplies to be used on the machine, thus preventing trouble and annoyance on his part, as with the supplies furnished by the Dick Company he can invariably secure the best results, not only because of their special adaptability but also because of their uniformity. Besides this, they get the benefit of all of our experiments and experiences in the use of the machine, including information as to special uses to which the machine may be put but which might not be apparent at first sight (C. Rec. p. 80). After the possible customer has been satisfied that the machine is well adapted for his purposes, and after he has made an investigation as to the cost of the machine and the cost of the supplies and he is satisfied with same, the sale is made (C. Rec. p. 77, fol. 308)."

In fact there is nothing unreasonable or extortionate in these license agreements and restrictions; the purchasers or licensees of these patented machines can take them, subject to the license restriction, or let them alone. They are not a prime necessary of life required to maintain existence nor are the supplies. They are a convenient and useful thing, and a labor saving machine. It is a special ink made specially for use on these machines. This ink is neither a staple article of commerce nor a public commodity required in the ordinary affairs of life. The same is true of defendants' ink. The evidence shows, and I find, that defendants' ink is a special ink, designed for use on this machine, and a similar one known as the "Rotary Neostyle," a patented machine sold under and with a like restriction.

The alleged contributory infringement complained of consists in the facts: (1) That one Christina B. Skou was licensee of complainant, she having purchased one of these machines with full knowledge of the restriction; (2) she used same, except in the one instance complained of, within the license agreement using thereon and therewith supplies obtained from complainants; (3) the complainants had reason to suspect and did suspect that defendants were furnishing and selling

their ink made for use on such machines to various of the licensees of complainants for the purpose of having such licensees use same on such machines bearing the license restriction and license agreement in violation thereof, defendants, as stated, having full knowledge thereof; (4) the complainants thereupon requested Miss Skou to afford defendants an opportunity to sell her ink of defendants' make for use on such machine; and this she did; (5) being given the opportunity by Miss Skou the defendants did sell to her such ink for such purpose requesting her at the same time to put same into one of complainant's cans and throw his away. The complainants did not instruct Miss Skou to lead defendants into selling her ink of their make, or to induce them so to do, but simply to afford them an opportunity. On this subject the evidence is:

"Re-d. Q. 311. Your testimony concerning what I wished you to do with regard to these defendants Henry has been so much garbled by defendants' counsel that I will ask you to state if you were instructed to lead Henry into purchasing these supplies? A. No, sir; not at all. Re-d. Q. 312. Were you instructed by me to procure him to sell you any supplies? A. No, not at all; no. Re-d. Q. 313. Were you instructed by me to do anything more than to afford him an opportunity to sell you his supplies for use on the rotary mimeograph if he chose? (Objection.) A. That is all."

The transaction between Miss Skou and Henry was as follows:

"He came in and brought with him a tube of black ink I ordered; the pound of purple ink for the rotary mimeograph, and also a part of his box machine, the lineograph, and he showed me what he thought was superior in that machine to the A. B. Dick Company's box mimeograph. After explaining to me about the box machine, he noticed that I had the rotary mimeograph in the office, and he went over and examined it. Miss Bennem was working at it at the time, turning out duplicate copies from it, and he looked it over and noticed the restrictions on the machine itself, and also the restriction on the feed-board about the purchasing of the materials, and then he said he would rather not sell the purple ink for the rotary mimeograph, but he went on to say, 'I will sell it to you, but pour it into the A. B. Dick Company's can; throw my can away, because the A. B. Dick Company has given me quite some trouble in selling these supplies.' Then I took up that purple ink he had in his hand at the time, and looked at the can and there was a notice on that, 'Not sold for Licensed Machines.' I showed this to Mr. Henry, and called his attention to it—no; I again asked him, 'Can I use this ink on my rotary mimeograph?' and he looked at it, and said, 'Why, that's nothing; my lawyer told me to put that on.' He left the purple ink for the rotary mimeograph and I paid him for that, and I also paid him for the tube of black ink for the box machine."

As this is corroborated, I find the facts as stated, notwithstanding the denial. That defendants sold their ink of a peculiar make for use on such machines, for the purpose of enabling and inducing a licensee of complainants to violate the license restriction agreement by using such ink on this licensed machine in place and stead of the ink sold by complainants and intended for use on the licensed machine, and which the licensee had agreed to use on the machine to the exclusion of all other inks, is established by the evidence and cannot be doubted.

Are defendants guilty of contributory infringement? This is a patent not a trade-mark case. The machine was sold under the recited license agreement and restriction as to which there is no doubt, and of such license defendants, as to the particular machine, had full notice

at the time the sale of ink was made. The defendants intended to induce and procure a violation thereof, and sold this ink to Miss Skou for that purpose and in order to obtain a market for and use of their ink in place of complainant's ink. It is clearly established that the complainants having a patented duplicating machine which they are introducing into the trade and selling, and which to produce a good result and prove a success must be used with ink of a peculiar make, have sold their machines under this license restriction only. The complainants seek to introduce and build up a market for their machines, and of course desire to have them successful. They manufacture special ink to be used thereon which if used produces good work or results. The complainants look to their sales of ink for profit. They have parted with their machines, and permitted others to have and use them only on condition this special ink shall be used therewith. The defendants have knowingly and willfully made and sold an ink for use thereon, not the same in kind and quality, to one of these licensees for the express purpose of inducing, aiding and abetting her to violate this license agreement or restriction by using the licensed machine in a way she has agreed she will not use it, and in a way she has no right to use it. That such license restrictions are lawful, good, valid, and binding in the case of patented machines and articles has been established by a long line of decisions. Also that one who knowingly and directly aids, abets, and procures a violation of such license restriction is a contributory infringer of the patent. Heaton-P. B. F. Co. v. Eureka Specialty Co. et al., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, 47 U. S. App. 146, cited and approved; Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; Victor Talking Machine Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58; Cortelyou et al. v. Lowe et al., 111 Fed. 1005, 49 C. C. A. 671; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (C. C.) 142 Fed. 531; Rupp & Wittgenfeld Co. v. Elliott et al., 131 Fed. 730, 65 C. C. A. 544; Cortelyou v. Johnson (C. C. A.) 145 Fed. 933. While this last case attacks and seeks to limit this doctrine of contributory infringement in patent cases, it expressly affirms the doctrine of the Peninsular Case, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and the Lowe Case, 111 Fed. 1005, 49 C. C. A. 671, and it simply reversed the court below, on the ground it was not shown by sufficient evidence that defendants had knowledge of the license restriction. See page 936 of 145 Fed. In this case the evidence is overwhelming that defendants did know of the license agreement when it made the infringing sale as Henry looked at and read it on the machine for use upon which he sold his ink. He also, as stated, requested a concealment of the fact that he was selling this ink for use on this machine. Ink for ordinary writing and printers ink for printing are sold generally to all who use ink in writing or printing, and may be what Judge Coxe refers to in Cortelyou v. Johnson, supra, as "staple articles of commerce" or public commodities required in the ordinary affairs of life. But the ink made and sold by defendants is neither made nor sold as a staple article of commerce or as a public commodity required in the ordinary affairs of life. It is made and sold for use on the patented machines referred to. True, the defendants put on their cans a notice

that same was not to be used on such machines, but that was done under advice, to mislead and deceive, and was a part of the plan to induce and procure a violation of the license restrictions by the licensees of complainants.

In a court of justice under this evidence, it has and should be given the same effect we would give a label on the back of a thief, caught in the act, reading, "I am not a thief, I must not and will not steal." Indeed, I cannot see, but for the opinion in Cortelyou v. Johnson, supra, that it is material whether or not the ink sold by defendants is a staple article of commerce or a public commodity used in the ordinary affairs of life. If the decisions referred to have any vitality—any solid basis on which to rest—it must be for the reason that the owner of a patent has the right to make and use the patented article or not use it as he pleases; to sell it, or license it, or its use, or to license it for a limited use as he sees fit. If he sells or licenses he may limit or restrict its use in any way he sees fit, however ridiculous such restriction may seem, so long as he violates no law in so doing, or commits no wrong, and imposes no obligation on another, his licensee, to violate a law or commit a wrong. Such is the doctrine of Bement v. Harrow Company, supra, enunciated by the Supreme Court of the United States. If this be so such restriction has nothing to do with trade or commerce. If the licensee did not have the machine, he would not need the ink or use it. If he takes and uses the machine under the license, he wants the ink, and, as the license agreement is valid and binding, and, under the authorities, makes him a licensee of the patentee, he is an infringer when he uses any other ink thereon or therewith in operating it. The owner of the patent may be extremely whimsical in imposing the license restriction, but that is of no concern to courts or to the public if no law is violated or wrong done, and the restriction be plain and undertsood by those who deal with the machine or its use. If the licensee is an infringer in so doing, then one who knowingly and designedly aids, abets, and incites him in so doing, and knowingly furnishes the means to accomplish the infringement, intending they shall be used for the purpose of infringing, is as much a wrongdoer as the licensee. In the case at bar, any person may purchase, use, make, or sell this ink, or any ink for all other uses and purposes, but not for the purpose of putting the licensed machine to an unlawful use, a use prohibited by the license. If this is not the law, then there is no such thing in patent law as contributory infringement.

In Walker on Patents (4th Ed.) § 407, the law is thus stated, and I think quite correctly, viz.:

"Sec. 407. Contributory infringement is intentional aid or co-operation in transactions, which collectively constitute complete infringement. For example; where a person furnishes one part of a patented combination, intending that it shall be assembled with the other parts thereof, and that the complete combination shall be used or sold, that person is liable to an action, as infringer of the patent on the complete combination. And where a person furnishes a machine which is useful only for the purpose of making a patented article, intending that it shall be thus used, that person is himself liable for any infringement which is afterward committed in the manufacture of that article with that machine. So, also, a person is chargeable with contributory infringement of a patent on a machine, where he furnishes

articles for that machine to operate upon, intending that the machine shall be used by operating on those articles. Furthermore, where a person furnishes a machine, composition of matter or other article, which is particularly adapted to be used in performing a patented process, and which the person furnishing the same intends shall be thus used, that person is liable as a contributory infringer for any infringement which afterward occurs in accordance with his intention. But where the machine or other property thus furnished is useful for some other purpose than to be a part of a patented combination, or to make a patented article, or to be operated upon by a patented machine, or to be used in performing a patented process, and where he who furnishes the property does not intend or know, when furnishing the same, that it is to be thus used, he incurs no liability to an action for infringement. But if he knew or intended that the property furnished by him was to be used in either of the infringing ways, he cannot defeat an action for infringement by showing that the furnished property could have been used in some noninfringing way."

The vice of the transaction is in becoming a party to the infringement by inciting, aiding and abetting it, not in the mere selling of something to a licensee which he may use in infringing the patent by violating the license.

In Imperial Chemical Mfg. Co. v. Stein et al. (C. C.) 69 Fed. 616, the patents were for a process for dyeing hair, viz.:

"(1) Coloring human hair or the hair or fur of animals by treating the said hair or fur first with an ammoniacal solution of nickel, and then with pyrogallic acid, substantially as hereinbefore described and set forth. (2) The dye bath, consisting of an ammoniacal solution of nickel and pyrogallic acid, substantially as described."

The court, Judge Townsend, now of the Circuit Court of Appeals, said:

"The patent states, as an essential element of the patented process, that the liquids used therein shall be successively applied in a given manner. The defendants have sold a hair dye put up in three separate bottles, one containing sulphate or nitrate of nickel, one a solution of pyrogallic acid in water, and one a solution of nitrate of silver. The circular accompanying said bottles shows that defendants apply said dye in the manner specified in the patent, and sell it to others to be so applied. Such sales constitute contributory infringement. Chemical Works v. Hecker, 2 Ban. & A. 351, Fed. Cas. No. 12,133; Boyd v. Cherry (C. C.) 50 Fed. 279."

It is common knowledge that such articles are common articles of commerce, and sold generally by druggists for many different uses and purposes, and that they are used for other purposes than the dyeing of hair. The vice of the transaction in that case was that defendants applied the substances in violation of the patented process and sold same to others to be so applied. But it is insisted that complainants procured the alleged infringement, and cannot be heard to complain and that they suffered no actual damage. The answer is, first, that the complainants did not procure the infringement. They had the right to have a licensee afford the suspected infringer an opportunity to infringe and allow him to do so if he chose, and, second, if infringement is proved, the amount of damage is immaterial. This action is maintainable, if maintainable at all, as one in equity for an injunction because of the infringement, and not because of the amount of damages sustained. As was said by Judge Lacombe, in Chicago P. T. Co. v. Philadelphia P. T. Co. (C. C.) 118 Fed. 852:

"There is no force in the suggestion that the sale was made to a purchaser who bought in the interest of complainants, in order to secure proof of infringement. We are not now dealing with any question of damages, but with the mere fact of sale of a device made in conformity to the patent. The sale of such a device is an act of infringement, although it may be made under such circumstances that complainants cannot recover damages for it."

In Badische Anilin v. Klipstein (C. C.) 125 Fed. 556, it is said:

"Defendants further contend that the sales were not infringements of which a court of equity should take notice, because, being made to its agents, it was as though Badische Anilin had bought the cans; that the dye-stuff was not sold to a person who intended to dye with it; and that sales to a patentee are licensed sales. A similar objection was overruled by this court, in Chicago Pneumatic Co. v. Phila. Tool Co. (C. C.) 118 Fed. 852, where it was held that, although a complainant might not be able to recover damages or profits for such a sale, it was nevertheless an infringement, entitling complainant to injunctive relief."

See, also, Lever Bros. v. Pasfield (C. C.) 88 Fed. 485; Samuel Bros. & Co. v. Hostetter Co., 118 Fed. 258, 55 C. C. A. 111; People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131.

Damages for an infringement are recoverable in an action at law, and equity will not take cognizance for the purpose of giving damages or awarding an accounting. The accounting is an incident to the injunctive relief and given to avoid the necessity for an action at law. Hence, when the patent has expired, equity will not take hold of the case even where there have been hundreds of infringing acts and thousands of dollars of damage sustained. In such case, as there is no use for an injunction, the remedy at law is adequate and complete.

The complainants have made a case by a preponderance of credible evidence. I am satisfied the defendants have intentionally infringed, and are prepared to continue the wrong and intend so to do.

There will be a decree for the complainants.

BENBOW-BRAMMER MFG. CO. v. RICHMOND CEDAR WORKS et al.

(Circuit Court, N. D. Illinois, E. D. November 22, 1906.)

No. 28,245.

PATENTS—INFRINGEMENT—MECHANICAL MOVEMENT.

The Schroeder patent, No. 535,465, claim 1, for means for operating washing machines as construed in prior adjudications, and limited by the prior art, *held* not infringed, on a motion for a preliminary injunction.

In Equity. On motion for preliminary injunction.

Poole & Brown, for complainant.

Charles C. Bulkley, for defendants.

KOHLSAAT, Circuit Judge. This suit is brought to restrain defendants from infringing claim 1 of patent No. 535,465, granted to John Schroeder, March 12, 1895, for new and useful improvements in "means for operating washing machines." Claim 1 reads as follows:

"(1) An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft, combined with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction, substantially as shown."

The cause is now before the court on a motion for a preliminary injunction.

In view of the record and the decisions of the courts in Brammer v. Schroeder, 106 Fed. 918, 46 C. C. A. 41 (by the Circuit Court of Appeals for the Eighth Circuit, affirming Judge Shiras of the Circuit Court); B. & B. Mfg. Co. v. Simpson Mfg. Co. (C. C.) 132 Fed. 614, rendered by Judge Seaman, and B. & B. Mfg. Co. v. Heffron-Tenner Co. (C. C.) 144 Fed. 429, rendered by Judge Ray, all sustaining the validity of the patent in suit, that fact must be deemed sufficiently established for the purposes of this proceeding; so that the question now involved is: Does defendant's device infringe? In arriving at a proper disposition of this question, it is important that the court ascertain just what is the scope of the patent in suit as disclosed by the claim, specification, and decisions of the courts above cited, together with such other facts in evidence herein as bear upon that subject, including the prior art.

Claim 1 in suit is, upon its face, for a mechanical device whereby a reciprocating rotary motion may be obtained in the thing driven, while the driving shaft is operated continuously in one direction. The specifications set out that the object of the invention is to provide a mechanism for use in operating reciprocating rotary washing machines, and it is for the use thereof in connection with washing machines that the bill proceeds. It is plain, however, that the device is one which may be used in any connection requiring reciprocating rotary motion. This position was taken in the following language by the patentee before the Circuit Court of Appeals for the Eighth Circuit in Brammer v. Schroeder above cited:

"Appellee simply claims to be the inventor of the means employed for effecting this action of the stirrer-shaft, and not the function of washing clothes in a tub by the backward and forward revolution of the stirrer-head, and, in this connection, it will be observed, that the claims of the patent in suit are drawn simply to cover said means, and that the language of these claims does not limit the combination of elements embodied therein to washing machines."

The fact that it was patentee's invention, primarily, to use it in driving washing machines is not to the purpose. It is a device for general use in attaining the reciprocating rotary motion, well adapted, presumably, for use in connection with washing machines. The court, however, must deal with it as unrelated to such machines, further than that use may be found to throw light incidentally upon the construction to be placed upon it. From the claim it is apparent that this reciprocating rotary movement is obtained by the combined use of (1) a stationary or fixed driving shaft having means for revolving same at its outer end, and a wheel or cog at or about its inner end for engaging

teeth upon a cylinder made vertically movable upon an operating post; (2) a cylinder placed upon the operating post, having a vertical sliding-movement thereon and a double row of teeth or cogs meshing with the wheel or cog of the driving arm or shaft in such a manner as to give it a reciprocating rotary motion, which it in turn imparts to the operating post.

It will be noted that the thing driven, under the terms of the claims, is the operating post. What use that movement may be applied to, is not anywhere limited in the claim. It is with regard to this mechanical device that the condition of the art must be considered, and not necessarily with relation to its relation to wash tubs. Considering, then, the elements of the patent in suit in the order stated, it may be definitely stated that the securing of reciprocating action from a continuous or straightforward actuation of a driving shaft is very old; as is also reciprocating rotary motion. The former is shown clearly in mechanical movements 197 and 198, contained in the book entitled: "507 Mechanical Movements." No. 371 of the same book, shows a reciprocating rotary movement. It is also disclosed in the ancient and well-known mangle-wheel device. Moreover, it appears in a number of washing machine patents set out in the record. Indeed, that it is old, is conceded by complainant. Very many devices for effecting this result—some of them cumbersome, complicated, and unsatisfactory—are referred to in the record. Such, complainant's expert finds the case to be with the "Brammer Lever," "Davenport Rotary," and "Original Benbow Rotary" patented devices. However, it must be remembered that this testimony was given with reference to the use of these devices in operating washing machines. The mechanical movement known as "No. 371" is in said book described as a "modification of mangle wheel motion." It is further therein said:

"The large wheel is toothed on both faces, and an alternating circular motion is produced by the uniform revolution of the pinion, which passes from one side of the wheel to the other through an opening on the left of the figure."

This is, it seems to me, substantially defendant's device. In complainant's device, the pinion on the driving arm is stationary and the teeth located upon the cylinder move about it. This movement as adapted to reciprocating movement alone, is substantially shown in "Mechanical Movement 198" above referred to. The universal joint and floating driving arm of defendant is substantially shown in No. 197 of same book. The rotary movement is added to the reciprocating movement by placing the teeth upon the cylinder or driven post as in No. 371, instead of in a straight line, as in Nos. 197 and 198. To restate the difference between the devices in suit, it should be noted that the complainant's device is operated by means of the teeth of a vertically sliding cylinder meshing with the teeth upon a stationary driving shaft, while defendant's device is actuated by the meshing of the teeth upon a moving driving shaft, having teeth mounted upon and integral with a driven post, which is vertically stationary.

It is complainant's contention that defendant's movement is merely an equivalent of its device. That the two effect the same result is

obvious. In view, however, of the state of the art, it is evident that a very narrow construction should be given to the patent in suit; so that unless defendant's device is in all respects an equivalent, the general rule should not be applied. That complainant was the first to apply the movement to washing machines, has little to do with the case. Resting the validity of the patent in suit, for the purposes of this motion, largely upon the decision of the cases cited from the Eighth Circuit and that of Judge Seaman, it is important to ascertain upon what ground the patent was in those cases sustained. In all of them, the court found that the alleged infringing devices employed complainant's sliding cylinder. The infringing device in the former case varied the precise means employed by the patent here in suit for elevating and lowering the cylinder. That before Judge Seaman involved the use of a single row of teeth upon the cylinder, instead of a double row as contained in the patent in suit. The opinion in the former case (106 Fed. 918, 46 C. C. A. 41) sets out at considerable length, what it found to be the patentable novelty in the Schroeder device. "It is plain," says the court, "that the cog bearing, actuating, sliding cylinder was the element of this combination which embodied its principle and distinguished its mode of operation from those which preceded it. This principle has been appropriated by appellant." And again:

"What Schroeder described and claimed here, was the cog bearing, actuating, sliding cylinder in combination; not the specific form of that cylinder which he described, nor the identical means he pointed out to hold its cogs in mesh with the pinion, but this tooth-bearing, actuating, sliding cylinder in combination with the driving shaft and pinion and the angular operating shaft of the washing machine."

After defining the principle of a machine to be "its mode of operation, or that peculiar combination of devices which distinguish it from other machines," the same court adds:

"Now what was the principle of Schroeder's invention? What was the advance in the progress of the art which his combination marked? What was the peculiar combination of devices which distinguished his from all prior machines? It was the combination of the sliding cog-bearing cylinder, by which alone the reciprocating rotary motion was imparted to the operating shaft, with the old and familiar elements of his combination. The history of the prior art has been searched in vain for any device or machine in which a sliding actuating cylinder on the operating shaft, provided with cogs or cog wheels adapted to mesh with those of the driving wheel, is disclosed. The use of such a sliding cylinder to impart motion to the shaft, in combination with the other parts of this machine designated in the first claim of this patent, was new in the art."

In Benbow-Brammer Co. v. Simpson Mfg. Co., supra, defendant had substituted a single row of teeth for the double row of complainant's patent. On application for a preliminary injunction, Judge Seaman granted the motion, citing with approval the language just quoted. The specifications of the patent in suit limit the device to a sliding cylinder in combination. In order that the operating shaft may be grasped by the cylinder. it is made square or angular. Defendants' operating shaft, being rigidly integral with the teeth constituting a part of the driving device, entirely eliminates this feature of the patent in suit. Unless novelty may be predicated upon the sliding

cylinder and its adjustment to the reciprocating device, there would seem to be no escape from the conclusion that it was a bodily appropriation of the prior art—not of one or more elements, but of a prior combination of elements placed in the same relation to each other and producing the same result, with such slight modifications as would readily occur to anyone versed in the art.

As for defendants' device, it is almost a Chinese copy of mechanical movement 371 above noted. It can be read almost literally upon the device of the Norris English patent (1875), for improvements in the method of actuating washing machines. The latter employs the floating arm, which swings upon a pivoted bearing instead of the universal joint used by defendant. The mangle art of which all these washing machine actuating devices are but modifications, must be deemed an analogous art. Assuming, therefore, that the patent in suit is established for the purposes of this proceeding, it seems clear from the foregoing that, so far as may be determined from the present record, its validity rests entirely upon the use of the sliding cylinder and its adaptation to the uses set out. If that be so, it follows that defendant's device does not infringe, and the motion for a preliminary injunction must be, and is, denied.

HARDER et al. v. UNITED STATES STEEL PILING CO.

(Circuit Court, N. D. Illinois, E. D. November 22, 1906.)

No. 27,851.

1. PATENTS—INVENTION—FEATURES NOT CLAIMED.
A patent for a metal piling made in interlocking sections cannot be sustained alone because the form of the sections and interlocking parts is such that they be rolled from steel, whereas those of the prior art, while similar in principle of operation, could not be so made, where the patent does not claim such advantage nor mention the material or method of making and the device has never been manufactured or entered into commercial use.

2. SAME—INFRINGEMENT—SHEET PILING.
The Harder patent, No. 771,426, for a sectional sheet piling construed, and, in view of its limitation by the prior art, *held* not infringed.

In Equity. On final hearing.

John G. Elliott, for complainant.
Thomas F. Sheridan, for defendant.

KOHLSAAT, Circuit Judge. Complainants file their bill to enjoin the infringement of claims 3 and 4 of patent No. 771,426, granted October 4, 1904, for improvements in sheet-piling used in the construction of cofferdams and other similar work. The claims in question are as follows:

"(3) A beam piling section, having a straight cross flange on one of its edges and a C-shaped flange on the other edge.

"(4) In a sheet-piling, a beam-section provided with a C-shaped flanged edge and a companion beam provided on its joining edge with a cross-flange engaging the recessed C edge."

The device consists of a beam in the nature of a T-beam, having a C-shaped flange on one edge and a straight cross flange on the other, both integral with the central or web portion of the beam. In practice, the beams are driven into the ground or other substance into which they are to be sunk, vertically. The next sheet or beam is then in like manner driven in in such a manner as that the straight cross flange shall telescope the C-flange of the beam first driven in, while the web of the beam slides down the opening between the points of the C. This process is repeated until the work is finished, the beams being locked together "so as to comparatively form a tight joint, and at the same time permit of the parts being assembled or separated with facility." "By means of this integral locking arrangement" it is set out in the specifications, "much valuable time, material, and expense is saved, as the use of all separate parts such as angle and Z irons are entirely dispensed with." For the complainants, it is insisted the patent creates a new art. For the defendant, it is claimed the alleged infringing device is but a summary of the prior art. The defendant's device differs from the patent in suit only in the shape of its cross and recess flanges which is practically that of a D and C connected thus: D————————C. This leaves a vacant space in the cross-flanged recess at the opposite side of the beam, as shown in the models, equal, substantially, to the dimensions of the cross-flange, thereby forming a much larger opening than that of the patent in suit.

In interlocking sheet-piling beam with bead-flange on one side and recess-flange on the other, both integral with the web, is not new. It is distinctly claimed and found in the devices of the Dodge patent, No. 103,028, granted May 17, 1870; the Behrend patent under which defendant claims to be operating, dated December 26, 1899, upon which complainant's original claim 1 was rejected; and Gregson's British patent, accepted September 20, 1890. All of these, however, call for flange and recess edges which fit snugly into each other, forming a dovetail, or tongue and groove joint. In the Behrend device, the tongue is recessed, so as to permit of the use of packing, "preferably," it is stated, "one which expands by the action of moisture upon it," thus making the joint tight. The others make no claim of this character; but it appears from the testimony of the experts that by the act of forcing the beam into the ground, earth, and other material is made to supplement the tongue, so as to make the joint tight.

There seems to be no difference between the device of the patent in suit and the prior art which calls for inventive genius, so far as the adjustment of the parts is concerned. The working principle of complainants' beam-piling is thoroughly anticipated. As above noted, the tongue of the Behrend device, and sometimes the groove, are recessed for packing purposes. Instead of the recess shown in the patent, defendant, now the owner of the Behrend patent, has removed approximately one-half of the tongue, and thereby secured what complainants call a "straight cross flange" tongue. This change, complainants insist, involves the difference between failure and success, because, until it was made, the Behrend device could not be rolled, but must be cast. It is in evidence, and must be apparent that sheet-piling, in order to

withstand the thrust of a pile-driver, must be wrought or rolled. Witnesses versed in the art of rolling, testify that none of the devices of the prior art above named, can be manufactured by rolling-mill processes, owing to their form; but that those of the parties hereto can be so manufactured. The claims of the Behrend patent call for steel, and rolled steel piling. The patent in suit makes no mention of the material of or method of making the piles. Generally speaking, these matters would not bear seriously upon the question of invention, especially when invention therefor is not claimed. Where, by reason of such a modification of a device, a commercial success has been attained, and injustice might arise by holding to the strict rule, a court might be disposed to consider it persuasive evidence of invention. Here, however, it appears that the device of the patent in suit has never been manufactured or entered into commercial use. The court cannot rest entirely upon the question thus raised. With other evidential facts, it might be potential; alone, it cannot avail. Whatever of patentable improvement over the prior art there is in complainant's device must be found in elements which do not exist in defendant's piling, and the injunction must be denied.

The bill is dismissed for want of equity.

CALCULAGRAPH CO. v. AUTOMATIC TIME STAMP CO.

(Circuit Court, S. D. New York. October 23, 1906.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

An application to a Circuit Court for a preliminary injunction to restrain infringement of a patent will not be granted, where it has been adjudged by a Circuit Court of Appeals of another circuit, after full consideration and upon substantially the same record, that defendant's device does not infringe. If the record on such application contains important new matter, the court will exercise its own judgment on the whole record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 481-488.

Grounds for denial of preliminary injunction in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

In Equity. On motion for preliminary injunction.

Edwin J. Prindle, for the motion.

Emery & Booth, opposed.

LACOMBE, Circuit Judge. The alleged infringing machine is identical with the one which was the subject of controversy in the First circuit. The practice in this circuit is well settled by numerous decisions, many of which are not reported, since it is not usual here to write more than a brief memorandum on denial of motions for preliminary injunction. When a patent has been carefully discussed by a Court of Appeals in some other circuit upon a full presentation of the state of the art, the construction of the patent adopted by the appellate court is accepted by the circuit judge upon application for a preliminary injunction as a correct exposition. It is not the function of the Circuit Court to review the decision of the Circuit Court of Ap-

peals upon substantially the same record. Sometimes the record on the later application contains important matter, not before the appellate court. Prior patents, prior publications, prior public uses not at first presented may challenge attention. In such a case the new matter is considered, and if the Circuit Court reaches the conclusion that such new matter would, if presented in the earlier case, have probably induced a different conclusion by the appellate court which heard it, the Circuit Court will exercise its own judgment upon the whole record. But there is no such new evidence presented here. There is only a further elaboration by the patentee, or by experts, of the evolution of the invention by the patentee.

Under these circumstances, application for an injunction preliminary to final hearing should be denied, since the Court of Appeals in the First Circuit held that the very machine now sought to be enjoined did not infringe.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CUTTER ELECTRICAL & MFG. CO.

(Circuit Court, E. D. Pennsylvania. December 5, 1906.)

No. 5.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction to restrain infringement of the Wright & Aalborg patent, No. 633,772, for an automatic circuit breaker, denied, on the ground that, under the evidence and the construction placed on the patent in prior litigation between the parties, infringement by defendants new device was doubtful.

In Equity. On motion for preliminary injunction.

Kerr, Page & Cooper and Robert W. Archbald, Jr., for complainant.
Joseph C. Fraley, for defendant.

HOLLAND, District Judge. This motion for a preliminary injunction is based on patent No. 633,772, granted on September 26, 1899, to the complainant's assignees, Wright & Aalborg, for an improvement in automatic circuit breakers. It was before this court in a former suit, and is reported in 136 Fed. 218. The case was appealed to the Circuit Court of Appeals, and it was there held that the device which the defendant in this suit was then manufacturing and putting upon the market was an infringement of the complainant's patent. See 143 Fed. 966.

In the former suit the Court of Appeals found that the invention of Wright & Aalborg was not a primary one; it is a combination, and all the elements are old. They have been used in the art long prior to the issuance of the patent in question. Before the Court of Appeals the defendant contended that the pivot called for in the claims 2 and 5 was the pivot B, and that the shunt contact member consisted of carbon block, 7, its frame, 18, and the long arm, 20. The complainant contended that the movable shunt contact consisted of the carbon block, 17, and its frame, 18; that the pivot referred to in the claim was pivot

A, and that claims 2 and 5 were not limited to a construction involving the arm, 20. The Court of Appeals took the view of the complainant, basing its decision on three grounds: (1) That there was nothing in the language of claims 2 and 5 to restrict them to the pivot, B; (2) that the pivot, A, was essential to the practical operation of the apparatus, and therefore the said claims should be construed to include it; and (3) that the pivoted arm, 20, was expressly made an element of claims 1 and 3, but was omitted from claims 2 and 5. See opinion of Court of Appeals, 143 Fed. 966. The court also held that the contention of the defendant that it had eliminated from its structure the loose and yielding connection at point B, which is an important feature of the complainant's patent, was not in fact true, but that this function was accomplished by the slot, 7, in which its movable laminated contact member was pivoted, and these two devices the court held to be equivalent mechanical arrangements.

Subsequent to the decision by the Court of Appeals, the defendant set about to place upon the market a type of circuit breakers which did not infringe the complainant's device, and submitted a modified form to the complainant, with the information that it (the defendant) intended to place it upon the market in order that it might be able to continue its business. Upon an examination of the modified breaker, this bill was filed, and the complainant moves the court for a preliminary injunction, claiming the modified device is an infringement the same as the one previously manufactured by the defendant, and bases its claim for the injunction upon prior adjudication between the parties, which they must accept with all its limitations.

We do not intend to discuss in detail the difference between the defendant's prior device and the modified machines now before us, other than to say, however, that the pivots in the shunt of the defendant's former device, the slot affording the motion of translation, and the toggle joint have all disappeared from the modified forms. This fact we think gives additional importance to the Hewlitt patent, and, in view of the further fact that there is now before us two patents which were not considered in the former case, to wit, a British patent, issued to Drake & Gorham July 10, 1889, and the Scott patent, issued August 18, 1903, together with the proofs in opposition to the motion for this injunction, there is sufficient, in our judgment, to raise a doubt as to the right of the complainant. The rule of law applicable under these circumstances is aptly stated by Judge Dallas, in the case of Blakey v. National Mfg. Company, 95 Fed. 136, 37 C. C. A. 27:

"It is sufficient for the present purpose to say, as has often been said before, that a preliminary injunction should not be awarded where the right is doubtful, or the wrong uncertain, and that the infringement here charged has not been clearly established."

Injunction refused.

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

(Circuit Court, E. D. Pennsylvania. November 26, 1906.)

No. 30.

COSTS—PATENT SUITS—EXPENSE OF PRINTING EXHIBITS.

The expense of printing exhibits in a patent case is not a taxable disbursement, in the absence of a rule of court making it so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 660.]

On appeal from taxation of costs and motion to dismiss appeal. See 148 Fed. 91.

Joseph P. Nolan and Edward K. Jones, for complainant.
Harold Steele Mackaye and Kenyon & Kenyon, for respondent.

J. B. McPHERSON, District Judge. The motion to dismiss the appeal, on the ground that it was not seasonably taken, does not seem to be well founded, and must be refused. The meeting on September 24th was an adjournment from September 6th, and continued the discussion between the parties; but the taxation was not finally made until October 2d, when the clerk's decision upon the disputed items was announced. The appeal was therefore taken within the time limited by the rule of court.

The first and second exceptions to the taxation are sustained on the authority of Tesla Electric Co. v. Scott (C. C.) 101 Fed. 524, and the third exception is sustained on the ground that, when the two witnesses therein referred to were recalled for further examination, their testimony thus taken did not become a new deposition for which a second attorney's fee of $2.50 would be properly charged. The fourth exception is disallowed, in view of the stipulation on page 104 of defendant's record, agreeing to the taking of testimony in New York—except as to the charge of double mileage in the case of the witness Lysinger; this charge being reduced to single mileage for 100 miles. The fifth exception must be sustained on the authority of Hussey v. Bradley, 5 Blatch. 210, Fed. Cas. No. 6,946a; Wooster v. Handy (C. C.) 23 Fed. 49; Cornelly v. Markwald (C. C.) 24 Fed. 187; Kelly v. Springfield Railway Co. (C. C.) 83 Fed. 183; and Edison v. American Mutoscope Co. (C. C.) 117 Fed. 192. The sixth exception disputes the correctness of the clerk's computation of the total amount, and is disallowed, because I am not convinced that a mistake has been shown.

The taxation will be corrected in accordance with this opinion, and thereupon the decree, presented to the court on October 10, 1906, but modified as required by the re-taxation, may be entered by the clerk.

SCHELL v. ALSTON MFG. Co. et al.

(Circuit Court, N. D. Illinois, E. D. September 19, 1906.)

No. 28,111.

1. CORPORATIONS—STOCKHOLDERS' ACTIONS—PARTIES—JOINDER.

In a suit by a stockholder of a corporation to obtain an accounting as to certain corporate transactions, the reissue of smaller stock certificates,

ratification of an issue of stock dividends by the corporation, and other relief, there was no such community of interest between the corporation and its president and secretary as authorized their joinder, in the absence of fraud, as parties to the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 719.]

2. PLEADING—FACTS OR CONCLUSIONS—FRAUD.

In a suit against a corporation and its president and secretary, it is insufficient that the bill charge that the acts complained of were fraudulent without the allegation of facts showing fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 721: vol. 39, Cent. Dig. Pleading, § 28½; vol. 23, Cent. Dig. Fraud, § 37.]

3. SAME—ACTS OF OFFICERS.

The fact that an officer of a corporation insisted that there was a lien against complainant's stock, or that his stock was worth less than par, and that the surplus of the corporation was less than it really was, could not subject the corporation to a charge of fraud or conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1685–1692.]

4. EQUITY—BILL—MULTIFARIOUSNESS.

A bill by a stockholder against a corporation and its president and secretary charged certain alleged misconduct of such officers, and prayed for an accounting, the reissue of smaller stock certificates, ratification of an issue of stock dividends by the corporation, the issue of another stock dividend from the surplus, an accounting of damages incurred, that complainant's stock be declared free from any lien, that defendants be enjoined from selling additional stock, and that a receiver be appointed for the corporation. *Held*, that the bill was multifarious, both as to parties and subject-matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 340–367, 371.]

5. CORPORATIONS—STOCK DIVIDENDS—DECLARATION—DIRECTORS—DISCRETION.

The declaration of a stock dividend from the surplus of a corporation is within the discretionary powers of the directors, and will not be controlled by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 585.]

6. SAME—ISSUANCE OF STOCK—MANNER AND FORM.

A demand of a stockholder of a corporation to have 25 shares of his stock issued in 25 certificates calling for one share each was unreasonable, and it was not therefore improper for the corporation to refuse to comply.

Thomas C. Clark and Howard & Howard, for complainant.
John Stuart Roberts and Elbert C. Ferguson, for defendants.

KOHLSAAT, Circuit Judge. The bill herein alleges that defendant company is a corporation of Illinois, and that the other defendants, Levy and Holabird, are, respectively, president and secretary thereof. It further appears that complainant is a stockholder and former employé thereof; that originally he owned 50 shares of the company's stock; that he, as such stockholder, voted to increase the stock of the corporation from $100,000 to $200,000; that $50,000 of such increase was to go to the stockholders as a stock dividend; that the remaining $50,000 of stock was to be offered to the stockholders, and, if not taken by them, then to be placed in the market. Complainant further al-

eges that he voted for such additional stock on said terms under the impression, conveyed to him by the said individual defendants, that there was a surplus of only $50,000; that he gave notice of his refusal to take any of the new issue not paid for by his share of the surplus; that he received 25 shares of the new stock as his stock dividend, after a considerable delay, certain of the defendant corporation's officials insisting that the same was subject to a lien for the price of the complainant's proportionate share of the remaining $50,000 of stock; and that the directors and stockholders have not officially ratified the issue of stock under the increase. The bill further charges, on information and belief, that the surplus was in fact not less than $80,000, and that $30,000 surplus still remains, of which he is entitled to his share, either in stock or money; that complainant was deceived by certain officials in consenting to the said agreement for the $100,000 new stock; that certain of the corporation officers have tried to get his stock for less than par. He also charges that he has not been permitted properly to examine the corporation books; that he made application to have his 25-share certificate split up into 25 certificates, and his 50-share certificate split up into 10 5-share certificates, which was refused, whereby he lost sales of stock; that by selling the last $50,000 of the new stock his share of the surplus, $30,000, would be prejudiced; that defendants and others are conspiring to wrong and injure him. He therefore prays (1) for an accounting as to corporation's transactions; (2) the reissue of smaller stock certificates; (3) ratification of said issue of stock dividends by the corporation; (4) that a stock dividend be issued to him for any surplus in excess of $50,000; (5) that he have an accounting and decree as to his damages incurred; (6) that his stock be declared free from such lien; (7) that defendants be enjoined from selling the additional $50,000 of stock; (8) that a receiver be appointed to wind up the corporation.

'To the bill defendants demurred generally and upon the following special grounds: (1) Want of jurisdiction as to amount and because of a remedy at law; (2) multifariousness as to parties and relief sought; (3) that, in the absence of action by directors, no further dividend can be made; (4) want of compliance with equity rule 94; (5) that the directors are not in such case answerable to a stockholder; (6) nor to the court. It is apparent that, in the absence of fraud on the part of the defendants, there is no such community of interest between the defendants as would justify their joinder in this proceeding; nor is it sufficient that fraud be charged in the bill. The facts must be stated. Certain letters and acts of the individual defendants and others are set out which utterly fail to furnish a satisfactory foundation for the charge of fraud. At best, they are the expressions of opinions only, and form no ground for the allegation of conspiracy. Within certain limits, officers of a corporation as individuals may speak for their corporation, but beyond that they have no power to commit it to any course of action. The mere fact that some officer of the corporation insisted that there was a lien against the complainant's stock, or that his stock was worth less than par, or that the surplus was less than it really was, cannot subject the corporation to a charge of fraud

or conspiracy. In its affairs a corporation acts through its directors. But, were it otherwise, the facts stated fail to support the charge.

It would, indeed, be a short road to summary relief, could the complainant in the same proceeding combine all the demands above enumerated. No conspiracy being shown, it cannot be claimed that each of the defendants is liable for the acts of the other. Both as to parties and subject-matter the bill is multifarious. The main point in the bill consists in complainant's demand that he receive the benefit of the surplus in excess of $50,000. To give him his share of this in the form of a further stock dividend would be the declaration of a dividend from the surplus. This is within the discretionary powers of the directors, and will not be controlled by a court. Beveridge v. N. Y. El. Ry. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.

In Cook on Corporations (5th Ed.) § 545, it is said:

"The board of directors declares the dividends, and it is for the directors, and not the stockholders, to determine whether or not a dividend shall be declared"—citing Hunter v. Roberts, etc., Co., 83 Mich. 63, 47 N. W. 131; Grant v. Ross, 100 Ky. 44, 37 S. W. 263.

It is there further stated:

"When, therefore, the directors have exercised this discretion, and refused a dividend, there will be no interference by the courts with their decision, unless they are guilty of a willful abuse of their discretionary powers, or of bad faith, or of a neglect of duty. It requires a very strong case to induce a court of equity to order the directors to declare a dividend, inasmuch as equity has no jurisdiction unless a fraud or breach of trust is involved."

See, also, section 539, same author. To the same effect are many adjudicated cases. There is no such case made by the bill in this suit.

The manner in which stock shall be issued is, generally speaking, a matter for the discretion of the directors under the by-laws. In the absence of any such requirement, there must exist a right in the stockholder, within reason, to have his holdings in such amounts as he may desire. To have 25 shares issued in 25 certificates calling for one share each does not on its face seem reasonable, nor can the court assume that it is reasonable. It is a matter of common knowledge that it is such a cumbersome method as would justify the directors in declining to permit it, in the absence of a by-law requiring it. The bill in that respect does not appeal to the judgment of a court of equity.

Undoubtedly, in a proper case, complainant would be entitled to examine the books. In view of what is said above, that matter is not before the court at this time. Were the bill in other respects unobjectionable, the jurisdictional allegations would be such as to invest this court with power to adjudicate the questions raised.

The demurrer is sustained.

MARYLAND TRUST CO. v. KIRBY LUMBER CO. et al.

(Circuit Court, S. D. New York. October 27, 1906.)

DEPOSITIONS—GRANTING OPEN COMMISSION—CONDITIONS.

Upon the granting of an open commission to examine witnesses in a remote jurisdiction, the adverse party may properly be given the right, at his election, to reserve his cross-examination until the direct testimony shall have been returned, and to then cross-examine, either orally or on written interrogatories.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 142–145.]

On Motion for Open Commission.

Arthur H. Van Brunt, for the motion.
Jno. G. Carlise, opposed.

LACOMBE, Circuit Judge. The Kirby Lumber Company may examine such witnesses as it desires to call in Texas upon a commission which shall set forth the names of the witnesses to be examined, so that counsel for the claimant may be able intelligently to determine whether or not it is desirable that he should attend their examination. The commission may be an open one, not on written interrogatories, if counsel for defendant so elect. But, in the event of such election, claimant's counsel may give notice that they elect not to incur the expense of attendance in a remote jurisdiction, and if they do so they may interpose their objections to testimony, and may prepare their cross-interrogatories after the direct testimony shall have been returned; or they may, at that time, elect orally to cross-examine the Texas witnesses, in which event such witnesses shall be produced for such cross-examination on reasonable notice.

UNITED STATES v. RICHARDS et al.

(District Court, D. Nebraska. December 20, 1906.)

No. 101.

1. CONSPIRACY—DEFINITION.

Under the act of Congress providing that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more do any act to effect the object of the conspiracy, all shall be liable to a penalty, the gist of the offense is conspiracy, combination, or agreement to effect an unlawful end, which offense is completed only on some one or more of the parties doing an act to effect the object of the conspiracy, termed an "overt act."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 38, 39, 60.]

2. SAME—OVERT ACT.

An overt act, required to constitute conspiracy, must be a subsequent independent act, following the complete agreement or conspiracy, and done to carry into effect the object of the original combination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 38.]

3. PERJURY—DEFINITION.

To constitute perjury, the party charged must take an oath before some competent tribunal or officer that he will testify, declare, depose, or certify truly that his written testimony, declaration, or certificate by him subscribed was true, when in fact some material matter so testified, declared, or certified by him was false and untrue, and known by him at the time of taking such oath to have been false and untrue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 1-3.]

4. PUBLIC LANDS—HOMESTEAD.

It is not a compliance with the homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose to live there, and with no intention of cultivating any part of it and acquiring it for a place of residence; but there must be a combination of act and intent to make the property entered his actual place of abode.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 74.]

5. SAME—AGREEMENT TO SELL.

An agreement to sell land entered by a homesteader, made prior to his acquisition of the patent, in violation of the homestead law, need not be in writing, nor of sufficient form or of a nature to be enforced in a court of law; but it is sufficient that the minds of the applicant and some other person have met definitely and understandingly, so that there was a mutual consent that, when the applicant acquired title to the land from the United States, it should inure to the benefit of the other for a consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 371, 373.]

6. SAME—DISPOSITION.

An entryman may acquire a valid title under the homestead law, though his entry was made with a view of disposing of the land after he had completed his purchase, provided that at the time and before the completion thereof he had not entered into any agreement whereby such other should receive any of the benefit of such purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 371-373.]

7. CRIMINAL LAW—EVIDENCE—INDICTMENT.

A finding of an indictment by a grand jury against a party is no evidence of the defendant's guilt.

8. CONSPIRACY—OVERT ACT—CONSIDERATION.

In a prosecution for conspiracy, the overt act may be considered, with other evidence, as one of the circumstances in determining whether or not there was a conspiracy or agreement charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 104, 107.]

9. CRIMINAL LAW—EVIDENCE—DECLARATIONS OF CONSPIRATORS.

In a prosecution for conspiracy, the acts and declarations of the persons accused may be considered, though made in the absence of some of the defendants, where the conspiracy has been fully established by independent evidence, and it has been shown that the defendant against whom it is offered was a party thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 984, 1012.]

10. CONSPIRACY—HOMESTEAD ENTRIES—FRAUD.

In a prosecution for conspiracy to defraud the United States of certain public land under homestead entries, the fact that defendants advanced money to the entryman to pay his entry fee and to make improvements on the land was not in itself unlawful, and could only be considered in determining whether or not there was a conspiracy or unlawful agreement with the entryman, of which such advancement formed a part.

11. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—WEIGHT.
Though evidence of accomplices is admissible in a criminal case, the jury should scrutinize the same with great care.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1099, 1111.]

12. SAME—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.
The presumption of innocence continues with accused throughout the trial, and stands as sufficient evidence to justify an acquittal, until on the whole evidence the jury is satisfied beyond a reasonable doubt of his guilt.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 719, 731.]

13. SAME—REASONABLE DOUBT—DEFINITION.
A reasonable doubt is sufficient to acquit a person of an offense, and is an actual, substantial doubt, arising and resting in the mind as testimony is heard and considered, which results after the exercise of judgment and reason, when fairly and candidly applied to an investigation of the evidence.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1267, 1906.]

14. CONSPIRACY—CIRCUMSTANTIAL EVIDENCE.
Though the offense of conspiracy may be established by circumstantial evidence, the circumstances must be of such a character as to exclude every reasonable hypothesis but that of defendant's guilt of the offense charged.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 106; vol. 14, Criminal Law, § 1261.]

15. SAME—INDICTMENT—COUNTS—ISSUES AND PROOF.
Where an indictment for conspiracy contains several counts, it is sufficient, to warrant a conviction on counts charging two or more overt acts, that the evidence establishes the commission of one of them.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 105–107.]

16. CRIMINAL LAW—VENUE—PROOF.
In a prosecution in a federal District Court sitting in Nebraska, the evidence, in order to warrant a conviction, must show that the offense charged was committed within that state; the limits of the district of Nebraska being coextensive with the boundaries of the state.

17. PUBLIC LANDS—HOMESTEAD—ENTRY BY SOLDIER—VIEW.
A soldier of the United States may enter a homestead claim selected by an agent without ever viewing it.

18. SAME—FRAUD.
Fraud in the making of homestead entries may not be inferred from the fact that a large number of entries may have been solicited and located by one person, if the entries themselves are legal.

19. SAME—LEASE.
That defendants desired and did lease homestead lands from entrymen for grazing purposes could not make them responsible for any failure of the entrymen to comply with the law relating to settlement or residence on the land.

20. SAME—AGREEMENT TO SELL.
A homestead entryman may agree with any person at any time that when he has proved up on his land, if he desires to sell, he will give that person the first option to buy; such option in itself not being a violation of the law.

Charles A. Goss, U. S. Atty., and Sylvester R. Rush, Sp. Asst. U. S. Atty.

Richard S. Hall, Harry C. Brome, and A. W. Crites, for defendants.

MUNGER, District Judge (charging jury). I congratulate you that your labors, with those of the counsel and court, are drawing to a close. For 30 days you have been deprived of your liberty, the society of family, and cut off from intercourse with the world. The court would not have subjected you to this restraint, but for the public interest which the case has excited. It was proper that you should be removed beyond the reach of any popular feeling, whether favorable to the government or any of the defendants; for no popular wishes or considerations, no thoughts other than those which pertain to strict, impartial justice, should be permitted to invade the sanctity of the jury room to bias or even shade your deliberations. Now that the case is about to be committed to you for consideration and determination, we trust that your action will be such that you can return to your homes with a conscientious assurance that you have performed your duty justly and impartially, and with family and friends enjoy a Merry Christmas and a Happy New Year.

The prosecution in this case is based upon a statute of the United States as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty."

The statute then prescribes the penalty for a violation of its provisions. This statute uses the word "conspire"; "if two or more persons conspire," etc. "conspire," or "conspiracy," has been defined as "a combination or agreement formed by two or more persons to effect an unlawful end, they acting under a common purpose to accomplish that end." Under this statute the gist of the offense is the conspiracy—the combination or agreement between two or more persons to effect an unlawful end. But, before the offense is a completed one, some one or more of the parties must do some act to effect the object of the conspiracy. Such act is termed an "overt act."

Persons may conspire together to commit an offense against the United States; but if the offense stops with an agreement, and no act is done to carry into effect the object of the agreement, no criminal offense has been committed. But, the moment any act is done to effect the object of the conspiracy, that moment criminal liability is fixed, and this act to effect the object, though it be done by only one of the parties, binds each and all of the parties to the conspiracy and completes the offense as to all; for in that case the act of one becomes the act of all. The overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiring together; but it must be a subsequent, independent act following the complete agreement or conspiracy, and done to carry into effect the object of the original combination.

In this case the grand jury have presented an indictment against Bartlett Richards, Will G. Comstock, Charles C. Jameson, Ammi B. Todd, Aquilla Triplett, Thomas M. Huntington, Fred Hoyt, James K. Reid, and F. M. Walcott. The court has granted separate trials for some of the defendants, and in this case the only defendants on trial are Bartlett Richards, Will G. Comstock, Charles C. Jameson, Aquilla Triplett, and F. M. Walcott.

The first count of the indictment in substance charges that Bartlett Richards, Will G. Comstock, Charles C. Jameson, Ammi B. Todd, Aquilla Triplett, Thomas M. Huntington, Fred Hoyt, James K. Reid, F. M. Walcott, and divers other persons to the grand jurors unknown, on the 28th day of June, 1904, within the district of Nebraska, did unlawfully conspire, combine, confederate, and agree together among themselves to defraud the United States of the title, possession, and use of large tracts of land in Cherry and Sheridan counties, Neb., of great value, of which the following described land is a part thereof, to wit: The N. ½ section 31, the S. E. ¼ of the S. E. ¼ section 30, the S. W. ¼ of the S. W. ¼ section 29, and the W. ½ of the N. W. ¼ section 32, all in township 30 N., range 38 W. of the sixth P. M., in Cherry county, Neb.—by means of false, feigned, fraudulent, untrue, illegal, and fictitious entries of said lands under the homestead laws of the United States, the said lands being then and there public lands of the United States open to entry under said homestead laws at the local land office of the United States at Valentine, in the county of Cherry, and Alliance, in the county of Box Butte, respectively, in said state and district.

This is the offense charged, and for which the defendants are on trial, to wit: That they entered into an unlawful conspiracy, and did unlawfully combine, confederate, and agree together among themselves, to defraud the United States of the title, possession, and use of large tracts of land in Cherry and Sheridan counties, Neb., a portion of which were the lands above described. The overt act is charged in substance as follows: That in pursuance of said unlawful conspiracy, combination, confederation, and agreement among themselves, had as aforesaid, and to effect the object of said conspiracy, the said parties, whose names have been given, did, on the 28th day of June, 1904, at the town of Merriman, in the county of Cherry, within the said district and state, fraudulently, unlawfully, and corruptly persuade, induce, and hire one Clyde R. Beckwith to take an oath before one El L. Heath, a United States commissioner, that a certain written affidavit, then and there made by said Clyde R. Beckwith, was true, which affidavit was to the effect that a certain written application, No. 15,082, to the register of the United States land office at Valentine, whereby said Clyde R. Beckwith applied to said register to enter the public lands theretofore described, under the homestead laws of the United States, in which affidavit the said Clyde R. Beckwith stated in substance and effect that he did not apply to enter the said lands on speculation, but in good faith to appropriate the same to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which

the title he should acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; whereas, in truth and in fact the said Clyde R. Beckwith and said defendants (naming them), and each of them, then and there well knew that said Clyde R. Beckwith did not apply to enter said lands in good faith and for the purpose of appropriating the said lands to his own exclusive use and benefit, but in truth and in fact for the use and benefit of said Bartlett Richards, Will G. Comstock, Charles C. Jameson, and the Nebraska Land & Feeding Company, a corporation, and said divers other persons to the grand jurors unknown. That in fact the said Clyde R. Beckwith and defendants (naming them) well knew that said Beckwith, in making said affidavit and entry of said lands, was acting as the agent of, and in collusion with, and for the benefit of, said Bartlett Richards, Will G. Comstock, Charles C. Jameson, and the Nebraska Land & Feeding Company, under an agreement and contract before made with the said (naming all defendants), whereby the said Beckwith agreed that the said title which he might acquire from the government of the United States to said lands should inure to the benefit of said Richards, Comstock, Jameson, and the Nebraska Land & Feeding Company, and divers other persons to the grand jurors unknown. That in pursuance of said unlawful conspiracy, confederation, and agreement the said defendants (naming them) did pay and cause to be paid to the receiver of the United States land office at Valentine the sum of $14, the filing fee and costs of said entry; and, further, in pursuance of said unlawful conspiracy, combination, confederation, and agreement among themselves as aforesaid, and to effect the object of such unlawful conspiracy, the said defendants (naming them) and divers other persons to the grand jurors unknown did build and cause to be built upon the lands above described and so entered as aforesaid a small house, of the value of $25, for and as the homestead improvements of the said Clyde R. Beckwith, without expense, charge, or cost to him, the said Clyde R. Beckwith, therefor.

Each of the first 31 counts in the indictment are similar to this in charging the offense, to wit, the unlawful combination and agreement between the parties named to defraud the United States out of certain of its public lands by means of a fraudulent use of the homestead law. The several counts differ in regard to dates, specific tracts of land, and the overt acts committed in furtherance of the unlawful combination or agreement. It will, however, be unnecessary for me to read to you the substance of the remaining 31 counts, as the principles of law which must govern you in the consideration of this case are applicable to each of said 31 counts.

Counts 32 to 38 inclusive, charge the defendants with conspiring together to violate section 5393 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3654], which section is as follows:

"Every person who procures another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed."

The gist of the offense in these counts is, as in the 31 counts, the unlawful conspiring, combining, confederating, and agreeing together;

differing in this: That in the first 31 counts the unlawful conspiring, combining, confederating, and agreeing together had for its object the defrauding the United States out of certain lands by a fraudulent use of the homestead law. In these 7 counts, from the 32d to the 38th, inclusive, the object of the unlawful conspiracy, confederation, and agreement, was to commit an offense against the laws of the United States, to wit, section 5393 of the Revised Statutes, which I have just read, to wit, by unlawfully, willfully, knowingly, and corruptly agreeing together and with divers other persons to the grand jurors unknown to unlawfully, willfully, and knowingly suborn, instigate, and hire certain persons named in the several counts of the indictment to unlawfully, willfully, knowingly, and corruptly commit the offense of perjury against the laws of the United States.

Perjury is defined by section 5392 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3653] as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury."

Section 5393, which I have heretofore read, defines subornation of perjury by providing that:

"Every person who procures another to commit any perjury is guilty of subornation of perjury."

To constitute perjury, a party must have taken an oath before some competent tribunal, officer, or person authorized to administer an oath that he will testify, declare, depose, or certify truly that his written testimony, declaration, or certificate by him subscribed is true, when in fact some material matter so testified, declared, or certified to by him is false and untrue, and known by the party at the time of taking such oath to have been false and untrue.

The gist of the offense in these seven counts, as I have said, is the combining, confederating, and agreeing together upon the part of the defendants and the parties named with them in the indictment to unlawfully, willfully, and knowingly suborn, instigate, and hire certain persons named in the several counts of the indictment to unlawfully, willfully, and knowingly commit the offense of perjury against the laws of the United States. To constitute perjury it is not sufficient that the oath so taken be false and untrue as to some material matter, but it must further appear that the party knew at the time of taking his oath that the same was false and untrue.

The first 31 counts of the indictment, as before stated, charge that the parties entered into a conspiracy to defraud the United States out of certain lands by means of a fraudulent use of the homestead law, and that overt acts committed in furtherance of such conspiracy were the causing and procuring of a false and fraudulent declaratory statement, and in some of the counts fraudulent entries under the homestead law. The provision of the homestead law applicable to the consideration of this case is as follows:

"That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer, and file in the proper land office, an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all of the requirements of law with reference to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, persons, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person, persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself or herself."

The object and purpose of the homestead laws of the United States were to grant land to actual, bona fide settlers, persons making settlement upon the public lands for use as homesteads, and to encourage residence upon, cultivation, and improvement of the public domain. The applicant, as the portion of the statute I have read states, is required to verify that his application is in good faith, made for the purpose of actual settlement and cultivation, and not for the benefit of any other person; that he will faithfully and honestly endeavor to comply with the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he is not acting as agent for any person in making such entry, nor in collusion with any person to give him the benefit of such land entered; that he does not apply to enter the land for the purpose of speculation, but in good faith to obtain a home for himself; that he has not directly or indirectly made any agreement or contract in any way or manner with any person or corporation by which the title he may acquire shall inure in whole or in part to the benefit of anyone except himself.

In establishing a residence, as required by the homestead law, there must be a combination of act and intent—the act of occupying and living upon the claim, and the intention of making the same a home to the exclusion of a home elsewhere. Inhabitancy must exist in good faith. It is not a compliance with the homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose to live there, with no intention of cultivating any part of it and acquiring it for a place to reside in.

The statute, in forbidding the applicant to make directly or indirectly any agreement or contract in any way or manner with any person by which the title he may acquire from the government shall inure in whole or in part to the benefit of any person except himself, means by the word "agreement" that there must be a meeting of minds expressed in some tangible way, and must be an intent in some way to be binding upon the parties. One party may have intended to sell, the other party may have intended to buy, yet this would not be sufficient, unless the intention of each was in some way communicated from one to the other, and was understood and agreed to by both.

An agreement, as the word "agreement" is used, need not be in writing. It need not be of sufficient form or of the nature to be enforced in court. It is enough if it is proven beyond a reasonable doubt that in some way the minds of the applicant and some other person have met definitely and understandingly—that there is a mutual consent—that, when the applicant may acquire title to the land from the United States, it shall inure to the benefit of such other person for a consideration; that is, that in truth and in fact the applicant is ready to acquire the land for the use and benefit of another. And any words and acts manifesting this mutual consent of the minds of the parties are sufficient to constitute a contract or agreement.

The applicant, under the statute, is also required in his affidavit to state that he does not apply to enter the land for the purpose of speculation, but as a home for himself. This provision, that he does not seek to acquire it for speculation, was not intended to limit the homesteader's dominion over the land after he has complied with the provisions of the homestead law, made his final proof, and acquired title. It is only intended to prohibit his entering the land under an agreement whereby he is acting for another. He may acquire valid title under the homestead law with a view of disposing of the same after he has completed the purchase, provided that at and before the time of completing such purchase under the homestead law he has not entered into an agreement with another whereby such other should receive any of the benefit of such purchase.

A person is required to reside upon his homestead five years before making final proof. An exception to this rule is where the homesteader has served in the army or navy of the United States. A person who has served in the army or navy of the United States and received an honorable discharge is given by law six months after making his filing to enter upon and establish his residence upon the land, and the period of time served in the army or navy may be deducted from the period of five years residence, provided, however, that in any event the party must reside at least one year upon the land.

This prosecution is based upon an indictment found by the grand jury. The finding of an indictment by a grand jury against a party is no evidence of the defendant's guilt. That must be established upon the trial by competent and sufficient evidence. In this case, then, your first inquiry should be, was there an unlawful agreement entered into by two or more of the parties named in the indictment to defraud the United States out of certain of its public lands mentioned in the indictment, by means of the false and fraudulent use of the homestead laws of the United States? The understanding, combination, or agreement between the parties in the given case to defraud the United States out of its lands, as charged in the indictment, must be proven, because, without the corrupt agreement or understanding, there is no conspiracy.

It seldom, if ever, happens that, when parties enter into a conspiracy or agreement to accomplish an unlawful end, such agreement is reduced to writing or specifically stated to witnesses, and it is usually necessary to resort to circumstantial evidence to establish the agree-

ment or conspiracy. The acts of parties in the particular case, the nature of those acts, or declarations and statements, whether verbal or in writing, and the character of the transactions or series of transactions, with the accompanying circumstances, as the evidence may disclose, should be investigated and considered as circumstances from which evidence may be derived of the existence or nonexistence of an agreement, which may be expressed or implied, to do the unlawful act.

I have before stated that the overt act must be one independent of the conspiracy or agreement. This is true. Yet the overt act, the manner and circumstances under which it is done, may be considered, in connection with other evidence in the case, as one circumstance in determining whether or not there was the conspiracy or agreement charged. But it must be established that the conspiracy or agreement which is charged to have existed, and which is the gist of the action in this case, had been formed before and was existing at the time of committing the overt act.

The government affirms the formation and existence of a conspiracy to commit the particular offense charged against the United States, and that these defendants were each a party to such conspiracy. The burden is therefore upon the government to prove what it thus affirms by legal and competent evidence, in order to ask a verdict in its favor.

As has been said, in determining the question of the formation or existence of a conspiracy, the acts and declarations of the persons accused may, among other circumstances, be looked to and considered by the jury. Statements of some of the accused conspirators, in the absence of the defendants, and some of them, on trial, and conversations with some of the witnesses on the part of persons accused as co-conspirators, other than the defendants, made in the absence of the defendants, have been given in evidence. These statements were admitted to show the nature and purpose, the plan and operations, of the conspiracy, if one existed, and to aid in shedding light upon the relation of the persons so speaking to the transactions; but guilt cannot be fastened upon any person by the declarations or statements, oral or written, by others. Guilt must originate within a man's own heart, and it must be established by his own acts, conduct, or admission. To establish the connection of any one of the defendants with the conspiracy, such connection must be shown by facts and circumstances, or by his own acts, conduct, or declarations, independent of the declarations of others, and, until this fact is thus established, he is not bound by the declarations or statements of others.

The principle of law and rule of evidence is that, when once a conspiracy or combination is established and the defendant's connection therewith is shown by independent evidence, then he is bound by the acts, declarations, and statements of his co-conspirators, because in that event he is deemd to assent to or command what is done by any other in furtherance of the common object. In this case, in determining whether any one of the defendants on trial was a party to the conspiracy, if you find a conspiracy was formed, you cannot consider

the declarations and statements made by other persons to the various entrymen or others in the absence of such defendant, as such defendant is not bound by or affected by such statements and declarations of others, until it is shown by other competent evidence that he was a party to such unlawful conspiracy.

It will be well, then, for you to take up and consider the evidence as it relates to each defendant on trial separately. For instance, Bartlett Richards is the first defendant named in the indictment. In considering whether or not he was a party to the conspiracy or agreement, if you find there was one, you are only to take into consideration his own statements, action, and conduct, and his own connection with the action and conduct of others, as shown by the evidence, independent of any statements or declarations by others; and unless you find from such evidence that he was a party to such conspiracy, if one existed, then it would be your duty to acquit him. If, however, you find that he was a party to such conspiracy, then the statements and declarations of his co-conspirators may be considered as if made by him. Apply this same method in determining whether each of the other defendants were parties to the alleged conspiracy.

The parties are upon trial for the offense charged in the indictment, to wit, a conspiracy to defraud the United States out of certain lands, and to suborn perjury, and are not on trial for any other offense; and, though the evidence might establish the commission of some other offense, they are only to be found guilty for the offense charged. Should you find that a conspiracy existed, and that the defendants were parties thereto, then you should inquire whether or not one or more of the parties to such conspiracy did the act or acts in pursuance or in furtherance of such conspiracy, as is charged in the indictment, which acts I have denominated and called the "overt act"; for, although a conspiracy may have existed, unless some one or more of the overt acts charged in the indictment are established to have been committed by one or more of the conspirators, the offense charged in the indictment would not be established. On the other hand, although the evidence may establish to your satisfaction that the various homestead entries were fraudulent, yet that would not warrant a conviction, unless such fraudulent entries were procured to be made in pursuance of a precedent conspiracy or agreement, as I have before explained.

You are further instructed that the mere advancing of money to a party to enable him to enter his homestead, or advancing money to make improvements thereon, are not of themselves unlawful acts, but are simply acts and circumstances which may be considered in determining whether or not there was a conspiracy as alleged, or unlawful agreement by which the entryman was to make the entry, not for his own use and benefit, but for the use and benefit of another. Neither is it unlawful for a person having a bona fide homestead entry to permit another, by lease or otherwise, to use the same, if he does not thereby exclude himself from residing thereon. Such fact, if it be a fact, however, is to be considered with the other evidence in the case in determining the good faith and bona fides of the entryman.

Witnesses have been called in the course of the trial who have testi-

fied to their own participation in fraudulent and criminal practices. Criticism has been made of their testimony, and the weight to which it is entitled. The court instructs you on this subject that it is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the government has the right to use them as witnesses. It is the duty of the court to admit their testimony, and that of the jury to consider it. The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care. But the jury should not rely upon it unsupported, unless it produces in their minds the most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth.

In determining the guilt or innocence of each defendant in this case, you must be convinced beyond a reasonable doubt that he has committed the offense or offenses charged in order to convict him. Each and every fact necessary to constitute the offense must be so proven; that is, beyond a reasonable doubt. Until guilt is proven, there is an absolute presumption of innocence, and this presumption of innocence continues with the defendant throughout the trial, and stands as sufficient evidence in his favor until from the whole evidence you are satisfied beyond a reasonable doubt of his guilt.

It is the settled rule in criminal cases that a conviction cannot be secured upon strong suspicion or probabilities of guilt, nor, as in civil cases, upon a mere preponderance of evidence; but guilt must be established beyond a reasonable doubt. By a reasonable doubt is meant an actual, substantial doubt, that arises and rests in the mind as testimony is heard and considered; that results after the exercise of judgment and reason, when fairly and candidly applied to an investigation of the evidence. You may, therefore, in testing the character of the conviction or belief as to the guilt of each one of the defendants, ask yourselves this question: Would such a degree of conviction, certainty, or opinion as the proof in this case has made upon my mind be sufficient to induce or lead a prudent man to act in a matter of the highest concern or importance to his own personal interest? If you answer that question in the affirmative, then you cannot be said to have any reasonable doubt of the defendants' guilt. On the other hand, if the proof leaves your mind in such a state of doubt and uncertainty as to the guilt of the accused as would deter or prevent a man from acting in matters of great moment and importance to himself, there would exist a reasonable doubt, and the defendants should have the benefit of that doubt.

I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts

proven, and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

The credibility of the several witnesses is wholly for you to determine. In determining the credibility of the witnesses, take into consideration their demeanor upon the witness stand, the reasonableness or unreasonableness of their story, and their interest or lack of interest, if any, in the result of the suit. All these are matters proper to be considered in determining the weight or credibility which you will give to the testimony of any one of the witnesses. A large number of witnesses have been called, and many days occupied in the taking of testimony. This testimony, however, has been largely of the same character and with reference to overt acts charged in the indictment. Its credibility, the proper inferences to be drawn from it, and its application to the charges made in the indictment, have been so thoroughly, ably, and fairly discussed by counsel that it is unnecessary that I should advert to or call your attention to any portion of it.

In your deliberations you should take up each count of the indictment separately, and consider the question of the guilt or innocence of each one of the defendants as charged therein, and if, in such consideration of each count of the indictment, and each defendant's relation thereto, the evidence convinces you beyond a reasonable doubt that the defendant is guilty as charged in the count of the indictment, then you should find him guilty upon such count. If each and all the essential facts to constitute the offense as charged is not established, then his guilt is not proven beyond a reasonable doubt, and you should acquit him upon such count.

To warrant a conviction on counts of the indictment which charge two or more overt acts, it is not necessary that the evidence establishes the commission of every one of the overt acts. It is sufficient if the evidence establishes the commission of one of the overt acts charged in such count.

It is charged in the indictment that the several entrymen made their declaratory statements, applications, and entries, not for their own use and benefit, but for the use and benefit of the said Bartlett Richards, Will G. Comstock, Charles C. Jameson, and the Nebraska Land & Feeding Company, a corporation. Upon this feature of the case it is not necessary to establish that the entry was for the use and benefit of all of the parties named. It will be sufficient if the evidence establishes that it was for the use and benefit of some one of them.

The evidence must establish the fact that the offense, if committed, was committed within the district of Nebraska, and within three years before the finding of the indictment, which was June 15, 1906. The district of Nebraska is coextensive with the state of Nebraska. If the evidence does not show that the offense charged was committed within the district of Nebraska, then this court has no jurisdiction. and your verdict should be not guilty; and unless the indictment was found by the grand jury within three years from the committing of

the offense, then the prosecution is barred by the statute of limitations, and in such event your verdict should be not guilty.

The defendants have asked some instructions which I give, some modified, and they should receive the same consideration and be accepted as the law applicable to the case to as full an extent as if given by the court on its own motion.

The jury is instructed that there is no law requiring a soldier of the United States to see his land before entering it, and that a soldier who has filed his declaratory statement and had his land selected by an agent need not see the land before entering the same.

The jury is instructed that they are not entitled to infer fraud from the mere fact that a large number of entries may have been solicited and located by any of the defendants, if the entries themselves are legal. The great number of them would not make them illegal.

The jury is instructed that the mere fact that any of the defendants desired to lease, or did lease, any lands entered by entrymen, for grazing purposes, would not make them responsible for any failure of the entrymen to comply with the law relating to settlement or residence on such land. To say to an entryman upon government land under the homestead law that if, after he has made final proof and obtained title to the land, he desires to sell it, you will give him a definite sum of money therefor, is not a crime, and does not constitute an unlawful agreement respecting the title to public lands.

The jury is instructed that there is no law of the United States preventing an entryman from agreeing with any person at any time that, when he has proved up on his land, if he desires to sell, he will give that person the first chance to buy it, and that such an understanding of itself is not in violation of law. The mere fact that the homesteader may have said that, after he should prove up, he would sell if he could obtain a satisfactory price, or that he would give another the first chance to purchase, should he conclude to sell, or the mere fact that a party may have said to the homesteader, when he proved up, he would give him a stated sum, such statements alone would not constitute an agreement.

The jury is instructed that in this case it is charged that the purpose of the defendants was to defraud the government by means of false, feigned, fraudulent, untrue, illegal, and fictitious entries of land under the homestead laws of the United States, and that they cannot convict these defendants upon this charge in any case where the entry was not false, feigned, fraudulent, untrue, illegal, or fictitious.

The jury is instructed that the defendants, or any of them, had a perfect right to advance money to entrymen to pay filing fees, and to agree that, in the event the entryman desired to sell after he had proved up and the defendant then desired to buy, such advances should be credited on the sale, or if no such arrangement was thereafter made the money would be refunded, and that such an agreement would not, in and by itself, be a violation of any law of the United States. But such fact may be considered in connection with the other evidence in determining the existence of the alleged conspiracy or corrupt agreement.

The jury is instructed that the fact that somebody in the course of

the proceedings before the United States land department has made a false statement or false affidavit is not chargeable or imputable to the defendants, unless it is shown by the testimony, clearly and unmistakably and beyond a reasonable doubt, that the defendants in this case knew of the fact that such affidavit was false and procured it to be made with such knowledge.

Before you can convict any of the defendants of the crime charged against them, you must be satisfied to a moral certainty, and beyond a reasonable doubt, that some two or more of the defendants did agree, conspire, and confederate together, or with some other person named in the indictment as a co-conspirator, or with some other person or persons whose names were actually unknown to the grand jurors, and alleged to be unknown to them, to induce settlers to make entry upon the public domain, with the purpose and intent of having said settlers make final proof and final entry of said lands, without having complied with the laws of the United States with respect to settlement, residence, and improvement on said lands, and with the intent that said settlers should not comply with said laws or some of them in a substantial and material respect, and that, notwithstanding such failure in complying with such law by said settlers, they should make final proof and entry of said lands, and then convey them to the defendants, Bartlett Richards, Will G. Comstock, Charles C. Jameson, and the Nebraska Land & Feeding Company, or to some one of them. There must have been a clear intent on the part of the defendants, or of those of them you may find guilty, that said settlers should not comply with some law, and should make final entry and deed notwithstanding such noncompliance. It is not enough to warrant a conviction that the defendants may have thought or believed that some of such settlers might not comply with the law; but the defendants must have intended that such settlers should fail in some material respect in such compliance.

The jury is instructed that the evidence in this case of Anna Mechler, Charles W. Reed, Martha Reed, Mary Rose Reed, and Robert Reed, not being for acts charged in the indictment, was only admitted to show wrongful intent on the part of defendants, and cannot be considered for the purpose of establishing independent overt acts not charged in the indictment.

The case is now submitted to your consideration.

JONES v. BYRNE et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. November 12, 1906.)

1. SPECIFIC PERFORMANCE—PRINCIPLES GOVERNING.

The specific performance of a contract is not a matter of absolute right, but rests in the judicial discretion of the court, to be exercised in accordance with the principles of equity, and a specific performance will not be decreed where it would be inequitable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

2. SAME—CONTRACT FOR PURCHASE OF LANDS—BREACH OF TRUST BY PURCHASER.
Complainant, who was a resident of Massachusetts, purchased certain notes secured by vendor's liens on lands lying in Arkansas and Texas near the line between them, and defendant, who was a lawyer, residing near the lands, became the owner of the legal title subject to such liens. Prior to maturity of the notes, the parties entered into a written contract, by which defendant agreed to look after the lands, free them from liens, and do whatever was necessary to render them marketable, and to sell the same in his discretion; complainant agreeing to release his lien on any part so sold. The proceeds of any such sales, after deducting expenses incurred by defendant, were to be applied on the liens until they were extinguished; and the contract provided that any land remaining should belong to the parties equally. During a number of years defendant looked after the lands and made some sales, but complainant realized nothing therefrom. After a time defendant commenced negotiations for the purchase of complainant's interest, making offers which he increased from time to time until he finally telegraphed an acceptance of an offer which had been made to him by one acting in complainant's behalf. Prior to such acceptance he had entered into a contract with his codefendants for the sale to them of one-half in value of the lands in consideraation of their furnishing the money to buy complainant's interest, but such contract was not disclosed to complainant. *Held*, that the contract between the parties constituted defendant both attorney and trustee for complainant with respect to the lands and imposed on him the duty of fully disclosing all the facts relating thereto before he could make a valid contract for their purchase, and that, conceding that a contract otherwise valid was made by his telegram, it was in violation of his trust, and would not be specifically enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 173.]

3. COURTS—FEDERAL COURTS—PROPER DISTRICT FOR SUIT—CANCELLATION OF INSTRUMENTS—NATURE OF SUIT.
A suit for the cancellation of a contract for the sale of land is one in personam, and may be brought in a district other than that in which the land is situated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 809.]

4. CANCELLATION OF INSTRUMENTS—PERSONS AGAINST WHOM SUIT WILL LIE—CONTRACT IN BREACH OF TRUST.
A contract for the purchase of land made with the holder of the legal title, in violation of his duty as trustee, for the owner of an equitable interest therein, will be canceled at suit of the latter, where the purchasers had knowledge of his interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 47.]

5. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT AFFECTING LANDS IN ANOTHER STATE.
A federal court is without jurisdiction to decree the foreclosure of a lien upon, and to order a sale of, land which is situated in another state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 809.]

6. VENDOR AND PURCHASER—VENDOR'S LIEN—RIGHT TO ENFORCE—VIOLATION OF TRUST AGREEMENT BY DEFENDANT.
Complainant, who was the owner of notes secured by a vendor's lien upon lands entered into a contract with defendant who had purchased the legal title by which defendant was to take charge of and sell sufficient of the lands to pay the lien notes, the remainder, if any, to be owned by the parties equally. No time of performance was fixed nor for the duration of the contract. After several years, defendant attempted to purchase complainant's interest without disclosing material facts, and did other acts in violation of his trust and in fraud of complainant's rights. *Held*, that complainant was entitled to a foreclosure of his lien.

In Equity.

The bill of complaint in this case is not voluminous, but the answer and cross-bill are long, rambling, argumentative, and evidentiary, and the answer to the cross-bill necessarily long. The material facts are few, and, in the main, not in dispute. There is some conflict in the evidence on points not essential to the correct determination of the case. No effort will be made to set out the substance of the pleadings, or the evidence in full. The substantial facts are these: On the 27th of December, 1889, W. L. Whittaker and wife sold to A. C. Jones, B. T. Laws, and R. A. McKee, the lands in controversy, and the latter gave to said Whittaker, for the unpaid balance of the purchase money, their 10 promissory notes, amounting, in the aggregate, to $5,250. The notes bear 10 per cent. interest. The notes are described correctly in the bill, and, upon some of them, payments have been made. Whittaker and wife executed a deed to said purchasers, which was duly recorded, and contained a description of the notes, and reserved a vendor's lien to secure the same. Before maturity, for value, and in the regular course of business, Whittaker assigned the notes to the complainant, Erastus Jones. The lands for which the notes were given, by mesne conveyances, became vested in the defendant Lawrence Byrne. On the 2d day of June, 1892, the complainant, Jones, and the defendant Byrne entered into the following agreement:

"Whereas, under and by virture of a series of conveyances, namely two deeds from W. L. Whittaker and wife to A. C. Jones, B. T. Laws, and R. A. McKee, under date the 27th day of December, 1889, and under deeds from said Jones, Laws, and McKee to the Miller Hardwood Lumber Company, and bearing date 9th day of July, 1890, and by virtue of two other deeds from said Miller Hardwood Lumber Company to L. A. Byrne, bearing date 1st day of June, 1891, he the said L. A. Byrne owned the legal title to the following tracts of land, to wit: All that certain tract of land lying about five miles north of Texarkana, and known as the 'Texas and Pacific survey, No. 1.' the same containing 640 acres of land, it being the same tract of land surveyed by virtue of certificate 2/1254 issued to the Texas & Pacific Railroad Company, by the Controller of the General Land Office of Texas August 27th, 1874, and patented March 4th, 1877, which land is situated in Bowie county, Texas (also S. E. ¼ of the S. W. ¼ of section 25; the fractional half of section 30; all of fractional section 31; the S. E. ¼ of the N. E. ¼ the S. E. ¼; of the S. E. ¼ the west half of the east half and the west half of section 32; all of section 33; all in township 14, range 28, Miller County, Arkansas, and containing 2,023.63 acres more or less.

"And, whereas, under the sale from W. L. Whittaker and wife to said Jones, Laws, and McKee, a balance of the purchase money is not yet due, which are evidenced by purchase money notes, and that shortly after the sale of the said land by said Whittaker he transferred all of said purchase money notes to Erastus Jones, who is now the owner and holder of same, and that it is estimated there is an aggregate of about $5,000.00 due upon said notes to said Erastus Jones, which amount, however, is subject to vary upon a complete settlement between the parties.

"And, whereas certain payments have been made to W. L. Whittaker since the sale made by him which were intended as a payment upon said notes, but the said Whittaker has failed and neglected to turn said payments over to the said Erastus Jones.

"And, whereas there are certain expenses which must necessarily be incurred in clearing the titles to said land and placing the same upon the market, such as redemption from taxes, litigation now pending, surveying, and mapping the same, and any other expenses that may be absolutely necessary to place the same upon the market. No charge shall be made by said Byrne for time in the sale of the land, or for attorney's fees to him:

"Now, therefore, it is agreed between L. A. Byrne and Erastus Jones as follows:

"That the said L. A. Byrne, in order to facilitate the making of deeds in case of sale of said land, the legal title thereof shall remain in his name, that he shall have the right, and he is hereby empowered with authority to incur

all necessary expenses to place said land upon the market; and he is further empowered with authority to make all sales of said land, and, in case of sale said Erastus Jones, will relinquish his vendor's lien on that of the land sold.

"That out of the proceeds of any and all sales of the land, the expenses of preparing the same for market shall first be paid.

"(2) The proceeds arising from the sale of said land shall next be applied to the payment of the balance of the purchase money now due Erastus Jones until all of said purchase money is paid.

"(3) Then after the balance due said Jones for purchase money is paid, the remainder of the land or the proceeds thereof shall be owned and possessed by said Jones and Byrne equally.

"(4) It is further agreed that the money collected by the said W. L. Whittaker, and owing by him, which should go as a payment upon said purchase money notes, shall be applied to the payment of said notes when collected.

"(5) It is further agreed that in case of sale of any of said land made by said L. A. Byrne, and for the payment of which he shall take notes, that the same shall be assigned by him to said Erastus Jones as a payment on the purchase money notes held by him, in which case the said Erastus Jones waives and relinquishes his vendor's lien under the original notes to that part of the land sold by said Byrne, and accept the latter purchase money notes of the tract or tracts sold by said Byrne in lieu thereof.

"Witness our hands this second day of June, 1892.

"L. A. Byrne.
"Erastus Jones."

Later, while the above agreement was in full force, defendant Byrne, without the knowledge or consent of the complainant, entered into a contract with his codefendants, which is as follows:

"February 11th, 1905.

"For, and in consideration that Louis Heilbron, M. C. Wade, and J. O. Stribling will furnish the money, cash, to purchase the interest of Erastus Jones in certain lands, of which the lands herein named are a part, I agree to deed to said parties the following tracts for said consideration:

"All that part of section 1, Texas & Pacific survey, lying west of right of way of K. C. S. Railway, and south of center of the channel of McKinney Bayou, in Bowie county, Texas.

"All that part of fractional W.½ of section 30, lying north of center of McKinney Bayou.

"Also W. ½ of W. ½ section 32; S. ½ of S. E. ¼ of S. W. ¼ of section 32; S. ½ of S. E. ¼ of section 32; S. E. ¼ of N. E. ¼ of section 32.

"All that part of N. E. ¼ of N. E. ¼ of section 32, lying west of center of McKinney Bayou.

"Also W. ½ of the S. E. ¼ of section 3e; S. ½ of the S. W. ¼ of section 33k; N. E. ¼ of the S. W. ¼, except 5 acres of section 33; W. ½ of the N. W. ¼ of section 33.

"But, in case the interest of Erastus Jones in said land cannot be purchased for less than $7,500.00, which is the sum he asks, then said Byrne is to add the E. ½ of E. ½ of section 33 to the above land.

"L. A. Byrne.

"Accept the above proposition.

"J. O. Stribling.
"M. C. Wade.
"Louis Heilbron."

Under the contract of June 2, 1892, Byrne entered upon the discharge of his duties, instituting some suits and defending others, paying taxes, redeeming some of the lands which had been forfeited for delinquent taxes, and generally clearing up the titles. Some of the taxes he paid with money furnished by Jones; some, presumably, he paid with his own means, without any authority in the contract, or from Jones, dehors the contract. He also began improving the land, leasing it to tenants, building houses, collecting rents and carrying on farming operations. He sold some of the land, and took notes therefor, and collected some purchase money. Some of the notes for the

purchase money were turned over to Jones, and, later, returned to Byrne; but it does not appear that Jones ever realized a cent on his purchase-money notes, nor that any detailed and accurate statement of Byrnes' doings in regard to the land was ever furnished Jones at any time, before or since the institution of this suit. Indeed, it does not appear that any such accounts were kept. Jones resided in Massachusetts, was far advanced in years, never saw the land, knew nothing personally of its actual value, or the condition of the titles. For all this he depended on Byrne. On the 11th of November, 1899, Byrne, by letter, which will appear in the opinion in full, endeavored to induce Jones to divide the land, and, to that end, wrote him: "The way I figure is that you own about two-thirds and I own one-third. The land is worth about $15,000.00 and your two-thirds is worth $10,000.00. If you will hold it for five years it will be worth $20,000.00, as the land is increasing in value." Jones declined to divide. In 1904, possibly earlier, Byrne began negotiations to buy Jones' interest in the land, and for this interest, which he represented in 1899, was worth $10,000.00, and if Jones should hold it five years would be worth $20,000, he offered Jones, first, $4,000, then $5,000, then $6,000, then $7,000, and, finally, $7,500. Before Byrne made the offer of $7,500 for Jones' interest in the land, he had bargained to sell about half the land for $7,500 to his codefendants, as shown by the agreement of February 11, 1905, and studiously kept that fact a secret, and never did disclose it until the original bill had been prepared, to enforce the foreclosure of the vendor's lien notes. The bill is to foreclose said notes, cancel the agreement of February 11, 1905, and compel an accounting. The cross-bill is for specific performance, based on the alleged acceptance of Byrne of an offer of Bemis to sell Jones' interest in the land for $7,500.

The facts above stated are undisputed. Other facts, considered of importance, will be found in the opinion.

McRae & Tompkins, for complainant.

W. H. Arnold and L. A. Byrne, for defendants.

ROGERS, District Judge (after stating the facts). Logically, the cross-bill in this case, which is for specific performance, should be considered first, because, if the complainant is compelled to convey the lands in controversy to defendant Byrne, he is not entitled to a decree enforcing his vendor's lien, and his amended bill should be dismissed. In Hennessey v. Woolworth, 128 U. S. 442, 9 Sup. Ct. 109, 32 L. Ed. 500, Mr. Justice Harlan, speaking for the court, said:

"Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case. Willard v. Tayloe, 8 Wall. 557, 567, 19 L. Ed. 501; Marble Co. v. Ripley, 10 Wall. 339, 357, 19 L. Ed. 955; 1 Story's Eq. Jur. § 742; Seymour v. Deancy, 6 Johns. Ch. (N. Y.) 222, 224. The question in cases of specific performance, Lord Eldon said, is not what the court must do, but what, under the circumstances it may do, in the exercise of its discretion to grant or withhold relief of that character. White v. Damon, 7 Ves. 30, 35; Radcliffe v. Warrington, 12 Ves. 326, 331. It should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or, where it is left in doubt whether the party against whom relief is asked in fact made such an agreement. Colson v. Thompson, 2 Wheat. 336, 341, 4 L. Ed. 253; Carr v. Duval, 14 Pet. 77, 83, 10 L. Ed. 361; Huddleston v. Briscoe, 11 Ves. 583, 591; Lanz v. McLaughlin, 14 Minn. 72 (Gil. 55); Waters v. Howard, 1 Md. Ch. 112, 116."

The doctrine stated is believed to be, not only sound, but universally recognized by courts of equity. It is the doctrine of the Supreme Court of Arkansas (Ft. Smith v. Brogan et al., 49 Ark. 309, 310, 5 S. W. 337). It follows that the peculiar facts of this case must be

inquired into. In a great measure the decision of this case depends on the proper construction of the contract between complainant and defendant of June 2, 1892. What status was established between the parties by that contract? Before the contract was executed they were at arms length; neither owed the other any duty, and neither had assumed any obligations to the other. The plaintiff had the right to enforce his vendor's lien against the land on the maturity of his notes, and cause it, or so much as was necessary, to be sold to satisfy the same. The defendant Byrne had the right to pay the notes, and thereby release the land of the vendor's lien, but he was under no obligation to do so. Byrne had paid, as surety, $5,000 for other parties, and those parties had conveyed land to Bryne, subject to the vendor's lien, to reimburse him for the money he had so paid for them. Naturally Byrne wanted to realize something to that end. The titles to the land were defective, and it was desired by both parties that they should be perfected. If sold while imperfect, the complainant might reasonably fear that they would not bring the amount of his debt, and he would have to buy them in and perfect the title afterwards. He lived in a distant state (Massachusetts), and was himself advanced in years. Naturally he would be glad to avoid that contingency. On the other hand, Byrne was a lawyer, living only a few miles from the land, and, being interested to realize something to reimburse him for his loss, could readily look after the perfection of the titles, and would naturally not want to sell if any of the titles were imperfect, lest they fail to bring the amount of complainant's debt, and he should sustain a total loss. Such were the conditions out of which grew the contract under consideration. The contract is loosely drawn, and is unlawyerlike, but I do not think it difficult of construction in this regard.

As we shall see later, we are aided by the correspondence of the parties before there were any differences between them. Before the contract was executed the complainant had no interest in the land itself. He had only an equitable vendor's lien upon the land. Byrne held the legal title, so far as the complainant was concerned, for he had acquired such title as Whittaker, who was the payee of the notes, had at the time of selling the land and taking the notes; but, by this contract, Byrne, in consideration of plaintiff's forbearance to enforce his vendor's lien on the land, undertook to do three things: First, to attend to all suits pending in which the lands were involved, without compensation; second, he was to perfect the title, sell the land, and pay off the notes of the complainant, without pay; third, after the notes were paid, the contract says: "The remainder of the land or the proceeds thereof shall be owned or possessed by said Jones and Byrne equally." A more critical examination of the contract will be made later. Now, the only thing under consideration is the legal status created by the contract between the parties to it. Nothing can be clearer than that the relation of attorney and client was created, and there was a valid consideration for the contract. Was the relation of trustee, and cestui que trust created? That depends upon the proper construction of the contract. The legal effect of the contract was this: Byrne was to

hold, as before, the legal title to all the land, and this was done as a convenience, to facilitate the making of deeds when sales were made. He was to be the agent and attorney for perfecting the titles, either by litigation in the courts or by redemption from tax sales and the like, and for preparing and placing the land on the market and selling the same, and was authorized to incur the necessary expense thereof. When sales were made the proceeds were to be used, first, for defraying the expenses referred to; second, to pay off the notes of complainant; third, the remainder of the land or the proceeds thereof to be the property of Jones and Byrne equally.

The contract expressly provides that when Byrne sold lands Jones was to "relinquish his vendor's lien on that of the land sold," and the last provision of the contract is that if lands are sold and notes taken, the same should be assigned to Jones as a payment of the purchase-money notes to be held; and, in that event Jones "waives and relinquishes his vendor's lien as to that part of the land sold," and was to accept the new notes in lieu of the old. It is clear Jones did not intend by the contract to surrender his vendor's lien, except upon such of the lands as were sold in pursuance of the contract. But, in addition to the interest he held before the execution of the contract, he acquired by the terms of the contract, an equal interest in the remainder of the lands after his notes were paid. This was the condition of things when negotiations began for Byrne to purchase Jones' interest in the lands. Was Byrne a trustee for Jones? He was both agent and attorney; but was he also trustee? Did he hold anything real or personal under the contract for Jones, and in such way as to make him trustee for Jones? "A trust in the most enlarged sense in which that term is used in English jurisprudence may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof." 2 Storys' Eq. Jur. par. 964. A trustee, in the widest meaning of the term may be defined to be a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another. Hill on Trustees, p. 46; Emmert v. De Long, 12 Kan. 67; Truesdale v. Philadelphia Trust Co., 63 Minn. 49, 65 N. W. 133; Burnet v. Bookstaver, 10 Hun (N. Y.) 48. "Express trusts are those which are created by the direct and positive acts of the parties by some writing, or deed, or will. Not, that in those cases, the language of the instrument need point out the nature, character, and limitations of the trust in direct terms, ipsissimis verbis; for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used, and the trust can be drawn, as it were ex visceribus verborum. Implied trusts are those, which are deducible from the nature of the transaction, as a matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law, as matter of equity, independent of the particular intention of the parties." By the terms of this instrument Byrne had the authority to sell the land, fixing the prices without consultation with Jones. He did that very thing in more than one instance under the contract. Doubtless Jones thought Byrne's personal interest, which

depended upon the payment of the lien notes, coupled with the fact that Jones had, by the terms of the contract agreed to release his vendor's lien in case of sales, was a sufficient guaranty that Byrne would sell for the best price that he could obtain. It was his interest to do so; for, to get anything out of the land himself, he had to look to what was left after the lien notes were paid. Jones reposed this confidence in Byrne by the very terms of the contract. He reposed in Byrne the confidence to clear up the title, to prepare the land for market, survey and map it when necessary, and the like, and to incur the necessary expense to do it, using his own judgment, and without even conferring with Jones. Byrne did these very things. Jones reposed in him the additional confidence of holding, in his own name, the remainder of the land after the expenses referred to, and the lien notes, were paid, and of selling the same and dividing the proceeds between them. The latitude given Byrne in the management of the land, and so as to enable him to realize something for himself, was very wide, both as to the time in which the trust was to be discharged, the authority to clear up the title and prepare the lands for sale, as well as to conduct the necessary litigation, and the expenses within the powers conferred by the contract, were to be incurred in that respect solely in Byrne's discretion. The relation, therefore, was one of great confidence and responsibility, requiring the utmost candor and good faith, and clearly made Byrne a trustee for Jones.

Let us consider the law governing the relation of attorney and client, and of trustee and cestui que trust when dealing with each other as to the subject-matter of the litigation or trust while those relations subsisted. In 4 Cyc. at page 960, the author says:

"Owing to the confidential and fiduciary relation between an attorney and his client and to the influence of the attorney over his client growing out of that relation, courts of law, and especially of equity, scrutinize most closely all transactions between an attorney and his client. To sustain a transaction of advantage to himself with his client, the attorney has the burden of showing, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger."

In note 81, same page, it is said:

"It is obvious that this relation must give rise to great confidence between the parties, and to a very strong influence over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which, between other persons, would be held unobjectionable." Story Eq. Jur. Par. 310 (quoted in Gruby v. Smith, 13 Ill. App. 43, 45).

See, also, Gray v. Emmons, 7 Mich. 533, 548.

The text is sustained by the decisions of 15 states and the federal court. "An attorney can in no case, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest, touching the thing to which his employment relates, or put himself in an adverse position." Id. p. 958, par. 2. "It is the duty of an attorney to make

known to his client any interest he may have in the matter concerning which he is employed, to be faithful to the interests of his client, and to render correct accounts where he is called upon to account. To make proper payments of money belonging to his client is also the duty of an attorney where the payment falls within the scope of his employment." Id. p. 957, § 1. In Hill on Trustees, p. 217, it is said:

"In all these cases the title to equitable relief will of course be much stronger, where several fraudulent ingredients, such as the imbecility or distress of the parties, or inadequacy of price, etc., are to be met with together in the same transaction. It is from the collection of such facts, as was remarked by Lord Thurlow, that it is to be made out and evidenced, that fraud or misrepresentation was used. Wherever, from the peculiar relations or connection existing between the parties, considerable authority or influence necessarily exists on the one side, and a corresponding reliance and confidence is placed on the other, a party will not be suffered to abuse this authority or influence by extracting from it any advantage to himself. But the court will look into transactions between persons in these relative situations with extreme jealousy; and, if it find the slightest trace of undue influence used, or unfair advantage taken, will interpose, and give redress. Indeed, in some of these cases, as for instance, in dealings between guardian and ward, trustee and cestui que trust, or attorney and client, the transaction is in itself considered so suspicious, owing to the near connection between the parties, as to throw the proof upon the person who seeks to support it, to show that he has taken no advantage of his influence or knowledge, but has put the other party on his guard, bringing everything to his knowledge which he himself knew."

In Ludington v. Patton, 86 N. W. 580 the Supreme Court of Wisconsin said:

"No rule is better established than that, if a trustee, or a person standing in relations of trust and confidence to another, deal with the cestui que trust, or such other in respect to the subject of such trust, for his own benefit, or that of others whom he represents, serving two persons at the same time, in form, when, in contemplation of law he can serve but one loyally, the transaction cannot be upheld, if called in question by the cestui que trust, unless the trustee is able to prove to the satisfaction of the court, by clear and satisfactory evidence, that the two were at arm's length in the transaction, that no confidence was reposed in him by the beneficiary, that the bargain was profitable to the beneficiary, and that he was fully informed in regard to the value of the property and the nature of his interest in it. Beach, Trusts, § 518; Puzey v. Senier, 9 Wis. 370; Roller v. Spilmore, 13 Wis. 29; Barker v. Barker, 14 Wis. 131; Cook v. Woolen Mill Co., 43 Wis. 433; Davis v. Dean, 66 Wis. 100, 26 N. W. 737; Creamer v. Ingalls, 89 Wis. 112, 61 N. W. 82; Disch v. Timm, 101 Wis. 179, 77 N. W. 196; Saunders v. Richard, 35 Fla. 28, 16 South. 679, 685; Spencer's Appeal, 80 Pa. 317; Brown v. Cowell, 116 Mass. 461; In re Hodge's Estate, 63 Vt. 661, 22 Atl. 725; Cole v. Stokes, 113 N. C. 270, 18 S. E. 321; Mills v. Mills (C. C.) 63 Fed. 511; 1 Story, Eq. Jur. § 321. The policy of the law is to regard all transactions of a contract nature, between a trustee and his cestui que trust, whereby the former obtains the interest of the latter, or some part thereof, in the subject of the trust, as presumptively fraudulent and void at the election of the latter. If such a transaction be permitted to stand, it is upon condition that the trustee satisfies the court, fully and completely, that the cestui que trust received a full equivalent for that which he parted with, and that the transaction was to his advantage rather than to his disadvantage. The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts, and the same is true where a person deals to his own advantage with a person with whom he sustains relations of trust and confidence. The obligation of disclosure, and to protect the interests of the weak or trusting, is the same in one case as the other. 'It is the language of all the authorities that such a transaction is always scrutinized in a court of equity with a watch-

ful eye, and will not be sustained to the disadvantage of the cestui que trust, except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee.'" Puzey v. Senier, 9 Wis. 376.

At page 581 of the same case, it is said:

"The trustee must show, 'by unimpeachable and convincing evidence that the beneficiary, being sui juris, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary perfectly honest and complete disclosure of all the knowledge and information concerning the property possessed by himself or which he might, with reasonable diligence have possessed.' 2 Pom. Eq. Jur. § 958. 'A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, providing that the cestui que trust intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee'—that the trustee took no advantage whatever of his situation, and that he gave his cestui que trust all the information which he possessed. Lord Eldon, in Coles v. Trecothick, 9 Ves. 247."

In the case of Robertson v. Chapman, 152 U. S. 681, 14 Sup. Ct. 741, 38 L. Ed. 592, Robertson, who lived in Maryland, employed Chapman & Polk, attorneys residing in Plattsmouth, Neb., to sell certain properties belonging to the estate, of which Robertson was trustee. Polk, one of the firm, instead of selling the land for all it would bring, arranged with O'Donohue to buy it for him, and it was done, O'Donohue conveying the property the day he got his deed. The court say:

"What is the case as to the defendant Polk? It is not to be doubted that the relations between himself and the plaintiff in respect to the sale of this property, were those of agent and principal. He was precluded by the position voluntarily assumed by him from taking advantage of his principal, or from dealing with the property committed to his care in any other capacity than as an agent, who was bound to subordinate his own interests to those of his principal. He could not, directly or indirectly, become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing, his duty and his interest would come in conflict. If an agent to sell effects a sale to himself, under cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act, in the matter of such agency, solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal."

Apply these principles to the case at bar. At the very moment that Byrne offers to pay complainant $7,500 for his interest in the land, he, Byrne, had been offered by his codefendants that sum for about half of the land in value. I say about half—the record is in that shape that no one can tell from it how much he contracted to sell, or how much was left. The proof leaves it so the part contracted by Byrne to his code-

fendants was worth more than the part left—how much more, nobody can tell—but I infer from the proof very little more. Byrne says the contract for that sale was executed a day or two after he offered to pay the $7,500 for Jones' interest, but he says also that the offer was based on an oral agreement of his codefendants to take the land at that price, and that he had them execute the agreement, so as to bind them, a day or two later. When the instrument was executed makes no difference. He had their offer to take the land at $7,500, and that at the very time that he sent his telegram of acceptance to Bemis to purchase the land at that sum, and his telegram was based upon the offer of his codefendants, so made. It is this alleged agreement that Byrne based his telegram of acceptance on, that he now asks the court to compel Jones to carry out. This offer of his codefendants to give $7,500 for the land was not communicated to Jones, or his agent, Bemis, and the authorities above cited show that it was Byrne's duty to give Jones all the information about the land that he had. Can it be inferred that Jones would have sold his interest for $7,500 had he known it? Byrne had been trying to buy Jones' interest for several months, perhaps a year, prior to March 28, 1905, which is the date of his telegram, first offering $4,000, then $5,000, then $6,000, and then $7,000. This agreement with his codefendants was made after $7,000.00 had been refused by Jones. The agreement with his codefendants was prepared by Byrne himself. The first paragraph says:

"For, and in consideration, that Louis Heilbron, M. C. Wade, and J. O. Stribling will furnish the money cash to purchase the interest of Erastus Jones in certain lands, etc., I agree to deed to said parties the following tracts [describing them]."

The last paragraph says:

"In case the interest of said Erastus Jones cannot be purchased for less than $7,500, which is the sum he asks, then said Byrne is to add the E. ½ E. ½ section 33 to the above land."

But Jones did not know of this offer by Byrne, or that his codefendants had under consideration the purchase. Evidently on February 11, 1905, when Byrne drew the instrument he had made up his mind to buy the land from Jones for $7,500, if he could not get it for less, provided his codefendants would put up the $7,500, for he was willing to give up the additional 160 acres to secure the bargain, if he could not get Jones to take less. It was Byrne's duty to make the land bring every dollar he could, and to protect Jones' interest under the contract; but, on the contrary, he was trying to buy it as cheaply as he could. In order to do so, he was keeping to himself these material facts, which the law imposed on him the duty of telling Jones. Byrne proceeded upon the theory that because Bemis was Jones' agent, that he was absolved from his duty as attorney, agent, and trustee of Jones. In this he was mistaken. His trust was alive, and his duties in no sense modified or altered. His position was flagrantly inconsistent. He had agreed with Jones to represent him in selling, but he was also trying to buy from Jones, to use his own language, "by diplomacy and by bluffing," to get the land for the least possible figure. His personal

interest brought him in direct antagonism to his duty as trustee. He seems to have laid much stress upon the fact that Jones had Bemis for his agent to sell, and that he had invited Bemis to visit the land and see for himself its condition and value. He knew that neither Bemis nor Jones had ever seen the land, but if they had known all about the land, had been just as familiar with it, as Byrne was, still they were entitled to know, when Byrne came to purchase from Jones, everything that Byrne knew which would be of any importance to Jones in determining the price. But the invitation to Bemis did not absolve Byrne from any duty the law imposed on him, as attorney, agent, or trustee for Jones. The truth is the evidence fails to show that Bemis was Jones' agent at all, for any purpose, until the 8th of December, 1904, when he gave him the power of attorney. He was Jones' relative and friend, and, prior to the execution of the power of attorney, had acted as such, advising him when called upon about the land; but he had no authority to bind him, and did not try to do so. The power of attorney was defectively acknowledged and inadequate to bind Jones to any contract affecting the title to the land. Jones was not therefore bound by any representations Byrne made to Bemis; certainly not as to this land prior to the execution of this power of attorney. But if he had been, as stated, the duties the law imposed on Byrne, as trustee, remained unaltered, and without modification, notwithstanding Bemis' agency. Byrne was forbidden by law from dealing with his cestui que trust until he had put his cestui que trust in full possession of all information about the property, which he, Byrne, had in his own possession. This he never did do at any time, and even now this record does not disclose full information. It is unprofitable to examine the evidence further. Specific performance should never be granted under such conditions.

Another reason why no specific performance can be had, even assuming Bemis as agent for Jones had the power to sell the lands, is that the telegram of March 28, 1905, is not an acceptance of any offer made by Bemis. It is notice only that Byrne had "finally decided to accept" the offer, not that he had accepted it, or did accept it. The letter and inclosures forwarded by Byrne the next day injected new and other conditions never referred to in any of the correspondence, and this was tantamount to a rejection of Bemis' offer, assuming he had made one, and the tender of a new proposition by Byrne to buy, which Bemis had the right, and did refuse. It is unprofitable to discuss this matter, and I content myself with citing authorities. Hennessy v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Couch v. McCoy (C. C.) 138 Fed. 702, and cases there cited; James v. Darby, 100 Fed. 224, 40 C. C. A. 341, and cases there cited.

Another reason why specific performance will not be granted is that:

"Where the contract sought to be enforced is infected with fraud, misrepresentation or bad faith, equity will not lend its aid to its enforcement." 26 Am. & Eng. Enc. Law, p. 45, par. 71, and cases cited in footnote 4.

Another reason is that:

"It is well settled that a court of equity will refuse to enforce an unconscionable contract, or one whereby the party seeking a decree would obtain

an unconscionable advantage over the other contracting party." Id. p. 68, and cases cited in footnote 6.

The cross-bill should be dismissed for want of equity.

We now come to the consideration of complainant's amended bill. Enough has been stated to show that the contract between Byrne and his codefendants cannot stand; indeed, Byrne's codefendants wisely disclaimed. They could not have defended the suits for its cancellation, because the law holds them to a knowledge of all that is contained in the contract between Jones and Byrne, and that contract, in the light of their evidence, and that of Byrne, advised them that Byrne was acting in violation of his trust. Indeed, their contract with Byrne disclosed that fact, because, on its face, it appears that Byrne was trying to buy Jones' interest for the lowest price he could; whereas, the law imposes upon him the duty of making the land bring all it would. Every man is presumed to know the law, and Byrne and his codefendants must be held to have known it. Enough has been said to show that the case at bar is one falling clearly within the jurisdiction of a court of equity. The objection to the amount involved is insufficient—proceeds upon a mistaken theory of the case, and does not merit discussion. It is contended, also, that a part of the land lays in Texas, and that this court cannot deal with that—certainly cannot enforce the vendor's lien. The question is a serious one, so far as the Texas land is concerned. The court undoubtedly had the right, if necessary, to cancel the contract for its sale made between Byrne and his codefendants, for, to that extent, the action is in personam; but to enforce the vendor's lien, or to enforce the contract between complainant and Byrne, by a decree directing the sale of land through its master or commissioner, which lies in another state than that in which the court rendering the decree is held, is quite a different thing. Such an action is in rem. Pennoyer v. Neff, 95 U. S. 734, 24 L. Ed. 565. Counsel for complainant insists that the question is settled by the case of Muller v. Dows, 94 U. S. 445, 24 L. Ed. 207. To this the court cannot assent. That was a case covering railroad properties, lying partly in two states, and complainant filed his bill to foreclose the same in a Circuit Court of the United States, sitting in one of the states, and prayed a decree for the sale of all properties in both states. The decree was made and on appeal affirmed, but on facts peculiar to that class of property, and of circumstances widely different from those at bar. There it was one mortgage and one trustee, and the lien was created by one instrument, recorded, of course, in both states, and it was property that could not be sold in parts without destroying its value; it was an exception to the general rule. In the case at bar, five of the notes aggregated $3,750, and are a lien on the Arkansas land, secured, presumably, by a recitation in the face of one deed, and the other four notes are a lien on the Texas land, and secured, presumably, by a recitation in the face of another deed, and, in each case, the notes were executed for the balance due of the purchase money of the respective bodies of land. Muller v. Dows, moreover, has not been followed in the later decisions, for now the practice is to file ancillary bills in such cases in all the jurisdictions where the property lies. Another and earlier case of interest

is that of Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181, where Chief Justice Marshall reviews the English decisions and entertains jurisdiction, but that was a case of enforcing a trust by compelling an agent, who had entered in his own name lands which it was his duty to enter for his principal, and to convey them to his employer. He simply compelled him to convey, although such entry was in another state than where the court sat. In that case, other cases are cited in the English Chancery Courts, which fully warrant the foreclosure of a mortgage on land in another jurisdiction than that in which the court foreclosing the mortgage was sitting. Teller v. Carteret, 2 Ves. 494. This question, I think, was practically settled adversely to the complainant in Boyce v. Grundy, 9 Pet. 288, 9 L. Ed. 127. There a decree was rendered by the Circuit Court of the United States for the District of West Tennessee, in an action for rescinding a contract, and for an accounting. The contract was rescinded, and a personal judgment entered and made a lien on certain lands in Mississippi, and they were ordered to be sold to satisfy the lien. The court said:

"Another objection is to that part of the decree, which creates a lien upon the land in controversy, lying in another state, and decrees a sale for the discharge of the lien. We are of opinion that the decree is erroneous in this respect. In the first place, the court had no jurisdiction to decree a sale to be made of land lying in another state, by a master acting under its own authority."

The case at bar does not fall within any of these cases except the last, and I have not been able to find any decision overruling or establishing different doctrines than that declared in Boyce v. Grundy, supra. Inasmuch as Byrne's codefendants have entered a disclaimer to all the land, both in Arkansas and Texas, the bill, so far as it relates to the land lying in Texas, will be dismissed for want of jurisdiction to grant the relief sought, and without prejudice to the complainant to pursue any remedy he may elect in any court of competent jurisdiction to enforce any claim he may have against the Texas land, described in the bill of complaint herein. It remains to be considered to what relief complainant is entitled as to the Arkansas land. Enough has been said in the discussion of the cross-bill to show that the defendant Byrne acted under the contract in violation of his trust. Without reference to what may have been his motive, whether good or bad, he totally misapprehended his duty, and violated his trust. Indeed, he seems, under a misconstruction of the contract, to have deliberately and purposely violated it. It is recited, in the fourth paragraph of the contract, as follows:

"And, whereas there are certain expenses which must be necessarily incurred in clearing the titles to said land, and placing the sale upon the market, such as redemption from taxes, litigation now pending, surveying and mapping the same, and any other expense that may be absolutely necessary to place the same upon the market."

And in the following paragraph it is recited:

"Now, therefore, it is agreed between L. A. Byrne and Erastus Jones as follows, that the said L. A. Byrne, in order to facilitate the making of deeds in case of sale of said land the legal title thereof shall remain in his name, and that he shall have the legal right, and he is hereby empowered with author-

ity to incur all necessary expenses to place said land upon the market, and he is further empowered with authority to make all sales of said land and in case of sale said Erastus Jones will relinquish his vendor's lien on that of the land sold, that out of the proceeds of any and all sales of the land the expenses of preparing the same for market shall first be paid; second, the proceeds arising from the sale of said land shall next be applied to the payment of the balance of the purchase money now due Erastus Jones until all of said purchase money is paid."

There is no other provision contained in this contract which authorized Byrne to incur any expense of any character in connection with the sale of this land than those paragraphs I have quoted; and yet it seems that under this contract Byrne has sold some tracts of land and used a part of the money to pay taxes and part to build houses and clear land, and entered upon a general policy of farming operation upon such parts of the land as he could get tenants to go upon. He says in his testimony that both Bemis and Jones knew this. Jones and Bemis both deny it. Jones says that at different times he received information that Byrne had or was about to sell lands, but that the notes or purchase money not being sent to him, he was under the impression that the sales had fallen through; that he had never received any statement of Byrne's action in the premises, and when called upon by Byrne to furnish money to fence the whole land, he declined. Byrne insists that in the correspondence it appears that statements were furnished, but it does not satisfactorily appear to the court that any statements were ever furnished, until about the time Byrne began to negotiate for the purchase of the land. Then some imperfect statements were rendered to Bemis, and immediately upon the furnishing of these statements friction arose, and controversy over this land between Bemis and Byrne began. This was perhaps as late as 1904. Byrne insists that Jones knew that he was improving the land, and made no objection; but there is a wide difference, having regard to the relations of the parties, between Jones knowing that Byrne was clearing and improving the land, and that of his, authorizing Byrne to sell land and use the proceeds to make improvements. Jones thought, no doubt, that Byrne expected to get from the rents such money as he advanced for the improvements, and this could not reduce Jones' security; indeed, it improved it. But Byrne insists that his farming operations were disastrous, and that Jones knew he was engaged in farming, and spending money, etc., and did not object, and therefore the land is chargeable with his losses. No letter from Byrne to Jones (they never met each other) informed him of such claim, or understanding, has been produced. Byrne, in a letter of January 16, 1899, did advise Jones that he was leasing the land two, three, and four years to get it cleared, and spoke of revenue to be derived from it, but not that the proceeds of the land was to be used to clear it. Another letter, dated November 11, 1899, is in evidence, which is significant. It is as follows:

"Texarkana, Arkansas, Nov. 11th, 1899.

"Mr Erastus Jones, Spencer, Mass.—Dear sir: I write you some information concerning our land interest. Collected $48.00 of the nigger, Levi Marshall, on the 40 acres sold him. Shall I keep it to pay taxes, or send it to you. I brought suit against B. F. Cody to foreclose vendor's lien against the land bought by him. I had another tenant on a small improvement on the

land, but he made no crop and I lost personally on this negro. Bought him a horse, furnished him with supplies, and he now owes me over $100.00. I'll change this fellow for a better one. I am anxious to open up a farm on this land which will require an expenditure of money and would like for us to agree on a division of the land. The way I figure is that you own about two-thirds and I own one-third. The land is worth about $15,000.00, and your two-thirds is worth $10,000.00. If you will hold it for five years it will be worth $20,000.00, as the land is increasing in value. If you will consent to a division, I will agree to see after your interest, pay taxes, and collect rents without charge. I will agree to take the 640-acre tract in Texas in the division. There is going to be some litigation over this tract, but I will take the chances in this. There is about 2,680 acres in the several tracts and they join at the state line. My object is not to get any advantage in this division, but to get my part, so I can improve it. Give this matter your consideration, and write me.

"Truly yours, L. A. Byrne."

It would seem, from this letter that Byrne was seeking a division of the land, so he could improve his own part of it; not that he was using the money from the sales of the land to improve the remainder of it. November 4, 1899, in a letter, Jones declined to divide, saying he was "not prepared to give an opinion at present." The only other letter of Jones disclosed in the record which is significant as to leasing land and clearing land except the one refusing to furnish the money to place a wire fence around all the land, is as follows:

"Spencer, Mass. June 5th, 1897.

"L. A. Byrne, Texarkana, Arkansas.—Dear sir: In reply to your letter of recent date, I think it would be well to lease if there is an opportunity, but I should not care to take an interest in the business myself. Should be very glad to know if the land could be so shaped as to afford an income, and hope that you may be able to accomplish that.

"Yours truly, Erastus Jones."

So it appears Jones specifically declined to take an interest in Byrne's farming, fencing, and leasing operations. Byrne also insists that the contract of June 2, 1892, was changed by the parties, so that he was to have a larger share in the land. The details of the change, he says, were not agreed upon, but it was understood that on a settlement that it should be of an equitable nature, having regard to the nature and character of his services, and trouble in managing the land, which had far exceeded that contemplated by the parties when the contract was made. If such understanding was had, it was with Bemis, and long before he held Jones' power of attorney. This claim rests on Byrne's evidence alone, and is vague and unsatisfactory. There is nothing in writing in the record to show it, and both Jones and Bemis flatly deny it. Bemis disclaimed any power or authority to alter the contract. That claim of Byrne's must fail. Without prolonging the discussion, it is enough to say that the contract of June 2, 1902, must control the relations between the parties. Byrne then had no right, under the contract, to use the proceeds of the land for any other purpose than that stated in the contract of June 2, 1902. He certainly had no right to use any portion of it in clearing land or in his farming operations, nor had he the right to use it for payment of attorney's fees, unless authorized by Jones. Byrne owned the equity of redemption in the land, and it was his duty primarily to pay the taxes; but by the contract of June 2, 1892, Jones became entitled, after his lien notes were paid, to one-

half of the land remaining, or its proceeds, and should therefore pay one-half the taxes. Byrne, as the owner of the equity of redemption, had the right also to clear the land, build houses on it, and carry on his farming operations on it on his own account. He could not, under the contract. And therefore neither Jones nor the land was chargeable with his losses or expenditures in that regard. If he made money by his farming operations, it did not go to Jones. If he advanced his own money in that regard, and the rents did not reimburse him, it was his own lookout. If he leased the land for a long term of years to get it cleared up and put in cultivation, it neither injured the land or Jones, and the knowledge of Jones that he was so doing did not make Jones responsible for Byrne's doings in that behalf. Indeed, as early as 1897, Jones declined to go into that business, as he had also declined to furnish money to fence land. Assuming that Byrne intended no wrong, his whole course of conduct in selling lands, and using the proceeds for other purposes than those specified in the contract; in failing to turn over the deferred purchase-money notes to Jones, as the contract required; in attempting to purchase Jones' interest in the land, as shown by the contract with his codefendants; his not advising Jones that he was selling for the same sum he offered Jones for his interest, about half the land, thereby making clear for himself the balance of the land, whereas the contract required him to pay out of the land the lien notes, the principal and interest of which was far in excess of the price he offered Jones, and then give Jones half the remainder of the land—were all violations of his duty to Jones, and of his trust under the contract, and amounted to a legal, if not an actual, fraud.

It is in just this class of cases that courts of equity will interpose, and afford a complete remedy and full relief to the injured party. The contract between Byrne and his codefendants, a copy of which is set out in the bill of complaint, will as to the Arkansas lands be canceled. The lands which lie in Arkansas will be sold to pay off the purchase-money notes held by Jones, together with all accumulated interest thereon, and the surplus to be disbursed as equity requires. An account must be had between Jones and Byrne, on account of the land, and the case will be referred to the standing master, C. B. Moore, who will be governed in stating it by this opinion as far as applicable, and the following instructions:

(1) He will allow the complainant, Jones, the face of the notes given for the balance of the purchase money for the Arkansas lands, together with the accumulated interest to date of report, less any proper credits that he shall find to exist, if any.

(2) He will charge him with nothing not provided for in the contract of June 2, 1892, as interpreted by this opinion, unless it shall be made to appear that outside of the contract he expressly authorized Byrne to make the expenditure under such conditions that he did not expect it to be returned to him.

(3) He will charge Byrne with the purchase price of such land as has been sold and paid for, less any payments made to Jones, and any expenditures made by him under the contract as herein interpreted, plus all expenditures made by him, if any, which were expressly authorized or ratified by Jones, which were not provided for in the contract,

and not intended by both parties to be returned to Jones on a sale of the land.

(4) He will cause Byrne to account for any unpaid purchase-money notes not turned over to Jones, as the contract required.

(5) He will take no account of the rents and profits on the land, or the leases thereof, or of any expenditures made on such account by Byrne, unless he shall find that Jones expressly authorized such expenditures, outside of the contract, in which event such last-named amount shall be charged against Jones.

(6) He will inquire into and report his conclusions of law and fact, in regard to the payment of taxes, and redemption of lands from tax sales, and all money expended by Byrne in clearing up the title of the lands in Arkansas.

(7) He will ascertain the exact status of any lands sold by Byrne under the contract of June 2, 1892, and report his conclusions of law and fact thereon.

(8) He will ascertain and report to the court what amount on account of vendor's lien notes for the land in Texas is due and unpaid.

(9) He will report his conclusions of law and fact as to any other matters in controversy between Jones and Byrne in regard to the Arkansas land, arising out of the pleadings herein, and make a full report to the court, adjusting the differences between the parties.

(10) The standing master, C. B. Moore, will be appointed commissioner to make the sale of such of the lands, without delay, as lie in Arkansas, and which have not been sold by Byrne in accordance with the contract of June 2, 1892; and he is directed to bring the money into court to be disposed of under the order of the court as equity requires. Jurisdiction of the case is retained with power to make all necessary orders in the future.

UNITED STATES v. PRAEGER.

(District Court, W. D. Texas, San Antonio Division. January 2, 1907.)

No. 1,920.

1. JURY—WAIVER.

In a proceeding to punish a civilian for refusal to testify before a general military court-martial, under Act Cong. March 2, 1901, c. 809, 31 Stat. 950, 951 [U. S. Comp. St. 1901, p. 965], providing that for a witness' willful refusal to testify and to answer proper questions he shall be subject to a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court, the parties may waive a jury by written stipulation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 197–199.]

2. WITNESSES—REFUSAL TO TESTIFY—WILLFULNESS.

Act Cong. March 2, 1901, c. 809, 31 Stat. 950, 951 [U. S. Comp. St. 1901, p. 965], provides that every person not belonging to the army of the United States who, being duly subpœnaed to appear as a witness before a general court-martial of the army, "willfully" neglects or refuses to appear, or refuses to testify, etc., shall be guilty of a misdemeanor, provided that no witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him. *Held*, that where a civilian so subpœnaed was advised by competent counsel that certain

questions asked of him with reference to a publication concerning an army rifle contest, if answered, might subject him to a civil or criminal prosecution for libel, and for this reason he refused to answer on advice of counsel, and not from any evil intent, or with legal malice, his refusal did not constitute a violation of such act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 37–41, 1008.]

3. SAME—PRODUCTION OF DOCUMENTS.

Where a witness subpœnaed to produce certain documents before a military court-martial testified that he had destroyed the documents before service of the subpœna, his failure to produce did not constitute a willful refusal to produce such documents within Act Cong. March 2, 1901, c. 809, 31 Stat. 950, 951 [U. S. Comp. St. 1901, p. 965], making such act a misdemeanor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 25, 40.]

4. ARMY AND NAVY—COURTS-MARTIAL—STATUTES.

The acts of Congress touching army and navy courts-martial established in the United States are constitutional.

5. SAME—DETERMINATIONS—CONCLUSIVENESS.

Where a military court-martial has jurisdiction of the person accused and of the offense charged, and acts within the scope of its lawful powers, its decisions and sentence cannot be reviewed or set aside by the civil courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Army and Navy, §§ 94, 95.]

6. SAME—JURISDICTION—WITNESSES—REFUSAL TO TESTIFY—POWER TO PUNISH.

Under Rev. St. § 1342, 86th article of War [U. S. Comp. St. 1901, p. 964], providing that a court-martial may punish at its discretion any person who uses any menacing words, signs or gestures in its presence, or who disturbs its proceedings by any riot or disorder, such court has no final jurisdiction over a civilian subpœnaed to testify before it or power to punish him for contempt for refusing to testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Army and Navy, § 91.]

7. SAME—DECISIONS—CONCLUSIVENESS.

Where a civilian witness was subpœnaed to testify before a general court-martial, and refused to answer certain questions because the answers might tend to incriminate him, the decision of such court that the questions were proper was not conclusive on the civil courts of the question whether the witness was guilty of contempt in refusing to answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Army and Navy, §§ 94, 95.]

Prosecution for Refusal to Testify before Court-Martial.

The questions submitted for consideration arise upon an information, filed by the district attorney pursuant to the following act of Congress, entitled an "act to prevent the failure of military justice and for other purposes," approved March 2, 1901:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every person not belonging to the army of the United States who, being duly subpœnaed to appear as a witness before a general court-martial of the army, willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by the general court-martial, to file an information

against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, that this shall not apply to persons residing beyond the state, territory, or district in which such general court-martial is held, and that the fees of such witness, and his mileage at the rates provided for witnesses in the United States district court for said state, territory or district shall be duly paid or tendered said witness, such amounts to be paid by the pay department of the army out of the appropriation for compensation of witnesses: Provided, that no witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him." Act March 2, 1901, c. 809, 31 Stat. 950, 951 [U. S. Comp. St. 1901, p. 965].

It appears from the record that, upon the trial by general court-martial at Ft. Sam Houston, Tex., of Post Quartermaster Sergeant Eber I. Sharp, of the United States army, who was charged with conduct to the prejudice of good order and military discipline, the defendant, Otto Praeger, was subpœnaed as a witness in behalf of the government, and that, during the trial of Sharp, Praeger refused to answer certain questions propounded by the judge advocate, Lieut. Ellery Farmer, and failed to produce a written communication, described in the following statement, duly certified to the district attorney by the court-martial:

"One Otto Praeger, a resident of San Antonio, Bexar county, Tex., a witness for the prosecution, in the trial of Post Quartermaster Sergeant Eber I. Sharp, United States army, charged with conduct to the prejudice of good order and military discipline, in violation of the Sixty-Second article of war, having been duly subpœnaed according to law to appear before this general court-martial, and being further required, by said subpœna, to bring with him, to be used in evidence, in said cause, the following described document, to wit, a written communication from Post Quartermaster Sergeant Sharp, United States army, received by him about August 2, 1904, sent from Ft. Reno, Oklahoma Territory, about August 1, 1904, containing certain statements that appeared in an article entitled 'Bad features in the conduct of the Ft. Reno rifle shoot' in the San Antonio Daily Express of August 3, 1904, unlawfully did refuse to testify, as such witness, and to produce the documentary evidence aforesaid, which he had been legally subpœnaed to produce, when required to do so by this court. Whereupon it is ordered by the court that in compliance with the provisions of section one of the act of Congress, approved March 2, 1901, c. 809, entitled 'An act to prevent the failure of military justice, and for other purposes,' that the facts aforesaid be certified to the United States District Attorney for the Western District of Texas by this court, to the end that he shall file an information against, and prosecute, said Otto Praeger, so offending as aforesaid, in accordance with the terms of said act. To all of which certification is here made according to law and duly signed by the president of this court by its orders, and attested by the judge advocate thereof."

Upon receipt of the certified statement of facts the district attorney, by leave of the court, filed an information against the defendant, Praeger, the material part of which reads as follows:

"And the said Henry Terrell, attorney as aforesaid, who, after examination of the charge contained in the said certification of the proceedings of said general court-martial, finds that there is probable cause to require the said Otto Praeger, mentioned in said certification of said proceedings, to answer in this court, and therefore the said attorney charges: On the 5th day of November, A. D. 1904, before a general court-martial of the army, duly appointed to meet at Ft. Sam Houston, Tex., on the 16th day of September, A. D. 1904, pursuant to special order No. 183, headquarters department of Texas, and by command of Brig. Gen. Lee, commanding said department of Texas, and within the western district of Texas, and within the jurisdiction of this court, one Otto Praeger, late of said district, and of the county of Bexar, and city of San Antonio, being a person not belonging to the army of the United States, and being duly subpœnaed to appear as a witness before said general court-

martial of the army, and being duly and legally subpœnaed to produce certain documentary evidence required by the said general court-martial, willfully did refuse to testify before said general court-martial, and willfully did refuse to produce the said documentary evidence which he, the said Otto Praeger, had been legally subpœnaed to produce. And the said United States attorney further says: That the fees of said witness Otto Praeger and his mileage, at the rates provided for witnesses in the United States District Court for the Western District of Texas, have been duly paid to the said Otto Praeger."

The proceeding against Sharp before the court-martial had its origin in the following communication, which, it was charged, he wrote and caused to be published in the San Antonio Daily Express, in its issue of August 3, 1904:

"Ft. Reno, O. T., July 3. The infantry rifle competition of the Southwestern Division for 1904, just completed, was a notable contest in many respects, and not the least notable for its irregular mode of conduct.

"Coaching, though strictly forbidden in regulations, was nevertheless permitted in certain instances, to the discouragement of those who were away from their homes.

"Officers and ladies were allowed to follow their favorites down the skirmish range and protests availed nothing.

"Competitors were allowed to draw for their target and order of fire the day preceding the shooting, until this practice developed some ingenious dishonesty. On Friday morning Private Barr, Company M, Thirtieth Infantry, in making a skirmish run, tore the paper off his prone figure entirely. An investigation followed by which it was discovered that some one had worked hard the night before and placed about 60 pounds of small stones just beneath the surface of the ground in front of this figure. A number of other figures were doctored in like manner, but were not used. At first the range officer decided to give Barr 99 points; this brought forth a flood of protests and the controversy was finally settled by throwing out the score, and allowing another run.

"Musician Monks, Company K, Twenty-Ninth Infantry, was disqualified and ruled off for firing on another's target, though the same offense was overlooked in other cases.

"Competitors from Ft. Reno were allowed too many advantages for a fair competition.

"The worst feature of the competition was the mess. There is no visible reason why the mess should not have been excellent, as $2.00 in addition to the government ration, for each soldier, should have been sufficient, but instead it was sorely inadequate, both in quantity and quality, this causing a severe bowel trouble among 60 per cent. of the visiting competitors, and although the condition of the mess was known, it was not corrected.

"The competition has manifested the injustice of officers and soldiers competing with each other. One officer was permitted to use his sling so attached to his body with rubber bands as to make it a task to detach himself, or even to 'harness up' without help. This same officer had a coach with field glasses who called his score at two hundred yards.

"There is no doubt that the winners earned their places fair and square, but the contest had many unfair and unjust features that could only indicate the existence of favoritism, though perhaps the result was not changed thereby."

It is not important to consider the matter of the trial, conviction and sentence of Sharp by the court-martial. But a consideration of the foregoing letter becomes essential in view of the defendant's alleged connection with it as night editor of the San Antonio Daily Express. Although the information does not so charge, yet it is really based upon the refusal of the defendant to testify in reference to this letter, and upon his failure to produce it in obedience to the subpœna.

By written stipulation of the attorneys, a jury was waived, and all matters of law and fact were submitted to the court for determination. And it was further stipulated that the record of the court-martial should constitute the record and facts of the cause.

Charles A. Boynton, U. S. Dist. Atty., and Captain C. D. Roberts, for the United States.

Carlos Bee and Ogden & Brooks, for defendant.

MAXEY, District Judge (after stating the facts). It is thought proper to observe in the outset that the following grave constitutional question confronts the court at the threshold of the case: Is it competent for the defendant to waive a jury and submit the cause to the determination of the court? The punishment provided by the act of Congress, upon conviction, "shall be a fine of not more than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court." While in view of the punishment prescribed by the statute, the question is involved in doubt, the court is inclined to the opinion that, in a case like the present one, the parties have the right, under the authority of Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, by written stipulation to waive a jury. See, also, Stell v. State, 14 Tex. App. 59. It may be further remarked that the court entertains serious doubt as to the sufficiency of the information filed against the defendant, in that the pleader merely sets out the general language of the statute without alleging specifically any offense which the defendant was supposed to have committed. United States v. Hess, 124 U. S. 487, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; Evans v. United States, 153 U. S. 587, 14 Sup. Ct. 934, 38 L. Ed. 830. But neither demurrer nor motion to quash has been interposed, and the court will proceed to consider such questions—and such questions only—as may be deemed absolutely essential to the proper determination of the case.

In view of the allegations of the information, it becomes the duty of the court to determine whether the evidence, as embodied in the record of the court-martial, establishes beyond reasonable doubt the guilt of the defendant. To arrive at a correct solution of the question the exact charge preferred against the defendant, by the information, must be kept steadily in view. It is this: That the defendant willfully refused to testify before the general court-martial, and willfully refused to produce the documentary evidence, which he had been legally subpœned to produce. Do the facts disclose that he willfully refused either to testify or to produce the letter? That he refused to answer certain questions and failed to produce the letter demanded, is not only admitted, but it is clearly shown by the record. But the question remains, was the refusal, in the one case and failure in the other, willful? If not willful it follows that judgment must go in favor of the defendant. "Doing or omitting to do a thing knowingly and willfully," said the Supreme Court, in Felton v. United States, 96 U. S. 702, 24 L. Ed. 875, "implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word willfully,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means, not merely voluntarily, but with a bad purpose.' Com. v. Kneeland, 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' 1 Crim. Law, § 428." See, also, Potter v. United

States, 155 U. S. 446, 15 Sup. Ct. 144, 39 L. Ed. 214. Referring to the word willful as employed in a penal statute, Judge Pardee, speaking for the Circuit Court of Appeals, in Roberts v. United States, 126 Fed. 904, 61 C. C. A. 427, quoted with approval the following language used by the Court of Appeals of Texas in Thomas v. State, 14 Tex. App. 204:

"In a penal statute the word willful means more than it does in common parlance. It means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful. State v. Preston, 34 Wis. 675; State v. Clark, 29 N. J. Law, 96; Savage v. Tullar, Brayton (Vt.) 223; United States v. Three Railroad Cars, 1 Abb. U. S. 196, Fed. Cas. No. 16,513. In common parlance it is used in the sense of intentional, as distinguished from accidental or involuntary."

"To the same purport," said Judge Pardee, "see Sam Lane v. State, 16 Tex. App. 172; Wood v. State, Id. 574; Shubert v. State, Id. 645. See, also, Owens v. State, 19 Tex. App. 249, where the court approved 'by willfully, as used in this charge, is meant that the act was done without reasonable ground to believe the act of taking was lawful.'" It was said by Mr. Chief Justice Stayton, speaking for the Supreme Court of this state, in State v. Alcorn, 78 Tex. 393, 14 S. W. 664:

"It is universally held that the word 'willful' when used in a penal statute means with evil intent or without reasonable ground to believe the act lawful."

Keeping in view the meaning of the word willful, in its application to penal offenses and as it is used in the present information, the court is of the opinion that, if the defendant, in refusing to answer the questions propounded by the judge advocate, and in failing to produce the communication described in the subpœna, had reasonable grounds to believe that the answer to the questions and the production of the communication would tend to criminate him (see act March 2, 1901, c. 809, 31 Stat. 951 [U. S. Comp. St. 1901, p. 965]) then he would not be guilty of a willful refusal in either case, although his refusal may have been based upon an erroneous conception of the rules of evidence. In other words, if the defendant was really and in good faith impressed with the belief that the testimony, sought to be elicited by the judge advocate, would if produced tend to show that he had himself committed the offense of libel, the refusal to produce it would not be willful within the meaning of the law. To reach a satisfactory conclusion as to the conduct of the defendant as a witness before the court-martial, the facts appearing of record should be consulted. It is shown that a general court-martial was regularly convened at Ft. Sam Houston, to try Post Quartermaster Sergeant Eber I. Sharp, upon the following charge and specification:

"Charge: Conduct to the prejudice of good order and military discipline, in violation of the Sixty-Second article of war.

"Specification: In that Post Quartermaster Sergeant Eber I. Sharp, United States army, being on duty at Ft. Reno, Oklahoma Territory, in connection with the southwestern division infantry rifle competition, did, to the manifest prejudice of good order and military discipline, write and cause to be published in the San Antonio Daily Express, in its issue of August 3, 1904, a communication criticizing the official conduct of his superior officers and others."

The communication referred to in the specification is set out in the statement of the case, and need not be here repeated. At the time of the publication of the article in the San Antonio Daily Express the defendant, Praeger, was a civilian and night editor of the paper. The statements contained in the publication were evidently construed as seriously reflecting upon the officers engaged in the Ft. Reno rifle competition, and upon the trial of Sharp it was thought essential to prove the authorship of the communication and the facts regarding its publication. Evidently for that purpose the defendant was summoned as a witness and was required by the subpœna to produce the communication. Praeger appeared in answer to the subpœna, as did also his counsel, Mr. Bee and Mr. S. J. Brooks, both lawyers of experience, and of character and standing in the community. Praeger was duly sworn as a witness, and, in answer to questions propounded by the judge advocate, stated that he had authorized Sharp to wire him the scores of the competition, or rifle shoot, from day to day and that Sharp had wired him the scores every day during the competition. The witness was then shown a copy of the San Antonio Daily Express containing the article, set out in the statement of the case, and was then asked by the judge advocate the following question:

"Did the accused [meaning Sharp] furnish you any of the facts, in this article, by mail?"

To the question the counsel for Sharp objected. The objection, however, was overruled by the court, and Praeger thereupon made the following response:

"I will say to the court that I have made no evasion in regard to that article, and that on the advice of my lawyer I would like to file my reason with the court for declining to answer this and other questions of that nature."

By permission of the court the following paper, addressed to the president and members of the court, was read by the witness:

"With every respect for the authority of the general court-martial and due respect and obedience to its process, and with personal respect for the individual members of the court, I decline to answer the questions propounded to me by or under the direction of your honorable body. I so decline because of my sincere belief in the lack of right on the part of your body to require me to answer questions the effect of which may tend to incriminate me. I therefore decline to answer any further questions."

Thereupon the court was closed for consultation, and, upon being reopened, the president requested of the judge advocate a legal opinion on the subject of the refusal of the witness to answer. The arguments, submitted by the judge advocate and Mr. Bee, in response to the suggestion of the court, were confined to a discussion of the following points: (1) Was the article published in the San Antonio Daily Express a libelous publication under articles 721–749 of tit. 16, Pen. Code, 1895? (2) If libelous, was Praeger, as night editor of the paper, and the party directing the publication of the article, subject to criminal prosecution for its publication? (3) Was Praeger justified in refusing to answer the question because, in the judgment of himself and his counsel, the answer would tend to incriminate him? Upon the conclusion of the discussion the court sustained the objection

interposed by Praeger and held that he would not be required to answer. At a subsequent session of the court the following questions were propounded to Praeger by the judge advocate:

"Q. Mr. Praeger, you stated in your testimony in this case the first day you were here that you made arrangements with Sergt. Sharp, I believe, whereby he would furnish you with reports from that competition from day to day, did you not? A. Why, yes, I testified I made arrangements with him to telegraph us the scores from day to day, and I gave him a letter to the Western Union, authorizing them to receive, I think, about one hundred words per day on the scores from him. Q. And you also testified that you had received a number of such telegrams or messages from him? A. Yes, sir. Q. Did you have any corrrespondence with anybody at Ft. Reno during that competition?"

The last question Praeger declined to answer. In reply to the judge advocate, who insisted upon an answer, Mr. Brooks, in behalf of the witness, made substantially the following statement: That the prosecution was endeavoring to prove by the witness the responsibility of the article appearing in the San Antonio Daily Express; that the witness could not be required to answer either directly or indirectly with reference to the authorship or the publication of the article, because the article might be construed as libelous under the laws of Texas. In this immediate connection he made the further statement:

"I understand from Mr. Praeger that threats have been made for a prosecution for libel under that article, and we say that no question can be asked of him directly or indirectly drawing any statement with reference to the publication of that article or the authorship of it."

After discussion by counsel and consultation by the court, the objection of the witness was overruled, the court assigning for its action the following reason:

"Mr. Praeger declines to answer this question on the ground that the answer will tend to criminate him. Mr. Praeger admits that he is night editor of the San Antonio Daily Express, and on August 3, 1904, the article in question appeared in this journal. It is presumed by the court that Mr. Praeger objects to answering this question on the ground that a knowledge of this article will tend to subject him to a criminal or civil prosecution for libel. To the court the situation appears as follows: Either Mr. Praeger is responsible for the publication of said article in said journal, in which case he is liable under the law if the article is libelous—the two facts, the publishing of the article unsigned and his position being that of responsibility, being prima facie evidence of his liability, in which case anything he may say with regard to the writing of the article cannot tend to incriminate him further; or Mr. Praeger's position is such that he cannot be personally responsible for the publication of said article, in which case no testimony he can give with regard thereto, can possibly incriminate him. In either case the court fails to see how the answer to this question can tend to incriminate Mr. Praeger, and the question will be answered."

Responding to the judgment of the court-martial Mr. Brooks replied as follows:

"As I have stated before, we have taken the position with all due respect to the court, and we feel that our position is a correct one under the law. And in making this statement as to the legal correctness, I am further confirmed in that view by Mr. Bee, who has been the regular counsel for Mr. Praeger, and it is his candid opinion that any statement he might make would incriminate him, particularly a question like this; and, therefore, having that view of the law, the witness must insist on declining to answer the question."

The witness then answered a number of questions propounded by counsel and the court; and after testifying that Sergt. Sharp did not write the article, which appeared in the Express of August 3, 1904, he was interrogated by a member of the court as follows:

"To the best of your knowledge did Sergt. Sharp furnish the facts or the allegations of it, upon which this article was based?"

The court overruled the objection of Praeger's counsel to the question and held that the witness should answer. The court, it may be remarked, had previously sustained the objection of Praeger's counsel to substantially the same question. In reference to the ruling Mr. Brooks observed:

"As I said before, we are of the opinion that the position we take in reference to the law in this matter is correct, and that the witness would tend to incriminate himself by answering the question, and therefore he must decline to answer it."

The only remaining question in reference to the conduct of Praeger, as a witness, has reference to his failure to produce, in obedience to the subpœna duces tecum, the communication, alleged to have been written by Sharp at Ft. Reno and mailed to him at San Antonio. Touching this communication, Praeger testified that he did not have it in his possession, but declined to answer the question:

"Did you ever have it?"

The record is silent as to the action taken by the court-martial upon the refusal of Praeger to answer this question. It, however, does appear from the testimony of the judge advocate, who was sworn as a witness, that Praeger informed him that he had destroyed all communications that he had received from Sharp. The conversation between the judge advocate and Praeger was detailed by the former in the following language:

"Well, I went to see Mr. Praeger—the first subpœna I served on him I had a conversation with him and asked him if Sergt. Sharp was his correspondent during the competition at Ft. Reno, and he told me that he was, and I asked him if he was the author of that article that appeared in the paper on August 3, 1904, and he hesitated, and I have forgotten the exact words he used, but the impression he left and the substance of the words was that Sergt. Sharp was not the author—did not write the article, but he furnished the facts that appeared in that article. Then I asked him if he could show me that article—the original letter that Sergt. Sharp wrote him concerning these statements, and he told me that he had destroyed all of the communications that were received from Sergt. Sharp, and that he didn't have anything."

Nothing else was required of Praeger before the court-martial and he was dismissed as a witness. It will be observed, throughout the proceeding, that, in declining to answer questions, Praeger merely insisted upon the assertion of the right, which both he and his counsel thought he possessed, of declining to give evidence which might tend to show that he had committed an offense. "It is an ancient principle of the law of evidence," said the Supreme Court in Counselman v. Hitchcock, 142 U. S. 563, 564, 12 Sup. Ct. 198, 35 L. Ed. 1110, "that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to

fines, penalties, or forfeitures." And at pages 565 and 566 the following extract from the opinion of Chief Justice Marshall in Burr's Trial, 1 Burr's Trial, 244, was quoted with apparent approval by the court:

"If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. * * * According to their statement" (the counsel for the United States) "a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

And again at pages 585 and 586 of 142 U. S., at page 206 of 12 Sup. Ct. (35 L. Ed. 1110) it was said by the court:

"It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of section 860 of the Revised Statutes [U. S. Comp. St. 1901, p. 661] that it does not undertake to compel self-criminating evidence from a party or a witness. In several of the state statutes above referred to, the testimony of the party or witness is made compulsory, and in some either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of Emery's Case, in Massachusetts, than to that of People v. Kelly, in New York; and we consider that the ruling of this court in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

See, also, the following cases more or less in point: Brown v. Walker, 161 U. S. 594, 16 Sup. Ct. 644, 40 L. Ed. 819; Jack v. Kansas,

199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234; Ballmann v. Fagin, 200 U. S. 186, 26 Sup. Ct. 212, 50 L. Ed. 433; Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652.

While it is thought that, in view of the doctrine of the above cases, the defendant was within his legal rights in declining to answer the questions propounded, it is not deemed necessary to go to that extent in deciding whether he is guilty as charged in the information. It may be that his counsel mistook the law in insisting upon his privilege as a witness; it may be that the laws of Texas do not denounce as libelous the article which appeared in the San Antonio Express; it may be that a prosecution for libel under the state laws could only be brought in the state courts, notwithstanding Ft. Sam Houston is a military post within the exclusive jurisdiction of the United States. Let all these things be conceded; yet the record clearly discloses (1) that Praeger was not actuated by any evil motive or bad intent in refusing to answer questions; (2) that he acted under the legal advice of reputable counsel (see Stewart v. Sonneborn, 98 U. S. 196, 197, 25 L. Ed. 116; Griffin v. Chubb, 7 Tex. 604, 58 Am. Dec. 85); and (3) he had reasonable grounds to believe that, if he made answer to the questions propounded, the answers would tend to incriminate him. Thus his good faith was made manifest—the very reverse of willful conduct as the word willful is used in penal statutes.

The information also charges that the defendant willfully refused to produce documentary evidence required by the court-martial. What has already been said by the court applies with equal force to this charge. Whether the court-martial had the right, under any circumstances, to require the defendant to produce a paper which would tend to incriminate him, need not be decided (see Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Ballmann v. Fagin, supra), since the record makes it reasonably clear that the documentary evidence, described in the subpœna and referred to in the information, had been destroyed, and in the nature of things could not be produced." Lex non cogit ad impossibilia."

It is, however, contended by counsel for the government that, although Praeger may have acted within his privilege in refusing to answer objectionable questions, he cannot now insist upon his immunity because the court-martial decided the question against him and its ruling is final and not reviewable by this court. The exact proposition of counsel is stated in the following language:

"The court-martial having exercised its prerogative of deciding, from all the facts before it, that the witness' objection to answering was based on insufficient ground, its decision in this matter was final and is not subject to review by any civil tribunal."

In this connection it is well to note that the following propositions have been conclusively settled by the Supreme Court: (1) The acts of Congress, touching army and navy courts-martial in this country, are clearly constitutional. Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Dynes v. Hoover, 20 How. 625, 15 L. Ed. 838. (2) Where a court-martial has jurisdiction of the person accused and of the offense charged, and acts within the scope of its lawful powers, its decisions

and sentence cannot be reviewed or set aside by the civil courts, by writ of habeas corpus or otherwise. Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914; Dynes v. Hoover, supra; Ex parte Reed, supra; Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213; Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; Swaim v. United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823; Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861; United States v. Fletcher, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. Ed. 378. And it may be added that the proposition is true in relation "to every tribunal acting judicially, while acting within the sphere of its jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally in question, so long as it is unreversed." Wilcox v. Jackson, 13 Pet. 511, 10 L. Ed. 264.

The principle announced in the foregoing cases is peculiarly applicable to the trial, judgment and sentence of Sergt. Sharp. The proceedings in that case against him are not reviewable by this, or any other civil court, since the court-martial was legally organized and had jurisdiction of the accused and of the offense charged against him and acted within the scope of its lawful authority. But does the principle announced prevent the court from inquiring into the charge, preferred by the information, against the defendant Praeger? It must be remembered that Praeger, a civilian, was before the court-martial only in the attitude of a witness. That court had no final jurisdiction over Praeger; it was without power to punish him for contempt for refusing to testify (18 Op. Atty. Gen. 278; Rev. St. § 1342, Eighty-Sixth Article of War [U. S. Comp. St. 1901, p. 964]), its authority over him in that regard being limited to a certification of the facts to the United States district attorney. See act of Congress, approved March 2, 1901, c. 809, 31 Stat. 950, 951 [U. S. Comp. St. 1901, p. 965]. Under the act of Congress the facts only may be certified, and when that has been done it becomes the duty of the district attorney to file an information against and prosecute the offending party. The proceeding then assumes the form of a criminal prosecution, a direct proceeding, against the offender, who, upon conviction, may be fined not more than $500 or imprisoned not exceeding six months, or, at the discretion of the court, the punishment may include both fine and imprisonment. In this prosecution, as in all other criminal trials, the burden of proof is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Davis v. United States, 160 U. S. 487, 16 Sup. Ct. 353, 40 L. Ed. 499. In the latter proviso of section one of the act of Congress it is expressly provided, "that no witness," before a court-martial, "shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him." Whether the information in the present case should negative this proviso (United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; Ledbetter v. United States, 170 U. S. 609, 610, 18 Sup. Ct. 774, 42 L. Ed. 1162), or whether the proviso contains purely defensive matter for the defendant to prove, it is not necessary to decide, since, however the fact be made to appear,

evidence showing an incriminating tendency of answers to questions before the court-martial would operate as a complete defense and therefore as an acquittal of the defendant. This is so because the law is thus written; and certainly there is nothing in the act which, either expressly or impliedly, tends to impart the attribute of conclusiveness to the ruling of a court-martial that an answer to a question would not incriminate the witness. Were the contention admissible there would remain for the court, in the trial of a criminal cause of this nature, to do little except to enter a judgment of conviction, a judgment based not upon facts before the court but upon the legal opinion rendered by a court-martial. Such a proceeding, it is thought, would contravene not only the words of the statute and the plainest principles of right and justice, but would set at naught the safeguards of the constitution which guarantee to a defendant, charged with crime, the right to a fair and impartial trial and to be confronted with the witnesses against him.

The court is therefore of the opinion, upon this branch of the case, that the principle announced by the Supreme Court in Johnson v. Sayre, supra, and other cases of that class, is inapplicable in prosecutions, like the present, arising under the act of 1901.

For the reasons above given, judgment will be rendered in favor of the defendant.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.

(District Court, S. D. Iowa, C. D. November 27, 1906.)

1. COMMERCE—INTERSTATE COMMERCE.

All commerce in the United States is under control of either a state or of the nation, and it cannot be justly claimed that any of such commerce falls within the power of neither; and when merchandise is carried from one state into another, no system or scheme can be devised to make it intrastate traffic.

2. RAILROADS—STATUTORY REGULATION—EQUIPMENT OF TRAINS—SAFETY APPLIANCES.

The undoubted purpose of Congress in enacting the safety appliance laws was humanitarian, and such statute should not be frittered away by judicial construction.

3. SAME.

Two of the purposes for which the safety appliance act of 1893 (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) was amended by the act of 1903 (Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1905, p. 603]) were: (1) To include certain vehicles omitted by the former statute; and (2) to include cars "used" by an interstate carrier on any part of its line. The original statute was broadened, and not restricted, by substitution of the word "use" for the words "haul and use."

4. SAME.

Where an interstate carrier hauls cars considerably damaged by derailment, so that the coupling devices are gone, 379 miles past three or more places where repairing is done, in order to make the repairs at larger and better equipped shops, it violates the safety appliance law.

5. SAME—DEFECTIVE COUPLING.

Where a coupler couples by impact, but cannot be uncoupled, unless the brakeman or switchman goes between, or over, or under the cars,

or around the end of the train, in order to reach the appliance on the connecting car, such a coupling is defective, and prohibited by law.

6. COMMERCE—INTERSTATE COMMERCE.
A carrier operating its own construction train, which hauls its own rails and products from a point in one state to a point in another state, is engaged in interstate commerce.

7. RAILROADS—STATUTORY REGULATION—EQUIPMENT OF TRAINS—SAFETY APPLIANCES.
If an interstate carrier receives and hauls a defectively equipped foreign car, which it cannot be required to do, it violates the federal safety appliance acts.

(Syllabus by the Court.)

Lewis Miles, U. S. Atty., and Luther M. Walter, special counsel, for the United States.

J. C. Cook and George H. Carr, for defendant.

SMITH McPHERSON, District Judge (charging jury): This case has been fully heard by the court and jury on oral testimony, at the close of which each party moved for a peremptory direction for a verdict under every one of the four counts of the petition. It is my custom, and, as I think, my duty, when taking a case from the jury, to explain why that body can have nothing further to do in the case, I assuming all responsibility. This is an action by petition, under direction of the Attorney General, on information of the interstate commerce commission, against the defendant company for four alleged violations of the acts of Congress of 1893 (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), amended in 1896, and act of 1903 (Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1905, p. 603]), relating to coupling and uncoupling devices.

The act of 1893 makes it unlawful for a company to do certain things: First. To haul a car. Second. To permit the car to be hauled. Third. To use or permit a car to be used. All three of these prohibitions are with reference to cars on the lines of the company within this judicial district. And the prohibitions are with reference to cars used only in interstate traffic, and which cars are not equipped with couplers coupling automatically by impact, and which cars can be uncoupled without the necessity of men going between the ends of the cars. It is contended with much earnestness that as this is a penal statute the statute must be strictly construed. This point need be elaborated but little. It is an elementary rule of construction, that the statute cannot be broadened by construction, so as to cover acts or omissions not clearly within the spirit and language of the statute. But while this is conceded, another rule equally important and as clearly established is that statutes are not to be frittered away by courts by construction. A statute, like a contract, must be held up by the four corners and examined, and when remedial in its nature, it must be examined in the light of its history and its purposes, and the then existing evils, which were to be corrected, remedied, and prevented. The statutes, and particularly that of 1903, are assailed as being beyond the power of Congress.

I shall devote but little time to argument as to this. I shall state my views, and then leave that phase of the case. As every one knows, it at times is difficult to state whether certain traffic is within the power of a state or that of Congress. But we all agree that, generally speaking, when the traffic starts from, is carried, and ends within the one state, Congress cannot regulate it, and that the state only can do so. And, generally speaking, we all agree that when the traffic starts from within one state and is carried to a point within another state, the state cannot regulate it, and Congress alone can do so; and particularly is this so when Congress has legislated with reference thereto. The only dissent that can be urged against the foregoing is one phase of the question not covered by the facts of this case, and not necessary to now state. In so far as commerce can be regulated or controlled, it falls within the power of a state, or of Congress. To say that it falls within the power of neither is to argue an absurdity, and to say that up in the air somewhere is a subject-matter not grappled with by either the state or nation. I do not for one moment believe in that kind of talk. It is due to counsel to say that no such argument was made in this case, but it is often made. It is enough to know and state that, in the case now for decision, questions of interstate traffic alone are presented, which will be noticed later on, connected with which were the evils to be remedied, corrected, or prevented. It is within the knowledge of most men that back of a few years ago, when the pin and link couplers were in use, it was of almost daily occurrence for a heavy freight train to break into two parts. This was unavoidable because of the weakness of the couplers and the great amount of slack. The results were injuries to and deaths of employés and passengers in the way car or caboose, as well as the damage to property, and particularly live stock. But the greater evil to be corrected was the injuries to and deaths of those required to couple and uncouple cars. Ten and more years ago every day we read of men killed in making and unmaking couplings. Seldom did we then meet a brakeman or switchman but who had been injured while at work. The court dockets, state and federal, were in part made up of such personal injury cases. The plaintiff charged negligence, generally, against the engineer, and the company denied that, and pleaded contributory negligence on the part of the injured man, and that he assumed all such risks. Some of them recovered large judgments, and others were defeated. I do not know whether statistics are obtainable as to whether the judgments obtained against and expense incurred by the companies were greater than those incurred in putting on the automatic coupler. But aside from all that, an undoubted purpose of Congress was humanitarian. The purpose was to end the maiming and killing of the vast army of men engaged in railroad work. And that the results have been good one now needs but look at the court dockets and the men newer in the railroad service and read the statistics of the past few years.

But it is contended that one or more of the cars in question was not in use in interstate traffic, and therefore not covered by the act of 1893, and that such car or cars were not in "use," and there-

fore not covered by the act of 1903. And this argument was made before me, because, under the act of 1893, the car must have been "hauled or used" in interstate traffic. Why was the statute of 1903 passed as an amendment to the prior act? Was there an evil still existing under the former statute? If so, what was it? Was there a difficulty in enforcing the older statute? If so, what? The older statute was with reference only to cars used in moving interstate traffic, regardless of whether it was a local road or one extending into several states. The reported cases, and the reports of the Interstate Commerce Commission, show that it was often difficult to prove for what traffic, local or interstate, the car was being used, and without such evidence neither state nor national prosecution could be carried on. And therein the older statute was thought to be defective. And to cure that defect, the later statute covers all cars used on any railroad engaged in interstate traffic, regardless of whether the particular car was for local or interstate use.

The Circuit Court of Appeals for this circuit had held August 28, 1902, in the case of Railway v. Johnson (117 Fed. 462, 54 C. C. A. 508), affirming the Circuit Court for the District of Utah, that the older statute did not cover a locomotive under the term "car." Knowing that other courts might adopt that construction, and knowing that all judges on the circuit within this circuit must follow such construction, Congress in the later statute required locomotives to be equipped the same as cars. And as to couplers, no other changes were made. And as to locomotives, the change was not necessary, because of the reversal of the Circuit Court of Appeals by the Supreme Court, December 19, 1904, as will be seen by the report of the same case. Johnson v. Railway, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. But such reversal was not obtained until after the enactment of the later statute. And yet, in the face of this undisputed history, and these undisputed facts, counsel for defendant contend the later statute curtailed the provisions of the older statute. Such an argument only has force by adopting, and alone following the strict construction theory pertaining to penal statutes, which as to this statute was brushed away by the Supreme Court in the Johnson Case, because while it is penal, yet it also is remedial. And because the older statute recited the words "haul and use," and the later statute the word "use," only, therefore, the word "use," only must be referred to with reference to cars engaged in local traffic on an interstate road. I have found no word in the history of these statutes to warrant such as being the purpose of Congress. If Congress could regulate the use it could regulate the hauling. The maiming and killing of men was what Congress was striking at. And I can conceive of no reason, and none was offered in argument, why Congress intended to abridge the older statute, while it was apparent that it was enlarged for the two purposes stated. As to one count, the car was used or hauled but a short distance. But the car was employed both in interstate traffic and on an interstate road. And the distance cannot be chopped up so as to make it partly state and partly interstate. None of the cases cited otherwise holding are of binding authority on this court, and the reasoning in

the opinions are not at all persuasive to me. The merchandise was to be and was carried from one state into another, and when such is the case no system nor scheme of bills of lading, waybills, transfers, or other schemes, necessary or devised, can make it state or local traffic. No single step in the entire distance can be taken and thereby get out from under the national statute, if there is one. Such are my views of the powers of Congress, the purposes thereof, and the construction to be given the two statutes.

It remains to present my views as to the several counts of the petition.

Count 1. That is with reference to a refrigerator car of another company, with the coupling devices gone and chained to a car of defendant. It was hauled from Elmira, Mo., to Dubuque, Iowa, thus chained, a distance of 379 miles. Near Elmira it, with several other cars, was derailed, thrown down an embankment, left on its side, and off its trucks. A wrecking crew, with two locomotives, in pulling it up to the track still further injured it, but placed the trucks under it, chained it to another car, and placed them in a train for Dubuque. These two cars, so far as made to appear, were not uncoupled in transit; and how many cars were taken out and put into the train within the 379 miles is not made known, nor how many brakemen or switchmen went between them to uncouple and gave up the effort, can only be surmised. The excuse for taking it 379 miles thus chained is, that at Dubuque the company has extensive shops for making permanent repairs, while at Kansas City, a short distance west of Elmira, and at three or more places between Elmira and Dubuque, the company was only equipped for making light repairs. A great part of the time of this trial was taken up with evidence as to whether the damage to the cars was of a light nature, or such as required repairs of an extensive kind. If slight, they could have been made at nearby points. If extensive, and which could be made only at Dubuque, then the evidence without conflict shows that this empty box car, with the trucks detached as they were, could easily have been placed on a flat car properly equipped. And all the witnesses who testified on the subject, defendants included, say that such is easily and often done. And, in my opinion, defendant did not have the choice of methods, by abandoning the one quite or nearly as cheap, entirely safe, and adopt the other, which was a menace to life at every stopping place for nearly 400 miles, and, in my judgment, unlawful.

Second Count. This covers a car loaded with old steel rails taken from the tracks in Iowa and being hauled to a point in Illinois, to there be placed in side tracks or put to some other use by the company. The coupler would couple by impact, but could not be uncoupled without going between the cars, except as the attached car might have the appliance on that side of the car, where the brakeman or switchman might be, or by going over or under the cars or around the end of the train. The statute will admit of no such construction. Another defense pleaded is that, as the company was hauling its own rails, and would receive no compensation, it was not engaged in commerce or traffic. That is to say, that construction trains with cars

both hauled and used, both locally and across state lines, and cars hauled and used, as just stated, for hauling its own products, can still be equipped with links and pins and fastened with chains, and can be carried back and forth over thousands of miles of roads. Counsel will not expect me to discuss that.

Third Count. The facts under this count for all practical purposes are the same as those under the second count. It was being taken from a point in Missouri across Iowa, to a point in Illinois.

Fourth Count. The facts under this count have caused more discussion by counsel, and me more thought, than all other phases of this case. It was an Illinois Central Railroad car loaded with lumber, brought from a point in Arkansas to Ottumwa, Iowa, consigned to a manufacturing or industrial plant at the latter place. What company brought the car out of Arkansas is not made to appear. The Rock Island Company brought the car to Ottumwa, and that company placed it with a string of cars on the tracks of defendant, which in turn was to take it a few blocks to the house or plant of the consignee. By doing this with that car, defendant is not only an interstate road, but was engaged in an interstate traffic. Soon after the car was placed on defendant's sidetrack, two different efforts were made to uncouple it, when in motion, and which uncoupling was made as it only could be done by a man going between the ends of the cars. One of the appliances was broken, but when or where is not made known, and the defect could not be detected by the eye. While these efforts to uncouple were being made, inspectors of the government witnessed the same, and made report thereof, this case, as to this count, being the result. The defendant's inspectors when the car was received, and at no other time until after it was known that the government inspectors had witnessed the foregoing, made no effort to inspect this and the other cars. Thereafter, it was placed on other side tracks until repaired, which was easily done by substituting for the defective appliance one kept in stock, and at a trifling and nominal expense. On this state of facts, in my opinion, the company is liable for the penalty of $100. Defendant's counsel have said much as to acts of necessity being a defense, and have cited many cases. The complete answer thereto is that this was not a necessity. The company is not under a necessity to receive defective foreign cars. True it is that this car was placed on its track by another company, but no doubt with and under an implied if not an express contract for so doing. And if a defective foreign car is received, and no inspection is made, the receiving company is liable for injuries and damages that follow. The rule generally is, as contended by defendant's counsel, that guilty knowledge is necessary to constitute an offense. But the statutes in question make no such requirements. When passing on the demurrer to this count I referred to the numerous cases, without citing them, where one who allows a minor in a billiard room or saloon is liable, even though he believes the party is an adult. And to many like cases I alluded. But it is now contended that such cases are not in point, because there is no general right to have a billiard hall or saloon, a license therefor being necessary. Such an attempt to dis-

tinguish those cases from the one at bar is not an answer. Take the cases for violations of the pure food laws. It is no defense for the seller that he believed the food was pure. Statutory offenses generally are complete when the language of the statute is violated.

Mr. Merritt of the jury will act as foreman, and, as such will sign the four verdicts which I now hand him, which are for the government under all the counts, and on which judgments will be entered. All of which is now done.

PERE MARQUETTE R. CO. v. BRADFORD et al.

(Circuit Court, W. D. Michigan. April 4, 1906.)

No. 1589.

1. CANCELLATION OF INSTRUMENTS—ADEQUATE REMEDY AT LAW—DEFENSE TO ACTION ON INSTRUMENT—NEGOTIABLE BONDS.

Where negotiable bonds of a corporation were procured to be issued by fraud, the corporation may maintain a suit in equity against holders who are chargeable with notice of the fraud for their cancellation and to enjoin their transfer, notwithstanding the fact that as against the defendants the fraud might be pleaded as a defense at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 13.]

2. INJUNCTION—GROUNDS FOR DISSOLUTION OF PRELIMINARY INJUNCTION—NEW MATTER IN ANSWER.

A preliminary injunction will not be dissolved upon an answer admitting the material equities of the bill and setting up new matter in avoidance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 381.]

3. SAME.

The rule that a preliminary injunction, granted ex parte, will be dissolved on the coming in of an answer denying the equities of the bill, is not of universal application; but the matter rests largely in the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 381.]

4. SAME—PRELIMINARY INJUNCTION—PREVENTION OF IRREPARABLE INJURY.

Complainant railroad company filed its bill for the rescission of a contract for the purchase of the stock of another company and the cancellation of its negotiable bonds, to the amount of $3,500,000, issued in payment for such stock and held by defendants. The bill alleged that the contract was made with, and the bonds issued to, one of the defendants, through fraudulent collusion between him and a group of officers and directors of complainant who then controlled its action, and who acted in the transaction in their own private interest and contrary to the interests of complainant, and facts were alleged which, if proved, sustained such allegations. It was also alleged that the other defendants had knowledge of the fraud. The answer, to which oath was waived by the bill, denied the fraud and set up other matters in avoidance. A temporary restraining order was issued ex parte, and on a motion for preliminary injunction to restrain defendants from transferring the bonds and from further prosecuting actions at law on coupons therefrom the proofs were conflicting. *Held*, that such injunction should be granted, in view of the irreparable loss which complainant would sustain by a transfer of the bonds to innocent holders, should it sustain the allegations of its bill on final hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306, 95.]

In Equity. On motion for preliminary injunction.

Otto Kirchner (Lawrence Maxwell, Jr., and Francis Lynde Stetson, of counsel), for complainant.

Taggart, Denison & Wilson (Lawrence Godkin, H. D. Peck, and John F. Dillon, of counsel), for defendants Bradford and Kleybolte.

Harmon, Colston, Goldsmith & Hoadly, for receiver.

LURTON, Circuit Judge. The complainant, a railroad corporation of the state of Michigan, filed this bill to obtain the rescission of a contract under which the corporation purchased the entire capital stock of the Chicago, Cincinnati & Louisville Railroad Company, a railroad corporation of the states of Ohio and Indiana, from the defendant Wm. A. Bradford, Jr., and to cancel an issue of collateral trust bonds, aggregating $3,500,000, issued to said Bradford in payment for said stock. It is averred that 1,115 of these bonds are now held by the defendants Kleybolte and the remainder by the defendant Bradford. Another object of the bill is to enjoin the trial of two suits on the law side of this court, upon matured coupons from bonds held by the defendants Kleybolte, wherein said defendants are plaintiffs and this complainant a defendant.

Two grounds of relief are relied upon: First, that the contract under which the purchase of said shares was made and the bonds of the corporation were issued was procured by fraudulent collusion between the defendant Bradford and a group of the officers and directors of the railroad company then dominating its corporate action; second, that the Pere Marquette Railroad Company, as a corporation of the state of Michigan, neither owning nor operating any railroad in the state of Indiana or Ohio, had no power, under either its charter or the law of Michigan or any other state, to acquire the capital stock of the Chicago, Cincinnati & Louisville Railroad Company, and that the contract under which its said bonds were issued was, therefore, ultra vires.

Upon a former day a restraining order was issued upon an ex parte application, to stand until notice could be given of an application for a temporary injunction. In pursuance of this order an application for such injunction has now been made upon the bill, answer, and ex parte affidavits filed by each side. That the bill upon its face makes a prima facie case for an injunction is plain. Indeed, one cannot read its averments without concluding, if the facts charged are true, that the case furnishes an example of the most pernicious methods of what has come popularly to be known as modern "high finance." In substance the bill charges that the action of the corporation in buying the capital stock of the Chicago, Cincinnati & Louisville Railroad Company and issuing its bonds in payment for same was dictated by a dominating group of the company's officers and directors, styled in the bill "promoters," in their own selfish and personal interest, and as a means of carrying out a scheme for their own benefit.

If the averments of the bill be true, that group of directors owned 110,000 of the shares of the Pere Marquette Company, a block sufficient to control for all practical purposes the action of the corporation.

These "promoters" conceived a scheme for selling this controlling block of Pere Marquette stock to the Cincinnati, Hamilton & Dayton Railroad Company, a corporation of the state of Ohio, at a large profit to themselves. But, according to the charges of the bill, this result was not to be effected by an open negotiation with a board of directors free to act for the best interest of the C., H. & D. Co., as an entity, but by obtaining a controlling interest in the stock of the C., H. & D. and thereby reorganizing its board of directors in the interest of this deal. Now the charge of the bill is that these "promoters" undertook to organize a "syndicate," who should subscribe a fund great enough to obtain the necessary amount of Cincinnati, Hamilton & Dayton stock to carry out their plan, and that to obtain the necessary assistance various inducements were offered to secure the co-operation of others. The defendant Bradford was induced to join the syndicate and to subscribe thereto the sum of $625,000. It is in substance averred that these directors of the complainant corporation, for the purpose of securing the co-operation of said Bradford in their plan of selling their stock to the Cincinnati, Hamilton & Dayton Company agreed that his subscription to the syndicate pool, organized to obtain control of the directory of the Cincinnati, Hamilton & Dayton Company, should be conditioned upon a sale by him of his stock in the Cincinnati, Chicago & Louisville Company to the Pere Marquette Company on or before the falling due of any payment by him of the first installment of his subscription at a price satisfactory to him. In support of this averment an agreement in writing between F. H. Prince & Co. and Newman Erb, alleged to have been acting for the said directors composing the "promoters," and George Fernauld & Co., representing said Bradford, is filed as an exhibit. That agreement is in these words:

"In consideration of George A. Fernauld & Company subscribing for 5,000 shares of common stock of the C., H. & D. Railroad Company under the subscribers' agreement of May 19, 1904, with George W. Young and others as syndicate managers, and for other valuable considerations, moving from said George A. Fernauld & Company to us, the receipt of which is hereby acknowledged by us, we hereby agree that in case the negotiations now pending for the Pere Marquette Railroad Company acquiring the capital stock of the Chicago, Cincinnati & Louisville Railroad Company, and issuing temporary bonds in payment therefor, not being consummated and carried out on terms satisfactory to William A. Bradford, Jr., on or before the time when the first installment upon said subscriptions shall become due and payable (not later than June 30th, 1904), we, the undersigned, Newman Erb and F. H. Prince & Co., jointly and severally, agree to and will assume and take off the hands of said George A. Fernauld & Co. said subscriptions for 5,000 shares of common stock, and pay all liabilities connected therewith, including the installments called, or to be called, and to protect said Fernald & Co. against all liability connected therewith; said subscription to be thereupon assigned by said George A. Fernald & Company to us.

"[Signed] F. H. Prince & Co.
"Newman Erb."

That this arrangement gave these directors of the Pere Marquette Company a personal interest in carrying out this plan of causing a sale of Bradford's stock to their corporation, which was antagonistic to their relation as trustees of that corporation, is clear. Another part of

the proposed deal with Bradford was that when the object of the syndicate should be accomplished the bonds of the Pere Marquette Company, issued to him for his stock, should be indorsed by the Cincinnati, Hamilton & Dayton Company. It is then averred that the plans of the "promoters" went through. The syndicate succeeded in obtaining enough shares to secure control of the Cincinnati, Hamilton & Dayton Company. The directors of that company, or nearly all of them, were induced to resign. The nominees of the syndicate succeeded them, and this reorganized board carried out the purpose for which they had come into being by putting through the various deals prepared beforehand, including the purchase of the Pere Marquette shares owned by the "promoters" who had obtained Bradford's co-operation. The averment of the bill is that the Kleyboltes were partners, and as such members of this Cincinnati, Hamilton & Dayton syndicate; that one of them, Rudolph Kleybolte, was put into the Cincinnati, Hamilton & Dayton board, and as director voted to confirm and carry out all of the prearranged plans, including the purchase of the Pere Marquette stock owned by the "promoters" and the guaranty of the Pere Marquette bonds issued to Bradford for his stock; and that in fact he was in complicity with the plans of the syndicate and aware of the character of the deal made with Bradford when he obtained the Pere Marquette bonds now held by his firm. It is averred that the railroad controlled by the stock so purchased from Bradford is of no value to the Pere Marquette system; that it will require a vast sum of money to complete it at the two unfinished ends. It is bonded to the amount of $6,000,000, and it is averred that it has never been able to earn its operating expenses, and that the stock imposed upon the Pere Marquette Company at a cost of $3,500,000 has no value, except such as is purely speculative. It is charged that the "promoters" in the board of the complainant knew, or would have known if they had exercised their faculties, that this was not a purchase which was to the advantage of their company. It is also averred that by the sale of their stock the promoters lost their control of the complainant corporation, and that it has been lately set free by the election of a new board of directors, which represents the corporation itself and stands for all of its stockholders and creditors, and that the new board, upon becoming aware of the fraudulent imposition of said contract upon their corporation, repudiated the agreement and directed a return of said stock and the institution of this suit to rescind the agreement and obtain the cancellation of the bonds issued under its provisions.

If the averments of the bill shall be established, no other conclusion can be drawn than that the purchase of the Chicago, Cincinnati & Louisville stock was the result of a fraudulent plot carried through by the dominating influence of directors of that company, acting for themselves and not for the corporation, whose representatives they nominally were. Waiving for the purposes of the present motion the question of ultra vires in the acquisition of stock in a railroad wholly outside of the state of Michigan by a Michigan railroad corporation, there can be no doubt that, if the complainant shall

ultimately make out the truth of the facts charged, the cancellation of the bonds issued in pursuance of the deal must follow.

Aside from the defense of ultra vires, which I do not now consider, the bonds in question are negotiable securities, against which the defense of fraud in their inception would be unavailing if they shall come to the hands of an innocent holder for value. The mere fact that the defense of fraud can be made at law is no answer when a complainant is so circumstanced as that his defenses will be cut off if the bonds shall come to the hands of an innocent purchaser. If they are now, as is charged, in the hands of holders who are not entitled to enforce payment if the facts charged in the bill are true, equity will interpose and enjoin their assignment until the question can be tried out, and then compel their cancellation, and thus avoid the danger of their being put to some vexatious or injurious use if suffered to remain outstanding. In the case of Louisville, etc., Ry. Co. v. Ohio Valley Improvement Co. (C. C.) 57 Fed. 42, I had occasion on circuit to pass upon the question of equitable relief against negotiable bonds in the hands of persons affected with notice of defense, and that case upon that question was subsequently approved by the Supreme Court in Louisville, N. A. & C. R. Co. v. Louisville Banking Co., 174 U. S. 552, 567, 19 Sup. Ct. 817, 43 L. Ed. 1081. It follows that upon the face of the bill the complainant has made a case upon the fraudulent character of the bonds sought to be canceled which entitles them to a temporary injunction, and it was upon the showing so made, and upon the consideration stated, that I made an ex parte restraining order, to hold until notice could be given and formal application made for an injunction pendente lite.

The defendants have answered, and have denied any knowledge of any bad faith in their issuance or connivance in the breach of any duty by complainant's directors. The oath to the answers was waived, and their answers, though sworn to, are entitled only to the evidential weight of an ex parte affidavit upon this motion. Affidavits and counter affidavits have also been filed, tending to support or controvert the averments of the bill. Certain so-called "special defenses" are presented by the answers of Bradford, involving the question of whether the complainant is entitled to rescission by reason of alleged changes in the condition of the property of the Chicago, Cincinnati & Louisville Company since it passed under complainant's control as sole stockholder, and a question of alleged subsequent ratification by the stockholders of the complainant company.

The question as to whether, under all the circumstances of the case, the complainant company is in a situation to demand the equity of rescission by reason of an alleged inability to restore the Chicago, Cincinnati & Louisville Railroad to Mr. Bradford as sole stockholder, or by reason of estoppel by reason of the effective subsequent ratification of the contract with Bradford by its stockholders, are manifestly defenses in avoidance of the case made by the bill. I am not sure that new issues thus presented should be of controlling influence, if the court is otherwise persuaded that upon the equities of the bill the injunction should stand. That an injunction will not be dissolved

upon an answer admitting the material equities of the bill and setting up new matter in avoidance is well settled. Beach, Modern Eq. § 782; Speak v. Ransom, 2 Tenn. Ch. 210; Hoffman v. Hummer, 17 N. J. Eq. 263, 267. This practice is peculiarly applicable here, in view of the character of the new matter set up by the answers. Both involve questions requiring a wide range of evidence, as well as complicated questions of law, and are manifestly questions which should be postponed to a final hearing, when the evidence shall be fully before the court. This is also true of the defense made by the Kleyboltes of innocent purchasers. That is a defense in avoidance, and, if the plaintiffs show that the bonds were issued in fraud of the corporation, it will devolve upon them to make out this defense. Louisville, etc., Ry. Co. v. Ohio Valley Co. (C. C.) 57 Fed. 42; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866.

Aside from the question of ultra vires arising out of the Michigan act of February 27, 1889 (section 3405a, How. Ann. St. Supp.), the result in this suit must ultimately turn upon the question as to whether complainant's board of directors acted in good faith when they contracted to buy Bradford's stock in the Chicago, Cincinnati & Louisville Railroad Company and when they issued the company's collateral trust bonds in payment for same. A mere mistake of judgment will not suffice to convict them of bad faith. The question will be whether, in dealing with him, they were honestly acting for the corporation, or agreed to buy his stock as a means of benefiting themselves at the expense of their corporation. Of course, if it shall appear that the bargain they made was palpably detrimental to the corporation they represented, then action so opposed to the true interests of the corporation itself would lead to an inference that they were not actuated by an honest desire to subserve such interest. If, in addition, it appear that they had a private end to subserve, the inference that they acted in their own interest and for their own ends will be much supported. I am not sure that the showing made by the exhibits and ex parte affidavits make it clear that the complainant will succeed upon a final hearing. But upon a question of the allowance or disallowance of an injunction pendente lite it is not essential that there shall appear anything more than that there is ground for supposing that relief may be given. Beach, Modern Equity, § 785; Huffman v. Hummer, 17 N. J. Eq. 263; Hudson v. Butrom, 3 Madd. 448; Atwood v. Barham, 2 Russ. 186. The case as presented here is more analogous to a motion for the dissolution of an injunction upon the coming in of an answer than it is to an original application for an injunction, by reason of the fact that upon the strength of the averments of the bill a restraining order has been already allowed.

The sufficiency of the complainant's case, as exhibited by his bill, to justify an injunction, cannot be denied. The question, then, is whether the pending injunction, which has preserved the status quo until to-day, shall be discharged because the defendants have filed an answer denying the fraud alleged. The rule that an injunction granted ex parte will be dissolved upon the coming in of an answer denying the equities of the bill is not of universal application. The continuance of a re-

straining order or the dissolution of an injunction granted upon notice must, in the very nature of the matter, rest largely in the discretion of the court. Blount v. Societe, etc., Pasteur, 53 Fed. 98, 3 C. C. A. 455, 457; Duplex Printing Co. v. Campbell Printing Press Co., 69 Fed. 250, 16 C. C. A. 220. In Blount v. Societe, etc., Pasteur, cited above, our own Circuit Court of Appeals approved the rule as stated in Glascott v. Lang, 3 Mylne & C. 455, where it was said:

"In looking through the pleadings and evidence for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the piantiffs to relief at all events. It is quite sufficient if the court finds, upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In the same case Judge Jackson cited and approved the ruling of Lord Cottenham in Shrewsbury v. Railway Co., 1 Sim. (N. S.) 410, 426, when he said:

"That there are two points in which the court must satisfy itself: First, it must satisfy itself, not that the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right. The other is whether 'interim' interference, on a balance of convenience or inconvenience to the one party and to the other, is or is not expedient."

The fundamental purpose of a special injunction restraining the assignment of negotiable instruments, such as the railroad bonds here in question, is to preserve the statu quo until the hearing. The plain and undeniable fact is that the defense of fraud in the inception of these bonds will be cut off if they shall pass into the hands of an innocent purchaser. To discharge the restraining order, which has operated to prevent an assignment until this hearing, upon the denial of the answer supported by ex parte affidavits from some of the parties implicated in the transaction sought to be undone, will be to deny all relief against the bonds, if upon a final hearing complainant shall make out its case, if the defendants in the meantime shall have disposed of them to innocent purchasers. Under such circumstances it is the plain duty of the court to preserve the situation until the transaction depicted by the bill may be thoroughly investigated. High on Injunctions, § 1512; Beach, Modern Eq. Pr. §§ 785, 786; Poor v. Carleton, 3 Sumn. 70, Fed. Cas. No. 11,272. The injury to complainant by a dissolution, followed by a bona fide sale of the bonds, would be impossible, and a practical denial now of the relief it is plainly entitled to if the facts be as alleged. Hoagland v. Titus, 14 N. J. Eq. 81; City of Newton v. Levis, 79 Fed. 715, 718, 25 C. C. A. 161. If the case be one which turns upon a question of fraud, put in issue by the answer, the chancellor should be slow to dissolve or deny an injunction upon the denials of the answer and ex parte affidavits, especially when the fraud alleged largely depends upon inferences to be drawn from either established facts or facts about which there is an apparent conflict in the affidavits. High on Injunctions, §§ 1508, 1509; Beach, Eq. Pr. §§ 782, 785, 786, 787; Huffman v. Hummer, 17 N. J. Eq. 263.

I am not insensible of the consequences to the defendants if an injunction be allowed to stand. They, at most, however, will be restrained from selling and compelled to hold onto their investment,

when they might wish, or their circumstances demand, that they shall be sold. This is, at most, a minor injury, compared to that which will result to complainant if defendants are allowed to sell their bonds and complainant shall make out its case at a final hearing. This injury may be mitigated by a speedy preparation of the case for trial, and if the complainant is to hold onto its injunction it should speed the case. I will make all reasonable orders to this effect upon application and notice.

Neither do I think, under all the circumstances of this case, that the defendants should be suffered to prosecute their suits at law. Those suits are upon coupons cut from the bonds in the hands of the defendants Kleybolte and Bradford. The questions of fact and law in those suits are identical with those here. The determination of this suit upon its merits will determine the obligation of the complainant upon the coupons there involved. The convenience of all parties will be subserved, and time and expense saved, by the trial of these questions in this case. If so advised, the defendants may file cross-bills asking decrees upon their interest claims, if it shall turn out that the bonds from which their coupons come are valid obligations of the complainant. If they do not take this course, there will be no great delay if, when this case is decided, the decree is promptly set up in the actions at law as a bar to a relitigation of the same defenses. There is no hard and fast rule for the determination of cases coming under the general doctrine of avoidance of a multiplicity of lawsuits. Each case must in large measure stand upon its facts. Hale v. Allison, 188 U. S. 77, 23 Sup. Ct. 244, 47 L. Ed. 380; Wyman v. Bowman, 127 Fed. 258, 263, 62 C. C. A. 189.

The circumstances of this case are peculiar. To allow these suits to go on in the same court between the same parties, involving the same questions, where the hearing must include a large volume of evidence, partly oral and partly documentary, makes a case of great inconvenience and justifies the continuance of the restraining order heretofore made; and it is so ordered.

HOUSTON & T. C. R. CO. et al. v. STOREY et al.

(Circuit Court, W. D. Texas, Austin Division. December 3, 1906.)

1. CARRIERS—SUIT TO ENJOIN ENFORCEMENT OF RATES—DEMURRER.
   A suit to enjoin the enforcement of railroad rates established by a state commission is of such general importance, and so far independent on the particular facts which may be developed by the proofs, that it will not be disposed of on demurrer, unless the bill is clearly insufficient.

2. SAME.
   In a suit by a railroad company to enjoin the enforcement of rates established by a state commission as unreasonable and unjust, allegations in the bill respecting the amount of stock and bonds of complainant outstanding are pertinent.

3. SAME.
   A schedule of railroad rates established by state authority is not unreasonably low as to a particular road because it will not enable the

company to accumulate from its net earnings a sinking fund for the payment of its indebtedness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 19.]

4. SAME—STATE REGULATION OF RATES—CONSTITUTIONALITY.

The railroad commission of Texas, under authority from the Legislature, has power to fix railroad passenger rates not exceeding a maximum rate of three cents per mile, and may fix different rates for different carriers, subject to the constitutional restriction that it cannot deny to one carrier the equal protection of the laws by prescribing for it an unreasonably low and confiscatory rate, while other carriers similarly situated are permitted to charge a higher rate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 19.]

5. SAME.

A schedule of passenger rates prescribed for a railroad by a state commission cannot be declared invalid on an allegation that its enforcement will result in a reduction in rates by other roads, having the right to charge higher rates, at competitive points, which will work a discrimination between different localities.

6. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—CONTRACT WITH STATE—TEXAS STATUTE.

The provision of the Texas act of 1853 which empowers the Legislature to prescribe rates to be charged by railroad companies, subject to the limitation that no reductions shall be made in the rates of a company, unless it shall have made a net profit of 12 per cent. per annum during the previous 10 years, does not create a contract between the state and railroad companies subsequently chartered thereby, which deprives the state of the right to change such law or exempts the companies from the operation of future legislation respecting rates.

7. CARRIERS—REGULATION OF RATES.

Various grounds of demurrer considered in suits by railroad companies to enjoin the enforcement of schedules of rates prescribed by the railroad commission of Texas.

In Equity. On demurrer to bills.

Baker, Botts, Parker & Garwood, for Houston & T. C. R. Co., Houston, East & W. T. Ry. Co., Galveston, H. & S. A. Ry. Co., and Texas & N. O. R. Co.

Terry, Cavin & Mills, for Gulf, C. & S. F. Ry. Co.

N. A. Stedman, for International & G. N. R. Co.

E. B. Perkins, for St. Louis Southwestern Ry. Co. of Texas.

T. S. Miller and Fiset & McClendon, for Missouri, K. & T. Ry. Co. of Texas.

Thomas J. Freeman and W. L. Hall, for Texas & P. Ry. Co.

Newton N. Lassiter, for Chicago, R. I. & G. Ry. Co.

Spoontz, Thompson & Barwise, for Ft. Worth & D. C. Ry. Co.

C. H. Yoakum, for St. Louis, S. F. & T. Ry. Co. and Ft. Worth & D. Ry. Co.

Houston Bros., for San Antonio & A. P. Ry. Co.

R. V. Davidson, Atty. Gen. of Texas, and S. H. Cowan and R. J. Channell, for defendants.

MAXEY, District Judge. Separate bills have been filed by the following named railroads to enjoin the schedule of rates prescribed by the railroad commission, to wit: Houston & Texas Central Railroad Company; Gulf, Colorado & Santa Fé Railway Company; Inter-

national & Great Northern Railroad Company; St. Louis Southwestern Railway Company of Texas; Missouri, Kansas & Texas Railway Company of Texas; Texas & Pacific Railway Company; Houston, East & West Texas Railway Company; Galveston, Harrisburg & San Antonio Railway Company; Texas & New Orleans Railroad Company; Chicago, Rock Island & Gulf Railway Company; Ft. Worth & Denver City Railway Company; St. Louis, San Francisco & Texas Railway Company; Ft. Worth & Rio Grande Railway Company; San Antonio & Aransas Pass Railway Company. Demurrers are interposed by the defendants to all the bills; but, without making specific rulings in each case, it is thought that the disposition of the demurrers in the suit of the Houston & Texas Central Railroad Company and the views of the court hereinafter expressed as to special matters arising in other suits will enable counsel to prepare the proper orders in each case.

It is an elementary principle of pleading that facts well pleaded in a bill of complaint are admitted by demurrer to be true, and the determination of the truth or falsity of facts alleged must await the judgment of the court when the proofs are considered upon the final hearing of the cause. The bills filed by the various companies present questions of great importance to the plaintiffs and to the people, and it is conceived to be the duty of the court, in ruling upon demurrers to such bills, particularly special demurrers, to give to the allegations a liberal construction, to the end that the court may, upon consideration of all the proof submitted by the parties to the cause, intelligently decide whether the rates prescribed by the railroad commission are reasonable and just to the carriers and to the public. Along these lines it was said by the Supreme Court, in Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 597, 17 Sup. Ct. 205, 41 L. Ed. 560:

"In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. What those other circumstances may be it is not necessary now to decide. That can be best done after the parties have made their proofs."

With these general observations the court will proceed to rule upon the demurrers in the order as they appear.

General Demurrer.

The court is of the opinion that, taken as a whole, the bill states a cause of action, and the general demurrer is therefore overruled. See Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

Special Demurrers.

1. The first special demurrer goes to paragraph 3 of the bill, which alleges that the act of the Legislature of Texas creating the railroad commission is unconstitutional and void.

That the act of the Legislature, generally speaking, is a valid exercise of legislative power, there can be no doubt, since the same has been held to be constitutional by the Supreme Court of the United States. The demurrer is therefore sustained. Reagan Case, supra.

2. The second demurrer challenges the allegations of the bill, as contained in paragraph 3, that the rates, tariffs, classifications, schedules, etc., are void.

The question here attempted to be raised will be determined upon the final hearing. Hence the demurrer will be overruled.

3. The third demurrer objects to the allegations of paragraph 4 of the bill that the plaintiff is a carrier of interstate passengers and freight, etc., and that its duty in respect to such interstate traffic is voluntary.

The allegations of paragraph 4 may become material in determining the proper basis for rate prescription. The demurrer is overruled.

4. The fourth demurrer refers to paragraph 5 of the bill, and objects, in effect, that the value of stocks and bonds constitute no sufficient legal or authoritative basis or ground from which the court can determine the reasonableness or confiscatory character of the rates.

Every pertinent fact or circumstance which would have a tendency to enable the court to arrive at the fair value of the plaintiff's property should be considered in determining the reasonableness of the rates prescribed by the railroad commission. Thus it was said by the Supreme Court, in Smyth v. Ames, 169 U. S. 466, 467, 18 Sup. Ct. 418, 42 L. Ed. 819:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." San Diego, etc., Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

In view of the ruling of the Supreme Court, the allegations are pertinent, and proof of the facts would be clearly admissible. The demurrer is overruled.

5. The fifth demurrer objects to so much of paragraphs 7 and 8 of the bill as set forth that certain decrees, alleged to have been entered by the Supreme Court of the United States, are res adjudicata, etc.

The contention of the defendants in this respect is correct; and, so far as the plaintiff attempts to plead the decrees mentioned as res adjudicata, the demurrer is sustained.

6. The sixth and seventh demurrers go to so much of paragraphs 9 and 10 of the bill as allege the compromise of certain suits and the

establishment by such compromise of certain rules and regulations contained in circular 766 of the railroad commission.

Conceding the truth of the allegations, the railroad commission would not be estopped thereby from prescribing future reasonable and just rates; nor do the allegations show that the plaintiff acquiesced in the rates prescribed by circular 766. To the extent, therefore, that the plaintiff relies upon the allegations as an estoppel, the demurrer will be sustained. The allegations, however, may remain as part of the bill, as they may become important in considering other questions, particularly the supreme issue submitted, to wit, the reasonableness of the rates prescribed by the commission.

7. The eighth demurrer objects to so much of paragraphs 10 and 19 of the bill as complain of certain circulars, orders, rates, schedules, and tariffs issued by the railroad commission and described in Exhibit E.

The ground of this objection is that the plaintiff has, by its long-continued acquiescence in and observance of the regulations, confirmed their reasonableness and agreed to their enforcement. This demurrer is overruled, because the allegations of the bill show that the plaintiff has persistently and continuously protested against the rates referred to.

8. The ninth demurrer challenges the right of the plaintiff, as claimed in paragraph 10 of the bill, to earn an amount sufficient to provide a sinking fund for the discharge of its indebtedness, in addition to paying the interest thereon.

This claim of the plaintiff was doubtless based upon the decison of the Supreme Court of Pennsylvania. See Brymer v. Butler Water Co., 179 Pa. 251, 36 Atl. 249, 36 L. R. A. 260. With due respect for the opinion of that high tribunal, this court is unable to concur in the view expressed by it, and therefore sustains the demurrer.

9. The tenth, eleventh, twelfth, and fourteenth demurrers go to paragraphs 10, 11, and 13 of the bill. Generally speaking, these paragraphs claim the right, on the part of the plaintiff, to earn a dividend of 6 per cent. on its capital stock, and to an allowance out of its earnings, in addition to operating expenses, fixed charges, and dividends, for the betterment and improvement of its lines of railway and railway properties. The allegations of the bill further complain of the manner in which the railroad commission proceeded in prescribing the rates contained in Exhibit E, etc.

What was said by the court in the fourth clause of its conclusions applies to the grounds of demurrer under consideration. Besides, the court may more intelligently consider the elements which should properly enter into the question of rate making when all the facts are before it. The tenth, eleventh, twelfth, and fourteenth demurrers will therefore be formally overruled.

10. The thirteenth demurrer objects to the allegations of paragraph 12 of the bill which set forth that the evidence produced by the plaintiff before the railroad commission indicated that the tariffs and rates prescribed by the commission were unjust and confiscatory.

The allegations complained of are pertinent at least in showing that

the plaintiff never acquiesced in the rates fixed but constantly protested against them. The demurrer is not well taken and will be overruled.

11. It is objected by the fifteenth demurrer that those allegations of paragraph 13 of the bill are improper, which show that the plaintiff is conducting at great loss within the state of Texas its domestic, as distinguished from its interstate, business, etc.

As before intimated, all these and kindred matters may be more justly and intelligently considered in view of the proof upon the final hearing of the cause. The demurrer will be overruled.

12. The sixteenth and seventeenth demurrers are interposed to certain allegations of the fourteenth paragraph of the bill. In this paragraph the plaintiff assails the validity of passenger circular No. 4, which limits the plaintiff to a passenger rate of 2½ cents per mile, while, it is alleged, all other railway companies in the state may charge 3 cents per mile for the transportation of passengers. The special demurrers now under consideration object to other allegations of the bill, showing that the order was not properly adopted by the railroad commission because of the disqualification of Mr. Colquitt, one of its members, who, it is alleged, had formed and expressed opinions prior to the adoption of the order.

These demurrers raise other questions, of a somewhat similar nature, not necessary at the present time to be considered, since the demurrers were not pressed upon the argument; the counsel for the defendants preferring to answer the bill in these particulars, in order that the law may be applied to the proofs as shown upon the final hearing. The demurrers will therefore be formally overruled.

13. The eighteenth, twentieth, and twenty-second demurrers go also to certain allegations of paragraph 14 of the bill, and these demurrers will be considered together. Briefly stated, it is insisted by the plaintiff, in this paragraph, that the passenger rate of 2½ cents per mile prescribed by passenger circular No. 4 is (1) unreasonable and confiscatory; (2) that it is unjust and discriminatory; and (3) it is alleged that the railroad commission is without authority to establish passenger rates, because the Legislature has established for all roads in the state a passenger rate of 3 cents per mile.

Upon the points suggested the following conclusions are announced.

(1) The Legislature of Texas having expressly authorized the railroad commission to make and establish passenger rates, the commission has the power, with just regard for the constitutional rights of carriers, to fix such rates, provided they do not exceed the maximum allowed by the Legislature of 3 cents per mile.

(2) The commission, within the limits prescribed by the Constitution, may fix different passenger rates for different carriers. Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 598, 17 Sup. Ct. 198, 41 L. Ed. 560; Dow v. Beidelman, 125 U. S. 691, 692, 8 Sup. Ct. 1028, 31 L. Ed. 841; Chicago, etc., R. R. v. Iowa, 94 U. S. 155, 24 L. Ed. 94.

(3) Any order of the commission which prescribes an unreasonably low and confiscatory passenger rate of one carrier, while other carriers, similarly situated, are permitted to charge a higher rate, denies to the former the equal protection of the laws as guarantied by the fourteenth amendment of the Constitution. Cotting v. Kansas City Stockyards

Company, 183 U. S. 79 et seq., 22 Sup. Ct. 30, 46 L. Ed. 92. The allegations of the bill, admitted by the demurrer to be true, bring this case within the principle announced in the last proposition, and it necessarily follows that the plaintiff is denied, by passenger circular No. 4, considered in connection with the allegations of the bill, the equal protection of the laws. The ultimate determination of this interesting and important question must depend upon the proof. The demurrers will be overruled.

14. The nineteenth demurrer objects to the allegations of paragraph 14 of the bill which set forth the construction of the Trinity & Brazos Valley Railroad and declare the effect upon the plaintiff's business alleged to result therefrom.

The court is of the opinion that this demurrer is well taken, and it will therefore be sustained. See Covington, etc., Turnpike Co. v. Sandford, supra.

15. The twenty-first demurrer is interposed to that part of paragraph 14 of the bill alleging in substance that the enforcement against the plaintiff of the rate prescribed by passenger circular No. 4 would result in reduction of rates on other lines of railways at competitive points, and that such reduction would work a discrimination between different localities.

It is thought that this demurrer is well taken, and it will be sustained.

16. The twenty-third demurrer objects to those allegations of paragraph 15 of the bill which set forth the effect of the rules and orders of the railroad commission upon the plaintiff's interstate and foreign traffic.

For reasons already given, this demurrer is overruled.

17. The twenty-fourth demurrer objects to that portion of paragraph 16 of the bill alleging the existence of a contract between the plaintiff and the state of Texas which precludes the state and the railroad commission from prescribing rates the effect of which would reduce the plaintiff's earnings, in contravention of the act of the Legislature of 1853.

The section of the act relied upon by the plaintiff is in the following words:

"It shall be lawful for the Legislature at any time to prescribe the rates to be charged for the transportation of persons and property upon any such road, should they be deemed too high, and may exercise the same power every ten years; provided, that no reduction shall be made unless the net profit of the company for the previous ten years, the expenditures of the company being bona fide, and not with a view to defeat the operation of this section, shall amount to a sum equal to 12 per centum per annum upon its capital stock, and then so as not to reduce the future probable profits below said per centum."

Upon the subject of exemption from future legislation, as claimed by the plaintiff and other railroad companies filing bills, the following language was used by the Supreme Court of the United States, in the case of Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 455, 10 Sup. Ct. 466, 33 L. Ed. 970:

"It was held by this court in Pennsylvania Railroad Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34, 33 L. Ed. 267, in accordance with a long course of decisions both in the state courts and in this court, that a railroad corporation takes its charter, containing a kindred provision with that in question, subject

to the general law of the state and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject-matter involved; and that exemption from future general legislation, either by a constitutional provision or by an act of the Legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear with express words."

See, also, L. & N. R. R. Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298; San Antonio Traction Company v. Altgelt, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491.

It may be said, in reference to all the companies which seek to enjoin the rates of the commission, that no one of them relies upon a charter which either expressly or by implication exempts it from liability to future legislation as to the prescription of rates, and certainly the general laws of the state contain nothing which may be so construed. Hence all the companies, whether chartered by special act of the Legislature or under the general laws of the state, took their charters subject to the general law and to such changes as might be made in the general law, and subject to future constitutional provisions and future general legislation. It is unnecessary to consider the case of each plaintiff separately in reference to this question. It is deemed sufficient to observe that the claim of all of them, upon this point, is untenable. The demurrer will therefore be sustained.

18. The twenty-fifth demurrer goes to paragraph 17 of the bill. This paragraph assails, as unconstitutional, sections 5, 6, and 7 of the act creating the railroad commission.

Let it be conceded, though not decided, that the sections complained of are invalid. Still the hand of the commission should not be stayed on that account, since the act generally, which is constitutional, invests it with large powers in the matter of fixing and establishing rates. However, all these questions may be considered upon the final hearing, and the demurrer is formally overruled.

19. The twenty-sixth demurrer objects to that portion of paragraph 18 of the bill alleging that the penalties imposed by the railroad commission act are excessive and confiscatory, thereby rendering the act unconstitutional.

For the reasons assigned in the eighteenth clause of the court's conclusions, the demurrer will be overruled.

20. The twenty-seventh demurrer objects to that part of the bill which seeks to enjoin the railroad commission from ever hereafter making rates, or issuing or delivering any further tariffs, orders, or circulars, affecting the plaintiff.

For obvious reasons, not necessary to be enumerated, the demurrer is sustained. Reagan v. Farmers' Loan & Trust Company, supra.

In addition to the above the following rulings are made:

First. In the suit of the Texas & Pacific Railway Company, and perhaps in others, the defendants demur to so much of the bill as complains of reductions in the rates and charges of express companies. The demurrer is well taken, and is sustained.

Second. In all suits the rates and tariffs sought to be enjoined should be set out clearly and specifically, without confusing them with

prior rates, abandoned by the commission, or previous orders, set aside and annulled.

Third. Motions have been filed in several of the cases in the nature of exceptions. Disregarding these motions, the court has permitted, wherever necessary, the demurrers to stand as exceptions, and has endeavored to include in its rulings on the demurrers all questions that may have been raised in either mode.

Fourth. Leave is granted the plaintiffs in all suits to amend their bills.

KANSAS CITY HYDRAULIC PRESS BRICK CO. v. NATIONAL SURETY CO.

(Circuit Court, W. D. Missouri, E. D. December 24, 1906.)

No. 3,113.

1. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
   The question of the construction and validity of a bond given in conformity to the requirements of a state statute is one of general law, as to which a federal court is not controlled by a decision of the state courts, but must exercise its independent judgment.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 950–971; state laws as rules of decision in federal courts, see Wilson v. Perrin, 11 C. C. A. 71, and Hill v. Hite, 29 C. C. A. 553.]

2. PRINCIPAL AND SURETY—CONTRACTOR'S BOND TO PAY FOR LABOR AND MATERIALS—LIABILITY OF SURETY.
   The surety on a bond given by a contractor for public work, as required by law, conditioned for the payment of indebtedness for labor and materials furnished in the course of the work, is not released from liability for a claim for material because the work was not completed by the time required by the contract, and such material was furnished thereafter.

3. BONDS—CONTRACTOR'S BOND TO PAY FOR LABOR AND MATERIAL—VALIDITY.
   A bond given by a paving contractor under Gen. St. Kan. 1905, §§ 5578, 5579, which require a bond to be taken from every contractor for public work, conditioned that he shall pay all indebtedness contracted for labor or material furnished in the construction of such work, is not based on the contract between the contractor and city as a consideration, nor required for the protection of taxpayers or the public, but for the benefit of persons who may furnish labor or material, and in an action on the bond by such a person it is no defense that the contract with the city was invalid because not let on competitive bids as required by statute.

4. LIMITATION OF ACTIONS—ACTION ON CONTRACTOR'S BOND—KANSAS STATUTE.
   Gen. St. Kan. 1905, § 4890, which provides that "if any action be commenced within due time and a judgment thereon for the plaintiff be reversed or if the plaintiff fail in such action otherwise than on the merits, and the time limited for the same shall have expired, the plaintiff * * * may commence a new action within one year after the reversal or failure," as construed by the Supreme Court of the state, applies to an action on a bond given by a contractor for public work under sections 5578, 5579, of such statutes, to secure payment for labor or material furnished for such work which is required by the latter section to be commenced within six months from the completion of such work.

At Law. On demurrer to answer of defendant, National Surety Company.

This was an action on bonds given by a contractor for the paving of certain streets in Kansas City, Kan., to recover about $7,000 for

brick furnished by plaintiff and used in the work. The answer demurred to is as follows:

The defendant, National Surety Company, for its separate answer to the first cause of action in plaintiff's petition says:

(1) It denies each and every allegation in said petition made or contained, except the execution of the saving contracts and bonds mentioned in the petition.

(2) For another and further answer and defense, this defendant says that at the time of the execution of the contract between W. W. Atkin and the city of Kansas City, Kan., described in plaintiff's petition, it was provided by section 747 of the General Statutes of Kansas 1901 that before any work of the character provided for in said contract should be commenced sealed proposals therefor should be invited by the city of Kansas City, and said work should be done by contract let to the lowest and best bidder. The purpose of the said provisions of the statute was to require competition in all such work.

The Diamond Brick & Tile Company at all the times mentioned in plaintiff's petition, and for a long time prior thereto was, and now is, engaged largely in the business of manufacturing and selling vitrified paving brick for use in paving streets of cities and towns. It had the exclusive sale of all said brick manufactured by it, and it alone had the right to and did sell said brick to parties engaged in the business of paving with them streets in cities and towns. Said brick had become known as, and were generally called in the city of Kansas City and vicinity, "Vitrified Paving Brick, Diamond Brand." At all said times mentioned other kinds and makes of vitrified paving brick were manufactured and sold in the city of Kansas City and vicinity, and were used in paving streets of cities and towns, equal in all respects to the brick manufactured and sold by said Diamond Brick & Tile Company. Said other kinds and makes of brick were fully up to all the tests and standards established by the authorities of said city of Kansas City for paving brick, and were as easily obtainable in the markets of said city as said brick made by said Diamond Brick & Tile Company. Some time prior to the execution of the contract described in plaintiff's petition, and prior to the passage of the ordinance authorizing the doing of the work out of which this controversy has arisen, the Diamond Brick & Tile Company circulated and caused to be circulated among the resident owners of the lots and lands fronting upon Fifth street, a street in said city of Kansas City, between Central avenue and Euclid avenue, asking that the proper authorities of the said city cause said street to be paved with vitrified paving brick, Diamond brand, the manufacturer of said Diamond Brick & Tile Company, and procured a majority of said resident landowners to sign said petition. Its purpose in circulating and causing said petition to be circulated and signed as aforesaid was to procure the paving of said street with its brick, of which it had the exclusive manufacture and sale, to furnish such brick for such purpose, and to prevent competition as to the brick to be used in paving said street, as required and provided by the statutes of the state of Kansas, as aforesaid. Thereafter said Diamond Brick & Tile Company, in furtherance of said purpose, requested and procured the authorities of the said city to have enacted Ordinance No. 4680 of said city, which provided that said street should be paved with "No. 1 vitrified paving brick, Diamond brand," which was duly enacted. Said Ordinance No. 4680 was approved on September 11, 1901, and was entitled, "An ordinance providing for the paving of Fifth street from Central avenue to Euclid avenue." The work or improvement directed by said ordinance was of the character described in the provisions of said statute of the state of Kansas as hereinbefore referred to, and under the said provisions it was the duty of the authorities of said city to have so acted as to have had competition in making said improvements in all respects and every single detail thereof, including the materials out of which said improvement was to be constructed. Said ordinance violated said provisions of said statute by absolutely preventing all and any competition as to the brick out of which said improvement should be constructed, and in that it required absolutely that it should be of the manufacture of the Diamond Brick & Tile Company and sold

exclusively by it. After the enactment of the said ordinance said city entered into a contract with the defendant W. W. Atkin, who was solicited by said Diamond Brick & Tile Company to bid thereon, for making said improvement in pursuance of said illegal ordinance; and, in compliance therewith, said contract also provided that said pavement should be made of the vitrified paving brick, exclusively manufactured and sold by the Diamond Brick & Tile Company. The Diamond Brick & Tile Company circulated said petition and obtained the signatures of property owners thereto, requested and procured the council to enact said ordinance, and found and induced the contractor to bid on said work and obtain said contract, for the purpose of selling its brick for such work, in such manner that it would be impossible for any other kind of brick to be used, and without its active efforts to that end said work would not have been done or said contract made. By reason of the premises said ordinance and said contract are absolutely void in whole and in part, and the bond sued on herein, being founded on said contract, is also absolutely void in whole and in part. If the plaintiff sold any of the material described in its petition to the defendant W. W. Atkin, and delivered the same for the work described in the contract mentioned in plaintiff's petition, such sale and delivery were made with full knowledge of the facts hereinbefore set forth. Wherefore, having fully answered, defendant prays to be discharged with its costs.

(3) For another and further answer and defense herein, this defendant says that said contract described in plaintiff's petition, between W. W. Atkin and the city of Kansas City, provided that the work described therein should be begun within 10 days after written notice so to do should have been given to said W. W. Atkin by the city engineer of the said city of Kansas City, and that said work should be completed within 60 days thereafter. Such notice was given by said city engineer to the said W. W. Atkin on, to wit, September 15, 1902. But this defendant says that, if any of the material described in the plaintiff's petition was furnished to the defendant W. W. Atkin for said work, said material, and each and every part thereof, was, without this defendant's knowledge or consent, furnished more than 60 days after said notice was given by said city engineer to said W. W. Atkin, and more than 70 days after said notice had been given, and long after said contract had expired, and that, therefore, there is no liability on the part of this defendant on said bond. Wherefore defendant, having fully answered, prays to be discharged, with its costs.

(4) For another and further answer and defense herein, defendant says the work described in plaintiff's petition was completed before May 5, 1903, and more than six months prior to the institution of this suit, and plaintiff's cause of action, if any it had, has been barred by the provisions of section 5131 of the statutes of the state of Kansas, which provides that a suit on the bond sued on in this case must have been commenced within six months after the completion of the work.

(5) For another and further defense herein, this defendant says that at all times herein mentioned the city of Kansas City, Kan., was a city of the first class, with a population of more than 25,000 people; that by section 1 of chapter 81 of the Laws of Kansas of 1899 (Gen. St. Kan. 1901, § 730), it was provided that no resolution for the paving or repaving of any street should be valid unless a petition asking such improvement should have been ordered spread upon the journal of said city, which petition must have been signed by the resident owners of not less than one-half of the feet fronting or abutting upon such street to be improved. This defendant says that no such petition was ordered spread upon the journal in this case, nor was any legal petition ever procured for such pavement; but this defendant says that the pretended petition referred to in paragraph 2 of this answer (the allegation of said paragraph 2 being made a part hereof, as though fully incorporated herein) was fraudulent and void for the following reasons: For the purpose of procuring signatures to said petition, and to prevent competition as to the brick to be used in paving said street, as required by the statutes of the state of Kansas, as hereinbefore stated in said paragraph 2 of this answer, plaintiff and Diamond Brick & Tile Company, without the knowledge or consent of this defendant, secretly and fraudulently hired and

paid numerous resident owners of the feet fronting or abutting upon such street to sign said petition, whereby there was procured, what could not have otherwise been procured, a pretended majority of the feet fronting or abutting upon such street belonging to resident property owners. Defendant says that, without such signatures so secretly and fraudulently procured, said petition would not have contained a requisite majority of the feet fronting or abutting upon such street belonging to resident property owners. By reason of the premises said petition and the resolution, ordinance, and contract founded thereon are absolutely void in whole and in part, and the bond sued on herein, being founded on said contract, is absolutely void in whole and in part. If the plaintiff sold any of the material described in its petition to the defendant W. W. Atkin, and delivered the same for the work described in the contract mentioned in plaintiff's petition, such sale and delivery were made with full knowledge of the facts hereinbefore set forth. Wherefore, having fully answered, defendant prays to be discharged with its costs.

(6) The defendant reavers all the allegations of paragraphs 1, 2, 3, 4, and 5 hereof the same as if specifically set forth herein. This action cannot be maintained for the reason that the alleged cause of action, if it existed at all, is given by and arises out of sections 1 and 2 of chapter 179 of the Laws of Kansas of 1887, now appearing as sections 5578 and 5579 of the General Statutes of Kansas 1905, which sections provide:

"That whenever any public officer shall under the laws of the state enter into contract in any sum exceeding one hundred dollars, with any person or persons, for purpose of making any public improvements, or constructing any public building, or making repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Kansas, in a sum not less than the sum total in the contract, conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements."

"That such bond shall be filed in the office of the clerk of the district court of the county in which such public improvement is to be made or such building is to be erected; and any person to whom there is due any sum for labor or materials furnished, as stated in section one of this act, or his assigns, may bring an action on said bond for the recovery of said indebtedness: provided, that no action shall be brought on said bond after six months from the completion of said public improvements or public buildings."

But these sections make as a condition to a right of recovery that no action on the bond shall be brought unless within six months after the completion of the public improvement mentioned therein or covered thereby, and such public improvement was in this instance completed more than six months prior to the institution of this suit. Wherefore, having fully answered, defendant prays to be discharged, with its costs.

Botsford, Deatherage & Young and McFadden & Morris, for plaintiff.

Frank Hagennan, for defendant.

CARLAND, District Judge. The above cause has been submitted to the court upon the plaintiff's demurrer to the second, third, and fifth paragraphs of defendant's answer. The grounds of demurrer are that said paragraph do not allege facts sufficient to constitute any defense to the plaintiff's cause of action. There was some question at the argument as to whether the demurrer fairly raised the question of the statute of limitations, but the case by agreement of counsel has been submitted to the court on the theory that the demurrer of the plaintiff did raise the question as to whether or not plaintiff's cause of action had been barred by the statute of limitations at the time said action was commenced. The plea of the statute of limitations appears in paragraph 6 of defendant's answer, and there is no reference to said

paragraph in plaintiff's demurrer; but, as counsel have agreed in open court that the record may be amended so as to raise the question, the same will be considered on this hearing. So far as paragraph 3 of defendant's answer is concerned, the demurrer of the plaintiff thereto is sustained on the authority of Guaranty Company v. Pressed Brick Company, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242.

We will now consider the illegality of the contract or contracts entered into between W. W. Atkin and the city of Kansas City, Kan., for the paving of certain streets in said city, and as to how far the illegality of said contracts affect the contracts upon which plaintiff bases its right to recover from the defendant. In so far as the illegality of the contracts made between W. W. Atkin and the city of Kansas City, Kan., are concerned, we are bound by the decision of the Supreme Court of Kansas in the case of the National Surety Company of New York v. Hydraulic Pressed Brick Company (Kan.) 84 Pac. 1034, as the decision of this question involved the construction by the Supreme Court of Kansas of section 747 of General Statutes of Kansas 1901. But this court is not bound by the decision cited, in so far as it holds that no recovery can be had upon the contracts sued upon by plaintiff in this action, for the reason that that question is one of general jurisprudence and upon which this court is bound to exercise its independent judgment.

In the first place, we will consider the language of General Statutes of Kansas 1901, § 5130, under and by virtue of which the bonds themselves were given. It appears beyond any question that the bonds were given for the benefit of one furnishing labor or material. Section 5130 provides that the bond shall be "conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished," etc. The bonds in controversy were conditioned:

"Now, therefore, if the said W. W. Atkin shall promptly pay and discharge all labor and material bills incurred in the prosecution of said work, then the above obligation to be void, otherwise to be of full force and effect."

It would be idle to claim that a bond executed under the section of the statute referred to, or that the bonds upon which recovery is sought, would authorize the recovery of a single dollar, except for the benefit of one who had furnished labor or material, so that, when the Supreme Court of Kansas in the case cited decided that the statute of Kansas which requires competition in the letting of contracts for public improvements was passed by the Legislature of said state to protect the taxpayer and the public, it by no means followed from that decision that the statute which authorized the giving of these bonds in controversy was passed for the benefit of the public and the taxpayer. The best source of ascertaining the intention of the lawmaking power is from the language of the law itself, and the law says that section 5130 was passed for the benefit of one who furnished labor and material in the construction of public improvements. The reason for this legislation is well known. Such laws have been passed by other states and the United States for the reason that one who furnished labor or material for public improvements can obtain no security for his claim by way of liens, commonly known as "mechanics' liens." This being beyond question the purpose of the statute, what is the case before us? Plain-

tiff seeks to recover the value of certain material which it furnished to W. W. Atkin to be used by said Atkin in paving some of the streets of Kansas City, Kan., under and by virtue of certain contracts which W. W. Atkin had with said city of Kansas City. It seeks to recover this sum of the defendant, National Surety Company, for the reason that in and by the bonds, copies of which are attached to plaintiff's complaint, the defendant agreed to pay all labor and material bills incurred by Atkin in the prosecution of the work which he had contracted to do. This is the agreement which the plaintiff is seeking to enforce. This bond was not given for the faithful performance of the contract between the city of Kansas City and Atkin. The city of Kansas City was in no wise interested in whether Atkin paid his labor or material bills, and the contract between Atkin and the city of Kansas City was in no wise the consideration of the bonds sued on in this action. The section of the Kansas statute which required this bond did not intend that materialmen and laborers should be paid if the contract for public improvements was valid, and that they should receive nothing if it were void. Such a construction would place the laborer and materialmen in a position where they would have to furnish labor and material at their peril; the question whether they would get their pay or not being made to depend upon whether the contractor had for any reason entered into an invalid contract. But it is wholly beside the question at issue to force the invalidity of the contract between Atkin and the city into the present controversy. It is urged by the Supreme Court of Kansas in the case cited that the contract between Atkin and the city of Kansas City was a consideration for the contracts upon which suit is brought. This cannot be so.

Atkin by the bond which he signed agreed to pay the plaintiff in this action for every dollar's worth of material that he should furnish him. What was the consideration of that contract? Beyond all question, it was the furnishing of the material by the plaintiff and the payment therefor by Atkin. Can it for one instant be claimed that there was anything immoral, or prohibited by statute in this agreement that the plaintiff should furnish and sell its material to Atkin, and that Atkin should pay for it? How can it be claimed that this valid and lawful contract is destroyed by the fact that the contract between Atkin and Kansas City, with which the plaintiff had nothing to do, was void, not by reason of any immorality or moral turpitude, but because it was entered into contrary to the provisions of the statute of Kansas? The consideration for the contracts in controversy as between the plaintiff and the defendant surety company was the same as between the plaintiff and Atkin, with the addition that the defendant surety company required the payment of a cash premium before it would sign the bond. The simple proposition, so far as this question is concerned, is this: The plaintiff furnished material to Atkin. Atkin agreed to pay for it. The surety company agreed that, if Atkin did not, it would, and the consideration of this agreement to do so was the furnishing of material by plaintiff to Atkin and the payment of the usual premium to defendant for signing such bonds, and in the opinion of this court that contract stands untainted and in full integrity, regardless of the invalidity of the contract between Atkin and the city of Kansas City. It is urged

that the plaintiff knew of the facts which are set up in the answer at the time it furnished the material sued for. I do not think this has anything to do with the present controversy. There was nothing immoral, contrary to public policy, or public statute in the plaintiff selling brick to Atkin, even if it knew the facts set up in the answer. And it is very doubtful whether a citizen of the state of Missouri is bound to know a certain state of facts would render a contract void under the laws of Kansas, especially before the decision of the Supreme Court of Kansas declaring that they did. It results from the foregoing that in the opinion of this court the legality of the contract between Atkin and Kansas City cannot be urged as a defense by the surety company in this action.

We will now consider the statute of limitations. By section 4280, 1 Rev. St. Mo. 1899, it is provided:

"Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be complete defense to any action thereon, brought in any of the courts of this state."

The statute of Kansas hereinbefore referred to, which authorized and provided for the giving of the bonds in controversy, provides that no action shall be brought on said bond after six months from the completion of said public improvements or public buildings. Another statute of Kansas, being section 4890 of the Compilation of 1905, provides as follows:

"If any action be commenced within due time and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than on the merits, and the time limited for the same shall have expired, the plaintiff, or if he die and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

The question before us is whether the last-named section applies to the law providing for the giving of the bonds in question and the limitation therein specified. If so, this action is not barred, but if, on the contrary, it does not apply to said limitation of six months, then the plaintiff's action is barred, unless the bonds can be held good as common-law bonds, independent of the statute. Conceding that the bonds in question are statutory bonds, the plaintiff did commence its action in the state of Kansas within the six months limited by law for the bringing of the same, and after obtaining judgment of the trial court the same was reversed and remanded by the Supreme Court of Kansas, and the plaintiff then instituted this action in this court within the time limited by said section 4890. The court is of the opinion that under the decisions of the Supreme Court of Kansas this action is not barred. In the case of Seaton v. Hickson, 35 Kan. 663, 12 Pac. 22, the Kansas Supreme Court held that section 23 of the Kansas Code, which is the same as section 4890 herein mentioned, applied to actions brought in Kansas under the mechanic's lien law. To the same effect is the case of Hobbs v. Spencer, 49 Kan. 769, 31 Pac. 702, which was an action in regard to a tax title under a statute of Kansas which provided a remedy and limited the time within which the suit could be commenced. The Supreme Court of Kansas held that said section 23 was applicable. In the case of Becker v. Railway Co., 70 Kan. 193, 78 Pac. 408, decided in 1904, the Supreme Court of

Kansas recognized the doctrine declared in Seaton v. Hickson, supra. This is the last expression of the opinion of said court which has been called to the attention of this court, and it would seem that the Supreme Court of Kansas has in cases of this kind applied the provision of said section 23 uniformly. It is claimed, however, that the case of Rodman v. Railway Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704, is decisive of the question now under discussion, and that that decision compels a holding by this court that the plaintiff's claim is barred. The court does not so view the decision last mentioned. The learned judge who delivered the opinion held that, where a statute creates the right of action itself and prescribes in what time the action shall be brought, the limitation is a condition of the right, and one who does not bring himself within the provision of the statute cannot maintain his action; but it is also said in the opinion of the court as follows:

"A limitation upon the time in which a pre-existing right of action may be exercised is governed by the general statutes of limitations, and in consequence falls within the saving provisions of section 23, above quoted."

No reference is made in the opinion of the court in the last-mentioned case to the other cases in the Supreme Court of Kansas, hereinbefore cited, and this court is of the opinion that it was not the intention of the Supreme Court in the Rodman Case to change the general rule prevailing in the state. In the Rodman Case the right of action was created where none existed before, and it might well be held that the limitation expressed therein was a condition to the exercise of the right, but the law of Kansas authorizing and requiring the giving of the bonds in controversy created no new right of action, within the meaning of the phrase as considered in the Rodman Case. A right of action upon a bond by the obligee against the obligor existed long before the passage of the law in question. In the law which authorized the bonds nothing is said about a right of action. The law simply authorized and required the bonds to be given. The law no more created a new right of action than do parties create a right of action when they enter into contracts every day. The right of action by obligor against obligee existed long before the statute in question and the limitation in the statute referred to this pre-existing right. The Rodman Case is, when carefully considered, direct and controlling authority that said section 4890 is applicable to the law authorizing the bonds, because that case expressly holds that, where the limitation is upon a pre-existing right of action, then section 23 or 4890 applies. The idea entertained by the court may be illustrated thus: I have no contract with A. to-day, consequently I may not sue him on contract. To-morrow I make a contract with A. which is subsequently violated by him. I have my right of action, but it was not given me by the contract, and it is immaterial for this purpose whether I entered into the contract voluntarily or by command of a statute. My cause of action arises from the violation of the terms of the contract. My right of action is as old as the common law.

The demurrer will be sustained.

BROWN v. PEGRAM et al.

(Circuit Court, E. D. Pennsylvania. November 30, 1906.)

No. 19.

1. JUDGMENT—EQUITABLE RELIEF—PLEADING—CERTAINTY.
A bill by a judgment debtor against the judgment creditor and other defendants, which alleges that the creditor will hold a certain part of the amount collected on the judgment in trust for his codefendants or one of them, and that complainant has a set-off against all and each of such codefendants, is not insufficient for uncertainty because it does not allege which one is the owner of the beneficial interest in the judgment, but that complainant has no knowledge as to such fact, and prays discovery in respect thereto.

2. EQUITY—PLEADING—MULTIFARIOUSNESS.
A bill by a judgment debtor to restrain the enforcement of a part of the judgment, on the ground that the judgment creditor holds the same in trust for his codefendants, each of whom is indebted to complainant, is not multifarious because different items of set-off are alleged, since they constitute no part of the cause of action, which is the right to enjoin the collection of the judgment to the extent that it is not beneficially owned by the judgment plaintiff.

3. JUDGMENTS—SUIT IN EQUITY TO ENJOIN ENFORCEMENT—GROUNDS.
A judgment debtor is not debarred from the right to maintain a suit in equity to enjoin its collection on an allegation of set-offs against the beneficial owners, which would render its enforcement inequitable by the fact that such set-offs are legal demands or unliquidated, especially where the defendants against whom they exist are nonresidents of the United States, or are insolvent.

4. DISCOVERY—IN EQUITY—JURISDICTION OF FEDERAL COURT.
Where the subject-matter of a suit in a federal court is clearly within the jurisdiction of a court of equity, the complainant is entitled to discovery in respect to any matters relevant and necessary to his case.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 10.]

In Equity. On demurrer to bill.
See 143 Fed. 701.

Burr, Brown & Lloyd, for complainant.
Dickson, McCouch & Glasgow, for Pegram.

HOLLAND, District Judge. Thomas Pegram, one of the defendants in this bill in equity, brought suit in this court against Arthur K. Brown, receiver of the American Alkali Company (hereinafter called the "Alkali Company"), the plaintiff in this bill, and recovered judgment against him for $52,000, with interest, on two notes issued by the alkali company before it became insolvent, and which were held by him as collateral security for an indebtedness which he had against the Commercial Development Corporation, Limited (hereinafter called the "Development Company"), the payee of the notes. Prior to the time that judgment was obtained for this amount, Thomas Pegram was paid about $32,000 on account of his claim against the development company, leaving a balance due him of about $20,000, with interest, for which he holds the judgment, and claims to be entitled to collect the entire amount of said judgment, to wit, $52,000, with interest, out of which the balance due him is to be paid, and the surplus, amounting

to about $30,000, he, the said Pegram, claims to hold for the benefit of the development company or A. R. Harvey or Ruth L. Harvey, against whom Brown, the receiver of the alkali company, plaintiff in this case, has claims, which the bill avers he is entitled to set off against any interest either may have in the surplus of this judgment over and above what is necessary to pay the amount yet due Pegram. The set-off which the receiver claims to have against the development company and the Harveys, for whom Pegram as trustee will hold the balance of the judgment when collected, according to the allegations in the bill, arises out of the following state of facts: The alkali company was a corporation organized under the laws of the state of New Jersey in 1899, with an authorized capital of $30,000,000, of which $24,000,000 was to be full-paid common stock, consisting of 480,000 shares, par value $50, and $6,000,000 preferred stock, consisting of 120,000 shares, par value $50. One W. W. Gibbs became the president of the company, and in the spring of 1899 he, representing the alkali company, entered into an agreement with the development company, which was represented throughout the transaction by A. R. Harvey, for the purchase of certain patent rights owned by the development company, for which Gibbs agreed, on the part of the alkali company, to pay the development company, in addition to the common stock it was to receive, $1,000,000 in cash, which sum was to be raised by subscription to the preferred stock of the alkali company. The $6,000,000 of preferred stock of the alkali company was expected to be subscribed for and issued, upon which the subscribers would be required to pay 20 per cent. of the par value on the 120,000 shares, which would net the company the sum of $1,200,000. Of this sum it was intended to pay $1,000,000 to the development company for its patents, and $200,000 was to be used by the company for the construction of a plant to develop the commercial value of this patent process. Each subscriber to the preferred stock under the subscription agreement was only liable in case the whole of the 120,000 shares of preferred stock was subscribed for, and at one stage of the transaction it became clear that the public would not subscribe for all of this preferred stock; and, in order that it should all be taken, in accordance with the subscription agreement, A. R. Harvey subscribed for a large number of shares, either for himself or the development company or Ruth L. Harvey. Of these shares (the exact number being unknown to the plaintiff) 7,000 were subscribed for by one James Allen, who was a clerk in the office of the brokers who were representing the development company or A. R. Harvey or Ruth L. Harvey in the transaction. James Allen had no interest in these shares of stock only as a holder for the real owner. Subsequently, the cash payment due the development company for these patents was reduced by the amount which should have been paid on this pretended subscription by Allen. The alkali company, after consummating this agreement, became insolvent, and on September 9, 1902, receivers were appointed, and the plaintiff, surviving receiver, in obedience to an order of the Circuit Court of the United States for the District of New Jersey, on September 19, 1905, levied an assessment of $2.50 per share upon the holders of the preferred stock, which assessment upon the 7,000 shares held by Allen for the

development company or the Harveys amounts to $17,500, which is now payable; and it is claimed in the bill that this is a proper set-off against the interest which the development company or either of the Harveys may have in the judgment obtained against the receiver by Pegram. It is further alleged in the bill that these notes, amounting to $50,000, upon which Pegram brought his suit against the alkali company, were executed by the alkali company in favor of the development company as part payment for the $1,000,000 cash which the development company was to receive for these patents, and that the development company assigned these notes as collateral security to Pegram for a loan of $50,000, and that after the assignment the development company became insolvent, and, as a result, was unable to pay the entire amount of the loan at maturity, but it did pay, through its receiver, on account of this loan, about $30,000. This payment was made prior to the time that suit was brought in this district by Pegram against the alkali company. Prior to the payment, however, A. R. Harvey and Ruth L. Harvey had personally guarantied the payment of the entire judgment, and Pegram now claims a right to the whole amount of the judgment of $52,000, claiming to hold the balance over and above an amount sufficient to pay what is due him for the benefit of the development company or A. R. Harvey or Ruth L. Harvey, whichever may be entitled thereto. According to the allegations in the bill, it is further claimed that the receiver of the alkali company has an additional set-off of $529,500 against any interest which the development company or the Harveys may have in the Pegram judgment, which arises out of the fact that A. R. Harvey, for the development company, entered into a secret and fraudulent agreement with Gibbs, who was then president of the alkali company, by which Gibbs was to receive $529,500 out of the $1,000,000 cash which was agreed should be paid for the patents of the development company; so that, instead of the development company being paid $1,000,000 in cash for the patents which it sold to the alkali company, Harvey, by a secret and fraudulent agreement, permitted Gibbs to retain this large amount, which fraudulent payment to Gibbs by Harvey for the development company was without the knowledge of the alkali company, and a fraud upon it, for which the development company and A. R. Harvey are liable to the alkali company, and is now claimed to be a set-off against any interest which the development company or Harvey may have in the Pegram judgment. It is further averred that Ruth L. Harvey, the wife of A. R. Harvey, has the burden of proving that any interest she may have in the judgment was not derived through her husband.

The bill prays: (1) The defendants, Pegram, A. R. Harvey, Ruth L. Harvey, and the development company be compelled to answer every allegation of the bill. (2) That the court fix the amount due Pegram on the judgment. (3) That the plaintiff be permitted to set off the amount of the assessment upon the 7,000 shares of stock and the amount fraudulently paid by A. R. Harvey and the development company to Gibbs against any interest the development company or the Harveys may have in the Pegram judgment.

The defendants filed a demurrer to this bill, alleging that the plain-

tiff is not entitled to the several reliefs which he prays, for reasons which can be considered under four different heads.

First. The facts are not averred with sufficient certainty, in that the essential facts in paragraph 6 of the plaintiff's bill are not averred by the plaintiff of his own knowledge or upon information and belief, and he expressly admits that he is ignorant of who may be the beneficial owner of such interest as Pegram may not have in such judgment. It is true that the facts stated in paragraph 6 are not averred upon the knowledge, information, or belief of the plaintiff, and that they are essential to maintain the suit. The plaintiff states as a fact that Pegram, at the trial of the suit against the alkali company, in which he obtained the judgment of $52,000, testified to certain facts, to wit: that he had loaned the development company $50,000; that he had taken, among other collateral the notes of the alkali company; that he had received from the development company 80 or 90 pounds on account of his claim; that A. R. Harvey and Ruth L. Harvey had personally guarantied the loan of $50,000 to the development company; and that he had received another payment on collateral amounting to 6,000 pounds. Thus we have the allegation in the bill that Pegram testified to these facts in the suit upon which he recovered this judgment, and, following this, the plaintiff, in paragraph 7, makes an unqualified averment of the facts testified to by Pegram in paragraph 6, and further avers that Pegram holds the balance of the said claim and judgment as trustee for the said development company, A. R. Harvey, or Ruth L. Harvey, all defendants in the bill, depending upon considerations which are not known to the plaintiff, and which he has no means of ascertaining, but which he is bringing this bill in order to have the court ascertain and pass upon. Taking paragraphs 6 and 7 together, there is no uncertainty about the allegation of these essential facts. The averments are clear and positive as to the amount Pegram loaned to the development company; what collateral notes of the alkali company were taken as collateral security therefor; the amounts paid on account, and by whom; and the amount still due Pegram on his judgment, and that he holds the balance of this judgment as trustee of the other defendants; but the plaintiff is unable to say which of these defendants has the beneficial interest in the judgment. We do not think it essential that the plaintiff should aver positively which of the defendants is the owner of the beneficial interest in the judgment, where he has alleged facts showing the intimate connection of all, and the circumstances are such that he cannot know with certainty; but in paragraph 8 the plaintiff does allege that he has a just set-off against all of these defendants mentioned in paragraph 7 who may have an interest in the judgment. Which one it may turn out to be the plaintiff is unable to say, but he prays that all the defendants may answer these allegations fully, and whichever one shall finally be determined to be the beneficial owner of the surplus in the judgment, he has a set-off against that one. Less certainty is required concerning facts upon which a discovery is sought from the defendants. Foster's Federal Practice, § 67; Towle v. Pierce, 12 Metc. (Mass.) 329, 46 Am. Dec. 679.

The demurrer admits the truth of the allegations in paragraph 7, which is an averment of the facts which it is alleged in paragraph 6

was testified to by Pegram in the suit to obtain the judgment. Here we have the positive allegation that the plaintiff has a valid set-off against three parties, and that one of these parties is entitled to the surplus in the Pegram judgment, but that the evidence as to the one so entitled is in the possession of the defendants. This is made to appear in the bill, with proper technical averments, showing a necessity for a discovery.

We think the plaintiff has stated these essential facts with the certainty the circumstances would permit. These allegations set out the case intended to be made with certainty, and this is sufficient. Story's Equity Pleading, § 242; Foster's Federal Practice, § 69.

Second. It is urged that the bill is multifarious, which consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which may be the foundation for a separate bill, and that in this bill the first cause of action set out is one at law for an assessment on stock, and the second a claim sounding in tort for the payment of secret commissions to Gibbs by the development company and A. R. Harvey. The defendants mistake the items of set-off for the cause of action.

There is only one cause of action set forth. This single cause of action is the alleged fact that Pegram intends to collect this judgment from the plaintiff, when it would be unjust and inequitable that he should do so, because of the fact that he insists upon a right to collect the most of it for other parties, who owe the plaintiff upon various claims, which should be liquidated before they are entitled to any portion of their claim in the judgment. The cases cited in the plaintiff's brief in support of this objection to the bill, to wit, Lewarne v. Mexican International Improvement Company (C. C.) 38 Fed. 629; Holton v. Wallace (C. C.) 66 Fed. 409; First National Bank of Sioux City v. Peavey (C. C.)75 Fed. 154; New Hampshire Saving Bank v. Richley, 121 Fed. 956, 58 C. C. A. 294—are cases where the plaintiff in the bill joins distinct causes of action or distinct grounds of relief. As an example, in the case first cited, the bill brought by the stockholders against the corporation and directors for an accounting sets forth in three distinct and separate causes of action (1) an illegal issue of preferred stock; (2) a breach of trust on the part of the directors in fraudulently issuing full-paid stock for a nominal consideration; and (3) the illegal purchase by them of a certain lottery grant. Of this bill it can well be said that it was multifarious, and it was dismissed; but in the case at bar there is only one ground for the relief sought, and that is that the plaintiff shall be protected against the collection of this Pegram judgment by parties who now owe the plaintiff company. The multiplicity of claims which the plaintiff alleges he is entitled to set off against these parties who are endeavoring to collect the judgment does not make the bill multifarious. Nor can the bill be said to be multifarious because of a misjoinder of defendants. They are all interested in opposing the relief prayed. The rule in this regard was thus stated by Sir John Leach:

"In order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the cause, but whether

the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole object." Foster's Federal Practice, § 73.

The single purpose of this bill is to restrain Pegram from collecting this judgment partly for parties against whom the plaintiff has several items of set-off, and the fact, if it should so turn out, that each defendant is not interested in each item of set-off, does not entitle him to prevail in an objection to the bill that it is multifarious for that reason; nor do the prayers of a bill make it multifarious when the object of the bill is single. Mills v. Hurd (C. C.) 32 Fed. 127.

Third. The next objection is that the bill does not state a case which entitles the plaintiff to equitable relief, because he is, in effect, seeking, first, to recover an assessment on stock against an alleged subscriber, and, second, to recover judgment in an action of tort, and to set off one or both of these two different choses in action against the judgment. It is claimed the plaintiff is prohibited by the judiciary act of 1789 (Rev. St. § 723 [U. S. Comp. St. 1901, p. 583]), from pursuing his remedy in a court of equity, and that the defendants are entitled to a trial by jury. There might be some force in this objection if the primary object of this bill was to collect an assessment upon stock, and to recover damages upon an action of tort against the defendants. In the enforcement of such obligations debtors are entitled in the United States courts to a trial by jury in an action at law where the amount to be recovered is $20 or more. The purpose is to restrain Pegram, one of the defendants, from collecting a judgment in which the other defendants have an interest, and against which interest the plaintiff claims to have a set-off, which arises out of a liability on the part of these defendants for an assessment on stock and damages in an action of tort. The plaintiff has the right to invoke the power of a court of equity to relieve him against the collection of a judgment which in justice and good conscience should not be collected.

Justice Jackson, in Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 615, 14 Sup. Ct. 715, 38 L. Ed. 565, says:

"It is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing. Illustrations of these general principles are found in the cases of Leeds v. Marine Ins. Co., 6 Wheat. 565, 5 L. Ed. 332; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; Knox County v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870."

The plaintiff being entitled to equitable relief against an unjust enforcement of this judgment, the fact that the ascertainment of amount due on an assessment of stock and the liquidation of an unliquidated claim for damages in an action of tort, as items of set-off are involved, cannot defeat the plaintiff's right to maintain his bill, because the defendants would have a right of trial by jury if the sole object of the

action was either the collection of the assessment on the stock or a suit for the action of damages. Nor is it a valid objection that the plaintiff cannot set off an unliquidated claim in a proceeding of this kind. Farmers' Bank v. Penn Bank, 2 L. R. A. 273 (note); Fidelity Trust Co. v. Merchants' Bank, 9 L. R. A. 108 (note). This point has been passed upon by the Supreme Court of the United States in Rolling Mill Co. v. Ore & Steel Co., supra, wherein it is said, on page 615 of 152 U. S., on page 715 of 14 Sup. Ct., 38 L. Ed. 565:

"Cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice."

And again, it is held in the same case that the decided weight of authority is to the effect that the insolvency and nonresidence of the party against whom the set-off is claimed are grounds for equitable interference. In the case at bar the parties are all nonresidents of the United States, and one of the parties (the development company) is insolvent.

Fourth. The only other matter we need notice is the objection that a bill for discovery cannot be maintained in a federal court where the only ground for equitable relief appears to be discovery of evidence for the enforcement of purely legal demands. We have shown that the plaintiff's bill makes a case of which a court of equity clearly has jurisdiction. Where the subject-matter of the suit is clearly within the jurisdiction of a court in equity for redress, and the relief prayed is such as the plaintiff is entitled to receive in this court, he is permitted to have all the discovery which is relevant and necessary in aid of the relief his bill entitles him to receive. Story's Equity Pleadings, § 289; Foster's Federal Practice, p. 233.

The demurrer is overruled.

THE NONPARIEL.

THE WILLIAM HENGERER.

(District Court, W. D. New York. September 7, 1905.)

1. CANALS—CONSTRUCTION OF BRIDGES—AUTHORITY OF STATE.
   A state has complete power over navigable water courses within its boundaries, and may authorize and supervise the construction of bridges over public canals or other waterways, subject, however, to the power of the federal government to remove unnecessary obstructions to navigation.

2. SAME—RAILROAD BRIDGE—OBSTRUCTION OF NAVIGATION.
   A railroad company, although having the right under state authority to erect an abutment and pier for a bridge over a public canal, if it maintains the same so as to create hidden or dangerous obstructions to navigation and to cause injury to crafts rightfully using the canal, is liable for such injury.

3. SAME—LIABILITY FOR INJURY TO VESSEL.
   A railroad company, which maintained a bridge over the Erie Canal, with piers resting on submerged cribs extending beyond the piers on the canal side, which were not protected or marked in any way to show their location, *held* liable for the injury of a canal boat and the damage to her

cargo resulting from her collision with such crib, which was not apparent to her master, who exercised ordinary skill and care in her navigation.

4. SHIPPING—CARRIER AS BAILEE—SUIT TO RECOVER FOR DAMAGE TO CARGO.
A carrier by water of merchandise is a bailee, and has a special property therein which entitles him to maintain a suit for its loss or injury in behalf of all parties in interest, and such right is not defeated by the fact that the loss has been paid by an insurer.

5. SAME—USE OF TRADE-NAME IN CONTRACT OF AFFREIGHTMENT.
The fact that the owner of a vessel is doing business under a fictitious or trade name, and that contracts of affreightment are made in such name, will not defeat his right to maintain an action in his own name to recover for damage to a cargo.

In Admiralty.

Clinton & Clinton, for libelant.
Pooley & Spratt and John K. White, for claimant.
Harvey L. Brown, for canal boats.

HAZEL, District Judge. This proceeding was instituted against the claimant, a railroad corporation, to recover damages sustained by the libelant in consequence of a collision in the Erie Canal of the canal boat Nonpariel with a submerged wooden crib surmounted by a pier. Such pier or abutment, together with several others, supported the railroad bridge of the claimant across said canal and adjacent waters of Tonawanda creek. The mishap occurred at about 1:30 o'clock a. m. on May 14, 1901, at Tonawanda, N. Y., while the Nonpariel was being pushed by the steam canal boat William Hengerer, which also had in tow two other canal boats not involved in this controversy. The canal boats named were brought in on petition of claimant under admiralty rule 59. They were securely lashed together tandem fashion, and were proceeding westwardly in the Erie Canal, bound for Buffalo, N. Y. The weather was favorable, excepting a slight haze, which, however, did not obstruct the view of the commandant of the tow and in no way contributed to the accident. About 1,000 feet easterly of the abutments referred to, there is a bend in the canal, from which point the piers of the bridge can be plainly seen. The distance between the towpath and the abutment with which the Nonpariel collided is about 70 feet. On the night in question the master of the tow stood watch on the Nonpariel. From the time of turning the bend in the canal his ability to observe objects in his course became impaired and obscured by reason of the glare from strong reflector lights upon an approaching canal boat and scow drawn by horses on the towpath side of the canal. Immediately upon seeing such boats, which were proceeding eastwardly about 50 feet from the canal bank, and to keep clear of them, the speed of the Hengerer was reduced from 3 to 2 miles per hour and her helm ported; the tow going starboard toward the berm bank. Soon afterward, while proceeding in the canal and creek, the master of the tow again altered his course to port. He was then approximately 60 or 75 feet from the abutment and heading toward it. He was unable to clear the submerged crib upon which the abutment rested, and accordingly the Nonpariel collided with it and stove a hole in her bow. The injured boat was 98 feet long, 17 feet 6 inches

beam, drawing 6 feet of water, and was steered by the rudder on the Hengerer. Directly after the impingement she sunk to the bottom of the canal and her cargo of sugar was extensively damaged. The submerged cribbing extended in an easterly direction toward the approaching boat about 6 feet beyond the end of the pier, and upon the southerly or canal side of the pier it projected about 1 foot.

The navigability of the creek as a separate waterway or as a part of the Erie Canal is in sharp conflict. Evidence was given tending to show that Tonawanda creek was a navigable stream, though in different parts near the place of collision its waters were concededly shallow. Passing canal boats did not navigate on the northerly side of the pier, but invariably remained in the canal, on the southerly side thereof. Capt. Kill, master of the tow, a competent navigator of canal boats, was thoroughly familiar with the bridge, the abutments spanning the canal and creek, and their distances from the canal bank. The facts show that the glare from the lights on the approaching canal boats did not prevent him from seeing the towpath, yet he was unable, on account thereof, to see the abutment until close to it. As he neared the bridge, the moving reflector lights, which were then west of the abutment, became brighter. Although proceeding cautiously, he was unable to plainly observe objects in his pathway until the Nonpariel reached a point about 60 or 75 feet distant from the pier. He endeavored to avoid the collision with the abutment by a seasonable maneuver of his helm, and probably would have cleared the same, had not its crib extended about 1 foot into the canal beyond the invisible bank. The contention of claimant that the injury to the canal boat was sustained solely on account of bad seamanship is not supported by the proofs.

Libelant contends, inter alia, that, as the waters of Tonawanda creek were canalized, such creek was a navigable stream, within the legal definition of that term, and the erection of the abutments in question was presumptively illegal and a public nuisance. The principle of law governing this contention is quite clear; but, as this action was not brought to remove objectionable piers and bridges, the legal navigability of Tonawanda creek is not strictly necessary to a decision of this controversy. Assuming Tonawanda creek, however, to be public waters of the United States, it is nevertheless shown by the evidence that in canalizing the same a well-defined channel for the safe passway of canal boats was established. Conceding that Congress did not authorize the construction and maintenance of the bridge and pier in question, and that they were not erected in accordance with federal supervision, the evidence of claimant, nevertheless, indicates that the state exercised authority and control over the waters in question. It is incontrovertible that the state has complete power over navigable streams and water courses within its boundaries, and it may authorize and supervise the construction of bridges over canals, rivers, and waterways within its limits, reserving, however, to the federal government the power to remove unnecessary obstructions to navigation. Escanaba v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; Transportation Company v. Parkersburg, 107 U. S. 698, 2 Sup. Ct. 732, 27 L. Ed. 584; Willson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412. The pier

in question was erected by authority of the general railroad law of the state and by express permission of its officers having authority in the premises. Whether such permission was properly exercised, or whether the abutment endangered safe navigation, is a proposition with which we are principally concerned. If, by erecting an abutment or series of abutments to support a bridge, the waterway or channel is made unsafe, and vessels are hindered or obstructed in their navigation, then by reason of such hindrances or interference, if unexplained, a liability is established. Such is the holding of the cases. Blanchard et al. v. Western Union Telegraph Co., 60 N. Y. 510; Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; Vessel Owner's Towing Co. v. Wilson et al., 63 Fed. 626, 11 C. C. A. 366; Harrison v. Hughes, 125 Fed. 860, 60 C. C. A. 442; The Modoc (D. C.) 26 Fed. 718; Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 271, 59 C. C. A. 289.

So that in this case the claimant railroad company, though having the right to erect the abutment and cribbing, must nevertheless maintain the same so as not to create hidden or dangerous obstructions in navigation or to cause injury to crafts rightfully using the canal. From the proofs it is evident that the cribbing or caisson, as already stated, projected a submerged ledge or step in the creek and also in the canal. It was the plain duty of claimant to safeguard such obstruction, which endangered safe navigation, or to distinctly mark the place by spring piling or otherwise as would afford ample protection to boats lawfully navigated in the ordinary manner. Although acquainted with the channel and its surroundings, the master of the tow did not know of the existence of the submerged obstruction. He had frequently passed under the bridge and alongside of the abutment; but, its dangerous character not being apparent, he cannot be held in fault. The Pierrepont (D. C.) 42 Fed. 687; The James A. Garfield (D. C.) 21 Fed. 474; Wilson v. Charleston Pilots' Ass'n et al. (D. C.) 57 Fed. 227. He was bound to exercise ordinary skill and diligence in the management of the tow, and the evidence does not disclose the omission of this obligation. If the abutment had been properly guarded, and marked or illuminated to give warning of danger, his negligence or concurring negligence probably would be perceivable.

Claimant contends that the character of the hole in the bow of the Nonpariel, considered in connection with the testimony as to her distance from the abutment and from the towpath, discloses that she did not strike the projection of the cribbing in the canal, but that in fact she came in contact with the projection which extended into the creek outside the canal line, and hence the primary cause of the collision is attributable to the navigation of the tow out of her course. This contention, however, is not persuasive. There was an abundance of water in the creek just outside the canal line at the point where the pushing steam canal boat ported her helm, and it is unimportant whether the impact was in the creek, close to the canal, or actually in the canalized portion of the stream. The claimant must be held wholly in fault, inasmuch as the evidence shows that the extention of the cribbing and failure to give warning thereof was the proximate cause of the dis-

aster. The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84.

I have considered the testimony of the witness Knight, and as to boat clearances in the month of May down to and including the date of collision. Such evidence, it is contended, is corroborative of the assertion that no canal boat and scow, such as described by witnesses for libelant, passed eastwardly at the time of the collision, and accordingly the claim that Capt. Kill was blinded by the glare of light is a pure fabrication. The evidence of Kill, master of the tow, and of Becker and Loughlin, two of the crew, is to the effect that a canal boat and scow with powerful reflector lights passed eastwardly on the opposite side of the canal. Such positive and direct testimony of witnesses who were in a position to accurately observe the occurrence is entitled to more credence than that of the witness Knight, who stood on a bank 300 feet distant, and whose testimony is purely negative. 3 Greenleaf on Evidence (6th Ed.) § 375; The Alabama (D. C.) 114 Fed. 214.

Neither, under the circumstances, would it have been prudent for the Hengerer to back her engine or for the Nonpariel to drop her anchor. To reverse the momentum of the tow, despite her slow speed, undoubtedly would have resulted in losing steering control, and probably with more certainty in disaster.

The propositions that libelant has no authority to maintain this action, on the ground that concededly the damages have been paid by the insurers of the cargo, and, further, that the business of the libelant was conducted under the trade-name of American Transit Company, are not thought to be of sufficient importance to warrant dismissing the libel. It is uniformly held that in a contract of affreightment, such as considered here, the party undertaking the carriage of merchandise or its transportation by water from one point to another is a bailee and has a special property therein, and on account of his interest in the property carried may bring an action against a wrongdoer to recover damages for its destruction or spoliation. Another action by the cargo owner or insurer to recover for the loss is not permitted, where the damage has been satisfied or the wrongdoer has been released from liability. Payment by the tort-feasor to the libelant of the damages sustained by reason of the injury would be an effectual bar to any further recovery arising out of the same cause of action, either by the cargo owner or the insurer. The Jersey City, 51 Fed. 527, 2 C. C. A. 365; Hardman v. Brett (C. C.) 37 Fed. 803, 2 L. R. A. 173. In The Commander in Chief, 1 Wall. 51, 17 L. Ed. 609, it was held that "undoubtedly all persons interested in a cause of collision may be joined in the libel for the prosecution of their own claims and the protection of their own interests," and that other persons interested in the recovery may petition to intervene for the protection of their interest at any time before the fund is actually distributed and paid out of the registry of the court. The Propeller Monticello v. Mollison, 17 How. 152, 15 L. Ed. 68; The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993; City of Chicago v. Pennsylvania Co., 119 Fed. 504, 57 C. C. A. 509. The cases cited are applicable, and decisively negative the point that payment of the loss by the insurance company prevents recovery by the shipper or carrier.

In the case of Wood v. Erie Railway Co., 72 N. Y. 196, 28 Am. Rep. 195, it was decided by the New York Court of Appeals that the fact that an owner and shipper of property is doing business under a fictitious or trade name is no defense in an action by the owner for damage to such property while in transit. Hence it is clear, even though the contract of affreightment was made in the name of the American Transit Company, the undisputed evidence being that libelant transacted business under that name, that the objection urged is not such as to conclude the prosecution of this action in the individual name of libelant. In any event, no harm will result in allowing an amendment to the libel setting forth the fact that the business was conducted under the trade-name mentioned. Permission to so amend being requested in libelant's brief, it may be considered as granted. Benedict on Admiralty, § 483.

Evidence was given showing payment by libelant to the cargo owners of the amount of $19,106.74 in full of their damages. The damaged cargo was sold by libelant at auction for $5,000, and after paying expenses, as well as allowing for loss of freight, there remained an actual loss of $15,520.51. This amount libelant is entitled to recover, with interest from the 14th day of May, 1901.

A decree may therefore be entered against the New York Central & Hudson River Railroad Company, which alone is deemed in fault for the collision, and dismissing its petition to bring in the canal boats Nonpariel and William Hengerer, with costs.

PERKINS v. HENDRYX et al.

(Circuit Court, D. Massachusetts. December 11, 1906.)

No. 1,752.

1. EQUITY—BILL OF REVIEW AGAINST PARTNERS—NECESSARY PARTIES.
   To a bill in equity in the nature of a bill of review to vacate a decree in favor of a partnership, where the partnership has been dissolved and one of the partners has died since the decree was entered, his administrators are substantial, but not necessary, parties, and where they cannot be brought in because out of the jurisdiction the court will not for that reason dismiss the bill, but will permit the suit to proceed against the other partners.

2. SAME—VACATION OF DECREE—MISTAKE.
   A decree in equity dismissing a bill, entered by mistake on bill and answer, when, in fact, the case had not been set down for hearing on bill and answer, was without jurisdiction and void, and the complainant is entitled to have the same vacated on the filing of a bill in the nature of a bill of review, and to a hearing on the merits without regard to the lapse of time, where there has not been such laches on his part as to debar him from such relief.

In Equity.

John Mc C. Perkins, pro se.

L. L. Scaife and Dwight L. Fullerton, for defendants.

HALE, District Judge. This is a bill in equity in the nature of a bill of review. The original case was heard on bill and answer. On March

31, 1888, a decree was entered dismissing the bill. The complainant now seeks to have that decree vacated, upon the ground that the court was without jurisdiction to make the decree, for the reason that the case was, in fact, never set down for hearing on bill and answer. The present bill sets out all the material proceedings upon the original bill down to July 21, 1885, with copies of the pleadings and docket entries attached and made a part of the bill. Among these entries is the following:

"July 21, 1885, answer to bill amended so as to become a bill for relief, filed. Heard before Colt, J., on bill and answer."

The bill sets out the full decree dismissing the bill. The bill, among other things, contains this prayer:

"Your complainant prays that the decree of dismissal of March 31, 1888, may be set aside and vacated because the court had no jurisdiction to entertain the submission on the bill and answer of July 21, 1885."

The theory of the complainant is that the court was absolutely without power to hear and determine the case on the bill and answer, in the absence of a submission; that all proceedings subsequent to such determination of the case were null and void; that the decree entered on March 31, 1888, was not merely voidable, but absolutely void; and that no lapse of time can give effect to a void decree.

1. The respondents urge that the bill should be dismissed for want of necessary parties. The bill alleges the defendants to be as follows:

"Andrew B. Hendryx, a citizen of New Haven, in the state of Connecticut, and Nathan S. Johnson, a citizen of Waverly, in the state of New York, the surviving members of the firm of Andrew B. Hendryx & Co., formerly doing business in New Haven, Conn., Lockwood Hotchkiss, the third member of the firm of Andrew B. Hendryx & Co., the original defendants in this suit, having deceased on January 31, 1903, in Derby, Conn.".

The defendants now say that the bill should be dismissed, because the administrators of the deceased partner, Hotchkiss, are indispensable parties. The question is whether this bill of review can be brought against the surviving partners alone, or whether it must be dismissed on the ground that the administrators of the deceased partner are necessary parties; Lockwood Hotchkiss, now deceased, having been a party to the original suit. It is impossible actually to make these administrators parties, because they cannot be reached by the process of this court, and also because, as it is urged, administrators cannot either sue or be sued outside of the state from which they derive their authority. This point was raised by the defendants' plea and was heard by the Circuit Court. In January, 1904, in a very clear and ample opinion (127 Fed. 448) the court overruled the plea of the defendants, and said:

"There is therefore no good reason why the bill of review should not proceed against these defendants, nor why the original decree, upon proper cause shown, should not be set aside as to them. If subsequently, in the course of these proceedings, it should appear that the partnership assets are insufficient to meet the complainant's claim, and it is sought to hold the individual property of the defendants liable, the question may properly arise whether the cause can proceed further in the absence of the representatives of the deceased partner."

Defendants now claim that they have shown by testimony that the firm was dissolved and its affairs settled before the death of Hotchkiss, and that it follows, if the present defendants are held liable, that they must respond out of their individual property. Upon a careful examination of the record I do not find any affirmative evidence proving the facts claimed by the defendants; but, even if such facts were shown, the court is of the opinion that such facts would go no further than to show that the administrators of the estate of the deceased defendant are interested and "substantial" parties, but not necessary and indispensable parties.

In Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825, in speaking for the Supreme Court, Mr. Justice Miller enumerates the three classes of parties which courts in chancery have recognized, namely, formal, substantial, and necessary parties. He says further:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent. The principles which govern their introduction are flexible."

Necessary parties are those whose absence would leave the controversy in such a condition that its final determination would be impossible, or highly inconsistent with equity and good conscience. I think that these administrators are parties who are clearly within the definition of "substantial parties." They are parties who would have an interest in the result and ought to be joined if they were within the jurisdiction; but their interests are separable from those of the other defendants. Their absence does not prevent equity from being done to the other defendants.

In Daniell's Chancery Pleading & Practice, vol. 1, § 150, Lord Redesdale's language is cited:

"When a person who ought to be a party is out of the jurisdiction of the court, that fact, being stated in the bill, and admitted by the defendants, or proved at the hearing, is, in most cases, a sufficient reason for not bringing him before the court; and the court will proceed, without him, against the other parties, as far as circumstances will permit."

The text-writer cites a long line of authorities sustaining this proposition.

In Cockburn v. Thompson, 16 Ves. 326, Lord Eldon treats of the subject of dispensing with parties, and says:

"The same principle in a great variety of cases has obliged the court to dispense with the general rule as to persons out of its jurisdiction; and there are many instances of justice administered in this court in the absence of those, without whose presence as parties, if they were within the jurisdiction, it would not be administered, as it obviously cannot be so completely, as if all persons interested were parties, but the court does what it can."

In Lawrence v. Rokes, 53 Me. 110, a leading authority in Maine, Judge Kent says:

"Where persons not within the jurisdiction are named as parties, it may be required, before a hearing on the merits, that the court should be satisfied that the absent parties have actual knowledge of the pendency of the bill against them, and that they can, if they see fit, appear and answer, if such notice, formal or informal, can be reasonably given. But this is not absolutely essential to authorize the court to proceed with the parties before them. It is a matter in the discretion of the court in each case, depending upon its

character. * * * The Supreme Court of the United States has often considered this question of necessary parties, and has gone great lengths in sustaining bills, where all the parties could not be reached."

The court then cites numerous Supreme Court cases of this character.

In Towle v. Pierce, 12 Metc. (Mass.) 329, 332, 46 Am. Dec. 679, the Massachusetts court renders its decision on the strength of a citation from Story:

"The general rule is that to a bill against a partnership all the partners must be made parties; but if one of the partners be resident in a foreign country, so that he cannot be brought before the court, and the fact is so charged in the bill, the court will ordinarily proceed to make a decree against the partners who are within the jurisdiction, with this qualification, however, that it can be done without manifest injustice to the absent partner."

In Whitehouse's Equity Jurisdiction, Pleading & Practice in Maine, a book of real value, not only in Maine, but to the general equity student and practitioner, the author gives a valuable list of citations upon this subject, and states the rule as to substantial parties as clearly as it is stated anywhere in the text-books. He says:

"The term 'substantial parties' includes those persons who have some material or beneficial interest in the subject-matter of the suit, so that their joinder and subjection to the jurisdiction is desirable and will be required by the court when practicable, in pursuance of that rule which requires that the court shall do complete and final justice by adjusting all the rights of all parties involved in the cause, but whose interests are separable from other parties before the court, so that if it is impossible, or extremely inconvenient, to subject them to the jurisdiction, the court can proceed to a decree without them, and do final justice to the parties before it without affecting the interests of such persons as are not before it."

In 127 Fed. 448, Judge Colt decided the question of parties as it was then before him upon the plea. His reasoning and citation of authorities is entirely applicable to the question now before the court and decisive of it. The absence of these parties from the jurisdiction, and the impossibility of obtaining their presence within the jurisdiction, should not prevent the court from doing equity in this suit to the persons who are actually before it. The bill will not be dismissed for this cause.

2. The court may now proceed to the main question arising in the case. Under all the facts shown in the record, and in view of the rules that should govern courts of chancery, should the decree of dismissal of March 31, 1888, be vacated; the court having had no jurisdiction in the premises?

In 1897 a bill in equity, in the nature of a bill of review, was brought before this court by the same complainant against the same defendants, and against the defendant Hotchkiss now deceased. On that bill the complainant alleged substantially the same state of facts as are set out in the bill in equity now before the court. Among other things, he pleads that the defendants filed their answer to the bill in equity, No. 2,023, on June 29, 1885 (a copy of which answer was afterwards filed on March 31, 1887), and that the complainant submitted the case on the bill and on that answer; but that, without the knowledge of the complainant or of the court, the answer filed on June 29, 1885, was "fraudulently removed from the files of this court, and no note of the

filing of said answer was made in the court docket by the then clerk of this court." In the bill of 1897 complainant rests his whole case on fraud, setting forth that the answer of June 29, 1885, was "fraudulently removed from the files of this court."

Judge Colt heard the case in the Circuit Court. In Hendryx v. Perkins, 114 Fed. 801, 52 C. C. A. 435, his decision is found. In that decision he found the facts in detail and fully stated the case. He found that no fraudulent practice of any nature whatsoever had been proven in the case. He thus stated his conclusion:

"On July 21st the defendants filed an answer to the supplemental bill for discovery and relief, and the court proceeded to a hearing on this bill and answer. This is most material. The complainant objected to any hearing upon this bill and answer, and the court had no right to set the case down for hearing, unless upon motion of the complainant or with his assent. That hearing took place under a mistake of all parties—the counsel for the complainant, because he supposed that the case had been set down for hearing upon the bill and answer as they stood on June 29th, when it could not have been so set down under the facts as I find them; and under a mistake of the court and of the counsel for the defendants in setting the case down for hearing upon the bill and answer of July 21st. The result is that the complainant has not been allowed to make out his case. There has been no hearing upon the merits. There was a mistake of fact, for which I think the parties, the counsel, and the court were all to a certain extent responsible. The court undertook to render a decision and enter a decree upon the bill and answer filed on July 21st, which was a wrong proceeding on its part. To be sure, the complainant contended for a position which was untenable, and which helped to mislead the court; but that affords no justification of the course which was pursued. * * * Under all the circumstances I have decided to take the responsibility of allowing this case to be reheard, leaving my action to be reviewed by the appellate court. I propose, therefore, to enter an order that the final decree entered on March 31, 1888, be vacated; that the copy of the amended answer filed on the 31st day of March be treated in all respects as the amended answer to the bill for discovery, ordered by the court on June 29, 1885, and which has been lost from the files of the court; that all other opinions, motions, and orders made or entered subsequent to July 21, 1885, be vacated; and that the cause stand upon the pleadings as they appear on the 21st day of July, 1885."

From the decision of the Circuit Court an appeal was taken. In 114 Fed. 803, 52 C. C. A. 435, is found the decision of the majority of the Circuit Court of Appeals hearing the case. The decree of the Circuit Court was reversed upon the ground that the record disclosed an original bill to impeach the decree on the ground of fraud; that no fraud was found, and so it was impossible to render a judgment for the complainant. Shortly after the decision of the Circuit Court of Appeals the complainant filed in the Supreme Court a petition for a writ of certiorari, which was denied. In March, 1893, complainant filed a petition to the Circuit Court of Appeals for recalling the mandate. The court treated this petition as a petition for a rehearing, and in 123 Fed. 269, 59 C. C. A. 266, the court denied the petition, and, among other things, said:

"Whatever we have decided with reference to the case has been on it as made by the record, which we have held discloses an original bill to impeach a decree on the ground of fraud. While a consideration of this question necessarily called out several propositions which may lead to the conclusion that the complainant below, now the appellee, is entitled to no relief whatever, yet it must not be assumed that we have so decided. In other words, we have

not judicially considered whether he could proceed by a summary petition, or by any method which would claim that the proceedings below on the original bill were void for mistake on the part of either himself or the court, if there was any. As to all such considerations, we express no opinion except as necessarily involved in the questions judicially before us in the manner we have already stated."

It appears, then, that the decision of the Circuit Court was based upon the proposition that, while no fraud was shown, a mistake was clearly shown. This decision of the Circuit Court was reversed by the Circuit Court of Appeals, because there was not enough in the record before it to raise any question except the question of fraud. In the record now before us the complainant bases his prayer for relief on the ground that by mistake the court took certain action in the premises which it had no jurisdiction to take.

Upon a careful examination of the decision of Judge Colt, to which I have referred and which is found in 114 Fed. 801, 52 C. C. A. 435, it is evident that he intended his decision to be a finding of facts. The decision is evidently not intended as a formal opinion. The early part of the decision is intended to state the facts on evidence which he found. The latter part states his conclusions. In 123 Fed. 270, 59 C. C. A. 266, the Circuit Court of Appeals has said:

"It may be well to state here that the law is thoroughly settled that a mere opinion of a judge in the Circuit Court in an equity case is not a 'finding and statement of facts.' This has been very lately said by the Supreme Court in Finney v. Guy, in an opinion passed down on April 6, 1903, 23 Sup. Ct. 558, 47 L. Ed. 839, in the following language: 'No such issue was involved in the Hanson Case, and the opinion regarding such question is only the opinion of the very able judge who gave it upon an abstract proposition, as distinguished from an adjudication upon a point actually in issue.'"

I do not think that the Circuit Court of Appeals on the strength of Finney v. Guy intends to exclude the court from looking to Judge Colt's decision to obtain certain facts which he has stated to be facts; but, however that may be, the record now before me shows clearly what mistake was made. An answer was filed on June 29th. The cause was set down for hearing on bill and answer. Subsequently, on the 21st day of July, another answer was filed; but the case was not, and could not have been, set down for hearing upon that answer. The court, then, under mistake of fact, dismissed the amended bill, upon which there had never been any submission. It dismissed the bill upon the probative force of the answer, when, in fact, the case had not been set down for decision upon the amended bill and answer. The result was that the complainant never had his day in court. It may have been that, if issue had been joined and proofs offered in respect to matters contained in the answer, the complainant would have found himself in further difficulties. We cannot now try out that case and find what would have happened. The fact, however, is clearly before us that the complainant never did have his day in court. In an opinion dissenting from the majority of the court on the case as presented in the bill of 1897 Judge Aldrich said:

"I am under a strong conviction that the relief sought ought to be afforded, not upon the ground of fraud, for that is not shown, but upon the ground of accident or mistake, which is found as a fact, and stated by the learned circuit judge in the court below as a reason for his action in vacating the original decree; and, if necessary for such relief, that leave should be granted

to reframe the petition, to the end that relief may be afforded upon the ground of mistake in accordance with the view of the circuit court as shown by the findings and the opinion therein."

The majority did not take the view that the court had the right to proceed as suggested by Judge Aldrich, but did make the explanation in 123 Fed. 270, 59 C. C. A. 266, which I have quoted above, and which looks to some future action, claiming that "the proceedings below on the original bill were void through mistake." Such action has been taken by this bill of review. The record is fully before this court. It appears that by a mistake for which, as Judge Colt finds, the parties, counsel, and the court were all to a certain extent responsible, the court undertook to render a decision and to enter a decree upon the bill and upon an answer filed on July 21, 1895, when, in fact, there had been no submission of the case upon these papers. It would have been easy for Judge Colt to excuse himself from admitting any fault on his part, and to attribute the result to the untenable position taken by the complainant, to which reference is made, and to the mistake of parties; but he frankly assumed a part of the blame for the mistake, and made no excuse. He did this with a simple desire to do justice. He performed an act of clear judicial integrity.

The case now presents a record which shows that the court acted beyond its jurisdiction. Such action was absolutely void. The court cannot sustain the contention of the defendants, that the error was merely one of practice and within the jurisdiction of the court, although this position has been argued with great ability. Much of the learning which learned counsel have invoked would apply if the record showed that the court had jurisdiction and had made a mistake. Clearly the test is whether or not the court had jurisdiction in what it did. The record shows that it had no jurisdiction. Having, then, no power to hear the case on the submission which it made, its judgment and decree were void. No length of time can give effect to a decree based upon no jurisdiction. No lapse of years can give virtue to a void judgment. As Judge Aldrich has said:

"It is inconceivable that a court may relieve from the mistake of a clerk in filing a wrong paper or wrong order, and still be without power to relieve from its own mistake in taking up, considering, and dismissing a case upon a wrong paper or a record not submitted."

This court should not be prevented from doing justice by the fact that the complainant has been slow in invoking the aid of the court; that he was at first under the misapprehension that he was a victim of fraud, rather than of mistake; that through illness, or from other causes, he has not availed himself of all the opportunities which courts of equity have afforded him, or by the fact that the granting of the relief sought by his bill may only bring him into further litigation.

The fact still remains that he is entitled to have his day in court, and by a mistake he has been deprived of his right. It is the duty of this court upon the record to give the complainant this right. The following entry may be made with reference to the original suit, No. 2,023, namely:

The final decree entered on March 31, 1888, is vacated. The copy of the amended answer filed on the 31st day of March, 1887, is to be treated in all respects as the amended answer filed in court on June 29,

1885, which was lost from the files of the court. All opinions, motions, and orders made and entered subsequent to July 21, 1885, are vacated; and it is ordered that the case stand upon the pleadings as they appeared on the 21st day of July, 1885.

BRITISH MARITIME TRUST, Limited, v. MUNSON S. S. LINE.

(District Court, S. D. New York. November 14, 1906.)

1. SHIPPING—MANNER OF LOADING BY CHARTERER—USE OF MASTS TO SUPPORT BOOMS.

A custom of charterers of vessels to use their masts as parts of the apparatus of derricks for loading and discharging cargo, in the absence of express contract, cannot impose on the owners of chartered vessels the duty and responsibility of providing masts of sufficient strength to sustain loads of unusual and excessive weight, and, where a vessel is of such strength in construction as to fully meet all the requirements of her class and rating at Lloyds, and of her charter, and a charterer, who, without the consent of the owner or master, in loading subjects her masts to strains far above their computed working strength, takes the risk and responsibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 219, 220.]

2. SAME—LIABILITY FOR BREAKING OF MAST.

A steamer was chartered by a time charter to be employed in carrying lawful merchandise. The loading was to be done by the charterer with the assistance of the crew; the owners to provide ropes, falls, etc., to handle ordinary cargo up to three long tons in weight, and the captain to be under the orders of the charterer as regards employment, agency, or other arrangements. At the time of the charter the nature of the cargo was unknown, but the charterer subsequently decided to take a full cargo of 35 locomotives from New York to Colon. The boilers weighed 18 tons, of 2,000 pounds each, and the tenders 14 tons each. The vessel's tackle being inadequate to handle such weights, the charterer, without consulting the master, rigged a boom connected to the mast, which was strengthened by preventers, which, however, and especially on one side, were inadequate to secure rigidity of the mast. When most of the cargo had been loaded, and while a tender was being lifted, first a shroud pin and then the mast broke. Both were of sufficient strength for ordinary purposes, and the vessel was rated by Lloyds as 100 A1. *Held*, that the responsibility for the loss rested upon the charterer, and not upon the vessel.

3. SAME—DUTY TO PROVIDE MEN TO RUN WINCHES.

Under a charter party which required the owners "to provide men to run winches," the ship's duty is satisfied by furnishing competent men, although they may not be personæ gratæ to the charterer's stevedores."

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. § 161.]

In Admiralty. On libel and cross-libel.

Convers & Kirlin and Mr. Hickox, for libelant and cross-respondent.

Wheeler, Cortis & Haight and Mr. Bullowa, for respondent and cross-libelant.

HOUGH, District Judge. While loading cargo in this harbor on April 25, 1906, the mast of the steamship Austriana, then under charter to the Munson Steamship Line, buckled and broke. The owners of the vessel have been obliged to pay for the cost of repairs, and the charterers have incurred expense through delay and interfer-

ence with the loading and discharge of the cargo. Each party alleges that the breaking of the mast was the fault of the other, and both have filed libels.

The vessel had been chartered on April 6th, and before that date no information had been given the owners as to the cargo intended for her, and, indeed, the charterers did not know until after that time with what they would load her. The charter party is in the "Government form" of time charter, has been known to the trade for many years, and contains no direct reference to the steamer's masts. The charter provisions material, in the opinion of either party, to this controversy, are, in substance, as follows: The steamship is described as of 6,800 tons dead weight carrying capacity, built in 1901, and classed 100 A1 at British Lloyds. She is stated as "tight, staunch, strong and in every way fitted for the service." She is to be "employed in carrying lawful merchandise." The owner is to provide and maintain a full complement of officers, seamen, engineers and firemen. The charterers shall pay "all other charges whatsoever," except those specifically allotted to owners' account by the charter party. The captain "shall render all customary assistance with ship's crew and boats." The captain shall be appointed by the owners, but shall be "under the orders and direction of the charterers as regards employment, agency or other arrangements." The owners are "to provide ropes, falls, slings and blocks, necessary to handle ordinary cargo up to three tons (of 2,240 lbs. each) in weight." The steamer is "to work night and day, if required by charterers, and all steam winches to be at charterers' disposal during loading and discharging, and steamer to provide men to work same both day and night as required; charterers agreeing to pay extra expense, if any, incurred by reason of night work, at the current local rate." In the event "of loss of time from deficiency of men," payment of charter hire shall cease until the vessel be "again in an efficient state to resume her service."

On or about April 9th, the charterers concluded to use the Austriana to carry a cargo of locomotives from New York to Colon. They hoped to ship on her 40 complete engines, but she was found capable of stowing no more than 35. The loading of each locomotive entailed the lifting of a boiler and tender, besides other smaller parcels. The packed weight of a boiler was known to be from 18 to 19 (short) tons, and of a tender something over 14 (short) tons. Thus 70 packages, weighing over 14 tons, were in some way to be lifted on board in New York, and similarly gotten overside at Colon.

The charterers are, and for years have been, large employers on time charter of vessels in West Indian and South American trade. Their fleet seems to average about 50 vessels, and it has at times been even more numerous. It is, and long has been, their habit, and that of other charterers, to use the masts of vessels in their employment as parts of the apparatus of derrick booms, etc., necessary for the handling of cargo. They had in their business used masts in loading packages weighing as much as 20 or (according to some witnesses) 25 tons; but never before had they destined for any one vessel a cargo containing such numerous heavy weights as those they elected to put on board the Austriana.

The master of the steamship testifies that, when he learned the nature of his cargo, he told the charterers' agents that he could form no judgment as to the sufficiency of his masts for handling such heavy lifts, and that to him the masts seemed too slight for the purpose. While this testimony seems to me inherently probable, it is most positively denied by the representatives of the charterers, and I find, on the testimony of the more numerous witnesses produced by the charterers, that the Munson Line did not communicate with the master, did not ask his opinion, did not seek his judgment as to the strength of his masts, and made no examination of the masts whatever, limiting their inspection of the steamship to the capacity of her holds and their suitability for the stowage of this unusual cargo.

The charterers' "outside superintendent" personally rigged the Austriana to load her cargo, and describes himself as "the responsible party." It is evident that the work was looked upon as unusually arduous and as requiring special care, for, beside the superintendent, two foremen stevedores regularly employed by the charterers seem to have been on board most, if not all, of the time. The mainmast of the Austriana was 20½ inches in diameter at a point 9 feet above deck and just above the "pad" which surrounds the mast and supports the derrick booms belonging to the ship. The shrouds met on either side of the cross-trees, and were there supported on a two-inch iron bolt running through holes in the cross-trees. The three shrouds on each side were thus supported by one pin. This arrangement is rather a new fashion, but during the last seven or more years has become quite common. It is obviously easier and cheaper to build than the old fashioned mast-ring or the separate pad and eye for each shroud. It is also probably less strong, as it measures the holding strength of all the shrouds on one side by the strength of a single pin. As the ship was not required to furnish tackle for more than a three-ton lift, the charterers put on board a boom confessedly stronger than the mast, stepped it on an oaken shoe fastened to the deck by angle bars riveted through the deck plates (boring holes for the purpose through the plating), and connected it to the mast by a topping lift of several parts of steel hawser.

Concededly, before subjecting the mast to the expected strain, it needed strengthening by preventers. The charterers, accordingly, rigged on the port side, a preventer almost wholly of steel wire rope, leading straight from masthead to deck; and on the starboard side they constructed an arrangement of manila rope (in effect) leading from the masthead to the end of a smaller derrick boom standing up at an angle and attached to the side of the mast away from the loading hatch, and from the end of that boom leading to a point on the deck opposite the lower end of the wire preventer. I find that these preventers did not, and could not, take up or resist equal strains, because they were necessarily of unequal tensile strength, i. e., the manila would stretch far more than the wire, with the result that the starboard shrouds were continually subjected to more than their fair share of strain.

I further find that the starboard preventer was defective, in that it had not a "straight lead." The object of a preventer is to secure rigid-

ity, and to do this it must itself be as rigid as possible, and this arrangement of ropes and boom could not be rigid for obvious mechanical reasons. I agree with the witnesses who have described this starboard preventer as a "makeshift." The reason for its existence is, in my opinion, that the cargo was coming in over the starboard side, and the stevedores did not wish so permanent a thing as a wire rope securely fastened to interfere with their operations. The derrick boom and appurtenances used for the makeshift preventer could be, and had been shortly before the accident, themselves used for smaller parcels of cargo.

These arrangements of the charterers were neither devised, assisted in, nor objected to by the master or officers of the steamer. The mate pointed out the starboard shroud pin as a place to fasten one of the blocks comprised in the starboard preventer, and sometimes suggested tautening or loosening this or that rope; but the management of the whole matter was, in my opinion, with the charterers, and their superintendent has testified to his own responsibility therefor. After nearly all the cargo was aboard, after most, if not all of the 18-ton boilers had been lifted, and while a 14-ton tender was hanging suspended amidships from the charterers' boom, the starboard shroud pin broke, instantly slackening the starboard rigging, the mast broke in the pad, and the weight fell, fortunately only six inches and without causing further damage.

Much testimony has been taken to prove that the mast was weak. Its construction might have been improved, and it broke at its weakest point; but it is clear that no mast would have stood after the shroud pin broke. I find the mast good, if properly stayed.

The pin also is declared weak, and it seems of a hard and somewhat brittle fiber, though externally perfect. In my opinion it too would have lasted through the remaining 10 per cent. of cargo, had the starboard stay been as good as the port one.

The foregoing facts appear to me to furnish ample justification for putting the responsibility for this accident upon the charterers. They made no inspection, they asked no advice, they assumed a mast sufficient for the heaviest cargo they had ever handled, they rigged an unscientific and necessarily insufficient preventer, and the disaster happened as the load was just at the point where the greatest strain was upon the defective starboard apparatus. The importance, however, of ascertaining, if possible, such limitations as may exist upon the right of a charterer to use the chartered vessel's masts, leads me to consider carefully the arguments based upon the asserted legal duties or privileges of the parties, rather than upon the confessedly singular circumstances of the Austriana's remarkable cargo.

The charterers assert, admitting arguendo the facts as hereinabove found:

1. That the silence of the Austriana's captain, or his failure to object to the loading arrangements devised by the charterers, rendered such arrangements those of the ship, and made their failure something for which the shipowners are responsible to the charterers. No authority is produced for this proposition. The master was by the agreement of charter "under the orders and direction" of the charterers, and he

was also bound to "render all customary assistance with the ship's crew." To assert that, because he might have been ordered to set up these loading arrangements, and to use his crew so to do, therefore (although nothing of the sort was done) his owners became responsible for the negligence of those who actually did the work, is, I think a unique method of escaping liability for one's own acts. The contention is overruled, without expressing any opinion as to what would have been the effect, either inter partes or in respect of third persons, had the master actually done what the charterers did.

2. The charterers' main contention, however, was asserted by them in letters to the shipowners' agents even before this accident. Out of that asserted right, irrespective of any details of negligent or insufficient rigging, this litigation has really grown.

The Austriana's master, even before the fracture of the mast had demonstrated danger, objected to being required to unload at Colon, with himself as chief stevedore, this extraordinary cargo. The charterers immediately asserted their right to load the ship "with any lawful merchandise." They declined to accept "responsibility for any accident occurring directly or indirectly through the discharge of this heavy cargo," and their counsel now insist that, inasmuch as locomotives are lawful cargo, they had a right to use the ship's masts for the loading and unloading thereof, and any deficiency in strength on the part of the masts or rigging is as much an infringement of their rights as a lack of seaworthiness in the hull of the steamship. This statement of the charterers' claim avoids, however, discussion of the vital question to be considered in limine. It assumes that 35 locomotive boilers, weighing 18 tons each, and an equal number of tenders, weighing 14 tons each, were, so far as the use of the Austriana's mast was concerned, lawful cargo. It would hardly be contended that an article of such high specific gravity as to permit 100 tons thereof to be laden on a small fraction of the deck space of a hold, having 100 tons capacity, could be lawfully so loaded as to crush the deck, though that deck were perfectly capable of sustaining the same weight when properly distributed. So, too, the bare fact that locomotives are lawful cargo does not prove that charterers had any right to so load them as in the loading to destroy the ship's mast.

In legal effect I think the charterers' contention must rest upon either (a) an implied warranty of the mast as capable of use in loading a cargo such as this one, or (b) upon a custom of using the masts of chartered vessels for the loading and discharge of single packages of cargo weighing as much as 25 tons, in the light of which custom the charter must be construed. I think the two statements are substantially identical. If the alleged custom be sustained, it imports into the charter a warranty that the masts shall be sufficient to meet the requirements of the established custom.

It is therefore necessary to ascertain the shipowners' measure of duty in respect of his ship's loading capacity under such a charter as this. The Austriana was not only 100 A1, but was built under special inspection. Her masts, rigging, and cargo appliances correspond to each other. They are properly built and well fitted for lifting packages of from three to five tons, and such masts, etc., are usual and sufficient for her

class and rating at Lloyds. It results that for handling of weights even up to five tons, the limit placed by the evidence, she was in the language of the charter party "strong." The charterers do not deny this; indeed, they assert that her mast was of the usual size, and her rigging, except for the new fashioned shroud pin, usual and sufficient. Nor do they deny that her apparatus generally is within the express language of the charter party; but they assert that, when they get a mast of that size with rigging to suit, then that particular mast and rigging must be capable of the loads they insist upon as their right, and some of their witnesses even demand the same to be sufficient without preventers.

The charterers have not offered to show that either owners generally, or the Austriana's owners in particular, are aware of or have assented to the alleged custom, and they make no denial of the right of Lloyds' inspectors to regulate the equipment of vessels known and described by their ratings. It appears that the 14-ton load which broke the pin and mast produced, owing to the length of the charterers' boom, a total moment or strain variously calculated at from 155 to 216 tons, which had to be supported or resisted to varying extents by mast, derrick boom, shrouds, and preventers; and the most careful calculation of the probable strain on the shroud pin at the time of fracture is 18.3 tons. But the lifting apparatus of a ship, like other machinery and appliances subjected to varying stresses, is calculated for a "working strain" only, while the "breaking strain" of the same appliance is ordinarily five times as great. This has been testified to in this case and is the statement found in engineering text-books of authority.

In Carlson v. Comeric Co. (D. C.) 140 Fed., at 111, the court found that the "permissible actual strain on a hook requires a draft to be only one-sixth of the load that in theory would require the breaking point to be reached." The working strain for which the Austriana's mast and rigging were designed had been far exceeded for days before this accident, and the charterers' practice amounts to a demand that the owners of the Austriana either warrant their masts, etc., to be sufficient for regular work nearly up to the breaking strain, or be bound by a custom, not known to them, that a charterer may habitually so work them. No such warranty can be found in, or imported into, this charter party, and from the alleged custom the first essential is lacking, viz., reasonableness; and, if it is not reasonable, it is not lawful. What these charterers have habitually done is, as to vessels of the Austriana's class, both dangerous and unjustifiable. If the charter party affords any implication, it limits the warranty of the mast to three tons, and nothing in the evidence extends that weight beyond five tons of working strain. If, as alleged, the business of time chartering for outports depends upon using masts for heavy lifts, either the charterers must take the risk, or they must revise their charter party.

It is asserted that these charterers are entitled to a decree, under the authority of Worrall v. Davis Coal & Coke Co. (D. C.) 113 Fed. 549, on appeal 122 Fed. 436, 58 C. C. A. 418. The higher court there found that it was customary to protect a ship's coamings by planks and dunnage while a charterer's cargo of ore was coming on board by chutes. This custom the master failed to observe, although he had the means of

complying with it, and previous knowledge of the danger to which his ship would be subjected while loading cargo of such a kind. In this case the arrangements for loading cargo were wholly those of the charterer, they assumed to do everything needful, and I fail to see that the master could have done anything to improve the situation when the charterers' representatives, men more experienced than he, were actively making the deliberate mistakes above described.

I have considered the remarks of the court in the unreported case of The Mae.[1] It may be assumed that, under the peculiar circumstances of that case, the Mae's captain, though acting as the agent of the charterer in unloading his ship, was acting as the agent of his owner in preserving his ship from injury while so unloading; but it does not follow that the unconsulted master of the Austriana was chargeable with the duty of preventing the charterers' own arrangements from injuring his ship, at the peril of rendering his owners responsible to those charterers for the consequences of their own acts.

By amendment to the original libel, the owners assert that the injury to their deck plating, caused by the construction of the derrick shoe, above described, has not been properly repaired, because new deck plates have not been provided or paid for. This shoe was placed on the vessel without consultation with her master, but after the charterers had agreed in writing that "any alterations whatsoever made with the consent of the master in the fittings or structure of the said steamship," shall "be made good * * * at the expense of the charterers and to the entire satisfaction of the master." On the redelivery of the vessel the repairs to her deck plating, made by charterers, were regarded as sufficient by Lloyds' surveyor to make the vessel "perfectly fit and seaworthy" and to entitle her "to hold her classification." I think the demand for an entirely new plate is captious, and that the alteration in the structure of the steamship caused by these holes has been "made good."

The foregoing considerations require the dismissal of the charterers' libel, with the possible exception of some portion of their claim for the cost of shore winchmen. It seems that, while loading in New York, the charterers employed men to run the winches who belonged to the same labor union as did the working stevedores, and it is now claimed that, inasmuch as the charter party required the owners "to provide men" to work the winches both day and night, they are thereby required to provide union men, irrespective of the competency of the ship's crew, who for generations have been used in this work. The charterers' libel makes no such claim. It only alleges that the New York stevedores would not work on the steamship with sailors running the winches "owing to the risk of personal injury"; that the sailors "were without experience in handling heavy cargo, and were unfit to act as winchmen for the loading or discharging of this particular cargo, and it was therefore necessary to employ skilled winchmen." The only testimony offered is, in substance, that, although the union rule does not require union winchmen, in practice the New York stevedores will not work with sailors at the winches as long as they can get their own men

[1]Oral memorandum.

to do the work; but, when their own men are all busy, "they won't shut a ship off." This is not sufficient to sustain the libel.

On the question of union winchmen, I am referred to the commissioner's report in the case of The Cape Corrientes (Golcar S. S. Co. v. Tweedie Trading Co., 146 Fed. 563). It there seems to be held that the owners' obligation "to provide men to run winches" implies an obligation not only to provide competent men, but to provide personæ gratæ to the charterer's stevedores. To this proposition I do not assent, but the pleadings herein do not require further consideration thereof.

There is, however, some testimony to the effect that at Colon the seamen did not and could not run winches, because they were drunk and in jail. If the charterers suffered any damage by this time-honored maritime indiscretion, they are entitled to recover for it, but the amount is not sufficient to require the retention of the charterers' libel, especially in view of the variance between libel and proof.

Upon the owners' libel, let there be a decree for the libelant with the usual order of reference, but with authority to the respondent to prove as a set-off such damages as were occasioned by the drunkenness, or incompetency as winchmen, of the crew at Colon. The charterers' cross-libel is dismissed. Costs of both cases to the owners.

MORTON TRUST CO. v. AMERICAN SALT CO.

(Circuit Court, E. D. Louisiana. May 3, 1906.)

No. 13,289.

1. FIXTURES—LOUISIANA STATUTE—IMMOVABLES BY DESTINATION.

Civ. Code La. art. 468 (459), makes "immovables by destination" all movables which are permanently attached to realty by the owner, and also all movables which are placed thereon by the owner for its service and exploitation; and in respect to the latter class, the instances given in such article are not restrictive, but merely illustrations.

2. SAME.

After a movable has become immobilized by destination (Civ. Code La. art. 468 [459]), a mere act of will on the part of the owner cannot of itself deimmobilize it as against a mortgagee of the realty. The mere cessation by the owner of the work in which the immobilized movable is employed does not of itself deimmobilize the movable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 32–41.]

3. SAME.

Under Civ. Code La. art. 468 (459), machinery and apparatus placed on land by the owner for the sinking or working of oil wells thereon, or for sinking shafts for salt mines, become immovables by destination in favor of a mortgagee, as are also horses used in conducting any business to which the realty or any part thereof is devoted, and goats placed and kept on the land for the purpose of keeping it free from brush and weeds; but building materials intended for use in building on the land do not become immovables until so used, nor do staves for making barrels to contain a product of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 4.]

In Equity.

The Morton Trust Company, as trustee for the bondholders, who were secured by mortgage on a certain tract of land known as "Belle Isle," situated in the parish of St. Mary, La., on which was a salt mine, filed its bill in equity setting out grounds for the appointment of a receiver to the property. After notice to the defendant, the court appointed a receiver. The defendant appealed to the Circuit Court of Appeals, which sustained the appointment of the receiver, but modified the order appointing him so as to correct an ambiguity which might have been construed as authorizing the receiver to take possession of all the property of the defendant, whether claimed to be covered by the mortgage or not. Subsequently the Circuit Court directed the special master to ascertain and report what movables situated on the property were covered by the mortgage as being "immovables by destination," under the law of Louisiana. The master reported a large quantity of movables—being apparatus for sinking and working oil wells, apparatus for sinking shafts, building materials, bricks, machinery, staves, draft horses, a flock of goats, and other things—as being exempt from the operation of the mortgage. Exceptions to the report having been taken by complainant, the Circuit Court disaffirmed the report, and ordered it recast, for the following reasons, which will appear in the opinion.

Foster, Milling, Godchaux & Sanders, for complainant.
Farrar, Jonas & Kruttschnitt, for defendant.

PARLANGE, District Judge (after stating the facts). The Circuit Court of Appeals, passing on the interlocutory decree appointing a receiver in this cause, said that that decree might be construed to authorize the receiver to take possession of property of the defendant company which is not included in the mortgage, and that court modified the decree so as to correct the ambiguity which might exist in that respect. That action of the Circuit Court of Appeals was obviously correct. The order had, through inadvertence, been made to include all the property of the defendant company situated within the jurisdiction of this court, whether covered by the mortgage or not. But the question which now arises, as to what immovables by destination are included in the mortgage, had not and could not have arisen before the Circuit Court of Appeals, and necessarily, therefore, that court has never expressed an opinion upon it.

The learned counsel for the American Salt Company in his brief before the master, and, as I understood, in his argument to the court, contended that the indenture is nothing more nor less than a Louisiana mortgage, and that the words "tenements, hereditaments, and appurtenances," etc., in the first part of the indenture (pages 4 and 5) are, to use the words of the learned counsel's brief, "common-law terms, which mean 'immovables by destination,' which is the civil law term,"—citing authorities. I agree fully with the learned counsel for the defendant, and I am satisfied that the indenture, as plainly shown by its article 15, is to be considered only and exclusively as a Louisiana mortgage, and that no rights can be derived from it, as to the matters here involved, by virtue of the laws of New Jersey, or because of any supposed chattel mortgage, as contended by the learned counsel for the complainant and the receiver. Therefore, the sole and only question to be decided is whether, under the laws of Louisiana, the master has correctly found the immovables by destination which are affected

by the mortgage. Civ. Code La. arts. 468 (459) and 469 (460), together, possibly, with article 467 (458), concerning which there is a controversy among the commentators as to whether immovables by destination or by nature are created by that article, compose the entire codal law on the subject of physical immovables by destination in Louisiana. Those articles are taken textually from the Code Napoleon, except that as they now stand in the Louisiana Civil Code there is in article 468 (459) a serious error in the translation from the French text of the Louisiana Code of 1825 and from the Code Napoleon in rendering the French word "exploitation" into the English word "improvement" in the English text, which reads as follows:

"Civ. Code La. art. 468 (459). Things which the owner of a tract of land has placed upon it for its service and improvement, are immovable by destination. Thus the following things are immovable by destination when they have been placed by the owner for the service and improvement of a tract of land, to wit: Cattle intended for cultivation; implements of husbandry; seeds, plants, fodder and manure; pigeons in a pigeon house; beehives; mills, kettles, alembics, vats, and other machinery made use of in carrying on the plantation works; the utensils necessary for working cotton, and sawmills, taffia distilleries, sugar refineries and other manufactures. All such movables as the owner has attached permanently to the tenement or to the building, are likewise immovable by destination."

Whenever there is a conflict between the French text of the Louisiana Code of 1825 and the English text, the former prevails. Phelps v. Reinach, 38 La. Ann. 551.

The word "exploitation," which is of somewhat recent importation into the English from the French, has a different meaning from the word "improvement." See the Century Dictionary.

"Exploitation [Cent. Dict.]: (1) The act or process of exploiting, making use of, or working up; utilization by the application of industry, argument, or other means of turning to account, as the exploitation of a mine or forest, of public opinion, etc. 'Joint-stock companies or associations of capital are now very advantageously employed for the exploitation of different branches of industry.' To exploit. (2) To make complete use of; work up; bring into play; utilize; cultivate." (Recent, from modern French "exploiter.")

As to the persuasive authority of the French commentators in construing the codal law of Louisiana, see Meyer v. Richards, 163 U. S. 399, 16 Sup. Ct. 1148, 41 L. Ed. 199, Viterbo v. Friedlander, 120 U. S. 728, 7 Sup. Ct. 962, 30 L. Ed. 476, and Groves v. Sentell, 153 U. S. 478, 14 Sup. Ct. 898, 38 L. Ed. 785.

The first condition for the creation of an immovable by destination is that it be placed by the owner, and no other, upon realty. This realty, as must be clearly borne in mind, may be either land or a building erected upon land. This realty, under its double aspect just mentioned, is called by the French commentators "fonds" from the Latin "fundus." No English word occurring to me which seems to render fully this word, I shall use the word "fundus" for brevity.

There are two, and only two, ways in which an immovable by destination may be created:

"(1) Without any physical attachment to the fundus, but merely by the dedication of the movable to the service of the fundus. [See Civ. Code La. art. 468.] (2) By means of a physical attachment affixing the movable permanently—à perpétuelle demeure. [See Civ. Code La., last paragraph of article 468.]"

The above is an extract from Planiol, Droit Civil (Paris Ed. 1904) vol. 1, p. 703.

These two kinds of immovables by destination are plainly shown by Civ. Code La. art. 468 (459), in which instances of both kinds are given. (See that article cited in full, supra.) It may be well to say here that the instances given in that article are clearly not restrictive. The language shows it by the use of the word "thus." The French commentators all agree that the instances are illustrative, not limitative.

It should be noticed that in the last paragraph of Civ. Code La. art. 468 (459), it is said that "all such movables as the owner has attached permanently, etc., are likewise immovables by destination." And in the first part of Civ. Code La. art. 469 (460), it is said: "The owner is supposed to have attached to his tenement or building forever such movables as are affixed to the same with plaster," etc. The words "permanently" and "forever" in the articles just cited are translations from the French phrase "à perpétuelle demeure," which may be rendered as "to remain perpetually." It is important to consider this idea of permanency and perpetuity, and to clearly comprehend that it applies only to that kind of movables which are made immovables by destination by means of a physical attachment to the fundus, and that it has no bearing at all on the other kind. Baudry-Lacantinerie, Droit Civil, Des Biens (Paris Ed. 1890) vol. 5, p. 59, states his understanding of the law to be:

"* * * All the objects attached to a fundus by the owner for its service and exploitation are by that fact alone immovables by destination, whether they are placed there forever or not. * * * All movable objects also become immovables by destination, which an owner has attached to his fundus forever in another interest [the author meaning an interest other than the service and exploitation of the fundus]; such, for instance, as a purpose of utility to or ornamentation of the fundus. Therefore, perpetuity does not seem necessary except when the immobilization takes place in an interest other than the agricultural or industrial benefit of the fundus."

The same author, same work and volume (page 56) states the essentials of immobilization to be:

"(1) That the movable was placed on a fundus, that is to say, an immovable by nature [either land or a building]; for the movable can only become an immovable by destination as being an accessory to the fundus. (2) That the movable was placed there in the interest of the fundus, that is to say, for its service, its exploitation, its utility or its ornament. (3) That it was placed there by the owner of the fundus. Immobilization by destination necessarily supposes the act of the owner. It could not result from the act of a lessee, a renter, or even a usufructuary. The reason is that immobilization by destination takes place in the interest of the fundus, and the owner is the sole representative of that interest."

Planiol, in the work and volume cited, supra, at page 703, gives a test, which is that the movable in order to become immobilized must be employed in the service of the fundus, and not in the service of the person who owns the fundus. Thus, saddle and carriage horses on a plantation, used for the pleasure or convenience of the person of the owner, are not immovables by destination, whereas a plantation horse owned by the owner of the plantation, and used by the overseer to superintend the plantation work, would unquestionably be an im-

movable by destination. Thus, again, in France, the horse used by a brewer to turn a mill or other machinery in the brewery is an immovable by destination; but, on the other hand, the horse used outside of the brewery to convey beer to the shopkeepers is not. After a movable has become immobilized by destination, a mere act of will on the part of the owner cannot deimmobilize it. If this were not true, the owner in order to partly defeat the mortgage could, as soon as he feared a seizure, declare all the immovables by destination to be deimmobilized. But it is settled that the owner cannot do so as against a mortgagee except by a removal of the movables from the land, and by a bona fide sale followed by delivery, and subject to the right of the mortgagee to prevent the removal, whether the owner be in good or bad faith. Weil v. Lapeyre, 38 La. Ann. at page 306; Insurance Co. v. Gerson et al., 38 La. Ann. 310.

No mere cessation of the work by the owner can deimmobilize the movables as against a mortgagee. If a sugar planter abandons the cultivation of sugar, his mill and other immovables by destination will not, ipso facto, become mobilized as against the mortgagee. They will remain immovables until they are removed by the owner under circumstances which allow the title in them to be transmitted to another. Thus, the contention was denied in France that the death of the owner put an end to the immobilization. Planiol has shown us that the object is intended for the service of the fundus, and not for the service of the person of the owner; so that an immovable by destination, not lawfully deimmobilized, continues to be an immovable so long as it is capable of an actual or a potential service to the fundus, or until it is lawfully deimmobilized. Of course, cases could be imagined and might occur where immobilization would cease even regardless of the will of the owner, as where, for instance, such a change should occur in the nature of the fundus or of the movable that either the movable could no longer per se subserve the exploitation of the fundus, or else the latter per se could no longer, because of a change in its nature, be exploited by means of the movable.

Applying the foregoing law to the facts of this matter, it seems clear to me that all the apparatus for sinking or working oil wells, etc., were and still are immovables by destination. It certainly was intended for the exploitation of the land, and has been so used and can again be so used. The mere fact that the use of the apparatus was stopped some 90 days before the seizure can make no difference in its status. The apparatus for sinking shafts, etc., has the same status. Even if it be true that the owner did not intend to use it again, that fact, of itself, would not have deimmobilized the apparatus.

I will say here that it seemed to be assumed in the examination of Mr. Freeman, from whom alone evidence appears in this matter, that the question whether a particular movable was immobilized must be determined with exclusive reference to service or usefulness to the salt mine. Such is not my understanding. As has been shown, a fundus, of which a movable becomes a part by destination, may be a building as well as any other property immovable by nature. The French commentators agree that it matters not whether the fundus is exploited

for agricultural or industrial purposes, or whether it is used merely for habitation. Many industrial establishments might have been placed on the island mortgaged in this case, and each one might have incorporated into itself immovables by destination, even if it had no direct connection with the working of the salt mine. However, it would seem, under the proof, that most, if not all, the buildings did have a reference to or a connection with the salt mine; which, of course, would make the case stronger still. If the mortgagors built on the mortgaged land an establishment for the making of bricks, all the movables placed in the building for the purpose of exploiting the plant became immobilized. A fortiori, did this take place if the purpose of making bricks was to use them in the salt mine or in connection therewith.

The horses were undoubtedly immovables by destination. It is not even pretended that they were intended for the service of the persons of the owners. They were intended and used for the service of the fundus.

The goats were unquestionably immovable by destination. There is a unanimity of opinion among the French commentators that sheep kept for any purpose beneficial to the fundus, and not for the market, are immovables. The proof is that the flock of goats was placed on the land for the sole purpose of destroying the brush and weeds and keeping down the grass. It has been held in France that cows attached to dairy farms are immovable by destination.

By applying the general principle that all movables intended for the exploitation of the fundus become incorporated into it, it would seem clear that all materials intended to be used in building and repairing should be immovables by destination. But the French commentators show that the Code Napoleon (as also the Louisiana Civil Code, article 476 [468]) has chosen to make a special exception with regard to building materials, which do not become immobilized until actually used and incorporated into the building. Therefore, all material of any kind for building or repairing, including the bricks, of course, must be excluded from the operation of the mortgage.

It seems to have been held in France that barrel staves intended to be used in making barrels to contain the product of a factory are not immovables, doubtless by analogy with building materials. Therefore, the staves will be excluded.

The report of the master must be disaffirmed. It will be recommitted to him, with instructions to recast it with reasonable dispatch, in accordance with the views hereinabove expressed.

CALHOUN v. PULLMAN PALACE CAR CO.

(Circuit Court, W. D. Tennessee, W. D. December 14, 1906.)

No. 3,860.

1. CARRIERS—SLEEPING CAR COMPANIES—DUTY TO THE PUBLIC.
   A sleeping car company is not a common carrier of passengers, and its liability to persons seeking its accommodations rests solely on breach of its implied obligation to furnish such accommodations as it holds itself out as offering to the public.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1572.]
2. SAME—ACTION—DECLARATION.
   Plaintiff alleged that, being a holder of a railroad ticket which entitled him to be carried over the P. Railroad from New York to Washington, then to Chattanooga, Tennessee, he exhibited such ticket to the agent of defendant sleeping car company at Providence, R. I., who informed him that by purchasing a local ticket from Providence to Jersey City the agent could sell him sleeping car accommodations from Providence to Washington, where the railroad authorities would countersign his ticket so as to validate it for the balance of his journey; that, relying on such information, he purchased a ticket, but was refused permission to ride by the train conductor of the P. Railroad Company after leaving Jersey City, unless he paid fare, because the ticket had not been countersigned in New York; that he paid fare to the next nearest station, where he was ejected. *Held*, that the declaration did not state a cause of action against the sleeping car company.
3. SAME—ACTS OF AGENTS—SCOPE OF AUTHORITY.
   The agent of a sleeping car company had no authority to inform a prospective passenger that his railroad ticket entitled him to ride without having the same countersigned and validated at an intermediate point.

Carroll & McKellar, for plaintiff.
Thos. H. Jackson, for defendant.

McCALL, District Judge. This case is heard upon a demurrer to the declaration.

It is alleged as follows:

"That on the 1st day of September last the plaintiff was the holder of a ticket which entitled him to be carried over the Pennsylvania Railroad from New York to Washington City, and thence, over connecting lines, to Chattanooga, Tenn., which said ticket he exhibited to the agent of the defendant in Providence, R. I., who informed him that by purchasing a local ticket from Providence to Jersey City he could sell him and furnish him a lower berth in the Pullman car from Providence to Washington, where he could get the railroad authorities to fix his railroad ticket, so that he could go forward on his journey, returning to Chattanooga. The aforesaid agent of the defendant examined the aforesaid railroad ticket, and informed him that it was not necessary for him to go to New York for the purpose of having his ticket countersigned; that he could have that done in Washington, and thereupon, and upon the assurance given him by the agent of the defendant, the plaintiff purchased a local ticket which entitled him to enter upon the train of the connecting railroad company, and to enter a sleeping car thereto attached, and to be transported therein over the lines of the Pennsylvania Railroad from Jersey City to Washington, and having the assurance, as aforesaid, that with the aforesaid railroad ticket and the sleeping car ticket, and upon the undertaking of the defendant for the compensation it received for the said sleeping car berth, to furnish the plaintiff the accommodations of the sleeping car from Providence, R. I., to Washington City, and upon the assurance made

to him by the agent of the aforesaid defendant, and the warranty that upon his aforesaid railroad tickets and the sleeping car ticket, that he would have and enjoy the right to occupy the berth he purchased from Providence, R. I., to Washington City, he entered into the aforesaid contract with the defendant company, became a passenger upon the car, occupied the berth assigned to him, and was carried without molestation until the train reached Trenton, N. J., when he was awakened by the porter of the sleeping car and informed that the train conductor desired to see him; that the train conductor informed him that notwithstanding the representation and warranty made to him by the agent of the defendant company he would not be carried as a passenger, because his ticket had not been countersigned at New York, and that unless he paid him the local fare he would be ejected from the car; that the plaintiff thereupon paid to the conductor the local fare to Philadelphia, it being the nearest station at which the train stopped, and then, notwithstanding the assurance and warranty so made by the defendant company as aforesaid, he was ejected by the conductor from said car, and suffered the humiliation of a public ejection, was necessitated to go back to New York to have his ticket countersigned, and was delayed upon his trip, subjected to indignities and expense to his great damage $10,000, for which he sues, and demands a trial by jury."

The defendant in his demurrer thereto sets out eight separate grounds. All of them may be considered together, since, when they are boiled down, it is seen that the defense is that there is no ground of action alleged in the declaration which entitles plaintiff to recover against the defendant. There is but one count in the declaration, and a careful reading thereof discloses that it is inconsistent in its averments. The plaintiff first alleges that on the 1st day of last September he was the holder of a ticket which entitled him to transportation over the Pennsylvania Railroad from New York City to Washington City, and then, over connecting lines, to Chattanooga, Tenn. If this is true, and he was forced to leave the Pennsylvania Railway train, as is alleged, by a conductor of that company in charge of one of its trains, then his right of action, if he has any, would be against that railroad company, and not against the defendant, Pullman Car Company, against which nothing is alleged in so far as the complaint of actual ejection is concerned.

However, plaintiff avers, in connection with the above statement, that he exhibited his ticket to the agent of the defendant company in Providence, R. I., who informed him that, if plaintiff would purchase a local railroad ticket from that point to Jersey City, he, the agent of the defendant, could sell to plaintiff a sleeping car ticket from there to Washington, and that it was not necessary for him to go to New York to get his said railroad ticket countersigned, but that he could get it fixed at Washington and proceed on his journey to Chattanooga. If plaintiff's first averment is true—that is, that he had a railroad ticket over the Pennsylvania Railroad which entitled him to go over that road from New York to Washington—then it was not necessary to go to New York to have it countersigned. Clearly, if this ticket needed to be countersigned before it was good, then, until that was done, it did not entitle plaintiff to ride over the Pennsylvania Railroad from New York to Washington. And nothing that the agent of defendant said could validate the railroad ticket.

Plaintiff proceeds, and alleges that, relying on this information given him by the agent of the defendant, he purchased a local railroad ticket

to Jersey City, to connect with the Pennsylvania Railroad, over which he avers he held a ticket to Washington, and purchased a sleeping car ticket from defendant's agent to Washington, and went upon the train and into his berth, relying confidently on the assurance of this defendant that it was not necessary to go to New York to have his railroad ticket countersigned, and that the sleeping car ticket which he held would afford him the comfort of traveling in that sleeping car to Washington. After the sleeping car had been hooked onto the train of the Pennsylvania Railroad, and was near Trenton, N. J., he was informed by the conductor of the train that he could not carry him over that road on that ticket unless it had been countersigned in New York, and that plaintiff must pay his fare or get off. There is no allegation that the sleeping car on which he was to be carried from Providence to Washington, under the ticket he held for a berth therein, did not go at the time, and on the route, for which plaintiff's railroad ticket called. There is no allegation against the defendant, except that its agent informed plaintiff that it was not necessary for him to go to New York to have a railroad ticket countersigned which plaintiff held, and which he avers entitled him to transportation over the Pennsylvania Railroad.

There is no averment that the information given plaintiff by defendant's agent, and upon which he alleges he so confidently relied, was incorrect. Indeed, there is no allegation that it was at all necessary that said railroad ticket should have been countersigned at New York or elsewhere. The only allegation is that, notwithstanding the representation made to plaintiff by defendant's agent, the train conductor informed him that he could not be carried as a passenger on that train because his ticket had not been countersigned at New York.

Counsel for plaintiff insists that the facts stated in the declaration make the defendant company an insurer or warrantor of the validity of the ticket which plaintiff had over the Pennsylvania Railroad from New York to Washington. To sustain this position, counsel relies upon the case of Pullman Palace Car Company v. King, 99 Fed. 380, 39 C. C. A. 573. In that case the facts were that King held a valid coupon ticket from New Orleans to New York. The last coupon was over the Baltimore & Ohio Railroad from Washington to New York. He exhibited this ticket to defendant's agent at New Orleans, and thereby informed that agent that he, King, proposed to go over that line. The defendant's agent undertook to sell King a ticket good for a berth in the sleeping car Dioces from New Orleans to New York, to go over the railroad lines for which King's railroad ticket called. The agent made an error and sold King a ticket for a berth in a sleeping car that went from Washington to New York over the Pennsylvania Railroad, and over which railroad King's ticket was not valid, when he should have sold him a ticket, if he sold him one at all, which was good for a berth in a sleeping car that went over the lines of railroad for which King's railroad ticket called, including the Baltimore & Ohio Railway from Washington to New York. The Circuit Court of Appeals of the Second Circuit decided upon the facts in that case that the jury was justified in finding that the defendant undertook, for a compensation received, to furnish the plaintiff the accommodations of the sleeping car from New Orleans to Jersey City, and said:

"It, in effect, represented to him by its agent that the car would go by the line of the Baltimore & Ohio Railroad, because, by showing him his ticket, the plaintiff virtually informed the agent that he proposed to go by that line. The representation was in the nature of a warranty, and the contract may, therefore, be pleaded as embodying it as a part of its terms. It is plain that this contract has been broken, if the plaintiff was, without just cause, compelled by the defendant, or those for whose acts it was responsible, to leave the car at any time before reaching Jersey City; and in that event he was entitled to recover for the breach, as he could if he had been wrongfully ejected by a common carrier of passengers, or by an innkeeper."

After making this statement, Judge Wallace, speaking for the court, further said:

"The proprietor of a sleeping car is not, however, a common carrier of passengers, nor an innkeeper. And the liability of the sleeping-car corporation rests upon the breach of its implied obligation to furnish the accommodations which it holds itself out as offering to the public. It does not hold itself out as offering to supply the motive power for the transportation of passengers, or any of the instrumentalities or facilities for the management of the train. The passenger understands that these are to be supplied by the railroad company over which he has bought, or is to buy, his ticket, and that, unless he complies with the proper rules and regulation of the railroad company in respect to the payment of fare, he is not entitled to be carried, and may be ejected from the car"—citing Lemon v. Car Company (C. C.) 52 Fed. 262; Duval v. Car Company, 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715.

In Ulrich v. Railroad, 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369, it was held that the purchase of a ticket for a seat in a drawing-room car has no effect upon the status of the purchaser as a passenger, and that "the contract for a seat did not make the purchaser a passenger in any sense; but it simply provided that, if the purchaser secured a right to ride on the train, he could also enjoy the advantages of a specific seat during the trip if he so desired." The difficulty in which counsel for plaintiff here finds himself is that the facts alleged in the declaration do not bring this case within the decision in the King Case, supra. In that case the plaintiff was ejected from a train on a railroad over which he had no railway ticket at all, and he was placed in this embarrassing situation by reason of an error committed by the defendant's agent, made with the plaintiff's railroad transportation lying before him. In the case at bar the defendant was ejected from a train on a railroad over which he had a ticket, and he was ejected by a railway conductor because the conductor claimed the ticket should have been countersigned in New York. In other words, in this case, had the plaintiff complied with the proper rules and regulations of the railroad company in respect to having his ticket countersigned in New York (if we assume that that was necessary, it not being alleged), then he would have not been ejected from the car, but would have enjoyed the luxury of traveling undisturbed in a Pullman Palace Car from Providence to Washington, according to his Pullman car ticket. The infirmity was in the railroad ticket, and not in anything that the defendant did or left undone.

To hold, upon the facts stated in the declaration in this case, that the defendant, Pullman Car Company, is liable in damages to plaintiff is equivalent to saying that the Pullman Company is the insurer of the genuineness and validity, and the identity of the holder, of every railway ticket which is exhibited to its agents when applied to for a sleep-

ing car ticket, although the sleeping car ticket calls for a berth in a Pullman car that is carried over the line, or lines, of railway for which such railway ticket calls. That is to say, that if a party holds a railway ticket that must be countersigned to validate it, or if he holds a railroad ticket to which he is not entitled, and could not use for transportation if his identity became known to the railroad conductor, or for any reason the railroad ticket is invalid, all such party need to do in order to hold a sleeping car company for damages would be to go to the office of such sleeping car company, exhibit such railroad ticket to the agent, buy a sleeping car ticket over the lines called for by the railroad ticket, go aboard the train and into his berth, and then because of an infirmity in the railroad ticket, which the conductor discovers, get ejected from the car or train, and then sue the sleeping car company. Such a proposition, to my mind, is sanctioned neither by any rule of right reason or law. As above stated, the courts have held that the Pullman Palace Car Company is neither a common carrier of passengers nor an innkeeper, and, to this I add, neither is it an information bureau nor a guaranty company, but its liability rests upon the breach of its implied obligation to furnish the accommodations which it holds itself out as offering to the public. It does not hold itself out as an information bureau, nor as the insurer of the validity of railroad tickets.

Admitting that the information alleged to have been given by defendant's agent was incorrect, it could not render defendant liable for the reason that the agent was acting clearly outside the scope of his duty as such agent. And, further, the plaintiff, so far as this declaration discloses, had equal or better opportunity to know about the condition of the ticket which he held than was afforded the agent of defendant, and so far as this defendant is concerned, it appears to me that the plaintiff's trouble was brought about by his own negligence and carelessness.

The result is the demurrer is sustained, and the declaration will be dismissed.

ROWAN v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, N. D. Iowa, C. D. January 4, 1907.)

No. 267.

1. TELEGRAPHS—MESSAGES—DELAY IN DELIVERY—DAMAGES—MENTAL ANGUISH.
   Damages for mental anguish, unaccompanied by physical injury, cannot be recovered against a telegraph company for its mere negligent failure to deliver a death message to plaintiff, by reason of which he was prevented from attending his sister's funeral.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 69, 70; vol. 15, Damages, § 100.

   Damages for mental suffering from delay in delivering telegram, see Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 571; Western Union Telegraph Co. v. Coggin, 15 C. C. A. 250; Western Union Telegraph Co. v. Morris, 28 C. C. A. 62.]

2. DAMAGES—MENTAL SUFFERING.
   Damages for mental suffering are ordinarily allowable only where there has been a bodily injury causing physical pain, and the mental

suffering cannot be distinguished from the physical, or where there has been a malicious, intentional, or willful invasion of plaintiff's legal rights, when damages for mental suffering may be recovered, though there is no physical injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 100–103.]

3. TELEGRAPHS—MISTAKES—RIGHT OF ACTION.

Iowa Code 1897, § 2163, provides that the proprietor of a telegraph line is liable for all mistakes in transmission or for any unreasonable delay in transmission or delivery, and for all damages resulting from a failure to perform any duty required by law, the provisions of any contract to the contrary notwithstanding. *Held*, that such section did not create a right of action in the addressee of a death message to recover damages for negligent delay in the delivery where none existed before, and hence was ineffective to sustain a recovery of damages for mental anguish by such addressee, unaccompanied by any physical injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 48–50, 69, 70.]

On Demurrer to Petition.

D. C. Chase, for plaintiff.
Wesley Martin, for defendant.

REED, District Judge. This action is to recover damages for mental anguish alleged to have been sustained by plaintiff because of the neglect of the defendant telegraph company to deliver to him at Webster City, Iowa, a telegram sent from Gibson, Ill., June 16, 1903, informing him of the death of his sister at that place, by reason of which neglect plaintiff says he was prevented from attending the funeral, and suffered great mental anguish because thereof, for which he asks judgment in the sum of $5,000. The defendant demurs to the petition upon the ground that mental anguish alone caused by mere neglect is not a basis for the recovery of damages; and that presents the only question for determination. The petition is defective in its statement of the facts, and the demurrer might well be sustained upon this ground alone. But it can be amended to allege the facts as above stated, and the question may be considered as if it was so amended.

The authorities upon this question are not in accord. Many of them are referred to in Mentzer v. Telegraph Co., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294, and others in Cowan v. Telegraph Co., 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268, where it is held that damages for mental anguish, unaccompanied by bodily injury, may be recovered when it is caused by the mere neglect of another. It is freely admitted in the Mentzer Case that the general rule which has come down to us from England is that mental anguish resulting from mere neglect unaccompanied by injuries to the person affords no grounds for the recovery of damages, and that this is the general rule of to-day in all actions for breach of contract or for tort. The earliest departure from this rule seems to be the case of So Relle v. Telegraph Co., 55 Tex. 308, 40 Am. Rep. 805, decided in 1881, where it is held that the willful neglect of a telegraph company to deliver a message informing the plaintiff in that case of the death of his mother would warrant a recovery of damages for in-

jury to his feelings, where he was prevented by such neglect from attending the funeral. This case seems to be overruled in Railroad Co. v. Levy, 59 Tex. 563, 46 Am. Rep. 278, which, in turn, is practically overruled by Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623, and the doctrine of the So Relle Case re-established; and the rule obtains in Tennessee (Telegraph Co. v. McCaul, 90 S. W. 856), Kentucky (Chapman v. Telegraph Co., 90 Ky. 265, 13 S. W. 880), North Carolina (Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883), and perhaps some other states as well as in Iowa. The reasons given for this departure are not persuasive. In the main, they are that the elasticity of the common law is such as will permit of the application of its principles to new conditions as they arise in the advancing civilization; that the telegraph is a public utility of modern invention, endowed by the state with special privileges, and charged with public duties; that neglect by its managers and operators in the performance of these duties may cause mental anguish to those it is required to serve; therefore the principles of the common law should be so extended as to permit the recovery of damages for mental anguish when it is caused by such neglect. As well might it be said that as the steam and electric railroads are public utilities of modern invention, endowed with like privileges and charged with public duties similar to those of the telegraph, neglect by their managers in the performance of these duties may be the cause of the death of many of those they employ and of those they are required to serve; therefore the principles of the common law should be so extended and applied as to permit of the recovery of damages for death caused by negligence in the operation of these powerful agencies of the new civilization. Such an application would have rendered unnecessary Lord Campbell's act (9 & 10 Victoria, c. 93), which provides that damages may be recovered for wrongfully causing the death of a person, and the statutes of the various states patterned thereafter. No doubt the principles of the common law may and should be applied to afford protection to new rights and redress for new wrongs as they may arise under new conditions. But mental anguish is older than the new civilization, and the negligent cause thereof has been the subject of frequent consideration by the common-law courts, and it is the settled rule of those courts that such anguish, when unaccompanied with bodily injury, is too intangible and too remote to form a basis for the recovery of damages, as clearly as it is their settled rule that the taking of human life cannot be made the basis of a civil action for damages. Railway Commissioners v. Coultas, 13 App. Cas. 222; Lynch v. Knight, 9 H. L. Cas. 577; Hobbs v. London S. W. Ry. Co., 10 Q. B. 122; Insurance Co. v. Brame, 95 U. S. 757, 24 L. Ed. 580.

Damages for mental suffering are ordinarily allowable only: (1) Where there has been bodily injury causing physical pain, and the mental suffering cannot be distinguished from the physical, in which case it may be considered with the physical pain in determining the amount of recovery; (2) where there has been a malicious, intentional, or willful invasion of the legal rights of another, though it may be without physical contact, the natural result of which is mental

suffering, in which case damages may be allowed to the injured person, not alone as compensation for the injured feelings, but by way of punishment of the wrongdoer. Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 1079, 25 L. R. A. 406, 49 Am. St. Rep. 507; Railroad Co. v. Stables, 62 Ill. 313–321. In the last-mentioned case, it is said:

"The mental anguish not proper to be considered as an element of damages is where it is not connected with bodily injury, but is caused by some mental conception not arising from the physical injury."

The action of slander or libel is for injury to the character or reputation, and cannot be founded alone upon mental suffering. There must be some other damage alleged in such cases to state a cause of action. Lynch v. Knight, 9 H. L. Cas., above. Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Newell, Slander and Libel (2d Ed.) 863.

To permit of the recovery of damages for mental suffering alone is not the application of old principles to new conditions, but is the creation of a new right of recovery unknown to the common law as clearly as is the creation of a right of recovery for the killing of a human being. Such right, if it is to be created, is the province of the Legislature, and not of the courts. If the addressee of the delayed message may recover for his mental suffering, why may not his wife, sister, or mother, who resides with him, and for whose benefit it may also have been intended, and whose grief may be greater or sorrow deeper than his, also recover? Or, if the message has been timely delivered and the addressee has started by train to attend the funeral, but is negligently delayed by the railway company, so that he fails to reach his destination in time, why may he not recover for the mental anguish endured because of such delay? Wilcox v. Railway Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507. The mental suffering in such case, if any, is just as clearly the result of neglect as in the other. Other illustrations of the extent to which the departure may be carried, if it is permissible, may readily be suggested. The difficulty, if not impossibility, of separating the grief caused by the death of near relatives from that caused by inability to attend their burial, is obvious, and no rule has been formulated nor any suggested whereby the separation may be made and the effect or duration of each upon surviving relatives separately determined. The Texas court in which the new doctrine has its origin holds that such damages are not recoverable in that state when the message is sent from another, in which the right of such recovery does not exist; that the law of the state from which the message comes controls. Western Union Telegraph Co. v. Buchanan (Tex. Civ. App.) 80 S. W. 561. And the same is held in North Carolina. Bryan v. Telegraph Co. (N. C.) 45 S. E. 938. In Illinois, from where the message in question was sent, a right of recovery exists only in favor of the sender of the message to recover the price paid for its transmission, and nominal damages for the breach of the contract. Logan v. Telegraph Co., 84 Ill. 468. It would serve no useful purpose to further restate the reasons for denying the right of recovery in this class of cases. They are clearly stated in the fol-

lowing named cases: Telegraph Co. v. Saunders, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; Telegraph Co. v. Ferguson (Ind. Sup.) 60 N. E. 674, 54 L. R. A. 846, and cases cited; Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 1079, 25 L. R. A. 406, 49 Am. St. Rep. 507; Ward v. West Jersey R. Co., 65 N. J. Law, 383, 47 Atl. 561; Wilcox v. Railway Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; Telegraph Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; Western Union Telegraph Co. v. Sklar, 126 Fed. 295, 61 C. C. A. 281; Chase v. Telegraph Co. (C. C.) 44 Fed. 554, 10 L. R. A. 464; Crawson v. Telegraph Co. (C. C.) 47 Fed. 544; Tyler v. Telegraph Co. (C. C.) 54 Fed. 634; Kester v. Telegraph Co. (C. C.) 55 Fed. 603; Alexander v. Telegraph Co. (C. C.) 126 Fed. 445.

While the Court of Appeals for this circuit has not determined this precise question, it has held that mental pain and suffering alone, separable from that caused by bodily injury, may not be a basis for the recovery of damages. Railway Co. v. Caulfield, 63 Fed. 396, 11 C. C. A. 552; Southern Pacific Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288. In the last-mentioned case the plaintiff was permitted to testify upon the trial that it distressed him mentally because other people looked down upon and seemed to shun him because of his crippled condition, which condition it was alleged was caused by the neglect of the railway company. In holding this to afford no ground for recovery, the court said:

"In some states, notably in Wisconsin and Michigan, evidence of mental pain caused by disfigurement, apart from the physical suffering produced by an injury, is admissible to enhance the damages in an action for personal injury. * * * The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that in actions for personal injury the plaintiff may recover for the bodily suffering and the mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of damages in such a case, and evidence of it is inadmissible. * * * Mental pain of this character, the suffering from injured feelings, is intangible, incapable of test or trial. The evidence of it, like that which convicted the alleged witches, rests entirely in the belief of the sufferer, and is not susceptible of contradiction or rebuttal. Many other causes, the education, temperament, and sentiment of the sufferer, the mental attitude, the acts and words of his friends and acquaintances, concur with the accident to cause this mental distress, in such a way that it is impossible to separate and ascribe the proper part of it to the injury caused by the defendant."

This seems to be a direct holding that mental anguish alone may not furnish a basis for the recovery of damages. There is greater reason for permitting such recovery in that class of cases than in this, for there the defendant may be liable for the crippled condition which causes such anguish, while here there is no possible ground for holding the defendant responsible for the death which is the primary cause of the alleged suffering.

Section 2163, Code Iowa 1897, is relied upon as authorizing a recovery for such damages. That section is as follows:

"The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment,

or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law, the provisions of any contract to the contrary notwithstanding."

The courts, in the absence of statutes, are not agreed upon the question of the right of an addressee of a message, who does not stand in any contract relation with the telegraph company, to recover damages sustained by him for the negligent failure to deliver the same; and this section only makes the company liable to any party who sustains damages because of such neglect. Herron v. Telegraph Co., 90 Iowa, 129, 57 N. W. 696. It creates no right of recovery for damages not before recognized as recoverable. Telegraph Co. v. Sklar, 126 Fed. 295–300, 61 C. C. A. 281; Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 1079, 25 L. R. A. 406, 49 Am. St. Rep. 507. The section was not regarded in either the Mentzer or the Cowan Cases, before mentioned, as giving the right of recovery there held to exist, and it would seem a strained construction to give it such effect.

The conclusion, therefore, is that the demurrer should be sustained, and it is so ordered.

SMITH OYSTER CO. v. DARBEE & IMMEL OYSTER & LAND CO. et al.

(Circuit Court, N. D. California. October 22, 1906.)

No. 13,753.

1. QUIETING TITLE—SUIT UNDER CALIFORNIA STATUTE—RIGHT TO MAINTAIN.
Code Civ. Proc. Cal. § 738, which provides that "an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim," gives a remedy in equity enforceable in the federal courts where there is no adequate remedy at law; and, as construed by the Supreme Court of the state, the legal title is not essential to support such a suit, nor need a complainant in possession wait till his right or title has been established in an action at law before bringing such a suit to determine an adverse claim of one out of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 48–56; vol. 13, Courts, §§ 972, 974.]

2. SAME.
Under Code Civ. Proc. Cal. § 738, a suit to quiet title may be maintained by a complainant who is in the occupancy and possession of tide lands owned by the state, on which he is maintaining oyster beds, under and by virtue of Act Cal. March 30, 1874, which provides that persons planting such beds, and marking the same by fences or stakes, shall have the exclusive right to take up the oysters, and the exclusive use and occupation of the lands, for the purposes of the act, against a defendant not in possession, but who claims some adverse right or interest in the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 55, 56.]

3. INJUNCTION—RIGHT TO RELIEF—NATURE OF SUIT.
Relief by injunction may be granted, in the discretion of the court, in any suit in equity when a proper case therefor is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 3.]

In Equity. On motion to dismiss for want of jurisdiction.

Campbell, Metson & Drew, for complainant.

Louis Goldstone (Garoutte & Goodwin, of counsel), for certain respondents.

WOLVERTON, District Judge (orally). This is a motion to dismiss the action here pending, upon the ground that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court to try and determine. Several reasons are assigned in support of the motion, not all of which were insisted upon, and I shall notice those only that were urged at the argument as vital to the cause.

The action, or perhaps, more properly speaking, the suit, is designed as one to quiet title. Whether it is sufficient for that purpose is dependent upon the subject-matter of the controversy. Complainant asserts that it is the owner of the exclusive rights, privileges, and franchises for the planting, cultivating, laying down, growing, and taking up and carrying away oysters in and upon certain specified tide lands and the oyster beds thereon belonging to the state of California, and of the right to the exclusive use, occupancy, and possession of said tide lands and oyster beds for the purposes aforesaid, subject only to the right of the state of California to sell or dispose of such lands; that it is in the actual, peaceable, and exclusive possession of the same, except as subsequently stated, which said rights, privileges, and possession were so acquired and are now held under and by virtue of an act of the Legislature of the state of California entitled "An act to encourage the planting and cultivation of oysters," approved March 30, 1874 (see Statutes of California 1873–74, p. 940, c. 671), and that each and all of the respondents are claiming an interest or estate in said tide lands and oyster beds thereon adverse to the ownership and title of the complainant, the nature of which is unknown to the complainant, but that each and every of the claims of the respondents are without right, and that each and all of the respondents are without estate, right, title, or interest in or to any of said lands or oyster beds. Further allegations show occupancy and possession, and the marking, staking, and fencing necessary to assert the rights and privileges granted by the statute. These are followed by others showing certain trespasses on the part of the respondent, the Darbee & Immel Oyster Company, its agents and employés, for a short time only, accompanied with threats to destroy the property of complainant, which constitutes the only exception to complainant's peaceable and exclusive possession previously suggested. The prayer is, in purpose, that complainant's right, title, privileges, and franchises be quieted as against the claims or demands of the respondents.

The right to have a dismissal is based upon the act of Congress of March 3, 1875 (chapter 137, § 4, 18 Stat. 471), as amended in 1887–88 (chapter 373, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 511]). By that statute, if it shall appear at any time that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, it shall be dismissed. The Circuit Court is given equitable cognizance, concurrent with the courts of the several

states, by the same statute, where the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000. U. S. Comp. St. 1901, p. 508. The amount involved here is shown to be above that fixed by the statute, so that the question comes simply to whether the pleadings state a cause for equitable interposition. If they do, the motion must fail; otherwise not.

The local statute, being section 738 of the Code of Civil Procedure, provides as follows:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; * * * provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given." Statutes and Amendments to Codes of California 1895, p. 72, c. 77.

It has been frequently adjudged "that where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession, to quiet title to lands, such remedy would be enforced in the federal courts, if it did not infringe upon the constitutional rights of the parties to a trial by jury." Greeley v. Lowe, 155 U. S. 75, 15 Sup. 24, 39 L. Ed. 69, and cases cited. The local courts have given interpretation to this statute. In the case of Pierce v. Felter, 53 Cal. 18, it is said:

"The only question presented in this case is whether the owner of an estate or interest in land less than an estate in fee can maintain an action for the determination of an adverse claim made by another person. We think that he can. The Code of Civil Procedure (section 738) provides, in terms, that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

So in Stoddart v. Burge, 53 Cal. 394, 399:

"The statute evidently contemplates that whether the plaintiff be the owner in fee or not, if the defendant claims an interest adversely to his right or title, such as it is, he is entitled, in an action of this character, to have the adverse claim determined."

I find another case in the same volume (Gelcich v. Moriarty, p. 217) where the statute was invoked to try the possessory title to a mining claim. Under a similar statute in Nevada, the federal court, in Book v. Justice Min. Co. (C. C.) 58 Fed. 827, 830, has declared that an action brought in pursuance thereof "by a party in possession to quiet the title to a mining claim is an equity suit, and may be tried and disposed of as such"; and, after citing authorities, the court continues:

"Foster, in enumerating the state laws creating new rights which can be enforced by federal courts of equity, specifies one authorizing a person in possession of land to sustain a bill to determine and quiet title to the same."

One of the cases referred to by the learned court is Balmear v. Otis, 4 Dill. 558, Fed. Cas. No. 819, wherein the court says:

"A proceeding under the Iowa statute to quiet title is in its essence an equity suit. In the federal courts, whether a particular case is one at law or equity depends upon the case stated in the petition. If the case there made shows a mere contest of legal titles, and the defendant is in possession, the remedy is at law. If the plaintiff is in possession, or if neither party is in

possession, and the petition or bill shows that equitable relief is necessary or proper, the jurisdiction is in equity."

While the California Supreme Court treats the statute as giving a right to compel others by suit (that is, in equity) to litigate and determine controversies in cases where such right did not exist before, yet it does not consider that it takes away the right to proceed in an action at law in a proper case, or to have the right of trial by jury asserted where the issues presented are clearly cognizable in a court of law. Crocker v. Carpenter, 98 Cal. 419, 33 Pac. 271. The act of March 30, 1874, above cited, provides, by its first section, that:

"Any citizen of the United States may lay down and plant oysters in any of the bays, rivers, or public waters of this state; and the ownership of and the exclusive right to take up and carry off the same shall be continued and remain in such person or persons, who shall have laid down and planted the same."

By its second section it provides for staking or fencing off the land, which stakes and fences are declared to be sufficient marks of the boundaries and limits, and entitle the person so doing to the exclusive use and occupation of such land for the purposes described in the act, and by its third section, for recording and full description of the bed or beds. A later section (the seventh) requires that parties availing themselves of the provisions of the act shall cause to be erected a sign of a designated description. This statute unquestionably gives an exclusive right of possession, for the purposes therein specified, to any person who complies with the provisions thereof. Such right of possession may be deemed a privilege or franchise. But whatever may be the most appropriate designation thereof, the right is one that the courts will interpose to maintain in behalf of the party or parties entitled thereto. It is such a right, therefore, as a court of equity will interpose to quiet as against any one claiming an adverse interest. The right is analogous to the possessory right in a mining claim, which may be maintained, by a compliance with the statute, against all other persons whomsoever; and equity, as I have suggested, will, under the local law, interpose to quiet such title or right of possession. It is unnecessary for the plaintiff, in bringing suit to quiet title, to set out specifically the character of his title or the alleged title of the defendant, but it is always sufficient to simply allege plaintiff's ownership and possession, and that defendant is unlawfully asserting a claim thereto adverse to him. Union Mill & Mining Company v. Warren et al. (C. C.) 82 Fed. 519. That is just what this bill of complaint does. It states with sufficient particularity the complainant's right and title, and that it is in the actual and exclusive possession, with an exception which falls far short of an ouster, and it sets out pertinently the adverse claim, and the further material fact that it is being disturbed in its possession. I am of opinion, therefore, that the bill of complaint, especially as it is not tested by demurrer, is sufficient to sustain the equitable action for which it is intended.

It is, however, further seriously contended that, under the latter clause of the local statute above quoted, the Circuit Court will not take jurisdiction in equity, for the reason that such a course would deprive the defendant of the right of trial by jury. The right of trial

by jury accorded by this statute is nothing beyond the right accorded to any suitor in an action at law. It has been so clearly defined by the Supreme Court of this state that there need be no further question about it. In Donahue v. Meister, 88 Cal. 121, 127, 25 Pac. 1096, 1098, 22 Am. St. Rep. 283, the court, in speaking of the action, says:

"It is really a statutory action. The Code confers equitable rights so far as it grants the power to maintain the action at all, and the decree is in form equitable; but if it has to deal with ordinary common-law rights, clearly cognizable in courts of law, it is to that extent an action at law."

So in that case, where the verified answer of the defendant showed the defendant to be entitled to possession, and that he was in possession of the disputed premises a short time prior to the commencement of the action, and was ousted by the plaintiff, it was held that such defendant could not be deprived of his right to a trial by jury, which was a constitutional right, and that the fact that the plaintiff had first instituted his suit could not operate to that end. The court was careful, however, to especially confine the decision to the facts peculiar to that case. The case has been followed in Newman v. Duane, 89 Cal. 597, 27 Pac. 66, and Gillespie v. Gouly, 120 Cal. 515, 52 Pac. 816. While the decisions in all these cases, except the last cited, were pronounced prior to the enactment of the latter clause of the statute now under consideration, yet the statute has not changed, nor was it intended to change, the rule, as is clearly manifest from a careful reading of it; the purpose being to declare the law as it had previously existed. But where the action is purely equitable, as is the present one, the parties are not entitled to a trial by jury. This is determined, in effect, in the case of Crocker v. Carpenter, supra. Nor is the right guarantied by the Constitution or demandable as of right. Raymond v. Flavel, 27 Or. 219, 40 Pac. 158.

Again, it is urged against the procedure that no such action can be maintained until complainant has first established its title by an action at law. As to this, whatever might have been the rule formerly, it is not so required now. In an early case in the Supreme Court of California (Curtis v. Sutter, 15 Cal. 259, 262) it was determined that under the statute it was unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in possession by the institution of a suit against him, and until such suit has been passed in his favor. "It is sufficient," says the court, speaking through Mr. Justice Field, "if, whilst in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted." The doctrine is well sustained and thoroughly settled. Central Pacific R. R. Co. v. Dyer, 1 Sawy. 641, Fed. Cas. No. 2,552; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52.

Another proposition advanced is that the bill of complaint does not show that complainant is without an adequate remedy at law; but the bill does show, to all intents and purposes, that complainant is in possession, and while in possession it can have no action at law in

ejectment or to recover possession, and, as I have shown heretofore, it is not required to wait until its antagonist moves to oust it. It may, when its title and possession are threatened through an adverse claim of title or right, sue to quiet title against such claim, and that is what has been done here. "This 'crucial question,' more specifically stated," says Wellborn, District Judge, in Davidson v. Calkins (C. C.) 92 Fed. 230, 236, "is, as I have already shown, whether or not defendant is in possession. If he is not, there is no adequate remedy at law, and a suit in equity will lie. If the defendant is in possession, ejectment is appropriate, and the interposition of a court of equity forbidden." See, also, Harding v. Guice, 80 Fed. 162, 25 C. C. A. 352.

Lastly, it is asserted that injunctive relief is not properly an incident to the statute. As to that, it is sufficient to say that the action is equitable, and where there is a proper showing for the relief, it is usually granted, within the discretion of the court.

Having disposed of all the questions presented adversely to the motion, it will be denied.

TEVIS v. PALATINE INS. CO., Limited. OF LONDON, ENG.

(Circuit Court, N. D. California. November 22, 1906.)

No. 14,025.

1. REMOVAL OF CAUSES—PETITION—FILING—TIME.

A rule of a state court, from which a cause was removed, provided that no agreement or consent of counsel in respect to the proceedings in a cause, the purport of which is disputed or denied, will be regarded, unless the same shall have been made or assented to in open court and entered in the minutes, or unless the evidence thereof shall be in writing, subscribed to by the party against whom the same may be alleged or by his attorney. Plaintiff's counsel stipulated in writing that defendant might have until October 10, 1906, within which to plead to the complaint or file or make such motion as it might be advised. *Held*, that plaintiff could not object that such stipulation did not extend defendant's time to plead for the purpose of filing a petition to remove the cause to the federal courts on or before the time so fixed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 135–140; vol. 44, Stipulations, §§ 2, 43.]

2. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY.

Code Civ. Proc. Cal. § 283, subd. 1, provides that an attorney shall have authority to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered on the minutes of the court, and not otherwise. *Held* that, where an attorney assumed to bind his client by a valid written stipulation extending defendant's time to plead, he could not thereafter, under such section, disavow his own authority to extend the time in which defendant could file a petition for removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 155–161; vol. 44, Stipulations, § 3.]

John E. Bennett, for plaintiff.
Van Ness & Denman, for defendant.

WOLVERTON, District Judge. Complaint was filed in the above cause in the superior court of the state of California, in and for the city and county of San Francisco, on September 20, 1906, and summons served upon the same day. September 28, 1906, the attorney for plaintiff made and delivered to defendant's attorneys a stipulation, as follows:

"It is hereby stipulated and agreed that the defendant herein may have to and including the 10th day of October, 1906, within which to plead to the complaint on file herein or make such motion as it may be advised. This stipulation need not be filed.

"Dated September 28th, 1906.

"John E. Bennett, Attorney for Plaintiff."

On October 10th, following, the defendant petitioned the superior court and obtained an order for removal of the cause into this court. The transcript has been filed here, and the plaintiff now moves the court to remand the cause. The question for determination is whether parties may, by stipulation, enlarge the time in which to plead to the complaint, and by so doing also enlarge the time within which a petition may be interposed for a removal of the cause from the state court into this court.

The Revised Statutes of the United States require the petition to be filed "at the time or any time before the defendant is required by the law of the state or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

There is subsisting, in the superior court from which the cause was removed, a rule designated rule 21, in language as follows:

"No agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, the purport of which is disputed or denied, will be regarded by the court, unless the same shall have been made or assented to in open court and entered in the minutes, or unless the evidence thereof shall be in writing, subscribed to by the party against whom the same may be alleged, or by his attorney."

It is conceded by counsel for both parties that, under this rule, the stipulation had the force and effect to enlarge the time within which the defendant was required to plead until the expiration of the time fixed thereby.

The federal adjudications are divided upon the pivotal question here; that is, whether the parties may by stipulation thus enlarge the time for removal. The matter is one dependent upon local statutes and rules of court. It was held in this circuit (Austin v. Gagan [C. C.] 39 Fed. 626, 5 L. R. A. 476), soon after the amendment of 1888, Circuit Judge Sawyer presiding, that:

"The statute means at any time before the defendant is required to answer by the laws of the state, when the time is specially regulated by the statutes, and by the general rules of practice governing the matter adopted by the courts, when the matter is thus regulated, instead of by specific statutes of the state—not within the time provided by special orders extending the time, or application by or stipulations of the parties"—citing Dixon v. Telegraph Co., 38 Fed. 377, an earlier case also decided by the same distinguished jurist.

The principle has been reasserted also by Judges Sabin and Knowles, sitting in the same circuit. Delbanco v. Singletary (D. Nev.) 40 Fed. 177; McDonald v. Hope Mining Company (D. Mont.) 48 Fed. 593; Martin v. Carter (D. Mont.) 48 Fed. 596. But it is clear that the facts attending neither of those cases presented the identical question. There are decisions elsewhere, however, announcing the like doctrine. See Velie v. Indemnity Company (C. C. D. Wis.) 40 Fed. 545; Spangler v. Atchison, etc., Co. et al. (C. C. W. D. Mo.) 42 Fed. 305; Rock Island National Bank v. J. S. Keator Lumber Company et al. (C. C. N. D. Ill.) 52 Fed. 897; Ruby Canyon Gold Mining Company v. Hunter et al. (C. C. W. D. S. D.) 60 Fed. 305; Fox v. Southern Railway Co. et al. (C. C. W. D. N. C.) 80 Fed. 945.

Upon the other hand, Hawley, District Judge, sitting in the Circuit Court for the District of Nevada, has, in a later case than any decided in this circuit, held to the contrary; that is to say, that:

"Where a stipulation, signed by a party or his attorney or counsel, is of binding force, a cause may be removed from a state to a federal court within the period to which the defendant's time to answer is extended by a written stipulation, though no order of court is entered thereon." Chiatovich v. Hanchett, 78 Fed. 193.

The quotation is from the syllabus, but it correctly states the holding.

A like conclusion was arrived at by Simonton, District Judge, in People's Bank of Greenville v. Ætna Ins. Company (C. C. D. S. C.) 53 Fed. 161, as well as by Ray and Thomas, District Judges, respectively, in the cases of Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 137 Fed. 284 and Russell v. Harriman Land Company (C. C.) 145 Fed. 745. As applicable to the Chiatovich Case, there subsisted a rule of the Supreme Court in substance the same as rule 21 of the superior court of the city and county of San Francisco; and so in the three latter cases there was a similar rule promulgated by the court of original cognizance.

It was said by the Supreme Court of the United States (Powers v. Chesapeake & Ohio Ry., 169 U. S. 92, 98, 18 Sup. Ct. 264, 266, 42 L. Ed. 673), in a case decided in 1897, that:

"The time of filing a petition for removal is not essential to the jurisdiction. The provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel."

See, also, Hughes' Federal Procedure, p. 333.

So it has been held, in the Circuit Court for the Eastern District of New York, that the time may be enlarged by stipulation of the parties. Allmark v. Platte Steamship Company, 76 Fed. 614. See, also, Groton Bridge & Mfg. Co. v. American Bridge Co., supra, and Wilcox & Gibbs Guano Co. v. Phœnix Insurance Co. et al. (C. C. D. S. C.) 60 Fed. 929. "But," says Benedict, J., in Allmark v. Platte S. S. Co. (C. C.) 76 Fed. 614, 615, "if this were otherwise, I am of opinion that, under the circumstances above stated, the plaintiff should not be heard in this court to say that the time to answer had expired." That was a case where the plaintiff's attorney, as here, stipulated "extending the time to answer and to move."

To the same effect is the language of Judge Ray, in Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 137 Fed. 284, 299, namely:

"The written stipulation, extending the time of the defendant to plead to a certain day, estopped the plaintiff from saying in the proceeding to remove the cause that the time in which defendant was required to answer or plead to the complaint had expired before the arrival of the day named in such stipulation."

And of equal emphasis is the ruling of Thomas, District Judge, in Russell v. Harriman Land Co., supra, that such a stipulation estopped the plaintiff from objecting that the petition for removal was filed too late.

I have not cited all the authorities pro and con, but these are sufficient to indicate the line of cleavage in the holdings and the principle on which they divide.

Mr. Hughes, in his work of standard authority on Federal Procedure, p. 335, states what appears to him to be the meaning of the federal removal statute, as follows:

"If the effect of the extension under the state practice is under the general rules of practice of that state, and not under special agreement of counsel to extend the time within which he is first required to plead any sort of plea on pain of a default judgment, whether conditional or absolute, then the effect of the extension would be to extend the right of filing the petition."

But, whatever may be the sounder or the true rule as it relates to this subject, I am firmly of the opinion that neither the plaintiff nor his counsel can now be heard to say that the defendant was not in time with his petition for removal.

My attention has been called to section 129 of the Code of Civil Procedure, which provides that "every court of record may make rules not inconsistent with the laws of the state for its own government and the government of its officers." I see nothing, however, in rule 21 above set forth, inimical to this statute. And again, section 283, subd. 1, Code Civ. Proc., prescribing that "an attorney and counselor shall have authority (1) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise," is invoked. But the same attorney who assumed to bind his client by the stipulation in question here now seeks, in behalf of the client, to disavow his own authority to extend the time in which to petition for removal. It is plain that he should not be permitted to do so, especially when the opposite party has been misled to his detriment.

The motion to remand will therefore be denied.

HALL v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. December 19, 1906.)

No. 213.

1. REMOVAL OF CAUSES—GROUNDS OF REMOVAL—STATUTES OR LAWS OF THE UNITED STATES—PETITION.

A case not depending on diversity of citizenship cannot be removed from the state court to the Circuit Court of the United States as one arising under the Constitution or laws of the United States, as provided by the removal acts (Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]), unless that fact appears by plaintiff's own statement of his cause of action, and, if it does not so appear, the fact cannot be supplied by the petition for removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 58, 59.]

2. SAME.

Where the facts stated in plaintiff's petition disclose a right of action given or created by an act of Congress, and also a right of action created by a state law, it would be for the court on petition to remove to determine under which statute the action was maintainable, if at all, and, if one construction of the federal statute would sustain and another defeat a recovery, the action would be one arising under a law of the United States, and therefore of federal cognizance.

3. COMMERCE—REGULATION OF INTERSTATE COMMERCE—MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT.

Where a railroad company by which plaintiff was employed was an interstate carrier at the time plaintiff was injured, it was not material to plaintiff's right to the benefit of employers' liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232), regulating the liability of such carriers for injuries to employés, etc., that the train on which plaintiff was injured was an intrastate train.

4. MASTER AND SERVANT—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—PROSPECTIVE OPERATION.

Employers' Liability Act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232), regulating the liability of interstate carriers for injuries to employés, etc., was prospective only in operation, and did not apply to causes of action existing at the time of its adoption.

At Law. On motion to remand.

This action was commenced in the district court of Iowa in and for Linn county, August 25, 1906. The petition alleges that defendant is a corporation duly organized under the laws of Iowa and Illinois, and is a common carrier engaged in operating a line of railroad from Chicago, in the state of Illinois, westward into and through the state of Iowa; that on December 13, 1905, said Edward W. Griffiths, Jr., was in the employ of the defendant upon one of its trains in Iowa, and on that day, while in the discharge of his duty in uncoupling the air hose and cars of said train, was seriously and permanently injured by reason of defects in the roadbed and in the appliances upon the car, arising from defendant's neglect, and the negligence of the other employés of the train in moving the same, for which injuries he asks judgment against the defendant in the sum of $15,000. In due time the defendant removed the cause to this court upon the grounds, as alleged in the petition for removal, "that the cause of action alleged in the petition involves the construction of a law of the United States; that, if the plaintiff has any cause of action, it arises under, and is created by, an act of Congress approved June 11, 1906, entitled "An act relating to the liabilities of * * * common carriers engaged in commerce between the states * * * to their employés." The record has been filed in this court, and the plaintiff moves to remand the cause to the state court upon the grounds, in substance, (1) that it does not appear

from the petition of plaintiff that the cause of action alleged therein arises under the Constitution, or any law or treaty of the United States; (2) that the cause of action alleged in said petition arose under the statutes and laws of Iowa prior to the passage of the act of Congress of June 11, 1906; and (3) that Congress was without rightful authority to pass said act.

Dawley Hubbard & Wheeler and Main & Griffiths, for plaintiff.
Carroll Wright and J. L. Parish, for defendant.

REED, District Judge (after stating the facts). The claimed right to remove this cause from the state court rests solely upon the ground that the action is one arising under a law of the United States, viz., the act of Congress approved June 11, 1906, commonly known as the "Employers' Liability Act." Act June 11, 1906, c. 3073, 34 Stat. 232. The act is as follows:

"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, road-bed, 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 causes 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.

"Approved June 11, 1906."

This statute, if valid, effects radical changes in the liability, as it exists at common law or under the statutes of many of the states, of common carriers engaged in interstate commerce for injuries to their employés; in the time within which the action therefor shall be commenced; in the disposition of the proceeds of recovery when the injury results in death; and in the effect upon the right of recovery for such injuries when the employé is guilty of negligence which

directly contributes to his injury; and counsel for the respective parties practically agree in argument that Congress is and was without rightful authority to pass the same, and that it is therefore invalid. If the court should adopt this view of counsel, it would follow that the cause must be remanded to the state court. But an act of the Legislature, national or state, should not be declared invalid unless it appears beyond doubt to be so. Township of Pine Grove v. Talcott, 19 Wall. 666–673, 22 L. Ed. 227. Nor should it be so declared in any case when it is unnecessary to decide the question of its validity.

The authority of Congress, if it exists, to pass the act in question is, no doubt, the commerce clause of the federal Constitution. Whether it exists under that clause may admit of doubt, but for the purpose of this case it will be assumed, without so deciding, that it does, and that the act is valid. Does it follow that the case is a removable one? It is the contention of the plaintiff that the cause of action does not arise under this act of Congress, or at least that it does not so appear from the allegations of his petition. It is undoubtedly true that under the Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509], a case not depending on diversity of citizenship cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution or laws of the United States, unless that fact appears by the plaintiff's own statement of his cause of action; and, if it does not so appear, the fact cannot be supplied by the petition for removal. Chappel v. Waterworth, 155 U. S. 102–107, 15 Sup. Ct. 34, 39 L. Ed. 85; Third St. R. R. Co. v. Lewis, 173 U. S. 457–460, 19 Sup. Ct. 451, 43 L. Ed. 766.

But the court takes notice of the laws of Congress, and, if the facts stated by plaintiff as the basis of his right of recovery show a right of action given or created by such a law, then it may fairly be said that it appears from his own statement of his claim that the action is one arising under a law of the United States. If the same facts show, also, a right of action created or given by a state law, still it would be for the court to determine under which statute the action was maintainable, if at all; and if one construction of the federal statute would sustain, and another construction would defeat, a recovery under that statute, the action would be one arising under a law of the United States, and therefore of federal cognizance. Starin v. New York, 115 U. S. 248–257, 6 Sup. Ct. 28, 29 L. Ed. 388; Carson v. Dunham, 121 U. S. 421–427, 7 Sup. Ct. 1030, 30 L. Ed. 992. It sufficiently appears, therefore, from plaintiff's petition that the cause of action as alleged therein is one arising under a law of the United States, if the act of Congress of June 11, 1906, is to be given a retroactive effect.

It is contended on behalf of the defendant that, if the act is valid, it is because it relates to a subject-matter confided exclusively to Congress by the federal Constitution, and that its necessary effect is to abrogate all existing state legislation upon such subject, at least such as is inconsistent with its provisions, and to prevent further legislation by the several states relating thereto, and that there is now no right of recovery for causes of action such as are alleged in the plaintiff's petition, except under this act of Congress; and Henderson v. Wickham,

92 U. S. 259, 271–272, 23 L. Ed. 543, Railroad Co. v. Hefley, 158 U. S. 104, 15 Sup. Ct. 802, 39 L. Ed. 910, and other cases are relied upon in support of this contention. The questions thus presented are of much importance, especially in actions upon causes which have arisen since the passage of the act. But it is deemed necessary in this case to determine only whether or not this act is to be given a retrospective effect.

It is alleged that plaintiff was injured in the state of Iowa in December, 1905, by reason of the neglect of defendant in the matter of its roadbed, and the equipment of its cars upon which he was employed; and the negligence of his fellow servants engaged with him in the operation of its train. Whether or not the train was a local one operating between points in Iowa only is not alleged. But this does not seem to be important, for under this act it is the interstate character of the carrier, rather than the particular employment in which the employé may be engaged, that is controlling. For the alleged neglect of defendant in the matter of its roadbed and the equipment of its cars the plaintiff would have a right of action at common law; and under section 2071, Code of Iowa 1897, he may recover from the defendant for the negligence of his fellow servants engaged with him in the operation of its trains in that state, and he may bring his action at any time within two years after the cause of action accrues. The rule is elementary that statutes will not be given a retrospective effect unless that intention appears upon the face of the statute so clearly as to permit of no other construction. Cooley's Constitutional Limitations (3d Ed.) p. 63.

In Twenty Per Cent. Cases, 20 Wall. 179, 187, 22 L. Ed. 339, it is said:

"Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereinafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

There is nothing from which it can be inferred that this statute was to be given a retrospective effect, and it is incredible that Congress intended by it to take away, or in any manner impair, the right of recovery upon causes of action existing at the time of its passage. Any attempt upon its part to bar such right without affording reasonable opportunity to enforce the same after the passage of the act would be sufficient grounds for declaring it invalid as to such causes of action. Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886; Campbell v. Haverhill, 155 U. S. 610–615, 15 Sup. Ct. 217, 39 L. Ed. 280.

Other questions discussed at the bar need not be considered, for it seems clear that this act of June 11, 1906, was not intended to, and does not, apply to causes of action then existing.

The conclusion, therefore, is that the motion to remand must be sustained, and it is so ordered.

SHASTA POWER CO. v. WALKER et al.

(Circuit Court, N. D. California. December 12, 1906.)

No. 13,895.

1. EMINENT DOMAIN—PUBLIC USE—DETERMINATION.

While the question whether a proposed use for which property is sought to be condemned is in fact public or not is for the determination of the courts, the necessity for the taking, the instrumentalities by which it may be done, and the mode of procedure are matters resting wholly within the province and discretion of the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 165–167.]

2. SAME—PRIVATE CORPORATIONS—RIGHTS—INTEREST TO PUBLIC.

To entitle a private corporation to exercise the right of eminent domain, the use for which the property is desired must be such as will subserve the public in the sense that they shall have the right to demand the service of the corporation as of right, and not merely in accordance with the latter's will and pleasure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 51, 54.]

3. SAME—COMPLAINT.

Where a complaint in a proceeding by a private corporation to condemn land for a water ditch alleged that plaintiff had acquired a franchise from the city of R. and the county of S. to serve the inhabitants of such municipality with light, heat, and power, and to generate, transmit, and sell electricity for such purpose to the public in general, and that for this purpose it was necessary to conduct water from a certain creek, through ditches, flumes, and pipe lines, over the property sought to be condemned, to its power house, for use in operating its machinery, etc., the complaint sufficiently showed that plaintiff was a public service corporation, and that the use of the property desired was a public use.

Braynard & Kimball and Samuel M. Shortridge, for plaintiff.
A. E. Bolton and Reed & Dozier, for defendants.

WOLVERTON, District Judge. The question presented for determination here arises upon demurrer to the complaint, challenging the right of plaintiff to condemn certain lands of the defendant Walker for its use; the contention of defendant being that it is not made to appear that the use to which it is sought to devote the property is in fact a public use. It is alleged that the purpose of the plaintiff corporation is to generate, transmit, and furnish electricity and electric current to the public in general, and to all inhabitants and persons within the county of Shasta and elsewhere, in the state of California, for the necessary public use of light, power, and heat; that, to enable plaintiff to perform its functions in this respect, it is necessary to conduct water from Bear creek a long distance, by means of ditches, flumes, and pipe lines, to its power house for use in operating machinery for generating and transmitting electricity and electric current designed for supplying mines, quarries, railroads, tramways, mills, and factories in said county of Shasta and elsewhere in the state, not owned by plaintiff, also for supplying light, heat, and power to villages, towns, and incorporated cities in the county of Shasta and elsewhere, in California, and to the inhabitants thereof; that prior to the commencement of this action plaintiff was, and now is, the owner,

and entitled to the use and enjoyment of the right, privilege, and franchise to erect poles and string wires thereon for the transmission of electricity and electric current for power, light, and other necessary and useful purposes along and upon the roads, bridges, and highways of the county of Shasta for the period of 50 years, and also over, along, and upon the streets, alleys, and avenues of the city of Redding, in the county of Shasta, for a like period, all of which rights and privileges were regularly granted by the authorized boards of supervisors and trustees of the county and city; that the purpose and object of plaintiff is to supply, by means of electricity and electric current to be generated as aforesaid, the public needs in the city of Redding and the county of Shasta and elsewhere, in the state of California, for light, heat, and power, and that it will be impracticable for plaintiff to utilize the water of Bear creek for the purposes indicated, except by conducting the same, by means of a ditch, along plaintiff's surveyed and established ditch line, and over and across said lands of the defendant Walker; that a large proportion of the inhabitants, citizens, and residents within the county of Shasta and elsewhere, in the state of California, are not supplied with electricity or electric current for heat, light, or power, and the supplying of such electricity and electric current for the purposes designated is, and was at all the times mentioned, a public necessity. The ordinary prayer follows that the lands be condemned for plaintiff's use. The purpose of plaintiff, from a reading of the complaint, is plain. It is to show that the use for which condemnation is sought is public in character, and such as gives warrant to the proceeding to subject the property in question thereto.

The California Constitution contains the usual provision that "private property shall not be taken for public use without just compensation." In view of the restriction, the Legislature has adopted a regulation as follows:

"Any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title VII, part III, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title." Section 1001, Civ. Code, Cal.

The provisions in title 7, part 3, relate to the exercise of eminent domain, and define the manner of such exercise. "Eminent domain" is defined to be "the right of the people or government to take private property for public use." Section 1237 Code Civ. Proc., which is within the title above designated. The next following section (1238) provides that:

"Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * 12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for the supplying of mines, quarries, railroads, tramways, mills and factories with electrical power, and also for the supplying electricity to light or heat mines, quarries, mills, factories, incorporated cities, cities and counties, villages or towns, together with lands, buildings and all other improvements in or upon which to erect, install, place, use, or operate

machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth."

These statutes would seem to confer the very power that the plaintiff seeks to exercise by invoking the right of eminent domain; and, such being the case, the constitutionality thereof is drawn in question, although the point does not appear to be expressly made by counsel. The point is specifically made, however, that the use sought to be exercised is a private and not a public use, and not such in character, therefore, as gives authority to invoke the right of eminent domain. It is the consensus of judicial opinion everywhere that the question whether the use is in fact public or not, so as to justify its taking without the consent of the owner, is one which the courts alone may determine. On the other hand, however, it is just as well settled that the necessity or expediency for the taking, the instrumentalities by which it may be done, and the mode of procedure to be observed are matters resting wholly within the province and discretion of the legislative department. Secombe v. Railroad Company, 23 Wall. 108, 23 L. Ed. 67; Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; The Dalles Lumbering Company v. Urquhart, 16 Or. 67, 19 Pac. 78; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 835; Apex Transportation Co. v. Garbade, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513; Fanning v. Gilliland, 37 Or. 369, 61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758; Dallas v. Hallock, 44 Or. 246, 75 Pac. 204; County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621; Board of Health v. Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 375, 15 N. E. 429; Matter of S. R. C. R. Co., 128 N. Y. 408, 28 N. E. 506. It is the general doctrine that, if it be doubtful whether legislation is within or inimical to the constitution, the courts should resolve the doubt by sustaining the lawmaking body. As pertaining to the inquiry, under conditions similar to those attending the case at bar, the Supreme Court of California has made pertinent application of the general rule. In Lux v. Haggin, 69 Cal. 255, 303, 10 Pac. 674, 699, it says:

"It is the rule that, where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the Legislature; and the courts will not undertake to disturb its judgment in that regard. S. V. R. Co. v. Stockton, 41 Cal. 147. To this yielding to the legislative judgment there is but one exception; that is, when the property of the citizen is taken, or sought to be taken, for a use in no sense public, or, in the language of Chancellor Walworth (Varick v. Smith, 5 Paige [N. Y.] 159), 'where there is no foundation for a pretense that the public is to be benefited thereby.' Con. Chan. Co. v. C. P. R. Co., 51 Cal. 269."

So, in Re Madera Irrigation District, 92 Cal. 296, 309, 28 Pac. 272, 274 (14 L. R. A. 755, 27 Am. St. Rep. 106):

"If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the Legislature must prevail over the doubts of the court."

See, also, Lindsay Irrigation Company v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

The language of the cases above quoted is somewhat modified in County of San Mateo v. Coburn, supra; but whether it was intended to modify the doctrine is not apparent. The Supreme Court of California has spoken also with reference to the question of public use. It says:

"The words 'public use' here mean [referring to the Constitution] a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals. It is not necessary, however, that each and every individual member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public. * * * If the use for which the property is taken be to satisfy a great public want or public exigency, it is a public use. * * * It may be a use in which but a small portion of the public will be directly benefited, * * * though it must be of such a character as that the general public may, if they choose, avail themselves of it." Gilmer v. Lime Point, 18 Cal. 229, 251–253.

These utterances have the especial sanction of other courts. In Board of Health v. Van Hoesen, supra, the court says:

"To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. In Gilmer v. Lime Point, 18 Cal. 229, a 'public use' is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property, on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use. In other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use, or to direct its management, is conferred upon the public."

So it is said in Gaylord v. Sanitary District of Chicago (Ill.) 68 N. E. 522, 63 L. R. A. 582:

"It is also the settled doctrine of this court that, to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."

So, also, in Sholl v. German Coal Company (Ill.) 10 N. E. 199, 59 Am. Rep. 379:

"If, from the nature of the business, and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertains to all strictly private enterprises, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true that benefits resulting from a public use capable of individual appropriation are open to all alike upon the same terms and conditions."

And again, by a footnote to section 165, Lewis on Eminent Domain:

"The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn by the owner."

See, also, Fallsburg, etc., Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855, and State ex rel. Tacoma

Industrial Co. v. White River Power Co. (Wash.) 82 Pac. 150, 2 L. R. A. (N. S.) 842.

So it would appear from the cases that, in order to entitle a private corporation to exercise the exceptional right of eminent domain, the use which forms the basis of its application therefor must be such as will subserve the public in some appreciable way, such as it might demand in service as of right, and not merely such as may be bestowed at the will and pleasure, much less at the whim and caprice, of the corporation. It is not sufficient that the contemplated improvement will operate as a benefit to the community, or the people or property holders thereof, by increasing property valuations, or affording facilities for availing themselves of the service that the corporation proposes to supply or afford; for this is altogether foreign to the idea. But the service proposed must be such as every individual member of the community, similarly situated, shall have the right to demand and receive upon like conditions as any other member, whether the corporation would accede to the bidding or not. The community might be large or small, or the service might be limited to a few, or extended to many; but within the compass of the proposed service every individual similarly situated should be entitled to it as of right upon like conditions; otherwise it is hardly conceivable how such an institution could be considered a public service corporation. If it may serve whom it pleases and deny whom it pleases, although those it accommodates may be a part of the general public, the service becomes of private consequence merely, and the real public is ignored. So that, unless all may, under like and similar conditions and circumstances, demand and receive as of right, it is not a public, but a private service. The case of Strickley v. Highland Boy Mining Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, like the one it cites (Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 671, 49 L. Ed. 1085), is based upon exceptional conditions, and is without application here.

Now, it must be supposed that the Legislature of California in passing the statutes above set out had in contemplation a use of the nature thus defined, and, so interpreted, they are within the fundamental law. Taking the allegations of the complaint as a whole into consideration, and being mindful that the plaintiff has acquired franchises from the city of Redding and from the county of Shasta for the purpose of serving the inhabitants of both such municipalities with light, heat, and power, I am of the opinion that the plaintiff is shown to be a public service corporation, and hence that the complaint is within itself sufficient. The objection that the contemplated use is vague, indefinite, and uncertain cannot be maintained.

If, notwithstanding what has been said, it can be shown by extrinsic evidence, under issues properly formulated, that the end sought to be accomplished is not of a public character, but is solely for private purposes, the condemnation should be denied as being in excess of legislative power. County of San Mateo v. Coburn, supra. But this is matter for further controversy not arising under the complaint.

It follows, therefore, that the demurrer should be overruled, and it is so ordered.

Ex parte COLLINS.

(Circuit Court, N. D. California. November 22, 1906.)

No. 14,017.

1. HABEAS CORPUS—FEDERAL COURTS—JURISDICTION.

Circuit Courts of the United States have jurisdiction in habeas corpus in the exercise of a legal discretion to discharge from custody a person restrained of his liberty in alleged violation of the Constitution of the United States or of any treaty thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 38.

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

2. SAME.

Petitioner was extradited from Canada on a charge of perjury. He became a witness in his own behalf on the trial which resulted in a disagreement of the jury, after which he was again indicted on another charge of perjury alleged to have been committed in such trial. Of this he was convicted and appealed to the state Court of Appeals, pending which he applied to the federal Circuit Court for discharge on habeas corpus, challenging the jurisdiction of the state court to try him for any other offense than that for which he was extradited until he had been either convicted and served his sentence, and had a reasonable time to return to Canada, or had been acquitted and had a like opportunity to depart the country. *Held* that, as such objection was available on petitioner's appeal and finally on a writ of error issued from the Supreme Court of the United States, it would not be determined by a federal Circuit Court on a writ of habeas corpus pending such appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 4, 93.]

George D. Collins, in pro. per.

WOLVERTON, District Judge. The petitioner, having been convicted in the Superior Court of the state of California, in and for the city and county of San Francisco, of the crime of perjury, and being in the custody of the sheriff of said city and county, pending an appeal to the Court of Appeals of the state, has filed in this court a petition praying for the issuance of a writ of habeas corpus that he may be released from such custody. The petitioner was indicted on July 13, 1905, by the grand jury impaneled in said superior court for the crime of perjury, alleged to have been committed on June 30, 1905. Prior thereto he departed from the United States to the Dominion of Canada. Proceedings were instituted for his extradition, that he might be tried for the offense charged against him, and he was accordingly returned to this country. Thereafter his cause came on for trial, resulting on December 23, 1905, in a disagreement of the jury. He became a witness in his own behalf. On the following 29th of the same month the prisoner was again indicted by the grand jury, sitting in the same court, upon another charge of perjury alleged to have been committed on December 12, 1905; that is, while he was a witness at the trial under his previous indictment. For this offense latterly charged he was convicted on February 27, 1906, and is now in the custody of the sheriff pending an appeal as above indicated. An order having been issued to the sheriff and William Hoff Cook, the prosecuting attorney for said

city and county, to show cause, they have made returns separately, from which these facts appear, among others which are narrated in detail, disclosing the entire history of the case from its inception.

The petitioner has interposed demurrers to these returns, challenging the jurisdiction of the state court to try the petitioner for any other offense than that for which he was extradited, whether committed prior or subsequent, until he is either convicted for such offense and has served his sentence, and has had a reasonable time to return again to Canada, or acquitted and has had a like opportunity to depart this country. The case has been carefully and exhaustively presented, and questions of peculiar moment and interest have been discussed. There lies, however, at the very threshold of the inquiry, a question of the discretion of this court to take cognizance by habeas corpus now and to determine the matters and things involved, notwithstanding the petitioner's cause is still pending in the state court. All the questions here raised have been made matter for adjudication in the state court, and I must and ought to assume that they will be passed upon in due course and rightly determined, so that justice will be rendered to petitioner there eventually as well as in this court. Furthermore, the petitioner's right of review does not end with the Court of Appeals of this state, but he will have the right of appeal to the Supreme Court of that jurisdiction, and, if the judgment there is against him, he has a right of a writ of error from the Supreme Court of the United States, the same tribunal of final cognizance that can be reached through federal jurisdiction. Ultimately, therefore, his grievances will receive attention at the hands of the highest judicial tribunal of the land, and there appears no particular reason why his relief should not be as expeditious in the one channel as in the other. There is no doubt that the Circuit Courts of the United States have jurisdiction in habeas corpus to discharge from custody a person restrained of his liberty, in alleged violation of the Constitution of the United States or of any treaty thereof; and it is unnecessary to cite authorities in support of the proposition, but in the exercise of that jurisdiction the Circuit Courts have a discretion, legal, however, in character, to be controlled by such principles as are applicable to the particular case in hand. The Supreme Court of the United States, in the case of New York v. Eno, 155 U. S. 89, 93, 15 Sup. Ct. 30, 39 L. Ed. 80, in stating what was determined by the prior case of Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, where the subject is most ably and exhaustively treated, says:

"This court held that Congress intended to invest the courts of the Union and the justices and judges thereof with power, upon writ of habeas corpus, to restore to liberty any person within their respective jurisdictions who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States; that the statute contemplated that cases might arise when the power thus conferred should be exercised during the progress of proceedings instituted against the petitioner in a state court, or by or under the authority of a state, on account of the very matter presented for determination by the writ of habeas corpus. But it was adjudged that the statute did not imperatively require the Circuit Court by writ of habeas corpus to wrest the petitioner from the custody of the state officers in advance of his trial in the state court; that while the Circuit Court of the United States has the power to do so, and could discharge the accused in advance of his trial, if he be restrained of his liberty in violation of the National

Constitution, it is not bound in every case to exercise such power immediately upon application being made for the writ."

In the Royall Case it seems that, in addition to the petition presented to the Circuit Court, Royall made application to the Supreme Court of the United States direct for a writ of habeas corpus, based upon the same facts as those set forth in the petition addressed to the Circuit Court, and the application was denied; the court saying (Ex parte Royall [Original] 117 U. S. 254, 255, 6 Sup. Ct. 734 [29 L. Ed. 868]):

"It is sufficient to say that if this court has power, under existing legislation and upon habeas corpus, to discharge the petitioner, who is in custody under the process of a state court of original jurisdiction for trial on an indictment charging him with an offense against the laws of that state, upon which it is not necessary to express an opinion, such power ought not, for the reasons given in the other cases just decided (Ex parte Royall No. 1 and Ex parte Royall No. 2, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868), to be exercised in advance of his trial."

The court in the Eno Case distinguished the case In re Loney, 134 U. S. 372, 375, 10 Sup. Ct. 584, 33 L. Ed. 949, after reciting the facts, by saying:

"It is clear from this statement that that case was one of urgency, involving in a substantial sense the authority and operations of the general government."

And finally the court concluded that:

"When the claim of the accused of immunity from prosecution in a state court for the offenses charged against him has been passed upon by the highest court of New York in which it can be determined, he may then, if the final judgment of that court be adverse to him, invoke the jurisdiction of this court for his protection in respect of any federal right distinctly asserted by him, but which may be denied by such judgment."

In a later case (Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406), after distinguishing the case of In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, and In re Loney, supra, and Wildenhus's Case, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565, as involving matters of urgency, such as those of prisoners in custody by authority of the state for an act done or omitted to be done in pursuance of the law of the United States or an order or process of the court of the United States, or involving operations of the general government, or its relation to foreign nations, the court speaks emphatically by declaring that:

"Except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the state, and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court"—citing many cases.

And the court finally concludes in the following language:

"There could be no better illustration than this case affords of the wisdom, if not necessity, of the rule, established by the decisions of this court, above cited, that a prisoner in custody under the authority of a state should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of habeas corpus in advance of any proceedings in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the crim-

inal jurisdiction of the several states, and with the performance by this court of its appropriate duties."

The doctrine is generally stated in the syllabus as applying to a prisoner held in violation of the Constitution of the United States or of any law or treaty thereof.

Again, returning to the Royall Case, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, the province of the Circuit Court is as appropriately stated as can be in the following language (page 251 of 117 U. S., page 740 of 6 Sup. Ct. [29 L. Ed. 868]):

"The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

In a still later case (Baker v. Grice, 169 U. S. 284, 290, 18 Sup. Ct. 323, 326, 42 L. Ed. 748) Mr. Justice Peckham says:

"Instead of discharging, they [the federal courts] will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state court the federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented."

And yet later, in Tinsley v. Anderson, 171 U. S. 101, 104, 18 Sup. Ct. 805, 807, 43 L. Ed. 91, Mr. Chief Justice Fuller says:

"The dismissal by the Circuit Court of the United States of its own writ of habeas corpus was in accordance with the rule, repeatedly laid down by this court, that the Circuit Courts of the United States, while they have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the Constitution, a law, or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court."

And, again, in the recent case of Markuson v. Boucher, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. Ed. 124, all these cases are reaffirmed and the doctrine announced by them reiterated. So, it was said in the case of United States v. Rauscher, 119 U. S. 407, 430, 7 Sup. Ct. 234, 246, 30 L. Ed. 425, so much relied upon by the petitioner as authority requiring his discharge, that, "if the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the federal government, which has been fully recognized. This remedy is by a writ of error from the Supreme Court of the United States to the state court which may have committed such an error"; thus recognizing the primordial principle of the federal cases, that there should be no interference with the jurisdiction of the state courts while in the exercise thereof, except

in unusual and peculiar cases. This is made strikingly manifest by the court's reference to the Royall Case and in citing it as controlling.

These authorities leave the matter in hand without room for further controversy. It is the province as well as the duty of this court to exercise a legal discretion in the premises, and, when the record is considered, there is but one result to follow, which is to deny the writ. The petitioner has appealed from the superior court of the state, a court of original and general jurisdiction, to the Court of Appeals thereof, and his cause is now pending in the latter tribunal. As I have previously observed, if denied the relief he asks, he has still his appeal to the Supreme Court of the state, and then he has his writ of error from the Supreme Court of the United States to that court, and there exists no peculiar urgency why this court should now interfere with or intervene to oust the state court of jurisdiction. On the other hand, the case is peculiarly one in which the usual and regular course of the state jurisdiction should be allowed to run; the petitioner being a resident of the state, and having been extradited as a fugitive from justice that he might be made amenable to the laws thereof.

The demurrers to the returns of the officers of the city and county of San Francisco will, therefore, be overruled, and the petition for the writ of habeas corpus denied.

HAMMOND LUMBER CO. v. SAILORS' UNION OF THE PACIFIC et al.

(Circuit Court, N. D. California. November 7, 1906.)

No. 13,919.

1. WITNESSES—PRIVILEGE—PROTECTION.

A proceeding for the punishment of a defendant for contempt for the violation of an injunction will not be quashed because the petition shows that certain of the facts therein stated were obtained from testimony given by defendant as a witness in another case, even if he is protected, by Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], from having such testimony used against him in the proceeding; it not appearing that such facts may not be proved by other testimony.

2. INJUNCTION—VIOLATION—PUNISHMENT—SUFFICIENCY OF PETITION.

A proceeding to punish for contempt for violation of an injunction is summary in character, and technical pleadings are not required; but it is sufficient that by petition, affidavit, or other showing it is made to appear that there has been a willful violation of the court's order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 503.]

3. SAME—SERVICE OF RESTRAINING ORDER.

The service of a certified copy of a restraining order is sufficient to render a defendant so served punishable for contempt for its willful violation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 445, 446.]

4. SAME—SUFFICIENCY OF BOND.

The validity of a bond required on the entry of a restraining order is not affected by the fact that it bears a date prior to the entry of the order, where the sureties did not justify, nor was it filed, until the date of the order.

Proceeding to Punish for Contempt. On motions and demurrers attacking the sufficiency of the petition.

Henry Ach (J. W. Dorsey, of counsel), for complainant.
H. W. Hutton, for defendants.

WOLVERTON, District Judge. On July 13, 1906, there was pending a suit for injunction in the above cause, also an application for an injunction pendente lite, and, a prima facie case having been shown, the court made and caused to be entered a restraining order, whereby it was ordered that the defendants named be restrained during the pendency of the hearing for a temporary injunction, "upon its (complainant's) giving a bond with two good and sufficient sureties, to be approved by the clerk of this court, in the penal sum of one thousand dollars, securing respondents against all loss or damage which may result from the issuance of such restraining order, should it be finally determined that the same was improperly issued, or that may be awarded to respondents by reason of the issuance of such order." The order runs: That the defendants (naming them) their agents, servants, etc., are hereby specifically restrained and enjoined from boarding or attempting to board the steam schooner Arctic, the steam schooner Ravallie and the steamship Francis H. Leggett, against the commands, directions or requests of the master or of those in control of said vessels, and each and all of them, from in any wise interfering with the crews, foreman, cooks, stewards, seamen, or either or any of them, or any of the servants or employés of said vessels, or any of them, without due process of law, or in any wise making any threats of bodily harm against the said seamen, crews, firemen, cooks, stewards, or other employés of said vessels, or in any wise interfering with the business or concerns of the said steam schooners and the said steamship, or either or any of them, either in the Bay of San Francisco, or any place within the jurisdiction of this court, except by due process of law; from in any wise seeking to prevent the said vessels from conducting their and each of their legitimate businesses, and from in any wise conspiring, colluding or confederating together for the purpose of preventing the same from receiving and discharging freight and passengers; and from making any threats of harm or disaster to any person or persons employed on said vessels or either or any of them.

A bond in the required sum was filed on the same day and approved by the clerk, conditioned to pay the defendants all the "costs and damages" which may be awarded, etc., which bears date July 9th; the sureties justifying on the 13th. Certified copies of this order were served upon the defendant associations on the following day. On August 8, 1906, an order of injunction pendente lite was made and entered, following in effect the language of the restraining order, and directing, further, that the restraining order theretofore issued be and the same remain in force as to each of the respective parties thereby enjoined, until the writ issued and was served. The writ issued at once, and was served upon the three associations and Andrew Furuseth. On September 11, 1906, the complainant filed a petition, praying that an attachment issue against certain named individuals, and that they be

arrested for contempt of court for acting in disobedience to said orders, upon which an order to show cause was granted.

After setting forth the facts of the issuance of said order and injunction, the petition shows that, about May 28, 1906, the Sailors' Union of the Pacific declared a strike and directed its members not to work upon the vessels of the complainant, and that the other two associations indorsed such strike; that there was formed a strike committee, styled variously the "Strike Committee," "Emergency Committee," and "Executive Committee," composed of 11 members, 7 of whom were members of the Sailors' Union, and 2 of each of the other associations; that, at a meeting held about June 4th, another committee was appointed to carry into effect the orders of the union, composed of Andrew Furuseth, E. A. Erickson, John Carney, Harry Lundberg, and Walter McArthur, which was also denominated the "Executive Committee," and to which was subsequently added the names of Edward Anderson and C. C. Simonson; that certain differences existed between complainant and the Sailors' Union, touching an increase in the wages of the former's employés, and that the unions and associations named and A. Furuseth conspired to demand, persuade, and prevent any one and all persons from entering or remaining in the employ of complainant, and, for carrying into effect such a purpose, the executive committee was provided; that the said strike committee and A. Furuseth, Eugene Steidel, and John Carney have at all times had full charge and power and authority to call into requisition such ways and means deemed effective to carry out the object of the conspiracy; and that the conspiracy extended also to a prevention of the complainant's carrying on its business as shippers. Thereafter the petition sets up specific acts, some of them of violence, which are alleged to be in violation of the restraining and injunctive orders, and which, if true, render the parties restrained and participating in contempt. These acts are alleged to have been committed on different dates after the making, entry, and issuance of the orders.

The defendants appearing, have first interposed a motion to strike out various portions of the petition, for the reason, among others, that the acts complained of were not directed against the ships of the complainant, but against divers other ships and vessels of other companies and corporations doing a like business as the complainant. I am of opinion that, so far as the motion covers acts of the nature here indicated, it should be allowed, for the reason that they are in no measure a violation of the restraining or injunctive orders. These orders have in purview only the two schooners and the steamship named in the petition belonging to the complainant, but the matters moved against have a much wider range. The court will therefore sustain the motion as it respects the eighth to the twenty-sixth specifications, inclusive, and also the twenty-ninth, and all those allegations of the petition noted by such specifications will therefore be stricken out.

Included in the matter stricken out are certain purported minutes of Andrew Furuseth, which are comprised in subdivision No. 25. I require this matter to be eliminated for the reason that it is merely evidentiary in its bearing, and not the statement of ultimate or proba-

tive facts. The motions extend also to striking out numerous affidavits, but these I will permit to remain in the record for whatever pertinency they might serve as evidence in the cause, but the defendants will not be required to answer them for the purpose of making up the pleadings or issues. It is sufficient that they answer the petition if deemed advisable. The cause does not seem ripe for a final determination at this juncture. The defendants are moving and demurring to the petition as though the issues were not settled, and have offered no evidence in refutation of the charges or in their own defense, so that the court cannot finally determine the matter now, nor until the preliminary matters are disposed of, that defendants may have an opportunity to purge themselves of the contempt. When it comes to the final settlement of the cause, then the court may determine as to the relevancy of the affidavits.

Andrew Furuseth next moves the court to quash the proceedings as to him, because the petition shows that many of the facts set forth therein were obtained from him while testifying in obedience to a subpœna in another cause, namely, the California & Oregon Steamship Company v. Sailors' Union of the Pacific et al., pending in the superior court of the city and county of San Francisco, state of California, and that therefore they should not be permitted to be used against him, invoking the privileges vouchsafed to parties under section 860, Rev. St. U. S. [U. S. Comp. St. 1901, p. 661]. It is sufficient answer to the motion, even if section 860 protects Furuseth from having such testimony as he gave brought against him in this proceeding—a matter I do not now decide—that it is within the bounds of probability that other testimony might be adduced wholly aside from that tending to his conviction for contempt, or even that the same facts discovered by him might be otherwise shown. So the motion will be denied.

Following these motions are demurrers to petition, as follows: First, a separate demurrer by Martin Hunter; second, a like demurrer by Harry Johnson; and, third, a joint demurrer by Walter McArthur, Eugene Steidel, John Carney, Henry Lundberg, E. A. Erickson, A. Furuseth, and C. C. Simonson. As to all these parties, it is only necessary to add that the showing of the petition, through allegations of conspiracy and touching other acts of the parties connecting them in one way and another with the acts and things complained of, is sufficient to require each and all to purge themselves of the alleged contempt. The proceeding is summary in character, and technical pleadings are not required, but it is sufficient that by petition, affidavit, or other showing it is made to appear that there has been a willful violation of the court's order. To this pleading, whatever it may be, it would be proper for defendants to file a formal answer, if they so desire.

Another objection made to the petition is that the restraining order, so called, was never issued. A certified copy of the order entered was served, however, and a willful violation thereof, it seems to me, amounts to a contempt.

The objection to the bond, that it bears date of the 9th while the order was not entered until the 13th of July, is without merit, as it is clear that the bond was not complete until the sureties justified, which

was on the latter date, nor was it filed in the case until the entering of the order.

The demurrers will therefore also be overruled. The defendants may have leave to make such answer to the petition as they may deem necessary within 10 days.

UNITED STATES v. LAAM et al.

(Circuit Court, N. D. California. November 7, 1906.)

No. 13,742.

1. PUBLIC LANDS—SUIT FOR CANCELLATION OF PATENT—RIGHT OF UNITED STATES TO MAINTAIN.

The United States may maintain a bill in equity for the cancellation of a patent issued through inadvertence and mistake under the homestead law to a tract of land which had been previously selected by the state of California under Act March 3, 1853, c. 145, 10 Stat. 244, as indemnity school land, subject to the approval of the Secretary of the Interior, where the Secretary had directed the allowance of such selection, but it had not been formally approved and listed so as to pass title to the state, since the state is not in a position to mainain a suit in its own behalf to protect its equitable title, while the United States is under obligation to protect it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 332.]

2. SAME—EFFECT OF PATENT—NECESSITY OF DELIVERY.

A patent to public land, duly issued upon the decision of the proper officers and recorded in the record book kept in the Land Department of the government for that purpose, passes the title, and a delivery to the patentee is not necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 311.]

3. SAME—BONA FIDE PURCHASERS—PURCHASERS BEFORE PATENT.

A purchaser of land prior to patent from the government is not a bona fide purchaser entitled to protection as such in equity, but he must show that in his purchase and by the conveyance to him he acquired the legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 368.]

4. SAME—PURCHASER AFTER PATENT—CONSTRUCTIVE NOTICE OF RECORDS.

The rule that a purchaser of public land is required to take notice of the records and proceedings in the Land Department does not apply to a purchaser after patent, who may rely on its presumptive validity, and is not required to go behind it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 368.]

5. SAME—SUIT BY UNITED STATES FOR CANCELLATION OF PATENT—TENDER OF PURCHASE MONEY.

The United States in a suit to cancel a patent to public land, in order that it may convey the same to another party equitably and rightfully entitled to it, is not required to tender back the purchase money paid by the patentee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 333; bona fide purchasers of public lands, see note United States v. Detroit Timber & Lumber Co., 67 C. C. A. 13.]

In Equity. On demurrers to bill.

Robert T. Devlin, U. S. Atty.

L. F. Cooper and Titus, Wright & Creed, for respondents John H. and Elizabeth Laam.

George A. Sturtevant, for respondents E. M. Fine and Klamath Mill & Transportation Co.

WOLVERTON, District Judge. Demurrers to amended bill of complaint, by which it is sought to set aside a patent issued by the government to the defendant John H. Laam. The first is interposed by John H. Laam and Elizabeth Laam, and the second by E. M. Fine (named in the complaint "E. W. Fine"), and the Klamath Mill & Transportation Company. By the bill it appears that the state of California on November 13, 1889, made a school land indemnity selection, No. 1,698, comprising the land in question, namely, the W. ½ of the S. W. ¼ of section 35, township 14 N., range 1 E., Humboldt base and meridian, in the Eureka land district, and which selection was allowed by the Department of the Interior on June 9, 1896; that on May 2, 1901, the defendant John H. Laam, under the provisions of section 2289, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1388], and the regulations of the Department of the Interior, filed a homestead application, No. 4,423, to enter the land, at the same time entering into the possession of the same; that on July 8, 1902, the register and receiver of the Eureka land office issued a final certificate to Laam, and on the 21st of July, 1903, the President issued to him a patent therefor. It is further shown that the defendant Laam was allowed to enter the land and to receive his certificate of final patent through the inadvertence, mistake, and oversight of the officers and agents of the General Land Office in overlooking the fact, which duly appeared of record, that said indemnity certificate No. 1,698 had been allowed by the Department of the Interior, thereby declaring the selection valid as it respects the land in dispute, and that because of the pendency of proceedings affecting the selection of other tracts of land embraced in the list no action was taken in making up a final "clear list" until the entire list was designed to be ready for approval by the Secretary of the Interior, which approval of a clear list and its certification to the state constitutes the muniment of title from the government. The patent to Laam was never delivered to him, but remains in the General Land Office. It further appears that subsequent to the issuance of the certificate to Laam, but prior to the issuance of patent, he granted, through mesne conveyance, the N. W. ¼ of the S. W. ¼ of section 35 to the Klamath Redwood Company, which company is the present holder of the alleged title thereto; that within the same time Laam, through mesne conveyances, granted to E. W. Fine, the S. W. ¼ of the S. W. ¼ of said section; and that subsequent to the issuance of such patent Fine conveyed to the Klamath Mill & Transportation Company.

The demurrers are general, assigning as reason therefor that the bill of complaint does not state facts sufficient to entitle the plaintiff to relief in equity.

The bill proceeds upon the theory that, the state of California having made a selection of the land in dispute as an indemnity selection and the same having been allowed by the Department of the Interior, the government thereby became obligated and equitably bound to convey to the state, and that having subsequently, through mistake, inadvertence, and oversight of its officers in the Land Department, allowed and permitted Laam to make his homestead entry, and having, through like mistake and inadvertence, issued to him a final certificate and patent, it is entitled in equity to have the patent annulled, and thus to be restored to a position in which it would be enabled to make good its obligation to the state. It has been judicially settled that:

"Where a patent has been fraudulently obtained, and such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent. These principles equally apply where patents have been issued by mistake." United States v. Missouri, etc., Ry., 141 U. S. 360, 12 Sup. Ct. 13, 35 L. Ed. 766.

The quotation is from the headnotes, and is amply sustained by the following cases cited in its support: United States v. San Jacinto Tin Co., 125 U. S. 273, 286, 8 Sup. Ct. 850, 31 L. Ed. 747; United States v. Beebe, 127 U. S. 338, 342, 8 Sup. Ct. 1083, 1085, 32 L. Ed. 121. In the latter case the court says:

"And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where the government has a direct interest, or is under an obligation respecting the relief invoked."

See, also, U. S. v. Stone, 2 Wall. 525, 17 L. Ed. 765.

In the present case it is very clear, as will appear later, that the state of California is without any remedy as a suitor in its own behalf. By Act Cong. March 3, 1853, c. 145, 10 Stat. 244, the proper authorities of the state of California were empowered to make selections of other lands in lieu of such portions of sections 16 and 36 as might have been settled upon previous to survey, agreeably to the act of Congress of May 20, 1826 (4 Stat. 179, c. 83), "and which," it is enacted, "shall be subject to approval by the Secretary of the Interior." Subsequent legislation followed, but it does not affect the question here. The bill of complaint shows that the state selected by indemnity selection No. 1,698, the land in dispute, with other land, "which said selection," the bill runs, "was considered and directed to be allowed by the Department of the Interior on the ninth day of June, 1896." Reference is made to volume 22, Land Dec. Dep. Int. 666, where it was determined by the honorable Secretary of the Interior, so far as it concerned this land, that "the application must be allowed." This, I take it, was not the approval of the Secretary of the Interior as required by the act of March 3, 1853, nor was it the equivalent thereof; but it was such an act as allowed, or, I might say, approved, the suit, on application of the state for the land. There needed subsequently the approval of the Secretary of the Interior and the listing to the state, which would

have constituted its title absolute, without the further necessity of deed or patent. To these further acts on the part of the government the state was entitled, unless, for good cause shown, the selection should have been in the meanwhile rejected by like authority; but no such action appears to have been taken. The state has done all it could to entitle it to the land and had proceeded to the extent that there had been segregation from the public domain, and thenceforth the land was not unappropriated land, and was not subject to homestead or preemption. U. S. v. Turner (C. C.) 54 Fed. 228; 17 Opinions Attorneys General, 160.

Nor do I understand that the case of Roberts v. Gebhart, 104 Cal. 67, 37 Pac. 782, impinges upon this interpretation of the law. That was a case between private parties, and the Secretary of the Interior had taken action and refused to approve the selection, so the court said, speaking through Mr. Justice De Haven:

"Such a selection, when the Secretary of the Interior has acted upon and refused to approve it, does not confer even an equitable right upon the state, or upon one claiming under it, such as would authorize or justify a court of equity in reviewing the grounds or basis for such refusal. It is the consent of the United States, as manifested by the approval of the Secretary of the Interior, which gives legal efficacy to the application or selection made by the state, and without such approval neither the state nor its grantee is in a position to call in question any future disposition which the United States may make of the land embraced in the attempted selection."

So it appears that the state is not in a position to bring this suit in its own behalf, not having acquired such a right or title as gives it a standing in court; and hence it was that the government's interposition became necessary, it being a case "which personal litigation could not remedy"; thus affording one of the elements of jurisdiction specified in United States v. Missouri, etc., Ry., supra, and other cases cited in the same connection. The state can do nothing except through interposition of the department prior to the approval by the Secretary of the Interior, which is equivalent to a final grant of the title, yet, notwithstanding, when it has made its indemnity selection, which the law gives it the right to do, and when that selection or the application therefor has been allowed by a solemn adjudication of the Secretary of the Interior, it seems to me that the state has acquired an equity in the land of which it could not be divested by the susbequent entry thereof by a private individual, and that none of the proceedings subsequently had in the Land Department has had the effect to preclude or deprive it of that right. This furnished the state with an equity; and, being prior in time, is prior in right. The government had no right to permit the land to be entered as a homestead, unless, for good cause shown, it first rejected the selection or application of the state and set the land back again into the public domain. Thus far the government's right of suit seems complete.

It is contended, however, in behalf of the demurrers, under the showing of the bill, that the defendants, the alleged holders of the present title, are innocent purchasers. It will be observed that all the purchasers from Laam, whether directly or through mesne conveyances, save one, the Klamath Mill & Transportation Company, took title prior to the issuance of the patent. The last named took subse-

quent thereto. In this connection, it may be premised that it did not require a delivery of the patent to the claimant in order to pass the title. The title passed when the patent issued and was recorded in the record book kept for that purpose at Washington. This has been effectually determined by the case of United States v. Schurz, 102 U. S. 378, 397, 26 L. Ed. 167, 172. The court, speaking through Mr. Justice Miller, says:

"We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land Office, countersigned by the recorder of the Land Office, and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument."

See, also, Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. 399, 28 L. Ed. 962.

A purchaser prior to patent cannot claim to have purchased bona fide so as to entitle him to the protection of chancery. He must show that in his purchase and by the conveyances to him he acquired the legal title. Root v. Shields, 1 Woolw. 349, Fed. Cas. No. 12,038. This principle has been followed in the Department of the Interior. Travelers' Insurance Co., 9 Land Dec. Dep. Int. 316; Powers v. Courtney et al., 9 Land Dec. Dep. Int. 480; Richardson v. Moore, 10 Land Dec. Dep. Int. 415.

These considerations conclude the parties purchasing prior to the issuance of the patent, but not so as to the Klamath Mill & Transportation Company. "A patent being the highest evidence of title from the government, and presumptively valid, the purchaser from the patentee or those holding under him, is not required to go behind it, and to know that the previous steps to justify the making of it have been regularly taken." This was held in Schnee v. Schnee, 23 Wis. 377, 99 Am. Dec. 183. The court further observed that the doctrine contended for, namely, that the purchaser was required to take notice of the records and proceedings in the Land Department, would be true of different purchasers from the government of the same tract of land, which sometimes happens through mistake or otherwise, but not of remote purchasers after patent. The observation is particularly applicable here, and the state of California would be affected with notice from the records, but not the Klamath Mill & Transportation Company, which purchased after patent. I am of opinion that the bill of complaint does not show that the Klamath Mill & Transportation Company is not an innocent purchaser for value. The demurrer will, therefore, be sustained as to this company, but overruled as to Fine, and the demurrer of John H. and Elizabeth Laam will likewise be overruled.

Another point made in support of the demurrers is that the bill does not show that the government—it being apparent that the homestead was commuted to a pre-emption—has tendered back the purchase price

of the land to the holder of the title. I think, however, that this is not necessary where the government is suing that it may be enabled to grant the title to the party equitably and rightfully entitled to the conveyance from it. The case is the same as if the state of California had a standing in court and was suing to cancel the patent to Laam. The state in that case would not be required to tender to Laam the money paid to the government, so the government is not so required in the present case.

Let the order be entered as indicated in this opinion.

NEWHALL v. JORDAN, Collector of Internal Revenue.

(Circuit Court, E. D. New York. December 6, 1906.)

1. INTERNAL REVENUE—ARTICLES SUBJECT TO TAX—BAY RUM IMPORTED FROM PORTO RICO.

Bay rum not being subject to internal revenue tax, and imports from Porto Rico not being subject to customs duty, but to internal revenue tax, as "like article of merchandise of domestic manufacture," bay rum imported from Porto Rico is not as such subject to tax nor can it be theoretically resolved into its component parts for the purpose of imposing an internal revenue tax upon the distilled spirits which enter into its composition.

2. SAME—RECOVERY OF TAXES PAID—VOLUNTARY PAYMENT.

An importer of goods from Porto Rico, who formally entered the same and purchased stamps from the collector for payment of internal revenue tax thereon, as required by the treasury department, without protest or objection, and in the belief that such tax was lawfully due, must be regarded as having made the payment voluntarily, and cannot recover it back, although the goods were not lawfully taxable, and it is conceded that under the rulings he could not have obtained possession of the same without making the payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, §§ 83, 84.]

John David Lannon, for plaintiff.
William J. Youngs, U. S. Atty., for collector.

THOMAS, District Judge. This action involves the question whether bay rum imported from Porto Rico was subject to a tax upon the distilled spirits that entered into its composition, and whether the purchase of stamps of the Internal Revenue Commissioner, for the purpose of paying the tax, while the merchandise was detained by the government at the port of entry, without dissent, controversy, or protest, precludes the plaintiff from maintaining this action. The import duty imposed on imports from Porto Rico by the Foraker act (passed April 12, 1900) Act April 12, 1900, c. 191, 31 Stat. 77, was terminated by the authorized proclamation of the President, but such imports remained subject to the internal revenue tax as "like articles of merchandise of domestic manufacture" were subject. But domestic bay rum, as such, was subject to no internal revenue tax. Therefore, the letter of the statute authorized no tax on bay rum. But the govern-

ment in effect urges that while domestic bay rum is subject to no tax, the distilled spirits that enter into it are subject to a tax; and that as the rum blended in bay rum of Porto Rican manufacture, and thence exported, is subject to no tax at home, it will escape all tax, unless the government, upon the arrival of the article in the United States, theoretically resolve it into its component parts, and tax the parts as if they had arrived, each in its own peculiar form, before all were merged into the article known as bay rum. It is further urged that any other rule would allow distilled spirits to be brought to the United States from Porto Rico, under the guise of bay rum, with resulting injury to the revenue and the domestic distillers.

To this last objection, it seems an obvious answer that the mere fact that there is an omission in the law, if there be such, does not authorize the court to amplify the statute; and it is quite as noticeable that the fraudulent importer must distil the spirits from the bay rum to gain the advantage of his fraud, and that, should he do so, his product would become subject to the domestic tax. But, even otherwise, the hardships of the case cannot authorize the interpolation of words in the statute. The article is genuine bay rum, intended for honest use as such. It can only be taxed at the sum imposed on bay rum in the United States. There is no such tax. Hence there is none on the imported article. The statute should be interpreted according to the plain meaning of the words, and as men of ordinary intelligence, called upon to obey it, would understand its direct and simple language. The importer of articles from Porto Rico could not and should not understand from the law that every article imported from Porto Rico must be resolved into its component parts, each element scrutinized, and taxed as a separate and distinct article of domestic manufacture. There seems to be no justification for this nonobservance of the letter of the statute, save the plea of inconvenience and opportunity to defraud the revenue. Such considerations appeal to the lawmaker rather than to the court. But it is urged that the plaintiff paid the tax voluntarily, and that he may not recover the sum paid. The plaintiff's importations herein involved arrived as follows, the first importation, September 9, 1901, the second importation, July 30, 1902. It is conceded as a fact:

"That the Treasury Department at the times the duties herein were paid, as a matter of common knowledge, was insisting and had insisted upon payment of an internal revenue tax upon bay rum imported from Porto Rico as distilled spirits, and had refused to refund money paid as internal revenue tax upon such bay rum from July 26, 1901."

The following facts are stipulated:

"(23) That upon the arrival of the steamship at the port of New York the defendant being such collector of internal revenue for the First district of New York, did, through the exercise of the powers and authority in him vested for the performance of his duties as collector detain the said packages or barrels of bay rum, claiming that the said bay rum was taxable or dutiable under the provisions of the act of Congress of April 12, 1900, entitled 'An act temporarily to provide revenue and a civil government for Porto Rico and for other purposes,' commonly called the Foraker bill.

"(24) That thereupon plaintiff in compliance with certain regulations of the Secretary of the Treasury of the United States and on printed forms

prescribed thereby for such purposes, notified the defendant, the collector of internal revenue for the First district of New York, of the arrival of the said packages or barrels of bay rum and of his desire to remove the same, and requested that the said bay rum be inspected and gauged in compliance with such regulations. That plaintiff could not have obtained possession of the bay rum without giving the aforesaid notice and making the aforesaid request.

"(25) That thereupon the defendant as such collector as aforesaid instructed one of the United States gaugers of spirits to inspect and gauge the said packages or barrels of bay rum.

"(26) That subsequently and on or about September 14, 1901, the said United States gauger of spirits, acting in compliance with the aforesaid instructions, gauged the said bay rum and made a report thereof and a return.

"(27) That thereafter the plaintiff, in compliance with the regulations of the Secretary of the Treasury of the United States as aforesaid, and on printed forms prescribed thereby for such purposes, and compelled to do so in order to obtain possession of the said packages or barrels of bay rum made an entry for the removal of the said bay rum.

"(28) That the defendant collector as aforesaid determined that the said bay rum was subject to a tax or duty of $1,052.48, and on or about September 16th, 1901, did, through the exercise of the power and authority in him vested for the performance of his duties as collector, demand and collect from the plaintiff the sum of $1,052.48, which sum the plaintiff paid in order to obtain possession of the packages or barrels of bay rum aforesaid which the defendant was detaining from him and which he would not have delivered to him except upon the plaintiff's paying to him the sum of $1,052.48, for tax paid stamps to be affixed to the packages or barrels of bay rum, and the payment of the said sum was a condition precedent to the delivery thereof to the plaintiff; that the plaintiff purchased the stamps and paid the tax as aforesaid and in the manner prescribed and did not obtain the bay rum until the payment of the said sum as aforesaid."

The stipulation as to the second importation is the same, except as to the dates and the amount paid. It is further stipulated:

"(29) That thereafter and on or about August 4, 1903 the plaintiff made an application in writing to the United States commissioner of internal revenue to remit, refund, and pay back to the plaintiff the alleged tax, upon the ground that the said alleged assessment and said tax and the exaction and payment thereof were illegal, null and void and of no binding force and effect for the following reasons."

Thereupon the reasons are stated.

It is further stipulated:

"(30) That the United States commissioner of internal revenue did finally on or about the 27th day of July, 1904, deny and reject the application or claim of this plaintiff for the refunding of the said alleged tax and did refuse to remit or refund the said alleged tax or any part thereof, and did send to the defendant, as such collector a written notice of such rejection and the defendant as such collector on or about the 25th day of February, 1905, did cause to be served upon this plaintiff a written notice of such denial and rejection."

The plaintiff at the time of bringing suit was in the same position as if he had not instituted proceedings before the commissioner, so far as the question of voluntary payment is concerned. Chesebrough v. United States, 192 U. S. 253, 263, 24 Sup. Ct. 262, 48 L. Ed. 432. It is true that his property was detained, but the detention was on the theory that it was subject to the payment of the tax. Had there been no detention, and there had been payment, with or without protest, or acts or words equivalent thereto, the payment would have been voluntary. Chesebrough v. United States, supra. But when

property arriving in the country passes through the various channels that are necessary to the determination of the question of its taxation, and the importer himself pursues the law, and does, without dissent or suggestion of oppression or duress, whatever is necessary to procure his goods, he makes his own interpretation of the law. And if he interpret it mistakenly, there seems to be no rule that allows him at one time to affirm its application by his action, an affirmance unmodified by word or deed, and thereafter disaffirm the subjection of his merchandise to the statute. It is a payment under mistake of law, for which no relief exists. This conclusion accords with the opinion of the court in Chesebrough v. United States, 192 U. S. 259, 24 Sup. Ct. 264, 48 L. Ed. 432, where it is said:

"The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest, that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual and threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment. Little v. Bowers, 134 U. S. 547, 554, 10 Sup. Ct. 620, 33 L. Ed. 1016; Railroad Company v. Commissioners, 98 U. S. 541, 544, 25 L. Ed. 196; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409, citing Brumagin v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176, a case in respect of stamps purchased, in which the subject is discussed by Mr. Justice Field, then Chief Justice of California."

The parties stipulated "that the plaintiff could not obtain the bay rum so imported by him except by paying the duties."

It may be urged from this conceded fact that a protest would have been unavailing, but such suggestion does not go to the root of the difficulty. The stipulation may be broad enough to mean that the plaintiff could not have gotten his goods without paying the tax, whatever he might have done. But the fact remains that there is no evidence whatever that he regarded his goods as in duress, or that they were not taxable, or that he did not regard himself as the lawful debtor to the United States. The stipulation indicates that the government believed that the goods were dutiable, and would have insisted upon the payment. The history of the case shows, that the plaintiff also regarded the goods as dutiable, and, so far as appears, willingly made the payment. It was no mistake of fact, it was a pure mistake of law. The proposition of the plaintiff is that every person buying stamps of a collector, for the various uses pointed out by statutes, may do so without any objection whatsoever, and thereafter state that he did not pay according to a valid or applicable law, and recover the tax should the taxing law prove inapplicable. No fact shows that the plaintiff was conscious of duress or unlawful constraint to pay what he did not owe to obtain his property. His whole conduct before payment, and from September 9, 1901, as regards the first importation, and from July 30, 1902, as regards the second importation, to August 4, 1903, indicated perfect acquiescence and affirmance of the law. It is difficult

to understand how taxes may be raised by a stamp duty, if the purchaser when buying or using makes no indication of dissent from the obligation that is asserted against him.

The defendant should have judgment.

In re JOHN L. NELSON & BRO. CO.

(District Court, S. D. New York. January 9, 1907.)

1. BANKRUPTCY—PROCEEDINGS—PROPERTY—JURISDICTION.

Where a bankruptcy petition was filed against a corporation, the court in which the petition was filed had sole jurisdiction to decide whether the corporation was or was not subject to the operations of the bankrupt law, and, pending such determination, any other federal District Court was authorized to take charge of the alleged bankrupt's property within its own territorial jurisdiction and to appoint an ancillary receiver therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 22, 165.]

2. ATTACHMENT—PROPERTY IN CUSTODIA LEGIS—RECEIVERS.

Where an ancillary receiver was properly appointed in bankruptcy proceedings, property in his hands as such receiver was in custodia legis, and was not subject to attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 181; vol. 42, Receivers, § 359.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS—FOREIGN ASSETS—WHAT LAW GOVERNS.

Where a foreign assignee for the benefit of creditors demands the surrender of property located in New York belonging to his assignor, the assignee's rights as against New York creditors are governed by the law of New York, and depend on principles of comity as between the state of New York and the state of the assignee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, §§ 642-657.]

4. SAME.

An Illinois assignee for the benefit of creditors is not entitled to withdraw funds belonging to the assignor located in New York before payment of the assignor's attaching New York creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, §§ 642-657.]

5. SAME—WAGES—PREFERRED PAYMENT.

Where, after bankruptcy proceedings against an Illinois corporation were set aside, an assignee for the benefit of creditors, appointed in that state, sought to obtain assets belonging to the corporation in New York, which were held by an ancillary receiver appointed in bankruptcy proceedings, the court sitting in New York had no power to give New York creditors, who had claims against the corporation for wages, a preference of payment out of the New York assets as against attaching New York creditors, though such wage earners would be preferred both under the bankrupt act and under the insolvency statute of Illlinois.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, §§ 642-657.]

6. RECEIVERS—APPOINTMENT—EFFECT.

The effect of the appointment of a receiver is not to oust any person of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 127.]

7. ATTACHMENT—PRIORITY OF CLAIMS.

A bankruptcy petition was filed against a corporation in Illinois, and an ancillary receiver appointed, who took charge of the property of the corporation in New York. R., a New York creditor, having advanced information of the approaching termination of the bankruptcy proceedings, because the corporation was not engaged in a business which subjected it to the bankrupt law, instituted a suit in New York, aided by an attachment served by delivering a copy warrant to the ancillary receiver, after which other attachments were levied, some after an order had been passed terminating the bankruptcy proceedings. *Held* that, since none of the attachments which were served while the property was in the possession of the ancillary receiver were effective except as a notice of claim addressed to the court through its receiver, regardless of whether they were served before or after the dismissal of the bankruptcy proceedings, the senior attachment was entitled to priority, there being no infirmity therein except the date of its issue.

On Application of Ancillary Receiver for Instructions.

Williams, Folsom & Strouse, for ancillary receiver.

Joseph W. Keller and Mr. Shaffner, for assignee under Illinois statute.

Henry S. Dottenheim, for senior attaching creditor.

Nathan Bardach, for junior attaching creditors.

Michael J. Joyce, for employés of alleged bankrupt.

HOUGH, District Judge. In August, 1906, a petition in bankruptcy was filed against the corporation above named (hereinafter called the "Nelson Company"), in the District Court for the Northern District of Illinois. The alleged bankrupt was an Illinois corporation, and had its principal place of business in Chicago. Shortly thereafter, upon due application, an ancillary receiver was appointed in this court, who took charge of the New York office and local business of the Nelson Company, and reduced the assets thereof to cash, of which he now has in his possession upwards of $5,000. Not long after the filing of the original petition in bankruptcy, some parties in interest, doubting whether the alleged bankrupt was such a corporation as came within the purview of the bankruptcy law, advised the Nelson Company to execute on September 17, 1906, a deed of assignment for the benefit of creditors, pursuant to the statutes of Illinois, which deed was, on October 3, 1906, duly filed in the proper office in Chicago. On October 5th the assignee under the Illinois assignment appeared in the bankruptcy court sitting in Chicago, and set forth by petition the nature of the business of the Nelson Company, prayed that the assets in the hands of the bankruptcy receiver be turned over to him, and represented that the court itself was without jurisdiction to adjudge the Nelson Company a bankrupt, or to administer or hold its estate. Upon this petition of the assignee such proceedings were had that on November 21, 1906, an order was entered declaring that "all of the material allegations" in the petition "are true," settling the account of the receiver in bankruptcy, and directing that the balance in hand be paid over by said receiver to the petitioning assignee.

From the exemplification of the bankruptcy proceedings submitted to me, it does not appear that there has ever been a technical dismissal

of the petition in bankruptcy against the Nelson Company, but I find that the proceedings of the bankruptcy court in Chicago amount to a declaration, duly contained in the order of November 21st, that the Nelson Company was not subject to the operation of the bankrupt law owing to the nature of its business, and that, therefore, said District Court declined to proceed further with the matter. Evidently, some New York creditors of the Nelson Company had early information of the approaching termination of the bankruptcy proceedings in Chicago, and on November 5, 1906, one Ruthenburg began an action in the Supreme Court of New York against the Nelson Company, wherein he procured a warrant of attachment, and on the same date caused the sheriff of New York county to serve a copy warrant upon the ancillary receiver in bankruptcy appointed by this court. On November 22, 1906, divers other New York creditors took the same course. On November 28, 1906, the Illinois assignee served his petition in this court, demanding that the funds in the hands of the receiver of this court be turned over to him. When such receiver took possession of the local business of the Nelson Company, he found certain workmen's wages due and unpaid. These workmen would be entitled to preferential payment, either under the bankruptcy law or under the assignment statute of Illinois. The rights of these several claimants to the fund are now presented for consideration, after argument noticed for hearing under the receiver's petition for instructions.

It is the duty of this court to distribute the fund in question pursuant to general principles of law, which duty is cast upon it by Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374. The attachments were apparently sued out under the impression that the bankruptcy proceedings in Illinois were void, wherefore the appointment of an ancillary receiver was also void, and the moneys in the possession of that receiver but so much of the assets of the Nelson Company found in the hands of a private person. This view is erroneous. The District Court for the Northern District of Illinois was jurisdictionally empowered, and solely empowered, to decide whether the Nelson Company was or was not subject to the operations of the bankruptcy law; and, pending decision on that point, it had full power to take charge of the property of the alleged bankrupt, from which right flowed the power of appointing an ancillary receiver. The moneys now in the hands of that receiver have therefore always been in custodia legis, far more obviously so than in Gumbel v. Pitkin, supra.

Just as an execution cannot be enforced against property in the hands of a receiver (Wiswall v. Sampson, 14 How. 64, 14 L. Ed. 322), so an attachment will not lie against moneys in the hands of a receiver (Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491). The reason is the same, because an enforcement of the levy either of the attachment or the execution would constitute a contempt of court. But the court of original jurisdiction on questions affecting bankruptcy having now decided that no trustee can ever become entitled to the fund in question, and the Illinois assignee having claimed and

obtained the Illinois fund from the bankruptcy court in that state, the same assignee must now claim the New York find, not against the ancillary receiver, who offers no opposition at all, but against the rights of the New York attaching creditors. This court is bound to consider and respect the rights of such creditors growing out of the situs of the property in question within the state of New York, as well as its custody by this court. Gumbel v. Pitkin, supra. Such rights are governed by the law of New York, and depend upon principles of comity as between New York and Illinois. If the Illinois statute of assignments be regarded as an insolvent law, it is clear that a claimant thereunder cannot prevail against the subsequent attaching creditor. Security Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545.

I do not find it necessary to enter upon this question, and, arguendo, considering the transfer in Illinois as voluntary and lawful by the laws of that state, it must be regarded as lawful in New York unless opposed to the policy of that state. Ockerman v. Cross, 54 N. Y. 29, as cited in Warner v. Jaffray, 96 N. Y. 258, 48 Am. Rep. 616. It appears to be firmly established in Illinois that, even in the case of a voluntary foreign assignment, it is contrary to the policy of Illinois law "to allow the property or funds of a nonresident debtor to be withdrawn from this state before his creditors residing here have been paid, and thus compel them to seek redress in a foreign jurisdiction." Woodward v. Brooks, 128 Ill. 227, 20 N. E. 685, 3 L. R. A. 702, 15 Am. St. Rep. 104. See, also, Heyer v. Alexander, 108 Ill. 385; Smith v. Lamsen, 184 Ill. 71, 56 N. E. 387. And these decisions have been recognized by the federal courts sitting in Illinois. Sheldon v. Wheeler (C. C.) 32 Fed. 773. It thus appears that, were the situations reversed, a New York assignee would not be permitted to recover funds of his assignor situated in Illinois as against attaching creditors in that state. The rule of granting to assignments for the benefit of creditors extraterritorial vitality rests upon principles of comity. Faulkner v. Hyman, 142 Mass. 54, 6 N. E. 846. It involves reciprocity, and it appears to me to be clearly against the policy of any state to grant to the citizens of another jurisdiction a privilege from which its own citizens are debarred by the repeated decisions of the highest court of said jurisdiction. I am therefore of opinion that, upon principles of public policy, the claims of the attaching creditors are to be preferred to that of the assignor.

The claims of the wage earners of the Nelson Company would be preferred under the bankruptcy statute and also under the statute of Illinois, but there is no power in the court to apply either statute. These men are in the same position that they would have been in had no petition in bankruptcy been filed, and the attachments had nevertheless issued. Under existing circumstances, I know of no provision at all which entitles them to a preference.

On behalf of the junior attaching creditors, it is urged that, when the senior attachment was issued, there had been no decision by the bankruptcy court in Illinois adjudging that the Nelson Company was

not subject to bankruptcy proceedings, and that therefore a distinction should be drawn between their attachments which were issued after the entry of the order of November 21, 1906, and that of Ruthenburg, which was taken out earlier. This distinction is not substantial. The moneys in the hands of the ancillary receiver are just as much in custodia legis now as they ever were. The receiver is not only now, but was at all times, merely a custodian of funds, the title to which was in the Nelson Company, so far as the bankruptcy law is concerned, for that company was never adjudged a bankrupt, and title, therefore, remained in it. The effect of the appointment of a receiver "is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver." Wiswall v. Sampson, 14 How. 64, 14 L. Ed. 322. Thus the service in attachment of the copy warrant is to be regarded as a notice of claim addressed to this court through its receiver; and when, as here, followed by appearance and demand herein, it is obviously unjust that the court, whose power rendered the levy ineffective, should use that power to insure the delivery of what would otherwise have been actually seized, to an assignee who would never have gotten it, nor had an opportunity of asserting his right thereto, but for the mistake of certain creditors in instituting bankruptcy proceedings.

As no infirmity in the senior attachment has been pointed out except the date of its issue, the fund is awarded to Ruthenburg; but if the juniors in attachment desire to move to set aside Ruthenburg's claim upon grounds other than the one above considered, I will hear argument upon due notice.

Let the ancillary receiver file his account in this court, and give notice to all attorneys who have appeared herein. Exceptions to the account may be filed within five days after the service of such notice, and within that time, also, the junior attaching creditors must move if they are so advised. If no exceptions are filed and no motion made upon new grounds to set aside Ruthenburg's attachment, an order will be signed directing the receiver to pay over to Ruthenburg the net fund, upon receiving from him a satisfaction of his judgment pro tanto. In the order allowances will be fixed for the receiver and his attorneys. If exceptions are filed, let the matter be brought to my attention, and I will either hear the exceptions or refer the account.

THE PETER WHITE.

(District Court, W. D. New York. December 5, 1906.)

SALVAGE—AMOUNT OF COMPENSATION—RESCUE OF DISABLED STEAMER IN LAKE SUPERIOR.

On October 31, 1905, the steel steamer Peter White, 524 feet long and valued at $330,000, bound for Duluth, was disabled in Lake Superior 60 or 70 miles east of that port by the breaking of her crank shaft. The water was rough, and the wind was blowing 20 miles an hour and afterward increased. She lost her port anchor and was drifting at the rate of

4 miles an hour toward Outer Island, 30 miles distant. After six hours the steamer Troy bound from Duluth sighted the distress signal of the White and went to her relief, towing her to Duluth at a loss of 16 hours from her voyage. The Troy was also a large steamer, valued at $325,000, with a cargo of $250,000. There was some risk in making fast the hawser which necessitated going quite close to the White. During the six hours preceding the coming of the Troy, which was at noon, no other vessel had passed. *Held* that, considering all the facts and the considerable peril of the White, the Troy was entitled to a salvage award of $5,000, one-fourth to her officers and crew.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 70, 71; Salvage awards in federal court, see The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Brown, Ely & Richards, for libelant.

Hoyt, Dustin & Kelley, and G. W. Cottrell, for respondent.

HAZEL, District Judge. This proceeding is in rem to recover salvage for services rendered by the steamboat Troy in taking in tow and conveying to the port of Duluth the freight vessel Peter White, which was found disabled on Lake Superior on October 31, 1905. The Peter White is a large steel vessel 524 feet long, 54 feet beam, 30 feet in depth, gross tonnage 9,000, and valued at $330,000. The Troy is 398 feet long, 47 feet beam, 28 feet in depth, valued at $325,000. The latter was bound from the port of Duluth to Buffalo at the time of performing the salvage service, and carried a cargo of the value of $250,000. At about 6 o'clock on the morning of the day mentioned, when about 60 or 70 miles from Duluth, her port of destination, and about 8 miles from Sand Island westward, the Peter White broke her crank shaft. The wind was then blowing about 20 miles an hour. At noon of the same day, the Troy observed the signal of distress which the Peter White had hoisted, immediately left her course, and rescued the disabled steamer. On account of the rough sea the Troy towed her to Duluth, instead of Two Harbors, the nearest port, and was thereby delayed in her down trip about 16 hours.

The services rendered were clearly of the character of salvage. The single question for determination is the amount of compensation which should be awarded. The material facts are not in serious dispute. In arriving at the amount hereinafter decreed to be paid by the salved steamer, I have not considered her value with a view of making an award on a percentage basis; my intention being simply to adequately compensate the Troy, her officers, and crew for their generous and valuable services. I have weighed and considered the different views of the situation, the value of the steamer salved, her peril, the state of the wind and weather, the drifting of the vessel at the rate of about 4 miles an hour toward Outer Island (30 miles distant), and any probabilities of her going on the rocks or into shoal water; also the temporary repairs that were being made to enable her to proceed under steerageway to Duluth, and the claim that the steamer Presque Isle was scheduled to pass down and the possibility of the disabled steamer being observed and assisted by her. Furthermore, I have considered that the Peter White hoisted a flag of distress after her crank shaft broke, which evidently was indicative of apprehension and immi-

nent danger. She was in the trough of a rough sea and had lost her port anchor in trying to arrest drifting toward the group of Apostle Islands. The wind which was blowing fresh with increased velocity created a perilous situation and without doubt some anxiety on the part of her master, although he testified that he did not consider there was much danger. As already observed, the steamer Troy, carrying a valuable cargo, went outside her course to render assistance. The risk assumed by her, together with the skill and promptitude displayed in getting alongside and taking the hawser of the distressed steamer, her willingness to be helpful, irrespective of the danger or pecuniary loss from delay, are all elements to be considered upon the question of salvage remuneration, and I think entitle her to a fairly liberal award. But the respondent contends that in the cases of The Spokane (D. C.) 67 Fed. 254, and The Peerless, Fed. Cas. No. 4,494, the facts and circumstances are closely analogous to the conditions under consideration, and therefore the salvage award in this case should not be appreciably larger than in those cases. In Re The Spokane the property saved was nearly of the value of the Peter White, and the award, including expenses, was $3,600. In that case the court held that though disabled the steamer was in no imminent danger, there being no sea and good shore, and a small boat could have been sent ashore to telegraph for assistance. In The Peerless, supra, an air pump broke and the ship was rendered helpless. The water was not troublesome, nor was there any apprehension from drifting on rocks or into shallow water. Moreover, the value of the property saved and the value of the salvor was much less than in the case under consideration.

A distinction was drawn at the hearing by counsel for respondent between the conditions of navigation on the Great Lakes and those which prevail on the ocean, and though assenting to the proposition that perils may be encountered on the ocean more serious than those met on the Great Lakes, yet it is well known that, when the waters of the Great Lakes are tempestuous, the risks and dangers manifestly are not dissimilar to those which in a like situation confront the salt-water mariner. Therefore the rule is just that the circumstances of each case must be determinative of the amount of salvage compensation earned. The R. R. Rhodes, 82 Fed. 751, 27 C. C. A. 258; The J. Emory Owen (D. C.) 128 Fed. 996.

The libelant contends that the salvage services were of such a high order as to warrant a compensation on the basis of the value of the vessel, and that 10 per centum of such value would not be unreasonable. To this extreme view I do not assent. The services rendered necessitated going close to the disabled steamer to take her hawser, which was a hazardous undertaking, as the proofs show. Being light, she rolled or pounded considerably in the sea. Under the circumstances the act of thus venturing the safety of the Troy was meritorious and praiseworthy. Although the situation of the Peter White in view of the wind and her drifting towards Outer Island was grave and perilous, yet it is claimed that her danger was greatly minimized by the expectation that the temporary repairs to her shaft would be completed by about 3 o'clock in the afternoon, and that the Presque Isle or

some other passing boat might have perceived and succored her. These suppositions, however, do not warrant simply a moderate compensation, and such as the respondent has suggested a willingness to pay. Any surmises regarding relief from danger based upon the uncertain happenings indicated are bereft of controlling or effective force when one considers that the captain of the Peter White knew that the Presque Isle would pass in the pathway of steamers at about 3 o'clock that day, and also was aware of the estimated time it would take to complete the temporary repairs, and yet sought and accepted the services of the Troy.

The proofs show that the wind slightly increased in velocity, accompanied by snow flurries, after the towing by the Troy began, and it is not improbable, as argued, that the view of passing vessels might have become obscured or blurred and the signals of distress not heard or discerned. The claim that the Peter White was in imminent danger of drifting on Outer Island or Brownstone Reef or into shallow water, at first blush, may be regarded as somewhat remote, yet the facts that her drifting without a port anchor was at the rate of 4 miles an hour, that the wind meanwhile having veered to the northwest was blowing about 30 miles an hour, and that the Troy was the first vessel that appeared within six hours after the disaster, indicate a situation fraught with menacing danger. In this connection it is to be noted that, when the shaft of the Peter White broke, another steamer, the I. W. Nicholas, bound in the same direction was about half a mile ahead on her port bow. Four blasts of the whistle were blown, indicating distress and a desire to be taken in tow, but the signals were wholly disregarded, and the I. W. Nicholas uninterruptedly pursued her way. Whether such signals were actually heard does not positively appear, but that they were heard may be fairly presumed. It is important that the amount of compensation awarded in such a case as this should be sufficiently liberal to prove that the courts are not unmindful of the value of such services and to create and promote an incentive to vessels, their skippers, and crew to promptly and courageously assume risks and encounter dangers in the performance of saving life and property in distress on the Great Lakes. Therefore, even though no lives were hazarded, a salvage compensation to the Troy of $5,000 will not in my judgment be an excessive award.

The decree should provide that four-fifths of the amount be disbursed to the owners, and, as the lives of the master and crew were not greatly exposed, the remaining one-fifth only is awarded to them. From the latter sum $350 is awarded to the captain, $125 to the mate and a like sum to the engineer in charge, leaving $400 to be divided among the other officers and members of the crew in proportion to their wages.

Decree accordingly, with costs.

LONG et al. v. PENNSYLVANIA R. CO.

(Circuit Court, D. New Jersey. January 2, 1907.)

1. HUSBAND AND WIFE—INJURIES TO WIFE—ACTION—STATUTES—CONSTRUCTION.

P. L. N. J. 1906, p. 525, provides that any married woman may maintain an action in her own name, without joining her husband, for all torts committed against her or her separate property, in the same manner as she lawfully might if a feme sole, provided that the act shall not be so construed as to interfere with or take away any right of action at law or in equity now provided for the torts above mentioned. *Held*, that the proviso only saves to the husband and wife their joint right of action for any tort committed against the wife previous to the enactment, and is therefore not repugnant to the preceding part of the section.

2. SAME—PARTIES.

P. L. N. J. 1906, p. 525, § 1, authorizes a married woman to maintain an action in her own name, without joining her husband, for a tort committed against her, provided that the act shall not interfere with or take away any right of action previously provided for such torts; and section 2 declares that any action brought under the act may be prosecuted by such married woman separately in her own name, and that the nonjoinder of her husband shall not be pleaded. *Held* that, where an action is brought after the passage of such act for a tort committed against a married woman, her husband is an improper party thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 739, 802–807.]

In Tort. On demurrer to declaration.

George S. Silzer, for plaintiffs.
Alan H. Strong, for defendant.

LANNING, District Judge. The plaintiffs in this case are husband and wife. By their declaration they complain that on May 29, 1906, Mrs. Long, after having purchased from the defendant a ticket for passage on one of the defendant's trains, was standing on the platform of the defendant's railroad station at Menlo Park, N. J., awaiting the arrival of the train, and that while standing there one of the defendant's servants, as the train was coming to the station, threw a parcel of merchandise from a car of the train to the station platform in such manner as to strike Mrs. Long and injure her, in consequence of which she and her husband, in a single count, jointly claimed damages from the defendant company. The defendant has demurred to the declaration on the ground that the husband is not a proper party to the action. The demurrer is founded on the provisions of an act of the New Jersey Legislature, entitled "An act for the protection and enforcement of the rights of married women," approved May 17, 1906 (P. L. p. 525). Its provisions are:

"Section 1. Any married woman may maintain an action in her own name, and without joining her husband therein, for all torts committed against her, or her separate property, in the same manner as she lawfully might if a feme sole; provided, however, that this act shall not be so construed as to interfere with or take away any right of action at law or in equity now provided for the torts above mentioned.

"Sec. 2. Any action brought in accordance with the provisions of this act may be prosecuted by such married woman separately in her own name, and the non-joinder of her husband shall not be pleaded in any such action.

"Sec. 3. This act shall take effect immediately."

It will be observed that the act took effect 12 days before the alleged injury to Mrs. Long. The validity of the demurrer depends upon the construction that is to be given to this act.

The law of New Jersey, as it stood previous to the passage of the act, did not authorize a married woman to sue in her own name for any tort committed against her. Up to that time it was necessary in every such case that the husband and wife should be joined as plaintiffs. Upon the rendition of a judgment in any such case, the husband had the right to receive the money, and at any time before the rendition of judgment he could release the cause of action. Pennsylvania Railroad Co. v. Goodenough, 55 N. J. Law, 577, 28 Atl. 3, 22 L. R. A. 460. Such being the law before the passage of the act, what is the effect of the proviso in its first section? In Attorney General v. Governor and Company of Chelsea Waterworks, Fitzgibbon's Reports, 195, the Court of King's Bench declared that:

"Where a proviso of an act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers."

In Townsend v. Brown, 24 N. J. Law, 80, Chief Justice Green said:

"The rule has long been established that, if a proviso in a statute be directly contrary to the purview of the statute, the proviso is good, and not the purview, because it speaks the later intention of the Legislature."

In Clark Thread Company v. Kearny Township, 55 N. J. Law, 53, 54, 25 Atl. 327, 328, Mr. Justice Van Syckel said:

"A saving clause in a statute, where it is directly repugnant to the purview or body of the act, and cannot stand without rendering the act inconsistent and destructive of itself, is to be rejected."

But as to provisos he quoted Mr. Sedgwick as follows:

"A curious rule of a very arbitrary nature prevails with regard to provisos. It is that, when the proviso of an act of Parliament is directly repugnant to the main body of it, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers."

After thus referring to the different rules of construction to be applied to provisos and saving clauses, Mr. Justice Van Syckel said:

"What phraseology constitutes a saving clause and what a proviso does not appear to be free from doubt."

The same distinction between provisos and saving clauses is made in N. J. Midland R. R. Co. v. Jersey City, 42 N. J. Law, 97, 101.

Assuming, for the purposes of this case, that a proviso repugnant to the enacting clause which precedes it repeals the enacting clause and is given effect because it is the later declaration of the Legislature, and that a saving clause repugnant to the body of the section preceding it is rejected, it must still be remembered that the act of the Legislature is, if possible, to be so construed as to give every part of it due effect. It is a well-settled rule that a proviso is to be strictly construed,

so that it will take nothing out of the enacting clause which is not fairly within the terms of the proviso. United States v. Dickson, 15 Pet. 141, 165, 10 L. Ed. 689; Ryan v. Carter, 93 U. S. 78, 83, 23 L. Ed. 807; Clark Thread Co. v. Kearney Township, supra. In my opinion, whether the last clause of section 1 of the act of 1906 be regarded as a proviso or as a saving clause, it need not, and therefore ought not, to be construed as repugnant to the preceding part of the section. At the time of the passage of the act there was vested in the husband and wife jointly, in every case where a tort had been committed against the wife previous to its passage, a right of action for such tort. The proviso of section 1 should be construed to apply to such torts only. Its purpose was, I think, merely to save to the husband and wife their joint right of action for any tort committed against the wife previous to May 17, 1906. The proviso was not intended to apply to any tort committed against a wife after the approval of the act. Furthermore, if the last clause of section 1 is to be regarded as a proviso repugnant to the preceding part of the section, it can be given effect only in case it be the last declaration of the Legislature on the subject. But it is not. The second section is the last declaration of the Legislature on the subject, and that section expressly declares that, in an action brought by the wife in her own name for a tort committed against her, the nonjoinder of her husband shall not be pleaded.

But the plaintiffs insist that, inasmuch as the first section of the act declares that a married woman "may" maintain an action in her own name, without joining her husband therein, for a tort committed against her, she has an option in the matter, and may exercise her choice as to whether she will or will not join her husband in such an action, and that whether the suit be instituted in the name of the wife alone, or in the names of the husband and wife jointly, the act does not deprive the husband of his interest in the suit, or his right to take to his own use its proceeds. In my opinion such a construction of the section is not permissible. The Legislature, by conferring upon a wife the right to sue alone, has given her absolute control of her suit and the right to take to her own use whatever she may recover. The Legislature intended that, in a suit to recover damages for a tort committed against a married woman after the passage of the act, her husband should have no interest, and therefore that he should not be a party thereto.

The demurrer must be sustained. An interlocutory order may be entered sustaining it and allowing 20 days after service of a copy of the order within which the declaration may be amended. If not amended within that time, the defendant may enter final judgment nil capiat. The plaintiffs must pay costs.

SCOFIELD v. PENNSYLVANIA CO.

(Circuit Court, W. D. Pennsylvania. December 22, 1906).

No. 1, July Term, 1906.

1. DEATH—ADULT CHILDREN—ACTION BY PARENTS.
Where a child after becoming of age continues to live with his parents and they have a reasonable expectation of pecuniary advantage from his services they are entitled, according to the interpretation put by the State Courts upon the local statute which is the basis of the action, to recover damages for his wrongful death.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 43; vol. 13, Courts, §§ 956, 957.]

2. SAME—MEASURE OF DAMAGES—REASONABLE EXPECTATION OF PECUNIARY BENEFIT BY PARENT.
The right to recover however is confined strictly to compensation and the damages must be such as are reasonably in sight. It is the reasonable expectation of pecuniary benefit—that which it can be said with reasonable certainty that the parent in all likelihood would have enjoyed if death had not stepped in—which is the value to the parent of the child's life and the measure of the loss.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 112, 115, 117.]

3. SAME—DAMAGES—EXCESSIVENESS.
Plaintiffs sued for the alleged negligent killing of their son, a man about 30 years old, who was unmarried and living with plaintiffs, to whom he had given his services for a number of years, the estimated value of which was from $4,000 to $7,000 a year, receiving from his parents only about $500 a year to meet his personal expenses, having assured his father that he would continue so to work until the father had paid off an indebtedness under which he was laboring. *Held*, that the parents' reasonable expectation of the continuance of such services could not extend more than a year or two ahead at any time, and that a verdict awarding them $17,000 was excessive.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 125–130.]

Rule for a New Trial.

J. Ross Thompson, for the rule.
J. B. Cessna and J. R. McQuigg, for plaintiffs.

ARCHBALD, District Judge.* The plaintiffs sue for the death of their son, who was killed by the negligence of the defendant company while a passenger upon one of its trains. He was about 30 years old, unmarried, and living with his father and mother to whom he had given his services for a number of years, assuring his father that he would continue to do so until he (the father) had paid off the indebtedness under which he was laboring. His father is an architect engaged in a large and lucrative business at Cleveland, Ohio, and it was in that connection that the son undertook to assist him. His services were variously estimated at the trial by different witnesses as worth from $4,000 to $7,000 a year, the only amount paid him by his father on account of them being about $500 annually to meet his personal expenses. The

*Specially assigned.

jury gave a verdict for $17,000, and a new trial is asked for on the ground that it is excessive.

When a child is under age, the parents have a right to his earnings, and may therefore sue for the loss experienced by his death. But this right ends when he attains his majority, and, if death occurs before that, a recovery is limited in consequence to his probable earnings up to that time; "the chance of survivorship, his ability and willingness, after he should become of age, to support others," being too vague, as it is declared, "to enter into an estimate of damages merely compensatory." Caldwell v. Brown, 53 Pa. 453; Lehigh Iron Co. v. Rupp, 100 Pa. 35. It is, however, on the other hand, held, that after a child has become of age, if the family relation exists in fact, and the parents have a reasonable expectation of pecuniary advantage therefrom, an action may be maintained, based upon that expectancy. Pennsylvania Railroad v. Adams, 55 Pa. 499; North Penn. Railroad v. Kirk, 90 Pa. 15. It is difficult for me to reconcile these opposite and seemingly contradictory positions. It would be easier to do so, if the right to recover for the death of an adult child was confined to cases of actual dependence on the part of the parent, which the courts would naturally be reluctant to cut off, out of which the other doctrine may have grown. But this is not the law, which must be accepted as it is laid down; the act which is the basis of the action being local and the construction given to it by the state courts therefore being controlling. The conditions, however, which surround the subject suggests a limitation. The expectation of benefit to be derived by the parent from the child after it has become of age is not to be indefinitely extended. The effort at the trial was to have it reach to the full expectancy of the son's life according to the tables of mortality, regardless of the fact that, by the same, the parents would be both dead long before that. Hedged about by uncertainties and contingencies, as the expectation of the parent conspicuously is, it cannot be invoked to sustain any such speculative claim. The right to recover is confined strictly to compensation, and the damages must be such as are reasonably in sight. It is the reasonable expectation of pecuniary benefit—that which it can be said with reasonable certainty that the parent in all likelihood would have enjoyed if death had not stepped in—that is the value to the parent of the child's life, and the measure of the loss.

In the present instance, as pointed out at the trial, no matter what the filial affection of the deceased, or the assurances given to his father, the relation could be terminated at any moment, for any reason, or for no reason at all. The son was his own master, and, as the estimate put upon the value of his services shows, had abundantly proved his powers, and might assert his independence when he chose. He might be led to marry, or to go to work for himself, or be allured by a business proposition from some outside source, or he might fall out with his parents, as often happens, after years of good feeling, for the most trivial cause. Or disease or accident might incapacitate him, or death intervene, as it did.

Notwithstanding these considerations, the jury by the verdict have in effect declared that the existing relations were assured to the plaintiffs with reasonable certainty anywhere from three to five years,

according to the value to be assigned to his services, and taking the verdict as so much cash in hand. Put at interest, indeed, it would yield of itself something like $1,000 a year for all time. I regret to say that I do not see my way to let this stand. Undoubtedly the question of damages in this as in every case is one for the jury, but the court must see that they do not get beyond bounds. The deceased was nearly 10 years past his majority, and the plaintiffs would be fortunate, as it seems to me, if they could count with any certainty upon his remaining with them a year or two ahead at a time, the chance of which would lessen as the years went on. The verdict is thus, upon any reasonable basis, from two to three times what it ought to be, and cannot be sustained. If it had been $10,000, I might not have disturbed it, although that would have been large.

But as it is, without undertaking any nearer than this to say what it should be and simply declaring it to be excessive as it stands, the rule for a new trial is made absolute.

SANTA FÉ PAC. R. CO. et al. v. DAVIDSON et al.

(Circuit Court, S. D. California, S. D. December 24, 1906.)

1. SEARCHES AND SEIZURES—WITNESSES—SUBPŒNA DUCES TECUM—PREVILEGE.
   A subpœna duces tecum, directed to an officer of a railroad corporation, requiring him to appear before a federal grand jury and to bring with him certain records of the railroad company relating to freight claims, was not objectionable as violating federal Constitution, fourth amendment, protecting the people from unreasonable searches and seizures.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Searches and Seizures, § 5.]

2. SAME—REASONABLENESS.
   A subpœna duces tecum requiring an officer of a railroad company to produce before a federal grand jury letters, papers, memoranda, and documents relating to certain claims designated by number, and all papers, documents, books, and memoranda showing the final disposition of the claims and the method by which they were paid or disposed of, etc., was not objectionable for unreasonableness.

T. J. Norton and E. W. Camp, for complainants.
Oscar Lawler, U. S. Atty., for defendants.

ROSS, Circuit Judge. This is a bill filed by the Santa Fé Pacific Railroad Company, a corporation organized under the laws of the United States, and the Atchison, Topeka & Santa Fé Railway Company, a corporation organized under the laws of the state of Kansas, against G. A. Davidson, auditor of the last-named company, and the United States attorney and the United States marshal for the Southern district of California, by which the complainants seek to enjoin the production before a United States grand jury of those certain tissue copybooks described in a subpœna duces tecum issued out of the United States District Court, in which the grand jury is impaneled, to

Davidson, directing him to appear before that body at a certain specified time, and bring with him—

"Those certain claims made upon and against the Atchison, Topeka & Santa Fé Railroad Company on account of freight paid to said railway company, together with all letters, papers, memoranda, and documents relating thereto, in your possession or under your control, not heretofore produced by you before said grand jury, either as an employé of the Atchison, Topeka & Santa Fé Railway Company or otherwise and bearing the following claim numbers, to wit: 87,480, 89,455, 91,175, 92,496, 95,110, 96,125, 96,238, 96,127, 98,857, 99,474, 99,469, 99,472, 99,421, 100,677, 100,679, 101,121, 100,674, 100,668, 100,671, 102,843, 103,061, 104,744, 105,027, 104,887, 106,372, 106,369, 106,371, 106,363. Also bring with you any and all papers, documents, books, and memoranda, in your possession or under your control as such employé or otherwise, showing the final disposition of such claims and the method by which the same were paid or disposed of, and, particularly, those certain tissue impression copy books containing copies of vouchers made by you or by the office in which you are employed during the years 1904, 1905, and until August 1, 1906, in payment of each, every, and all of the claims made upon and against said railway company for refund of any freight paid. Also bring with you all those certain papers known as 'claim papers,' and all correspondence and memoranda relating to a certain loss and damage claim numbered 99,784, filed in the claim department of the audit office of said railway company, or if so in the Los Angeles local freight office of said Atchison, Topeka & Sante Fé Railway Company Coast Lines."

The bill shows that the complainants appeared before the District Court and moved that court to quash the subpœna in so far as concerns the tissue impression copybooks, and that the motion was denied.

Assuming, without holding, that this court of equity has the power to grant the injunction sought, are the complainants, as claimed, entitled to such injunction by reason of the provisions of the fourth amendment to the Constitution of the United States, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"?

In considering a similar question in the case of Hale v. Henkel, 201 U. S. 43, 73, 26 Sup. Ct. 370, 378 (50 L. Ed. 652), the Supreme Court said:

"We think it quite clear that the search and seizure clause of the fourth amendment was not intended to interfere with the power of courts to compel, through a subpœna duces tecum, the production upon a trial in court of documentary evidence. As remarked in Summers v. Mosely, 2 Cr. & M. 477, it would be 'utterly impossible to carry on the administration of justice' without this writ. The following authorities are conclusive upon this question: Amey v. Long, 9 East, 473; Bull v. Loveland, 10 Pick. (Mass.) 9; U. S. Express Co. v. Henderson, 69 Iowa, 40, 28 N. W. 426; Greenleaf on Evidence, 469a. If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness, he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to sub-

mit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights. Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges. It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the Legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations."

The court in the case of Hale v. Henkel further held that a corporation is entitled to immunity under the fourth amendment against unreasonable searches and seizures, such as it found the subpœna there under review to be, saying, upon that point:

"Applying the test of reasonableness to the present case, we think the subpœna duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union. If the writ had required the production of all the books, papers, and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its

operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpœna. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpœna of this description is equally indefensible as a search warrant would be if couched in similar terms."

The requirements of the subpœna in the present case are manifestly very much more restricted than the one held unreasonable in Hale v. Henkel, and are no more unreasonable than those of the subpœna recently sustained by Judge Lacombe in United States v. American Tobacco Company (C. C.) 146 Fed. 557.

Without, therefore, deciding the question in respect to the power of this court to grant the injunction asked for, I am of the opinion that it should be, and accordingly it is, denied.

CROTHERS v. EDISON ELECTRIC CO. et al.

(Circuit Court, N. D. California. October 31, 1906.)

No. 13,918.

LIMITATION OF ACTIONS—EFFECT OF CHANGE IN STATUTE—CAUSES OF ACTION PREVIOUSLY ACCRUED.

The amendment of Code Civ. Proc. Cal. § 340, which took effect May 18, 1905, places actions for injury or death caused by the wrongful act or negligence of another in the class of actions which must be brought "within one year," without specifying when such period shall commence to run. The previous limitation was two years. *Held*, that as to the causes of action which had previously accrued, but were not barred under the old law, the new period of one year commenced to run when the amendment went into effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 27.]

At Law. On demurrer to complaint.

F. H. Gould, for plaintiff.
H. H. Trowbridge, for defendant Edison Electric Co.
J. W. McKinley, for defendant Southern Pacific Co.

WOLVERTON, District Judge. This is an action to recover damages for the death of plaintiff's son, alleged to have been caused through the negligence of the defendant corporations. The casualty occurred December 7, 1904, and the action was commenced April 9, 1906. The statute of limitations in force when the cause accrued prescribed two years for bringing the action. On March 18, 1905, the Legislature of California amended the law limiting the period for commencing an action in such cases to one year, which amendment became effective May 18, 1905. The period of time that had elapsed,

therefore, between the time of the casualty and the taking effect of the amendment, was 5 months and 11 days, and the action was commenced 10 months and 22 days thereafter, being 16 months and 2 days after the cause accrued. The defendants interposed a demurrer to the complaint, challenging the plaintiff's right to maintain the action, on the ground that the statute of limitations had run when the action was instituted.

Counsel for the respective parties are entirely agreed that the limitation prescribed by the amendment is the one that applies to the present controversy, and the single point of difference is as to when the statute began to run with reference to the action—whether from the time of the casualty, or from the time when the amendment became operative. It is insisted on the part of plaintiff that it began running from the latter date, while, on the other hand, it is maintained that it began with the former.

The general rule applicable, together with the appropriate canon of interpretation, is pertinently stated by Mr. Wood, in his work on Limitations (section 12), as follows:

"If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs. That is, the period provided by the new law must run upon all existing claims, in order to constitute a bar. In other words, the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar. The question, however, as to whether the statute is to have a retrospective operation, is one of construction, to be determined from the language of the act and the intention of the Legislature to be gathered from the act itself and the subject-matter to which it applies; the rule being, as previously stated, that a statute will not be permitted to have a retrospective operation unless such was clearly the intention of the Legislature."

In harmony with this enunciation of the law is the case of Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737, where almost the exact point in controversy is determined. There a new statute had been adopted limiting the time for commencing an action upon a judgment from another state to two years "next after the cause or right of such action shall have accrued." The court, in deciding the case, speaking through Mr. Justice Bradley, says:

"The court below held that as the defendant was a resident of Kansas when the act took effect, the time of limitation began to run in his favor as against the present cause of action from that period, and that the action might have been brought at any time within two years afterwards, and not having been brought within that period it was barred. * * * A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the Legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But, if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such

was not the intent of the Legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But, as this construction leaves all actions existing at the passage of the act without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires—which reasonable time is to be estimated by the court—leaving all other actions accruing prior to the statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others."

This doctrine has the approval, also, of the Supreme Court of California, in Swamp Land District No. 307 v. Glide, 44 Pac. 451, where Mr. Justice Henshaw, announcing the opinion, says:

"But a man has no vested right in the running of the statute of limitations until it has completely run and barred the action; and, when a change in the statute is made during the time of its running, that time is not a credit to the defendant, under the new law. The whole period contemplated by the new law must lapse, to bar the action. Such are the general rules applicable alike to criminal and civil actions, unless the new act itself expresses a contrary intent."

So that it would seem that the question whether the new law shall begin to run from the time of the casualty, or from the time the law became operative, is one mainly for construction of the statute; the presumption being that it was not intended to be retroactive, unless so expressed, or unless such intendment is to be gathered from the words of the act. The statute (Code Civ. Proc.) as amended, reads:

"Sec. 335. Periods of Limitation Prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: Sec. 340. Within One Year. * * * (3) An action for * * * injury to, or for the death of one caused by the wrongful act or neglect of another."

It will be noted that the statute simply prescribes that the action shall be begun within one year. There is an entire omission of the mention of any specific time from which the limitation shall begin to run. Many statutes, as was the case in the Kansas act referred to in the Sohn Case, supra, employ the expression "next after the cause or right of action shall have accrued," or one of similar import. For all actions arising after the amendment, the law would imply, undoubtedly, that the limitation should begin to run from the time the action accrued; but for such as arose prior thereto, and as to which the old statute had not yet run, the omission alluded to would seem to indicate an intendment that the litigant should have the whole of the new period adopted in which to sue. Indeed, the law being remedial, the very literal interpretation would give it that meaning. In the Sohn Case the court refused to adopt a literal interpretation, because it would render the act void as unconstitutional; but here such an interpretation

is, not only the very natural one, but it renders the act constitutional as well. By how much stronger, therefore, is the reason for adopting the construction that the litigant shall have the whole of the period from the time of the taking effect of the amendment in the present controversy than in the Sohn Case. But whatever may be the logic of the rule, it is plain that it has direct application here, and, having the sanction of the highest judicatory of the local courts, as well as of the federal, it must be accepted as controlling.

A year not having elapsed between the date on which the amendment became operative and that of the commencement of the action, it follows that the demurrer was not well taken.

ST. LOUIS HAY & GRAIN CO. v. SOUTHERN RY. CO.

(Circuit Court, E. D. Illinois. June 25, 1906.)

CARRIERS—INTERSTATE RAILROAD—RECOVERY OF UNREASONABLE CHARGES PAID.

Defendant railroad company, on shipments of hay to southeastern points from East St. Louis, made a charge of two cents per 100 pounds above the rates charged from Ohio river points on all hay which was not unloaded into a warehouse at East St. Louis from the cars in which it was there received, whether such hay was consigned to that point or billed through to points of final destination, while on all hay so unloaded into a warehouse the additional charge was four cents. Plaintiff owned warehouses in East St. Louis from which it loaded and shipped hay to southeastern points over defendant's road and was required to pay thereon the four-cent charge. *Held*, on the evidence, that an additional charge of one cent per 100 pounds for hay loaded from warehouses would cover the difference in the expense to defendant, and the charge made was to the extent of the excess above that unjust and unreasonable, and that plaintiff was entitled to recover the amount of such excess charges paid.

Action to Recover Alleged Unreasonable Freight Charges Paid.

Forman & Whitnel and P. J. Farrell, for plaintiff.
C. B. Northrop and E. C. Kraemer, for defendant.

Special Findings of Fact and Final Judgment Thereon.

WRIGHT, District Judge. And now again come the parties to this suit, plaintiff and defendant, by their respective attorneys, and the court, having theretofore heard the argument of counsel for the respective parties and taken the cause under advisement and the court now being fully advised in the premises on consideration thereof, doth find that on the hearing of this cause before and by the Interstate Commerce Commission, the said Commission found in its report and opinion, in substance, the following facts:

(1) Large quantities of hay produced in territory east, north, and west of East St. Louis are consumed in southeastern territory, and much of it is carried through the East St. Louis gateway and passes over defendants' lines of railway from East St. Louis to points south of the Ohio river. With the exception of the Illinois Central, defendants' lines terminate at East St. Louis, and generally, also, lines of

railway over which the hay is carried from said producing points to East St. Louis terminate at that point.

(2) For the transportation from East St. Louis to said southeastern points defendants apply a proportional rate, which is two cents per 100 pounds greater than the rate to said southeastern points from the Ohio river, if the hay is not unloaded at a warehouse in East St. Louis, regardless of whether or not the hay is shipped locally to East St. Louis or through billed from the point of origin to the point of final destination, and regardless of provisions in their tariffs concerning through billing; but, if the hay is unloaded at a warehouse in East St. Louis, defendants exact for the transportation thereof from East St. Louis to said southeastern points a rate which is four cents per 100 pounds greater than the rate from the Ohio river to said southeastern points.

(3) Complainant operates two warehouses at East St. Louis, and most of the hay it handles it purchases on the track at East St. Louis, unloads, inspects, assorts, and reloads at said warehouses, and sells at said southeastern points, in competition with other hay dealers who do not unload the hay at East St. Louis. In such competition complainant, therefore, is prejudiced to the extent of two cents per 100 pounds by defendants' method of applying rates of transportation as aforesaid. Defendants claim this two-cent difference in rates is justified by difference in cost to them between the two kinds of transportation services they are called upon to perform.

(4) At East St. Louis transfers of loaded cars from the northern to the southern lines and transfers of empty cars from the southern to the northern lines are generally made by a connecting railroad company, and the charge made by that company for such service is $4 per car when the hay is unloaded as aforesaid, but only $2 per car when the hay is not so unloaded, and in each instance this charge is paid by the carrier which hauls the hay south from East St. Louis.

(5) When the hay is unloaded as aforesaid an empty car must be furnished for the shipment by the carrier which hauls the hay south from East St. Louis, and the service of so furnishing is fairly worth from 40 to 60 cents per car.

(6) This car is in use from two to three days longer when the hay is unloaded as aforesaid than when it is not so unloaded, and a fair compensation for such use is 20 cents per day.

(7) When hay is unloaded and reloaded at warehouses as aforesaid the time consumed in doing the work averages from six to eight hours, but the expense of such unloading and reloading is borne entirely by the shipper.

(8) Shipments of hay to which the rate of two cents per 100 pounds above the rate from the Ohio river is applied as aforesaid, and which are not unloaded at East St. Louis warehouses, are frequently transferred from one car to another in the railroad yards at East St. Louis, either because cars in which the hay is shipped to East St. Louis from the north are out of repair, or because the northern lines are not willing to allow their cars to go south from East St. Louis. The expense of such transfer is from $1.25 to $1.50 per car, and this expense is

entirely borne by the carrier which hauls the hay south from East St. Louis.

(9) The transfer charge of $4 per car above mentioned was formerly $3 per car, and the transfer charge of $2 per car above mentioned was formerly $1.50 per car.

(10) The weight of hay in cars shipped as aforesaid from East St. Louis to southeastern points is from 1,000 to 2,000 pounds greater when the hay is reloaded at East St. Louis warehouses than when it is not so reloaded. This is an advantage in favor of the reconsigned hay.

(11) Cars from the north, after being unloaded at warehouses as aforesaid, are frequently reloaded for the south; thus avoiding expense to the southern line of placing an empty car and subtracting perhaps a day from the additional time of the car service.

(12) That, taking everything into account, the average additional expense to the southern lines in case of reconsigned hay will not exceed that of direct through shipments by more than from $2 to $2.50 per car, which is equivalent on the average loading of hay to about one cent per 100 pounds.

(13) Much of the hay which actually passes through East St. Louis might reach its southern destination via other gateways. Hay grown in different sections also competes via these other gateways in the South with that which does or might pass through East St. Louis. These gateways are Cincinnati, Louisville, Evansville, Cairo, Memphis, Nashville, and perhaps others. The testimony showed that at all these points hay could be stopped off, unloaded, and treated as the complainant handles its hay at East St. Louis, without the imposition of any charge in addition to the through rate. The testimony showed that these markets all competed with East St. Louis, but the force of that competition did not appear.

(14) That complainant actually paid to the Southern Railway Company on reconsigned shipments of hay, at the rate of two cents per 100 pounds, the difference between the reconsigning rate and the rate on hay not reconsigned, the sum of $3,144.17.

And from all the evidence heard and adduced on the trial of this cause in this court the court finds that the said finding of fact by the said Interstate Commerce Commission are supported and justified by the said evidence, and it is ordered that the said findings of fact as above recited and set out be, and the same are, adopted as the special findings of fact of the court, and that the same be set out in the records of this court accordingly.

It is therefore considered, ordered, and adjudged by the court that the plaintiff herein have and recover of the defendant herein the sum of $1,659.41; the same being the amount of reparation awarded by the said Commission to the plaintiff against the defendant, with 5 per cent. interest from the date of said award, and it is further ordered and adjudged by the court that the plaintiff have and recover of the defendant its costs herein to be taxed, including a reasonable attorney's fee to be hereafter fixed, and that execution issue against the defendant for the amounts of the said judgment and the said costs.

It is further ordered that the defendant have 60 days from this date in which to present a bill of exceptions, if it shall be so advised.

BAKER v. DUWAMISH MILL CO. (CASUALTY CO. OF AMERICA, Garnishee).

(Circuit Court, W. D. Washington, N. D. November 15, 1906.)

No. 1,393.

REMOVAL OF CAUSES — SUITS REMOVABLE — GARNISHMENT PROCEEDING AFTER JUDGMENT.

A proceeding in garnishment after judgment, under Laws Wash. 1893, p. 95, c. 56 (Pierce's Code, p. 107; Ballinger's Ann. Codes & St. § 5390 et seq.), is a civil suit in which an issue of fact is or may be joined between the plaintiff and garnishee, and is removable by a nonresident garnishee, where the jurisdictional requisites appear, although the parties to the judgment are citizens of the same state. In such proceeding, while the judgment defendant is an indispensable party, his pecuniary interest is with the plaintiff on the issues between him and the garnishee, and he is to be ranged on that side of the controversy for the purposes of removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 21, 22, 80.]

Statutory Proceeding to Collect a Judgment by Garnishment Proceedings. Removed by the garnishee from the state court which rendered the judgment. Motion to remand denied.

Vince H. Faben, for plaintiff.

John P. Hartman, for garnishee.

HANFORD, District Judge. The plaintiff having obtained a judgment for $6,000, and the same being unsatisfied, caused a writ of garnishment to be issued by the state court which rendered the judgment and served upon the Casualty Company of America, a corporation, whereby said corporation was commanded to be and appear before the court within 20 days after the service of the writ, then and there to answer upon oath in what amount, if any, it was indebted to the Duwamish Mill Company, and what effects, if any, of said Duwamish Mill Company it had in its possession or under its control; the purpose being to collect from the casualty company an amount of money supposed to be due to the mill company, in order to apply the same in satisfaction of the plaintiff's judgment against the mill company. This form of proceeding is authorized by the laws of the state. Laws Wash. 1893, p. 95, c. 56; Pierce's Code, p. 107; Ballinger's Ann. Codes & St. § 5390 et seq. The casualty company appeared in response to the writ of garnishment, and filed an answer denying any liability to the mill company on any account whatever, and at the same time filed a petition and bond for removal of the case into this court, on the ground of diversity of citizenship, and the plaintiff has moved to remand the case, alleging that this court is without jurisdiction. In order to determine the questions arising upon the motion to remand, it is necessary for the court to ascertain from the record whether there is a controversy in a civil action wholly between citizens of different states, and with respect to these matters I find as follows:

Subsequent to the entering of the judgment, an affidavit conforming to the requirements of the state law was filed in the state court, alleging, in substance, that the casualty company was indebted to the mill

company, and had in its possession and under its control effects belonging to the mill company, which allegations the casualty company was required by the provisions of the law to answer, and it had the right to deny liability. Therefore an issue was tendered; that is to say, the casualty company was challenged to controvert the ground upon which the writ of garnishment was founded, and by its answer it did bring into the case a controversy not involved in the pleadings, upon which the judgment was rendered. If the casualty company had admitted liability, the court would have been authorized to adjust matters between the parties by compelling the casualty company to apply sufficient of its admitted indebtednes to satisfy the judgment, and such action would have exonerated it, pro tanto, from liability to the mill company, and in that case the proceeding would have been merely analogous to process against the property of the defendant; but, an issue having been joined, a new lawsuit came into being, which had to be litigated and determined, according to the procedure in civil actions. The proceeding under this statute, as it has been construed by the Supreme Court of the state, is in theory the same as if the suit had been instituted by the defendant against the casualty company for the benefit of the plaintiff. State ex rel. Wyman, Partridge & Co. v. Superior Court for Spokane County, 40 Wash. 443, 82 Pac. 875, 2 L. R. A. (N. S.) 568.

The plaintiff and the defendant in the original action are both citizens of the state of Washington, and the casualty company is a corporation organized and existing under the laws of the state of New York. I hold that the defendant in the original action is an indispensable party, but, to ascertain whether the necessary diversity of citizenship exists, the parties must be ranged on opposite sides of the controversy according to their respective interests; and, since the defendant will be benefited, rather than prejudiced, by having its liability to plaintiff discharged by the garnishee, and is deemed to occupy the position of a nominal plaintiff suing for the benefit of its creditor, the interest to be affected requires that both parties to the original action must be placed on one side of the controversy, leaving the garnishee in the place of sole party on the adverse side. In thus arranging the parties, I hold that pecuniary interests are to be considered, rather than any interest which the defendant may possibly have, based only upon mere sentiment, or a hostile inclination to obstruct the plaintiff in proceedings to obtain satisfaction of the judgment awarded to him.

The objection urged to the removal of the case into this court, on the ground that the proceeding is supplemental to the original action, which was not a removable case, does not call for extended discussion. I concur in the reasoning and conclusions set forth in the following paragraph from the opinion by Mr. Justice Daniel, in the case of Tunstall v. Worthington, Fed. Cas. No. 14,239:

"The proceeding of garnishment, as regulated by the statute of Arkansas, is anomalous, being partly legal and partly equitable. But it must be regarded as a civil suit, and not as process of execution to enforce a judgment already rendered. It may be used as a means to obtain satisfaction of a demand, in the same manner as a suit may be resorted to on a judgment of another state, with a view to coerce the payment of such judgment. In this proceeding the

parties have day in court, an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment. It is in every respect a suit in which the primary object is to obtain judgment against the garnishee, and certainly cannot with any plausibility be treated as process of execution, or as part of the execution process; for, if so, there could be no necessity or propriety in resorting to this forum to investigate the relations of debtor and creditor."

Motion to remand denied.

In re RENDA.

(District Court, M. D. Pennsylvania. October 25, 1906.)

No. 838.

1. BANKRUPTCY—EXEMPTION—DISTRIBUTION OF FUNDS BY COURT—PROCEEDS OF EXEMPT PROPERTY.
   A bankrupt who makes seasonable claim to his exemptions is not deprived of his right by a sale of the property by a receiver with his consent; but, since in that case the proceeds come into the bankruptcy court for distribution, such court may consider and determine any claims to the fund by others.
2. SAME—RENT DUE ON LEASE WITH WAIVER—WAGE CLAIMS.
   Out of a fund so produced and in court, the claim of a landlord for rent, upon a lease waiving exemption; and wage claims, against which there is no exemption under the state law, are to be preferred to the exemption claim of the bankrupt.
3. SAME—ATTACHMENT EXECUTION—CUSTODIA LEGIS—MONEY IN HANDS OF A RECEIVER.
   An attachment execution, however, issuing from the common pleas and served on a receiver in bankruptcy, even though it is based on a judgment with waiver, is entitled to nothing; the receiver being an officer of the court and the money in his hands being in custodia legis, against which no attachment lies.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 238, 301.]

In Bankruptcy. On distribution of funds in hands of receiver.

Charles H. Soper, for labor claimants.
Charles P. O'Malley, for landlord.
W. W. Johnston, for general creditors.
Ralph L. Levy, for bankrupt.

ARCHBALD, District Judge. The amount in the hands of the receiver for distribution is $607.07; $300 of this is the proceeds of goods which the bankrupt asked to have set aside to him as exempt, but which were sold by arrangement; the bankrupt being remitted to the proceeds. This he claims the right to take out of court unimpaired, but is met by wages claims, against which there is no exemption under the state law; a claim of the landlord for two months' rent amounting to $300, on a lease waiving exemption; and an attachment execution from the common pleas on a judgment with waiver, in which the receiver was served as garnishee.

The bankrupt, having made claim for his exemption within the time fixed by the act, is not debarred because the goods were sold.

In re Le Vay, 125 Fed. 990, 11 Am. Bankr. Rep. 114; In re Stein, 130 Fed. 629, 12 Am. Bankr. Rep. 384, affirmed 134 Fed. 235, 14 Am. Bankr. Rep. 30; In re Sloan, 135 Fed. 873, 14 Am. Bankr. Rep. 435. But, having to come into court to get it, the rights of others who also lay claim to the fund may properly be considered, and there is no occasion to send them elsewhere for relief. The case is not like that where goods are set apart to the bankrupt under his exemption, over which thereafter the bankrupt court has no jurisdiction, and liens upon which are therefore to be enforced in the state courts. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The bankrupt assented to the sale by the receiver by which the fund was produced, and, the money being in the latter's hands, the court has now to say how it is to be disposed of, necessarily passing upon conflicting claims. In re Rodgers, 125 Fed. 169, 11 Am. Bankr. Rep. 79. If the opposite course were pursued in the present instance, it would work manifest injustice. The bankrupt could put the money into his pocket, and those in whose favor he has waived his right to it would be without redress; and that, too, in the case of the landlord, in the face of the fact, that if he had not been restrained by the court from enforcing the distress which he had made he would have realized his money.

The fund in the hands of the receiver in strictness should be regarded as two funds; that made from the exempt goods being kept by itself, and the claimants being remitted to the other in the first instance. But the result is the same, and it is not necessary to preserve the distinction. Disposition will therefore be made of it as follows:

Fund for distribution			$607 07
Costs:			
Filing fees to be returned to petitioning creditors	$30 00		
Deposited by same with referee	15 00		
		$45 00	
Additional fees due referee		22 85	
To attorney of petitioning creditors		35 00	
To attorney of bankrupt		25 00	
		$127 85	
Wages due:			
William Simmons	$18 75		
James Malloy	54 00		
		72 75	
Rent due Landlord 2 mos.		300 00	
Balance to bankrupt on his $300 exemption claim		106 47	
			$607 07

The wage claims of John C. Thomas and Joseph Ammoretti are not established to my satisfaction, and are disallowed. So, also, is that of the attaching creditor. The receiver is the officer of the court, and his possession is that of the court itself. The money in his hands is thus in custodia legis, against which no attachment lies.

Let distribution be made as scheduled above.

M. S. DOLLAR S. S. CO. v. MARITIME INS. CO.

(Circuit Court, N. D. California. November 7, 1906.)

No. 13,835.

1. INSURANCE—ACTION ON MARINE POLICY—DEMURRER TO COMPLAINT.
The scope and effect of a marine policy of insurance, in which the "warranted free from capture, seizure and detention" clause had been stricken out, *held* not determinable on demurrer to a complaint thereon to recover for a loss by capture as between the conflicting theories of the parties.

2. SAME—SUFFICIENCY OF COMPLAINT—ALLEGATION OF PLAINTIFFS' INTEREST.
In an action on a policy of marine insurance to recover for a loss of the vessel, the complaint should show the nature of the plaintiffs' interest therein, and it is insufficient to allege merely the value of such interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1582, 1583.]

At Law. On demurrer to complaint.

Frank & Mansfield, for plaintiff.
Van Ness & Denman, for defendant.

WOLVERTON, District Judge. Demurrer to amended complaint in action upon a maritime insurance policy.

The complaint, after setting out the fact of the issuance of the policy, the consideration, etc., further shows:

"That the said insurance was an insurance lost or not lost at and from San Francisco to Vladivostock while there, and thence back to a safe neutral port, warranted to clear on or before January 31, 1905, or held covered at premium to be arranged."

Then, by paragraph 4:

"That the said policy so issued as aforesaid is an usual form of marine policy, containing the warranted free of capture, seizure, and detention clause as follows: 'Warranted free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, insurrections, hostilities or warlike operations, either before or after declaration of war.' That in said policy the said clause and warranty so referred to as aforesaid is canceled, and the said policy in and by its terms expressly covers the risks in said clause mentioned, and the said steamer was then and there by the terms of said policy insured against the risk of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of riots, hostilities, or warlike operations, either before or after declartion of war, and with liberty to run blockades."

Then follow appropriate allegations of loss by seizure, capture, detention, and confiscation, and of the furnishing defendant with proper proofs thereof. Plaintiff's interest in the property insured is stated in paragraph 8 thus:

"That the said plaintiff's interest in said vessel at the time of effecting the said insurance and at the time of the loss herein alleged was equal in amount to her said value as in said policy set forth."

It is first insisted, in support of the demurrer, that the complaint is fatally defective, because it does not show that the seizure causing the

loss, namely, by a Japanese man of war, was a risk insured against; the argument of defendant's counsel being that the policy was cast in exclusion, that is it was designed to cover those risks only contained in some other policy or policies excluded by the "warranted free from capture, seizure, and detention" clause, and, therefore, that the other policies, whatever those be, should be set forth in order to determine what the real risk insured against was. On the other hand, the plaintiff contends that the policy expressly covers those risks which are excluded in the usual form of marine policies.

The policy is manifestly an anomaly in marine insurance, and, being out of the ordinary, we would naturally look for some different meaning than that which attends the usual form. Instead of being cast in terms of exclusion, the complaint assumes that there is a usual form of marine policy or policies containing a clause identical with that which is stricken out in the one sued upon, and that the purpose of such policy was to insure those risks ordinarily excluded by that clause; that is to say, that the policy by its terms—namely: "This insurance is only to cover those risks excluded by the Warranted free of capture seizure & detention clause in Marine policy or policies. With liberty to run blockade"—the clause in question having been eliminated, specifically includes those risks so excluded by the usual policy. Such a construction is perhaps not unwarrantable, and it is not apparent that it renders the policy inoperative. The plaintiff ought to be left to proceed upon its own theory of its cause of action, and hence the first point of the demurrer is not well taken.

It is next insisted that the allegation of interest is insufficient to show that plaintiff had an insurable interest in the subject of the insurance. The allegation is, as will be seen:

"That the said plaintiff's interest in said vessel * * * was equal in amount to her said value as in said policy set forth."

This allegation is more nearly suited to show the value of the vessel than plaintiff's interest therein or the nature thereof. Indeed, it assumes that plaintiff had an interest in the vessel, and then sets forth its value, without saying that plaintiff had any interest whatever. There is no allegation elsewhere in the complaint touching the nature of the interest or what it was that plaintiff had, if any, and the complaint is palpably insufficient in this particular. I deem it insufficient to allege simply that plaintiff had an interest. This is a conclusion. The complaint should show what that interest is or the nature thereof, so that the court could see at once what claim is being made as to plaintiff's property right in the vessel. Chrisman v. State Insurance Company (Or.) 18 Pac. 466; Spare v. Home Mutual Insurance Company (C. C.) 15 Fed. 707; Earnmoor v. California Insurance Company (D. C.) 40 Fed. 847.

For the reason here last stated, the demurrer will be sustained, and it is so ordered.

UNITED STATES v. BEEBE.

(District Court, M. D. Pennsylvania. October 20, 1906.)

No. 108, October Term, 1906.

COUNTERFEITING—PASSING COUNTERFEIT UNITED STATES NOTE—NOTE OF STATE BANK.

A defendant cannot be convicted of passing a counterfeit United States note under Rev. St. § 5431 [U. S. Comp. St. 1901, p. 3671], where the note passed was a genuine note issued by a state bank, unaltered, although it may have been worthless and may have had some resemblance by reason of its color to a United States note.

Indictment under Rev. St. § 5431 [U. S. Comp. St. 1901, p. 3671], for passing a counterfeit $5 treasury note or greenback. On motion to direct verdict for defendant.

C. L. Hawley, for the motion.

The bill which was passed was a $5 note of the Oil City Bank, a state institution, issued in 1862. No doubt it is intrinsically worthless, but still it is genuine and not counterfeit. The suggestion that it bears resemblance to a United States treasury note because the engraving on the back is in green, so as to bring it within the act of Congress, is absurd. The act was not intended for any such case, and cannot properly be extended to it. If the party who took the bill has been cheated, the state law is ample to deal with the subject.

S. J. M. McCarrell, U. S. Atty., and A. T. Searle, Asst. U. S. Atty., opposed.

The note does not have to be in direct imitation of an obligation of the general government. It is sufficient if it bears such a resemblance as is calculated to deceive a person of ordinary intelligence and observation. United States v. Williams (D. C.) 14 Fed. 550; United States v. Fitzgerald (D. C.) 91 Fed. 374. That such was the case here is shown by the fact that the bill passed. And the question of similitude is for the jury. The case is exactly like U. S. v. Stevens (D. C.) 52 Fed. 120, where a conviction for passing a note of a broken state bank was sustained.

ARCHBALD, District Judge. This is a case to be dealt with by the state, and not the federal, law. On its face the bill is that of the Oil City Bank, a state institution, and is to all appearances genuine. Whether the bank is now in existence we do not know; nor whether, if it is, the note would be redeemed upon presentation. Nor is it material. The result is the same, assuming the bill to be worthless. The charge is that it is in similitude of a $5 treasury note or greenback, for which it is liable to be mistaken because of the color in which the back is printed, and as which it was passed by the defendant. It may be, according to the cases cited, that there does not have to be a direct imitation or counterfeiting of the terms and design of a government note or obligation in order to bring the case

within the act of Congress; but there must at least be such a resemblance, if not simulation, as is not only calculated to deceive a person of ordinary intelligence, but as enables us to say with some degree of certainty that, in disposing of or using it, the party charged was evidently trying to palm it off as a genuine obligation of the government. In U. S. v. Fitzgerald (D. C.) 91 Fed. 374, the security was purposely dressed out to look like a United States 5–20 gold bond, for which it might easily be mistaken. And while in U. S. v. Williams (D. C.) 14 Fed. 550, the general principle which is contended for by the government is recognized, it was held that an unsigned obligation would not support a conviction, notwithstanding that there was a general resemblance otherwise which would do so; which materially qualifies it. U. S. v. Stevens (D. C.) 52 Fed. 120, is no doubt in line with the case in hand. But opposed to it, and of equal authority, are U. S. v. Wilson (D. C.) 44 Fed. 751, and U. S. v. Kuhl (D. C.) 85 Fed. 624, in each of which it was held that there could be no conviction for passing a confederate note, even though in size, shape, color, and denomination it might be like the current money of the United States, for which it was received. Justifying this conclusion, it is pointed out in the latter case that a broader ruling would make all state bank issues obnoxious to the act, whether solvent or insolvent; with regard to which it may also be further observed that state currency is not prohibited, but is merely taxed out of existence; notwithstanding which, if any one desires to put out notes or bills to pass as money, there is nothing to prevent it, to say nothing of being charged with counterfeiting if they happen to prove worthless. Even metal coins and tokens are not within the act, provided they are not imitative. U. S. v. Roussopulous (D. C.) 95 Fed. 977. And much more not, notes and bills, which are less likely to deceive. Had the defendant here simply had this bill in his possession, and made no attempt to pass it, even though there was enough to show from the possession of a number of other bills of like character that that was his ultimate purpose, could he have been indicted for having possession of counterfeit money, with intent to make fraudulent use of it? And yet we must be prepared to go that far, in order to sustain the present charge, which differs only in degree. The federal government is only concerned with protecting the people against spurious or counterfeit imitations of the money to which it gives currency, and to this the act is to be confined. It cannot, indeed, be extended further, without intrenching upon the reserved rights of the states, which we must be careful to respect, if the dual form of government which we have, is to be preserved.

Motion allowed, and verdict of not guilty directed.

In re BARTON BROS.

(District Court, W. D. Arkansas. Texarkana Division. January 6, 1907.)

BANKRUPTCY—WITHOLDING ASSETS—SURRENDER—POSSESSION.

Where bankrupts were denied a discharge because they made false schedules and did not surrender all their estate, but there was no proof that property sought to be recovered by the trustee was in the bankrupt's possession or under their control at the time proceedings were brought to require them to surrender the property, an order directing such surrender was not authorized.

In Bankruptcy.

Hardage & Wilson, for bankrupts.
McRae & Thompkins, for creditors.

ROGERS, District Judge. This is a petition by Barton Bros., bankrupts, praying for a review of the findings of the referee requiring them to pay over to the trustee a large sum of money and property, amounting to $10,000. The bankrupts were heretofore denied their discharge by this court, and that action was afterwards affirmed by the Circuit Court of Appeals of this Circuit, and the opinion will be found in 136 Fed. 355, 69 C. C. A. 181. The substantial facts on which the court is now asked to approve an order of the referee directing the bankrupts to pay over the money will be found recited in that opinion; and, so far as the property is concerned, the facts will appear sufficiently in this opinion. The new testimony taken on this hearing serves to confirm the correctness of the conclusions then reached, but does not throw any additional light, in any material sense, on the present whereabouts of the stolen money, or who got it, or how it was distributed when stolen. The court was convinced, on the trial of the application for discharge of the bankrupts, that the bankrupts were guilty of complicity in the burglary and theft of the money, and therefore denied their discharge; but there is ample evidence in this record that their deceased brother, Clib Barton, not only had ample opportunity to steal the money, but that bills, similar to those stolen, were seen in his possession after the robbery in considerable numbers, and it does not appear that he had any other way of obtaining them, unless he withheld part of the money when he turned over the larger part of it to his brother, W. P. Barton, on his return from Little Rock. There is also strong circumstantial evidence that the father of the bankrupts, now also deceased, was also cognizant of the theft. Indeed, a considerable sum of money was found after his death to his credit, and from whence that came is not satisfactorily explained; and it is known that he appropriated the dividends coming to his daughter from the bankrupts' estate to two of the creditors of the bankrupts, who were pressing the bankrupts and threatening criminal proceedings. His anxiety to stop or prevent the prosecutions, and parting with his own means to accomplish that end, indicates criminal knowledge, and a desire to protect his sons by satisfying their creditors. Additional light is thrown on this aspect of the case by the case of

Beal-Doyle Dry Goods Co. v. Barton, decided October 22, 1906, by the Supreme Court of Arkansas, which will be reported in 77 Ark. ——. See 97 S. W. 58.

It is res adjudicata that these bankrupts did not surrender all of their estate, and that their schedules were false; but there is a wide difference between denying a bankrupt his discharge on the ground that his schedules are false, and making an order, four years after his bankruptcy, compelling him to pay over the proceeds illegally withheld from his trustee. It will be remembered that the partnership of Barton Bros. and the Barton brothers themselves were adjudicated bankrupts on the 28th of November, 1902. Since their bankruptcy this record discloses that these bankrupts have been engaged in various lines of business and financial transactions. It goes without saying that they might have had every dollar of the stolen money in their possession in 1902, and not have a dollar of it in their possession now. In the case of In re Rosser, reported in 101 Fed. 563, 41 C. C. A. 497, is laid down the rule governing the making of orders requiring bankrupts to turn over property alleged to be in their possession to their trustees. The syllabus of the opinion is as follows:

"(1) Under the general rules of law, and under the specific provisions of the bankruptcy act, a court of bankruptcy has power and jurisdiction to make an order requiring the bankrupt to pay or deliver to his trustee in bankruptcy money or other property found to be in his possession or control, constituting a part of his estate in bankruptcy, and which he has not surrendered or accounted for, and to enforce his obedience to such order by commitment as for contempt.

"(2) Two essential facts condition the lawful exercise of the power to require a bankrupt or other person to pay or deliver to the trustee money or property in his possession. They are that the money or property directed to be delivered to the trustee is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time the order of delivery is made."

And that court, in the case of Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451, the opinion being delivered by Judge Caldwell, not only affirmed, but elaborated, that doctrine. A careful study of these two cases will demonstrate conclusively, I think, that the court ought not, in this case, affirm the action of the referee. There is not a shadow of proof in this case to show what amount of money the two surviving partners of Barton Bros., against whom this order is now sought, received at the time of the theft, nor is it made to appear that anybody has ever seen them, since that time, in possession of any part of the money then stolen. Everything contained in the record is circumstantial, and, while it established to the satisfaction of the court that they were guilty of a complicity in the burglary, the proof is entirely wanting as to what amount of stolen money they obtained, if any. The proof is much stronger that the deceased brother and father got large portions of the money than it is that Ross and Punch Barton received any. It is seen, by an examination of the two decisions last quoted, unless they were in possession of the money at the time the order is made to pay over, the court has no power to make the order. If the court were to make the order for them to pay over when they were

without the means of paying over, the court would then be requiring them to do an impossible thing, and the effect of such an order would be equivalent to imprisonment for debt.

There is proof, however, to show that, since the discharge in bankruptcy was denied to Ross and Punch Barton, that they came into possession of considerable sums of money, insurance upon their deceased father's life; but there is an entire absence of proof that any portion of that money is now in their possession. So far as the evidence goes, if their testimony is to be believed at all on this subject, they long since parted with the money. There is evidence, also, establishing the fact that they have sold an interest in the realty of their fathers' estate, and made deeds thereto, to their mother and sister. This property, while upon proper showing it may not be beyond the reach of the creditors, is nevertheless not under the bankrupts' control or in their possession, so far as the proof shows, and therefore the court would not be justified in making the order in regard to that. The trustee and the individual creditors must be remitted to plenary suits for the recovery of such property as may be subject to the bankrupts' debts, and to the recovery of judgments which they can or might hold over the bankrupts themselves for this indebtedness, all of which was heretofore indicated by the court in its opinion on file with the papers in this case, when it came to pass upon the application for reopening the bankrupts' estate and readjudicating them bankrupts.

The action of the referee is disapproved, and his order requiring the money paid over is vacated and set aside.

BUCKINGHAM & HECHT v. NORTH GERMAN FIRE INS. CO. OF NEW YORK.

(Circuit Court, N. D. California. November 7, 1906.)

No. 13,956.

INSURANCE—SERVICE ON FOREIGN INSURANCE COMPANY—CALIFORNIA STATUTE.

An insurance company doing business in California where it is a foreign corporation may be served with process under Code Civ. Proc. § 411, subd. 2, which provides generally for serving foreign corporations having "a managing or business agent, cashier or secretary within the state" by delivering a copy of the process to such person, or service may be made under Pol. Code, § 616, which requires such companies to file in the office of the state insurance commissioner the name of an agent on whom service may be made, and also an agreement that, should it at any time be without such agent, process against it may be served on the commissioner; but such substituted service on the commissioner is authorized only when the company is, by resignation, revocation, or otherwise, without the agent specified in the latter section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 33.]

On Motion to Quash Returns of Service.

Samuel C. Wiel, for plaintiff.

T. C. Coogan, for defendant.

WOLVERTON, District Judge. The defendant insurance company was served with summons in manner as follows: By delivering to and leaving with J. H. Ankele, "the general and statutory agent" of North German Fire Insurance Company of New York, said defendant, a copy, etc., and further by delivering to and leaving with E. Myron Wolf, as insurance commissioner of the state of California, an attested copy, together with a copy of the complaint attached. The returns consist of two certificates of the marshal; the one showing service upon the agent and the other upon the insurance commissioner. The defendant, appearing specially for the purpose only, has moved to quash both returns for insufficiency of service.

By section 411, subd. 2, of the Code of Civil Procedure of the state of California, service is required to be made upon a foreign corporation or a nonresident joint-stock company or association doing business and having a managing or business agent, cashier, or secretary within the state by delivering a copy thereof to such agent, cashier, or secretary. An insurance company of another state or of a foreign country, being a corporation, is as much a foreign corporation of the state as if it was engaged in any other business, and, being a foreign corporation, I see no reason why service cannot be had upon it under section 411, if it has a managing or business agent, cashier, or secretary within the state. It is difficult to say from his return whether the marshal intended to make service under this section or not. If he did, the return is insufficient to show valid service. The "general and statutory agent" is not an agent designated by the statute, but, if he were, the affidavit of Ankele shows that he was not such an agent or person upon whom service could be properly made, nor does the affidavit of Mr. Wiel help the condition. The facts stated therein do not bring Ankele within the persons designated by the section upon whom service can be made. See Kennedy et al. v. Hibernia Savings & Loan Society, 38 Cal. 151; Blanc v. Paymaster Mining Company, 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Hausmann v. Sutter Street Ry. Co., 139 Cal. 174, 72 Pac. 905; Atlas Glass Co. v. Ball Bros. Glass Mfg. Co. (C. C.) 87 Fed. 418.

Service may also be made upon a fire insurance corporation under section 616 of the Political Code of California; the conditions there specified being present. By that section the corporation must file in the office of the insurance commissioner of the state the name of the agent upon whom summons and other process may be served. The agent so named or appointed is deemed a general agent, and must be the principal agent or chief manager of the business of such corporation within the state. But, as a further condition precedent to doing business within the state, it must also make and file with the insurance commissioner an agreement or stipulation, in effect, that, if at any time such corporation or company shall be without an agent in said state on whom summons or other legal process may be served, service of such summons or other legal process may be made upon the insurance commissioner, such service upon the commissioner to have the same force and effect as if made upon the corporation or company. Now, if the marshal intended by the designation "general and statutory

agent," the agent here specified, the return is even then insufficient, because it is shown by Ankele's affidavit that on June 2d of the present year he tendered his resignation as such agent, which resignation was accepted on the same day by the secretary and general manager of the company, and that thereupon the company revoked and withdrew the designation of himself as such agent, and gave notice thereof to the insurance commissioner in writing. There seems to be no provision of the statute preventing such action on the part of the company while continuing in the transaction of business within the state, but it does provide for the contingency that there may be no agent in the state upon whom service can be made, in which event the service may be made upon the insurance commissioner. I think the agent here referred to is the statutory agent provided for in section 616, and if it appears that such agency has ceased to exist, by resignation or otherwise, then that it will be proper to make the substituted service upon the commissioner. While there is such an agent, service must be had upon him, while service may at the same time be made under subdivision 2, § 411, Code Civ. Proc., if the conditions there specified are present, but when there ceases to be such an agent then substituted service may be had upon the insurance commissioner, under the stipulations and agreement of the corporation made as a condition to its doing business within the state, and this notwithstanding service may otherwise be had under section 411. So that, in order that there may be substituted service upon the insurance commissioner, the return must show in appropriate form that the corporation has no agent within the state, as is contemplated by section 616. Further than this, he is not required to show anything, or that service could not be had under section 411.

To recapitulate: An insurance company, being a foreign corporation doing business in this state, may be served under section 411, subd. 2, or, if it has filed with the insurance commissioner the name of its agent, it may also be served under section 616, but substituted service may be had upon the insurance commissioner only when the company is, by resignation, revocation, or otherwise, without the agent specified in the latter section.

The service upon the insurance company being insufficient, by reason of the want of a showing that the company was without an agent appointed under section 616, it will be quashed, but with leave to the marshal to amend in accordance with the facts.

RICHARDSON et al. v. LOWE et al.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1906.)

No. 2,242.

1. CONTRACT—RESCISSION FOR FRAUD—TIME FOR EXERCISE OF RIGHT AND CONDITIONS REQUISITE THERETO.

The right to rescind a contract for misrepresentation and fraud must be exercised immediately upon discovery of the fraud, or of sufficient evidence thereof to reasonably warrant such action. The intention to rescind must be manifested by some notice or outward manifestation thereof which will apprise the other party of such intention, and the party entitled to rescind must not vacillate in his purpose, but must consistently adhere to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1189.]

2. VENDOR AND PURCHASER—RESCISSION BY PURCHASER—WAIVER OF RIGHT BY LACHES.

Defendants purchased a group of mines that were being worked and at once took possession. Within four months thereafter they claimed to have learned that material misrepresentations had been made by the vendors as to the value and richness of the mines but continued to operate the same both for development and production for two years and until long after suit had been commenced by the vendors to foreclose a mortgage given to secure a note for purchase money, in which they answered setting up the fraud and also filed a cross-bill for rescission, no notice of the intention to rescind having been given to the vendors until the filing of such answer some five months after the fraud was discovered. *Held*, that by such laches they waived and irrevocably lost the right to rescind.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 212–214.]

3. SAME—ACTION FOR PURCHASE MONEY—DEFENSE OF FRAUD.

Although fraud inducing a purchase of property has been waived by laches as a ground for rescission of the contract, yet the purchaser may plead the resulting damages as a failure of consideration in defense of a note given for purchase money, provided he has fully performed on his part.

4. SAME—ACTION FOR PURCHASE MONEY—COUNTERCLAIM FOR DAMAGES ON ACCOUNT OF FRAUD.

If the fraud inducing a purchase of property has been waived by laches as a ground for rescission of the contract, and the vendee has not fully performed on his part, he may not, with full knowledge of the vitiating fraud, continue performance, voluntarily subjecting himself to damage, and afterwards recover therefor.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 30.]

5. MORTGAGES—SECURITY FOR PURCHASE MONEY—FORECLOSURE—DEFENSES—FRAUD—CROSS-BILL FOR RESCISSION.

In a suit in equity to foreclose a mortgage given to secure a note for purchase money of property, an answer setting up fraud inducing the sale in defense to the note and a cross-bill for rescission of the contract on account of the same fraud are not inconsistent.

6. VENDOR AND PURCHASER—ACTION FOR PURCHASE MONEY—DEFENSES—FRAUD—PROOF OF DAMAGES.

Where a purchaser of property in defense to a note given for purchase money sets up fraud in the sale, the burden rests upon him to prove that the property was worth less than the price agreed to be paid, and how much less, and where the property consisted of mines the value of which cannot be accurately determined, and is largely speculative a finding by the trial court on conflicting evidence, that such burden has not been sustained by the proof of any damages will not be disturbed on appeal.

7. EQUITY—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.

Leave to file a bill of review on the ground of newly discovered evidence will not be granted, where such evidence is merely cumulative on issues joined and tried in the case or where it is immaterial to the issues upon which the case was decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1092.]

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

This was a bill to foreclose a mortgage executed by Arthur J. Richardson and E. Jennie H. Richardson, defendants below, to secure the payment of a note for $182,500 made by them and payable to the order of Henry B. Lowe and Tyson S. Dines, complainants below. The property mortgaged consists of a number of mining claims known as the "Topeka Group" of mines located in Gilpin county, Colo. Defendants admitted the execution of the note and mortgage, and set up as a defense that the note was given to represent part payment of the purchase price of the mines which they had bought from complainants; that the mines were worthless and known to have been so by complainants when they made the sale; that they were induced to make the purchase by fraud, deceit, and misrepresentation practiced upon them by complainants and for these reasons the note was without consideration and void. Defendants also filed a cross-bill, setting forth the transaction culminating in the purchase of the mines, the false representations made by complainants concerning their values, the fraud practiced by complainants to induce them to make the purchase, payment of one-half of the purchase price by them, a rescission of the contract on the discovery of the fraud and other facts which will be sufficiently referred to later, and prayed that the note and mortgage be canceled, that complainants be decreed to restore to defendants $162,500, the cash payment made for the mines, and to retake title and possession thereof. On these issues the case was heard by the Circuit Court and decided in favor of complainants on their bill of foreclosure and against defendants on the issues presented both by their answer and cross-bill. Defendants appeal.

Charles S. Thomas and William H. Bryant (William P. Malburn, and Don M. Dickinson, on the brief), for appellants.

Charles J. Hughes, Jr., and O. L. Dines (E. E. Whitted, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The defendants, Mrs. Richardson and her son Arthur, were residents of Erie county, N. Y., and on the death of the husband and father, some 10 years before the events of this suit, became possessed of a large estate which enabled them to make transactions of their own, and which required of them the exercise of business sagacity and management. The mother was co-trustee with one Lindsay in the active management of her late husband's estate and had had considerable experience in mining deals in Wyoming and Colorado. The son was in the prime of young manhood, 23 years of age, and had dealt in mines in Colorado, Wyoming, and Michigan. They both appear by the record to have been fairly sensible and prudent persons. The complainants, Lowe and Dines, were the owners of the Topeka Group of mines, and resided in Denver, Colo. Lowe had the chief management and control of the transaction, which resulted in the sale of the mines to the defendants.

The alleged fraudulent and false representations mainly relied upon by defendants to secure a rescission of the contract of sale are: (1) the pretension that Lowe was obliged to undergo a dangerous and possibly fatal surgical operation which induced him to sell a mine of wonderful richness below its actual value; (2) the pretension that certain parties denominated the "Boston Parties" were clamoring for the property at the same price he was offering it to defendants; (3) the representations that the mines were of great richness and value as disclosed in certain engineers' reports submitted to defendants to induce them to make the purchase; (4) the representations that the mines were of great value and that the ore in sight was extensive and valuable as stated by Lowe and his agents orally to the defendants. As further ground for rescission it is claimed that there was a suppression of information concerning the expenses of operating the mines and that Lowe corrupted one Townsend while he was acting as the agent or associate of defendants in the purchase by offering and finally paying to him a commission to bring about the sale.

The questions whether the representations specified were made or whether if made they were material or of that sort upon which defendants might rely or whether they were in fact false or whether information was suppressed or whether Townsend was corrupted all received much attention in proof and argument and might afford interesting subjects for discussion, but in the view we take of the question of waiver of the fraud by failure to exercise due diligence to rescind, those questions, so far as the rescission of the contract is concerned, do not require consideration at our hands, and we accordingly refrain from so doing and proceed to a consideration of the evidence relating to the time when defendants acquired knowledge of the alleged falsity of the representations and reports concerning the character and value of the mines and the other alleged fraudulent conduct of Lowe. The proof discloses that defendants took possession of the mines with Townsend acting as their superintendent or general manager immediately on the consummation of the purchase, October 27, 1899; that they found soon after taking possession that the rich free gold which had been represented to be in a stope known as the Klondike stope was not there; that as early as December, 1899, they suspected that Townsend had received a commission from Lowe; that some time in January, 1900, they believed the reports and statements concerning the character and value of the mines upon which they claim to have relied in making the purchase were untrue. On February 24, 1900, according to the averments of the cross-bill and amended cross-bill of Arthur Richardson he and his mother had ascertained the fraudulent character of the transaction and rescinded the contract; he avers "that they have never from that time to this acknowledged in any way, shape or form that said note was binding upon them, but they have repudiated the entire transaction and they now repudiate the same." On that day Townsend was discharged as superintendent and one Nichols substituted in his place. On May 12, 1900, this foreclosure suit was instituted. On July 2, 1900, both Arthur Richardson and Mrs. Richardson filed

answers and cross-bills for relief on the ground of fraud. On November 28, 1900, Arthur filed an amended cross-bill and on a later date Mrs. Richardson filed a like amended cross-bill. From the foregoing we conclude that defendants discovered the fraud, if any there was, as early as February, 1900. Upon such discovery their rights and duties became clear. They had two remedies, one was to rescind the contract by reason of the fraud and the other to affirm the contract notwithstanding the fraud. If they proposed to rescind, their duty was to assert that right promptly, unconditionally and unevasively, otherwise the affirmation of the contract, notwithstanding the fraud, would follow.

In Grymes v. Sanders, 93 U. S. 55, 62, 23 L. Ed. 798, the Supreme Court by Mr. Justice Swayne stated the rule thus:

"Where a party desires to rescind upon the ground of mistake or fraud he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

In Shappiro v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, the Supreme Court by Mr. Justice Day says:

"It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it [citing Grymes v. Sanders]. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract. * * * If he choose the latter remedy [rescission] he must act promptly—announce his purpose and adhere to it, and not by acts of ownership continue to assert right and title over the property as though it belonged to him."

This court, in Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 781, and Burk v. Johnson (C. C. A.) 146 Fed. 209, citing many authorities in support, announced the same doctrine. These, without citing other well-known cases to the same point, sufficiently affirm the proposition that defendants upon discovering complainants' fraud had an instant duty to perform. If they would repudiate the contract by reason of that fraud they should thereafter have treated the property as they would have done the property of complainants found in their possession and not as their own property. How did defendants' conduct square with this well-settled rule of law? They employed Nichols to succeed Townsend as superintendent and general manager of the mine, and notwithstanding they claimed to have rescinded the contract on that day, they authorized him to do the best he could with the mines, and to work them to the best advantage. Nichols remained as superintendent until November, 1899, and says in his testimony that he worked the mines to the best advantage. The proof shows no substantial change in mining operations after the alleged rescission. Nichols kept right on with development work, practically as Townsend had done, drifting, cross-cutting, stoping, upraising, breaking down, and shipping ore and selling the same until November, when he resigned and was succeeded by one Beals, who, under Arthur Richardson's direction, drove levels and did other development work until

December, 1901. In May and June after the alleged rescission Nichols leased to numerous miners various parts of the mine for operation on shares, and so far as we can discover from the voluminous record before us the mines were worked both for development and producing purposes in the spirit of the instructions given Nichols when he succeeded Townsend as superintendent. In that part of appellants' brief where counsel discuss the value of the mine they well sum up the character of the operations after the time appellants discovered the alleged fraud and after the alleged rescission as follows:

"In February, 1900, he [Townsend] was summarily removed as manager and his connection with the appellants was thereby permanently ended. One John Nichols, an old experienced and competent miner was installed as manager in his stead, who, for months thereafter, and until October, 1900, vainly sought to locate and exploit the marvelous bodies of ore recounted in the reports of Mr. Lowe's experts and by his own representations."

The exploitation and operation of the mines as shown by the record not only after the admitted knowledge of the fraud, but after the defendants had pleaded it as a ground of rescission of the contract of purchase are totally inconsistent with the right of rescission. They evince a continued ownership and interest in the mines rather than a repudiation of the contract and a holding of the mines for the benefit of the vendors, and afford conclusive evidence that the vendees waived the fraud and affirmed the contract of purchase. Counsel for the vendees seek to avoid this result by claiming: (1) That the vendees were entitled to a lien on the mines to secure the repayment of the first installment of purchase money paid by them; (2) that the work on the mines was done pending negotiations for a settlement; (3) that the work was done to secure evidence of the worthlessness of the mines.

It may be conceded that the vendees might in case of success in their suit for rescission be decreed to have a lien on the property sold for the amount of their cash payment, and also that the vendees might have been justified in taking samples of ore and making reasonable experiments with the mines for the purpose of securing proof for use in the pending litigation, but neither of these concessions avail them for the present purpose. If they were entitled to hold possession to preserve their lien they would clearly be entitled to do such acts and such acts only as were reasonably necessary for and consistent with that purpose. Any other or further acts would be manifestly for some other purpose. Likewise, if they might take samples and otherwise prepare evidence for the trial, only such samples and other experimental work as would reasonably subserve that purpose would be justified. But neither of these purposes, in our opinion, required the breaking down, shipping and selling of ore, running levels and making cross-cuts and other acts of development and prospecting shown by the proof in this case. The vendees obviously had some other purpose in doing all this work, and it must, in our opinion, be referred to their own interests as owners of the mines which they had purchased and which they had determined to keep, notwithstanding any frauds practiced upon them by the vendors.

Again it is urged that the work was done on the mines pending

negotiations of settlement of the controversy between the parties and was therefore excusable. This excuse, in our opinion, is without merit. A careful examination of the record fails to disclose any attempt to settle the controversy presented by the pleadings in this case. As early as November 4, 1899, the subject of securing an extension of the time for making the second payment for the mines arose. In a letter from Mr. Lindsay (co-trustee with Mrs. Richardson of her late husband's estate) addressed to Mr. Lowe he says amongst other things:

"It would probably not inconvenience you to divide this second payment of $182,500 into 10 equal payments of $18,250, one to be paid December 12th next, and one on the 12th of each succeeding month; the last being paid in nine months from December 12th, each note bearing interest at 6 per cent. per annum. Had such an arrangement been originally made you would have deemed it reasonable, and you will also, I think, concede that the amounts of payment and dates of same were acceded to by the purchasers without mature reflection. Your consent to this plan will give us the needed time in which to provide for the payment * * * etc."

The proof shows that the purchasers did not have the ready money to make payment of the second installment; that they had expected to pay it out of the earnings of the mines or the sale of stocks belonging to their deceased ancestor's estate. Being disappointed in getting the money from these sources efforts to secure extensions of time in which to make the final payment were from time to time made, and these efforts, which we understand recognized the obligation of the purchasers to make the payment in full, seem from the proof to be the only negotiations to which general reference is made in the pleadings. No demand seems to have been made by the vendees for damages sustained by misrepresentation or fraud in bringing about the contract, and we discover no negotiations for the settlement of any such demand. In making the foregoing statement we confine ourselves to time antecedent to filing the cross-bills by defendants. We recognize that there is some evidence of an attempt at compromising, begun a long time after the case was at issue, in June, 1901, but such negotiations manifestly afford no ground for excusing defendants' prior conduct. As a further and conclusive answer to the contention that the vendees' conduct was excused by the pendency of negotiations for a settlement, attention is called to the fact that the operation of the mines by the vendees continued after the bill for foreclosure was filed and after the first answers and cross-bills were filed thereto for several months at least, practically the same as before. As a result of a most careful and painstaking consideration of the conduct of the vendees after February 24, 1900, as disclosed by the proof, we confidently assert that the purpose to rescind the contract by reason of the frauds alleged was never entertained by the defendants until they filed their answers and cross-bills in July, 1900. We find no evidence until then of any notice to complainants of such purpose. Up to that time they were silent and for months afterwards they exercised many acts of absolute ownership. They planned for and executed schemes for further development of the mines totally inconsistent with their present pretension of having repudiated their contract of purchase on February 24th. Rescission of a contract on the ground of fraud is not a mental process undis-

closed and unacted upon. It requires affirmative action immediately on its discovery; some overt act and outward manifestation of the intention to clearly apprise the other party to the contract of the right asserted. Melton v. Smith, 65 Mo. 325; Walters v. Miller, 10 Iowa, 427. No case has been brought to our attention which presents a clearer illustration of the doctrine of waiver of fraud and election to abide by the contract as made than this. The following cases afford apt and persuasive authority for the application of the doctrine to this case: Romanoff Mining Co. v. Cameron, 137 Ala. 214, 33 South. 864; Shiffer v. Dietz, 83 N. Y. 300; Booth v. Ryan, 31 Wis. 45; Greenwood v. Fenn, 136 Ill. 146, 26 N. E. 487; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148. The duty of rescinding arises immediately upon acquiring knowledge of the substantial and material facts constituting the fraud. It is not requisite that the defrauded party shall be acquainted with all the evidence constituting the fraud before the duty to act by way of rescission arises. Campbell v. Flemming, 1 A. & E. 40; Fry on Specific Performance of Contracts (2d Ed.) §§ 703, 704; Bach v. Tuch, 126 N. Y. 53, 26 N. E. 1019; Taylor v. Short, 107 Mo. 384, 17 S. W. 970. When he has evidence sufficient to reasonably actuate him to rescind the contract and on which he has once acted no subsequent discovery of cumulative evidence can operate to excuse waiver of the fraud if one has in the meantime occurred or to revive a once lost right of rescission. The election to waive the fraud once deliberately made is irrevocable. Vacillation or speculation cannot be tolerated. See cases supra.

In the view we have taken of the question already discussed, we find no occasion for considering or determining the interesting questions discussed by counsel touching the effect of a failure to restore or offer to restore the property conveyed before suit was brought or the inability at the time the issues were made up or the case tried to place the vendors in statu quo. The election to affirm the contract notwithstanding the fraud renders a discussion of these questions unnecessary. The further question requiring attention relates to the issue of failure of consideration of the note which affords the foundation of complainants' foreclosure suit, raised by defendants' answers. These answers charge that complainants concocted a scheme to cheat and defraud the defendants out of $365,000 in money without giving them any consideration therefor, and to that end that the complainants made the alleged false representations, statements and reports concerning the value of the mines, which have already been considered in the forepart of this opinion; that defendants in reliance upon them were induced to make the contract obligating themselves to pay $365,000 for the mines and to execute in part payment thereof the note in question. They further allege that the mines were practically worthless, and that by reason of these facts there was no consideration for the note in question or that the consideration failed.

Counsel for complainants first contend that the same fraud on which the cross-bill for recission was based is made the basis of this defense, and as that fraud was so waived as to prevent recission, the conse-

quences of it cannot be availed of on the plea of failure of consideration to diminish the amount due on the note secured by the mortgage. If the contract at the time of the discovery of the fraud were executory this contention would be sound. The vendees, with full knowledge of the vitiating fraud would not be permitted to go on and perform the contract, voluntarily subjecting themselves to damages, and afterwards to sue for and recover the same. Their waiver of the fraud by such performance of the contract would doubtless be for all purposes and would bind them to the contract in like manner as they would have been bound if the falsity of the representations had been known and fully understood before the execution of the contract. The waiver after knowledge of the fraud constitutes full affirmation and ratification of the contract, notwithstanding the fraud.

In Simon v. Goodyear Metallic Rubber Shoe Co., 44 C. C. A. 612, 105 Fed. 573, 579, 52 L. R. A. 745, Judge Lurton speaking for the Circuit Court of Appeals for the Sixth Circuit says:

"If the fraud be discovered while the contract is wholly executory, the party defrauded has the option of going on with it or not, as he chooses. If he executes it, the loss happens from such voluntary execution, and he cannot recover for loss which he deliberately elected to incur."

So in Kingman v. Stoddard, 29 C. C. A. 413, 85 Fed. 740, where this subject is considered in the light of the authorities a palpable distinction is made between the effect of waiving a fraud before and after the performance of a contract induced by it. The reason for nonliability in cases where the vendee has, with knowledge of it, waived the fraud before the performance of the contract has no application to a case like that now before us. Here the vendees had fully performed their contract, paid for and taken possession of the mines purchased, expended about $75,000 in equipping them with new machinery and had conducted much exploration work prior to the discovery of the alleged fraud. To hold in such a case that because of a state of facts which prevents total rescission of the contract there can be no recovery for the deceit would, in our opinion, deny a well-recognized remedy to the injured party. But it is said that damages occasioned by the fraud and deceit cannot be recovered by defendants on a plea of failure of consideration for the note given. This is not so. The note was given for a thing supposed to be of value and was so represented by complainants. If it had no value and the representations were material, false and relied upon there was no consideration for the note and complainants ought to have no relief by reason of the note. The consequence of the fraud and deceit may be availed of to defeat in toto the complainants' right of action on the note or if the same occasioned only a partial diminution of the value, in mitigation of damages. Withers v. Greene, 9 How. (U. S.) 213, 13 L. Ed. 109; Van Buren v. Digges, 11 How. (U. S.) 461, 13 L. Ed. 771; Zimpelman v. Hipwell, 4 C. C. A. 609, 54 Fed. 848; Boggs v. Wann (C. C.) 58 Fed. 681; Rotan v. Nichols, 22 Ark. 247.

Again it is urged that the two defenses based on the alleged fraud, the failure of consideration for the note and rescission of the contract are inconsistent defenses and cannot both stand. The same facts are

pleaded in both defenses and the two different theories are undoubtedly presented by counsel out of abundant precaution to present some theory of law to warrant relief on the facts as they might turn out to be. If the facts should justify a recission the relief would be greater than if only a diminution of damages could be awarded.

In Daniell's Ch. Pl. & Pr., vol. 1, *page 713, the author lays down the following rule:

"A defendant may, by his answer, set up any number of defenses, as the consequence of the same state of facts, which his case will allow, or the ingenuity of his legal advisers may suggest."

Chancellor Wolworth, in Hopper v. Hopper, 11 Paige Ch. (N. Y.) 46, says:

"A defendant in this court in an answer may set up as many defenses as he pleases. The different parts of his answer, therefore, are not to be construed in the same manner as the different parts of a plea would be in this court, or even in a court of law. * * * He cannot set up two distinct defenses therein which are so inconsistent with each other that if the matters constituting one defense are truly stated the matters upon which the other defense is attempted to be based must necessarily be untrue in point of fact."

This, as we understand, lays down the test to be whether the facts pleaded in the different defenses can or cannot physically coexist. Tested by the rule indicated in the foregoing authorities there can be no doubt that in this equitable proceeding the answer and the cross-bill are consistent. There might well coexist facts warranting the vendees in exercising the right of rescission which, if they waived, might also entitle them to damages. The exigencies of the trial alone might determine which would be most available to the defendant.

Woods, Circuit Judge, later Associate Justice of the Supreme Court, in the case of Hicks v. Jennings (C. C.) 4 Fed. 855, dealt with a similar question and took occasion to say:

"A court of equity would not allow a decree upon the note and mortgage in suit and then turn the defendant over to another suit to recover the amount out of which he had been wronged by the fraud and falsehood of the complainant. Having the parties before it, it would adjust the controversies between them springing out of the same transaction, according to equity and good conscience."

Reference to that opinion discloses that Judge Woods recognized as this court has done in Wilson v. New United States Cattle Ranch Co., 20 C. C. A. 244, 73 Fed. 994, a difference between the rule applicable to an action in a court of law as distinguished from a proceeding in equity. Having disposed of these preliminary questions we are now brought to the question of fact. Assuming, but not deciding, that complainants were guilty of the false representations, deceit or fraud complained of, were the defendants damaged thereby? If so in what amount?

The measure of damages, if any, in cases of this kind, is the difference between what the vendees parted with and the actual value of what they received. Stratton's Independence Limited v. Dines, 135 Fed. 449, 68 C. C. A. 161 and cases there cited. The burden was on defendants to prove not only that the mines which they received were of less value than $365,000 which they paid for them, but to prove how

much less was their value. They made their proof as best they could and have brought to this court the record on this subject, and on this record we are asked to find and decree that the note was without consideration in whole or in part and if in part, what part. Can we do so? The property which we are asked to value and say how much, if anything, less than $365,000 it was worth in 1899 consists of several mining claims partially developed, and which during seven or eight years before 1899 had produced the average value of $9 to $11 per ton. This property, from its nature, is of doubtful and uncertain value. No one can peer into the bowels of the earth and tell us with accuracy what is found there. It is so difficult to determine even the quantity and value of ore in sight that the Supreme Court in Southern Development Co. v. Silva, 125 U. S. 247, 252, 8 Sup. Ct. 883, 31 L. Ed. 678, says:

"It is at best a mere matter of opinion. It cannot be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially."

These observations are made by the Supreme Court concerning an estimate of ore actually "in sight" as that term is understood among miners. But that court in the same case goes further, and, quoting with approval from Tuck v. Downing, 76 Ill. 71, 94, says:

"No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of things, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop."

From such approved reflections concerning the character of the property which defendants purchased, and which we are now asked to say was worth less than they paid for it we find that we are dealing with a subject uncertain in actual value, and which, from the speculative feature involved in dealing in it, becomes almost impossible to accurately value. Notwithstanding these difficulties, we have given the testimony on both sides our most careful consideration.

The defendants introduced a dozen witnesses or more, some of whom qualified as experts and some did not, some of whom testified concerning their observation and experience in the mines, and some of whom testified to taking samples of ore from the mines, which were afterwards assayed. These experts and witnesses generally testified concerning the condition of the mines as they appeared after the defendants took possession in the fall of 1899 and during the summer of 1900. The general tendency of their testimony shows that the mines were of little or no value. The methods resorted to in securing the samples and the results indicated by them are characterized as unfair and unreliable by complainants' counsel. Complainants introduced an equal or greater number of witnesses in support of their contention touching the value of the mines. They produced experts who claimed to have made recent exhaustive and accurate examinations of the mines and found them to be of great value. They introduced

miners who had worked in the mines both before and after defendants took possession who gave evidence tending to show the continued existence of a good mine. Considering the great volume of this evidence, the mass of detail found in it, the irreconcilable and contradictory statements of witnesses as well as the uncertainty of inference to be drawn from the facts, we find ourselves unable to say that the mines in question were worth less than the amount paid for them, and much more are we unable to say how much less they were worth. Any conclusion on this subject rests largely upon conjecture and surmise, and these we cannot indulge. The defendants upon whom the burden rested have failed to satisfactorily show how much, if anything, should be allowed them as damages for the fraud and deceit charged by them.

Judge Hallett, who tried this case in the Circuit Court, is a man of great experience in the trial of mining cases and his findings on conflicting evidence are not only presumptively correct (Stearns-Roger Mfg. Co. v. Brown, 52 C. C. A. 559, 114 Fed. 939), but specially appreciated by us in this case. Speaking of the value of ore in the mines at the time of the sale, and specially of the proof of the defendants tending to show that complainants' representations as to value were false, he makes use of the following language:

"The respondents rely mainly upon the work which they did in the premises and the results which they obtained from getting the ore treated to show that the representations were in the first place false. I do not believe that this affords a fair test; at all events, the testimony on that point is met by a very considerable volume of testimony on the other side as to the previous yield of the mine and it leaves the whole subject in doubt, so that it cannot be said that the facts are established."

Unless we are prepared to say that the learned judge made a serious mistake in his consideration of the facts we ought not to disturb the conclusion reached by him. Stearns-Roger Mfg. Co. v. Brown, supra, and cases cited.

It results from what has been said that the decree below was for the right party, and it is therefore affirmed.

PER CURIAM. The motion filed in this case by appellants for leave to file in the court below a bill of review on the ground of newly discovered evidence must be denied for two reasons: First, the alleged newly discovered evidence, after a careful examination of the motion and proposed bill and supporting affidavits, is found to be corroboratory of the witnesses examined at the trial, or cumulative on the issues joined in the case and heard, and as such, under well settled principles, does not warrant a reopening of the case. Second, the newly discovered evidence relates to the fraud and misrepresentation alleged in the original cross-bill to have been practiced by the appellees to bring about the purchase of the mines by appellants. It will be observed in the opinion rendered on the appeal, handed down simultaneously with this that a decision of the case is reached notwithstanding the perpetration of the fraud complained of. The newly discovered evidence is therefore immaterial.

The motion is denied.

EDELSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 30, 1906.)

No. 2,406.

1. BANKRUPTCY—PETITION—REQUISITES.

Where a petition of creditors to have a debtor declared a bankrupt failed to aver that the debtor was not a wage earner or a person engaged chiefly in farming or in tilling the soil, as required by Bankr. Act July 1, 1898, c. 541, 30 Stat. 547, [U. S. Comp. St. 1901, p. 3423], as amended (section 4), the petition was demurrable and insufficient to sustain an adjudication if timely objection was made thereto.

2. JUDGMENT—BANKRUPTCY—ADJUDICATION—COLLATERAL ATTACK.

Where, after a debtor had been adjudged a bankrupt, he recognized the validity of the adjudication, and applied for a discharge from his debts, and there was no appeal taken, the adjudication was not subject to collateral attack because of a defect in the petition, in a proceeding against the bankrupt for taking a false oath.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 913, 914; vol. 6, Bankruptcy, §§ 142, 143.]

3. SAME—VERITY.

Where judgments are rendered in bankruptcy proceedings on questions arising therein, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction, and, unless reversed on appeal or writ of error, import absolute verity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 907, 908; vol. 6, Bankruptcy, §§ 142, 143.]

4. BANKRUPTCY—DEFENSES—"FALSE OATH"—STATUTES—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], provides that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy, and Act July 1, 1898, c. 541, § 2, subd. 12, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], imposes the duty to discharge or refuse to discharge bankrupts on courts of bankruptcy as one of the "bankruptcy proceedings." Act July 1, 1898, c. 541, § 30, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], authorizes the Supreme Court of the United States to prescribe all necessary rules, forms, and orders for carrying the act into effect, pursuant to which general order No. 12 was adopted, declaring that applications for a discharge shall be heard and decided by the judge, with authority to refer the application or any specified issue to a referee to ascertain and report the facts. *Held*, that the term "false oath" was not limited to the examination of the bankrupt, authorized by Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], nor to false swearing in connection with the bankrupt's schedules, but related to any proceeding in bankruptcy, including the examination of the bankrupt before a referee on an investigation of specifications filed against his discharge.

5. WITNESSES—BANKRUPTCY PROCEEDINGS—IMMUNITY—EXTENT OF.

Bankr. Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], provides for the examination of a bankrupt at the instance of his creditors, and declares that no testimony given by him shall be offered in evidence against him in any criminal proceeding. *Held*, that the examination contemplated by such section relates to past transactions; that the words "in any criminal proceeding" are limited to proceedings arising out of the conduct of the bankrupt's business, the disposition of his property, etc.; that the immunity provided for is limited to protecting the bankrupt from the use of his evidence in such criminal proceed-

ings as arise out of the conduct of his business or the disposition of his property, etc., and does not protect him from prosecution for false swearing in giving his evidence.

6. SAME.

Section 7, subd. 9, supra, does not grant immunity to the bankrupt from prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed against his discharge.

Philips, District Judge, dissenting in part.

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

On January 12, 1904, the defendant, Edelstein, and his partner, Jacob Harris, were adjudicated bankrupts by the District Court of the District of Minnesota on the petition of certain of their creditors. Later the bankrupts filed their application for discharge, to which several of their creditors objected, and specified grounds therefor as follows: "That within four months subsequent to the first day of the four months immediately preceding the filing of the petition in bankruptcy herein, they did knowingly and fraudulently transfer, remove, and conceal, and permit to be removed and concealed, certain of their property with the intent to hinder, delay, and defraud their creditors, as follows: That on said 30th day of September, 1903, said bankrupts shipped and consigned to said Morris Edelstein from St. Paul to Eveleth, Minnesota, a certain shipment of woolens, trimmings, and other merchandise, with intent to remove and conceal the same, for the purpose of hindering, delaying and defrauding their creditors, and they did thereafter conceal the same from their creditors for that purpose." Thereafter, on April 4, 1904, pursuant to the provisions of general order in bankruptcy No. 12, the specifications against their discharge were by an order of court referred to a referee in bankruptcy, to take the evidence of the parties in interest in respect of the matter set forth in them, and to report the evidence taken, with his findings thereon, for the information of the court. During this investigation Edelstein was sworn as a witness by the referee, and examined relative to the matter before him. Among other questions, he was asked the following: "Did any of the goods which are alleged to have been shipped September 30, 1903, by your firm to you from St. Paul to Eveleth ever come into your possession?" To which he answered, "No, sir." Later defendant Edelstein was indicted for the crime of having made a false oath "in relation to a proceeding in bankruptcy," as denounced by section 29, subd. 2, of the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]. He was found guilty as charged, and sentenced to a term of one year and three months in the Minnesota penitentiary. A writ of error prosecuted by him brings before us for review several assignments of error, which will be specified as the opinion proceeds.

Daniel W. Lawler, for plaintiff in error.

Chas. C. Houpt, for defendant in error.

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

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

Counsel for defendant urges several reasons for a reversal of the judgment: (1) Because the District Court, as a court of bankruptcy, had no jurisdiction of the proceedings in which defendant was charged to have made the false oath. (2) Because the testimony given by defendant before the referee could not be a "false oath," within the meaning of the act. (3) Because the testimony given by him afforded no ground for the prosecution, by reason of the immunity provided

for in section 7, subd. 9, of the act. Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425].

The first contention is presented in a double aspect: First, that it does not appear from the petition upon which defendant was adjudicated a bankrupt, which was offered in evidence by the government and received against the objection and exception of defendant, that he was not "a wage earner or a person engaged chiefly in farming or the tillage of the soil"; and, second, that the indictment fails to aver that defendant was not within the class just mentioned, and for that reason failed to charge a criminal offense.

The petition of the creditors was in the approved form, except that it failed to aver that the bankrupts were not wage earners or persons engaged chiefly in farming or the tillage of the soil, as required by section 4 of the bankruptcy act as amended. For want of such averment, the petition was demurrable, and if timely objection had been made to it no adjudication could have been had upon it. C. C. Taft Co. v. Century Savings Bank, 72 C. C. A. 671, 141 Fed. 369; In re Plymouth Cordage Co., 68 C. C. A. 434, 135 Fed. 1000; Beach v. Macon Grocery Co., 57 C. C. A. 150, 120 Fed. 736; In re Taylor, 42 C. C. A. 1, 102 Fed. 728. But after a hearing was had, an adjudication of bankruptcy made, and the bankrupt, recognizing its validity, had applied for a discharge from his debts, can it be said that such an adjudication, when no person interested has questioned its validity by appeal or otherwise, is void upon collateral attack? We think not. It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which it may exercise jurisdiction—but it is unlimited in respect of its power over proceedings in bankruptcy, specifically made subject to its jurisdiction by section 2 of the act. When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Its judgments, unless reversed on appeal or writ of error, import absolute verity.

Chief Justice Marshall, early, in the case of Kempe's Lessee v. Kennedy, 5 Cranch, 173, 185, 3 L. Ed. 70, speaking for the Supreme Court of the United States, said:

"The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be be totally disregarded."

In McCormick v. Sullivant, 10 Wheat. 199, 6 L. Ed. 300, the Supreme Court, speaking by Mr. Justice Washington, in answer to the argument that the proceedings were void because jurisdiction of the court was not shown, said:

"[The argument] proceeds upon an incorrect view of the character and jurisdiction of the inferior court of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

In Grignon's Lessee v. Astor, 2 How. 318, 341, 11 L. Ed. 283, the Supreme Court, speaking by Mr. Justice Baldwin, said:

"These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction; they are not inferior courts, in the technical sense of the term, because an appeal lies from their decision. * * * They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal."

In Dowell v. Applegate, 152 U. S. 327, 340, 14 Sup. Ct. 611, 616, 38 L. Ed. 463, the Supreme Court, speaking by Mr. Justice Harlan, after reviewing the authorities, observed as follows:

"These cases established the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction, unless the contrary affirmatively appears from the record (Bors v. Preston, 111 U. S. 252, 255, 4 Sup. Ct. 407, 28 L. Ed. 419, and the authorities there cited), yet if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity."

See, to the same effect, Freeman on Judgments, vol. 1, § 124; In re Columbia Real Estate Co. (D. C.) 101 Fed. 965, 970.

In view of the principles so announced, it must be held that it was the duty of the court of bankruptcy primarily to find the facts, and determine therefrom, as a matter of law, whether it had jurisdiction over the proceeding before it. It performed its duty, reached the conclusion that it had, and pronounced judgment accordingly. Neither the bankrupts nor any other interested party saw fit to challenge the judgment by appeal or otherwise. It therefore became final and conclusive, and is not subject to collateral attack, as attempted in this case.

It follows that neither the demurrer to the indictment nor the objection to the introduction of the creditors' petition were well taken, and that the trial court did not err in overruling them.

Do the words "false oath," as employed in section 29 of the act, comprehend false swearing by the bankrupt in a proceeding before the court to investigate the truth of specifications filed against his discharge? The section, so far as it is necessary for our present inquiry, reads as follows:

"A person shall be punished by imprisonment for a period not to exceed two years upon the conviction of the offense of having knowingly and fraudulently * * * (2) made a false oath or account in or in relation to any proceeding in bankruptcy."

Section 2, subd. 12, of the act devolves the duty "to discharge or refuse to discharge bankrupts" upon courts of bankruptcy as one of the "bankruptcy proceedings" of which original jurisdiction was conferred upon them. Section 30 of the act authorizes the Supreme Court of the United States to prescribe "all necessary rules, forms and orders as to procedure and for carrying this act into force and effect." Pursuant to the provisions of that section, general order No. 12 was adopted by the Supreme Court, which is as follows:

"Applications for a discharge * * * shall be heard and decided by the judge, but he may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts."

Upon the filing of the petition for discharge and the specifications of objection thereto, the court of bankruptcy, acting by authority of the general order just referred to, ordered:

"That said matter [the specifications of objection] be, and the same is hereby, referred to Michael Doran, Jr., one of the referees in bankruptcy of said court, to take the evidence of the parties in interest with respect to the material matters set forth in said specifications, which are attached to this order, and report such evidence to the court, together with written findings thereon and recommendations as to whether discharge should be granted or refused said bankrupts."

By that order the referee was required to take the evidence of the parties in interest. That necessarily included the bankrupt, Edelstein, for no one had a greater interest in the pending inquiry than he.

From the foregoing, it appears that the examination of the bankrupt, Edelstein, was authorized by law, and appropriate orders of court made pursuant thereto. Obedient to the order of court, the bankrupt appeared before the referee, was sworn by him, as authorized by section 20, to tell the truth, and gave testimony on his own behalf on the pending issue. In giving that testimony it is charged that he made a false oath, or swore falsely, within the meaning of section 29, supra.

It is contended by defendant's counsel that section 7, subd. 9, which requires a bankrupt when present at the first meeting of his creditors, and at such other times as the court shall order, "to submit to an examination," etc., does not necessarily contemplate that the examination should be under oath. We think this is a misconception of the provisions of the act. The word "examination," used in connection with legal proceedings, is commonly understood to mean an examination under oath or "affirmation," which by the provisions of the bankruptcy act (section 1, subd. 17) is included in the word "oath." In view of this common understanding, it is not conceivable that Congress intended a departure from it without clear and unambiguous words to that effect. There are no investigations in which prospect of the pains and penalties of perjury can be more salutary than one into the affairs of an insolvent debtor, and we cannot strain or distort the ordinary meaning of language to indulge the presumption that Congress intended to do away with that safeguard. This interpretation of the legislative intent is reinforced by the context, in which the provision for an "examination" is found. With direct reference to that provision it is said: "But no testimony given by him shall be offered in evidence," etc. The word "testimony" or "to testify" implies the usual preliminary qualification of taking an oath to speak the truth. Such an implication is so reasonable and well understood among lawyers and legislators that we would do violence to common intelligence to impute to Congress any other intention in the legislation in question.

It is further contended by counsel for defendant that the words "false oath" as so employed relate to the oath required by section 7 to be made by the bankrupt to his schedules of assets and liabilities, and do not relate to false swearing by the bankrupt in an examination to which he may be subjected. This contention does not commend itself to our approval. The offense is denounced broadly. It consists of making "a false oath or account in or in relation to any pro-

ceeding in bankruptcy." This, according to the plain and usual meaning of the language employed, embraces not only the making of false accounts, but the making of false oaths in or in relation to a proceeding in bankruptcy. Adverting again to section 2 of the act, it is observed that the granting or refusing to discharge a bankrupt is one of the recognized bankruptcy proceedings of which original jurisdiction is conferred upon courts of bankruptcy. The two sections, considered together, do not conduce to the result claimed by defendant's counsel. A most helpful rule governing the interpretation of legislative enactments is to examine all its provisions, and construe each in the light of all the others, to the end that they may be given one harmonious operation. In this way we most surely arrive at the legislative intent. If the false oath in question does not embrace false swearing in testimony given by bankrupts in the proceeding relating to their discharge, which is one of the primary purposes of the act, it is difficult to understand what proceedings in bankruptcy could be referred to in section 29, in which false swearing is denounced as a crime. We think the obvious meaning of the provision is as stated by Loveland in his second edition of the Law and Proceedings in Bankruptcy (section 231) as follows:

"An offense under this provision may arise in connection with any oath or affirmation made in any part of the proceedings; as an oath to a schedule filed by a bankrupt, an oath to prove a debt by a creditor, an oath made to an account by a trustee, or a deposition or testimony given by any person in the course of the proceedings."

This construction is a broad and wholesome one, fairly within the intendment of the language employed, and conducing to the effectual enforcement of all the provisions of the act; while any other, and especially that claimed by defendant's counsel, leaves the act unenforceable, except by the imperfect obligation of moral suasion, as against attempts of the bankrupt, which are too often made to thwart its main purpose of distributing all his assets among his creditors. This court in Bauman v. Feist, 46 C. C. A. 157, 107 Fed. 83, speaking by Judge Caldwell in a case involving the question whether a false oath would bar a discharge of the bankrupt, made use of the following language:

"The 29th section declares that the bankrupt shall be punished by imprisonment upon the conviction of the offense of having knowingly or fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy. Plainly the false oath contemplated by this provision must be one material to the proceedings in bankruptcy. It must have some relation to the bankrupt's estate or to the bankrupt's act affecting his estate, and must have been made knowingly and fraudulently."

Our present view is in full accord with the view then entertained by this court, and, notwithstanding the fact we were then considering the section in question in relation to other provisions of the act, the interpretation placed upon it is equally appropriate in its relation to the provisions now under consideration.

Does the immunity provision found in section 7, subd. 9, prevent the use of defendant's testimony as the basis of an indictment in this case? The context in which this provision is found is as follows:

"Any person at the first meeting of his creditors and at such other times as the court shall order [the bankrupt shall] * * * submit to an examina-

tion concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all the matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

This provision finds its inspiration in the fifth amendment to the national Constitution, which ordains that "no person shall be compelled in any criminal case to be a witness against himself." That constitutional inhibition was intended for the protection of personal rights, and a liberal construction should be placed upon it to accomplish the intended purpose. It has been held efficacious to prohibit coercion by statute of self-incriminating testimony, not only in a pending criminal case, but in investigations by grand juries and legislative committees. Statutory requirements for production of books, or making returns by individuals or officers of corporations, concerning their method of doing business, have been held invalid on a claim that they might tend to incriminate. The inhibition not only protects one from the disclosure of facts which would tend to prove his guilt, but also from disclosure of facts which might furnish a clue or a link in a chain of evidence by which a criminal offense might be made known. Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; State ex rel. Attorney General v. Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

In view of the foregoing authorities, the immunity found in section 7, subd. 9, not being an absolute one from future prosecution for the offense to which the testimony related, but a partial one from the use of the testimony given in such a prosecution, was not sufficient to supplant the privilege conferred by the Constitution in the event such privilege had been claimed by the bankrupt. Counselman v. Hitchcock, supra. The defendant, however, did not claim his constitutional privilege, but consented to answer the obviously self-incriminating question propounded to him on the terms of the partial immunity afforded by the bankruptcy act, namely, that his testimony should not be used against him in any criminal proceeding. He contends that this is a "criminal proceeding," and that he comes literally within the protection of the last-mentioned immunity clause. The government contends that the immunity has sole reference to the use of evidence in a prosecution for some offense to which his evidence related; that Congress offered as an inducement to a full, frank, and truthful disclosure by a bankrupt for the benefit of his creditors of all matters and things concerning his property and estate that his evidence should not be used against him in any prosecution for any such offense, however much it might implicate him.

Defendant's argument is that the language employed is comprehensive and unequivocal; "that no testimony given by him shall be offered against him in any criminal proceeding"; that it, in terms, prohibits the use of the negative answer given by the bankrupt to the question propounded to him, although knowingly and intentionally false, as a basis for the criminal charge involved in the indictment

now under consideration. To this we cannot give our assent. There is no rule requiring a literal construction to be placed even upon unambiguous words of a particular clause of a statute without consideration of its context. The meaning of specific words in one part of a statute is often controlled by other provisions of the same act, and frequently by provisions of other acts which are in pari materia.

Sutherland, in his work on Statutory Construction (section 219), says:

"Not only may the meaning of words be restricted by the subject-matter of an act or to avoid repugnance with other parts, but for like reasons they may be expanded. * * * The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction. * * * The intention of an act will prevail over the literal sense of its terms."

These are different ways of expressing the well-recognized rule for construing a statute, namely, to ascertain from all its provisions, reasonably and naturally construed, what was the legislative intent. Applying this rule to the present case, we observe that the provision for the immunity is found in a section of the act providing for the examination of a bankrupt, concerning the conduct of his business, his dealings with his creditors and other persons, and the amount, kind, and whereabouts of his property. Section 7, subd. 9. The examination there contemplated relates to past transactions. Such examination might, from the nature of the case, in view of the penal provisions of the act, disclose evidence of former criminal conduct on the part of the bankrupt. Such evidence, however, was deemed so important and necessary for the proper administration of the estates of bankrupts that Congress, in effect, in the concluding portion of subdivision 9, makes a proposition to the bankrupt that, if he would forego his constitutional privilege to refuse to testify about his past transactions in so far as they might tend to incriminate him, no testimony which he might give should be used against him "in any criminal proceedings." What criminal proceeding do these words relate to? Obviously, to such as might arise out of the conduct of his business, the disposition of his property, and other past transactions, about which alone the statute authorized the examination in question to be made. The immunity was made conditional upon his giving testimony upon subjects out of which prosecutions against him might flow. A most natural and reasonable inference, therefore, is that Congress intended the immunity to relate to the use of his evidence in such criminal prosecutions only.

The Supreme Court in the Counselman Case, on page 586 of 142 U. S., page 206 of 12 Sup. Ct. (35 L. Ed. 1110), said:

"In view of the constitutional provision [fifth amendment] a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

It would seem that the statute in question was not intended to confer a broader immunity, so far as it was applicable, than the constitutional provision does in its scope of operation. To hold that the statute pro-

tects a bankrupt from the use of his evidence in a prosecution for perjury while actually testifying would defeat the obvious purposes of the act. It would, in effect, say to the bankrupt: You may forego the exercise of your constitutional privilege, and consent to testify concerning the conduct of your business, and in that way promote the efficient administration of your estate and benefit your creditors, and by so doing secure the immunity provided for; but if you give false testimony, calculated to embarrass the administration of your estate and to defeat the just rights of your creditors, and thereby commit a crime specially denounced against you, you shall enjoy the same immunity therefor. Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words "any criminal proceeding" cannot sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify. "Constructions of statutes are to be made of the whole acts, according to the intent of the makers, and so sometimes are to be expounded against the letter to preserve the intent. * * * The reason and object of the statute are a clue to its true meaning." Taylor v. Taylor, 10 Minn. 107 (Gil. 81), and cases cited. "Theoretically, this argument" for construing statutes according to the literal meaning of the words employed "would seem to furnish a safe rule of interpretation. Practically, it is not always safe or sensible. A rigid adherence to it would not infrequently involve us in contradictions, absurdities, and palpable violations of the real intention of the Legislature." Ryegate v. Wardsboro, 30 Vt. 746, 749. "The intent and spirit of the act, and not the literal meaning, must govern where absurd consequences would otherwise follow." Reynolds v. Holland, 35 Ark. 56, 61. "If the intention" of the Legislature "is expressed in a manner devoid of contradiction and ambiguity, there is no reason for interpretation or construction * * *," and the literal meaning of the words of the statute must be enforced; but in cases involving such contradiction and ambiguity, courts are at liberty to decide in contravention of the exact language of the statute, if it is necessary to do so to enforce the legislative will. Sedgwick on the Construction of Stat. & Const. Law (2d Ed.) pp. 253–255.

In view of the mischief to be remedied and the object to be accomplished by the statute in question, we are unable, in the light of reason or authority, to sustain defendant's contention that it affords immunity to him for the crime with which he is charged in this case. The authorities to which his counsel invited attention (United States v. Simon [D. C.] 146 Fed. 89, among others) have been carefully considered, but are not sufficiently persuasive to overcome our settled conviction. Finding no error in the proceedings below, the judgment is affirmed.

PHILIPS, District Judge (dissenting). On mature consideration, I find myself unable to concur in so much of the foregoing opinion as holds that the testimony containing the alleged false answer to the question propounded to the bankrupt, the defendant below, does not come under the protection of the immunity clause to section 7 of the bankrupt act. By the first clause of said section, the bankrupt is required to attend the first meeting of creditors, "if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed." The bankrupt did attend and testify at the hearing of his application for final discharge in response to the subpœna from the referee, which was equivalent to the order of the court. The second, third, fourth, fifth, sixth, and seventh clauses of the section pertain merely to acts to be done by the bankrupt in aid of the administration of the estate, which do not involve the making of an oath by him. The eighth clause imposes upon him the duty of preparing under oath a schedule of his property and a list of his creditors. As this is not "testimony," but is an oath per se, it comes clearly within the purview of section 29b (2) of the bankrupt act, on which an indictment may be predicated. Then follows subsection 9 of section 7, which declares that:

"When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

The bankrupt submitted himself on such order "to an examination concerning the conduct of his business, * * * his dealings with other persons, * * * and the whereabouts of his property." It was in respect of his dealings with certain goods coming into his possession, claimed to belong to the estate, about which he was interrogated, and is alleged to have answered falsely. Immediately in this connection occurs the immunity provision that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." Among the objects of such examination of the bankrupt, either at the first meeting of his creditors or at the hearing of his application for final discharge, is the conservation of the interests of the estate in the matter of discovering assets and obtaining other information, as "matters which may affect the administration and settlement of his estate." To induce him to make answer and to waive his right to stand mute where any fact elicited from him might subject him to criminal prosecution, this proviso was evidently added. He had made oath to his schedules, purporting to cover and account for all his property. Concededly, no testimony he might give on such examination could be employed against him on a criminal prosecution for having made a false oath to such schedule. But it is asserted that such immunity of section 7 extends only to the offering of any testimony he may give on such examination against him where he is indicted for making a false oath in some other matter pertaining to the proceedings in bankruptcy, and that the purpose of Congress was to induce

him to tell the truth, and not a falsehood, about the matter inquired about. It ought to be sufficient, it seems to me, to say that this proviso does not so state. Its language cannot be extended by implication where it is sought to deprive the citizen of his liberty. In plain and unambiguous language the statute says to the bankrupt, when he submits to the examination by the court, that "no testimony given by you on this hearing shall be offered against you in any criminal proceeding, and therefore you need not stand on your right to remain mute, but you may testify as you may, with full impunity." No case could be made out against him under an indictment for perjury without offering in evidence his testimony given in the examination. It would be little less than a fraud upon him to induce him to take the witness stand and testify under statutory language so broad, and then hold that the immunity was intended by Congress to apply only to the instance where he may be indicted for having sworn falsely in some other matter. If Congress so intended, it should have said so, which it could have expressed by the addition of a few words. This is what Congress did in the act of February 25, 1868 (chapter 13, § 1, 15 Stat. 37, now section 860, Rev. St. [U. S. Comp. St. 1901, p. 661]), where it declared that no discovery or evidence obtained from a party or witness by means of a judicial proceeding "* * * shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding." But in order to place the limitation upon the immunity asserted in the majority opinion, Congress inserted the following proviso: "That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." So in the act of February 11, 1893, (chapter 83, 27 Stat. 443, 444 [U. S. Comp. St. 1901, p. 3173]), relating to the testimony in investigations, etc., under the interstate commerce law, after requiring persons to appear and produce books and testify, under the assurance of exemption from prosecution for anything concerning which the party might testify, Congress added the proviso: "That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." From which it appears that in the understanding of Congress, the broad terms of said statutes exempting the party testifying from prosecution, it would embrace a prosecution for perjury predicated on his testimony so given. Therefore, it added the proviso that he would not be exempt, however, from prosecution and punishment for perjury committed in so testifying. The omission of this proviso from subsection 9 of section 7 of the bankrupt act is most significant. Congress was legislating respecting proceedings under the bankrupt act, and it made all the provisions deemed by it advisable. Evidently enough, it did not conceive that said section 860 of the General Statutes was applicable.

The objection interposed by the defendant below to the admission of his testimony given before the referee in bankruptcy, in my judgment, should have been sustained, and the defendant discharged.

KREIDER et al. v. COLE.

(Circuit Court of Appeals, Third Circuit. January 11, 1907.)

No. 13.

1. COURTS—FEDERAL COURTS—JURISDICTION—DETERMINATION OF QUESTION.
In a suit in the federal courts, a question of jurisdiction is fundamental, and may be raised at any time, in any mode, and at every step in the proceedings, either by the court of its own motion or by the parties, and such investigation may be instituted as shall be necessary to establish or defeat the court's jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 818.]

2. SAME—CAUSE OF ACTION—TRANSFER.
Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], provides that if a suit brought in or removed to a Circuit Court of the United States does not involve a controversy properly within its jurisdiction, or if the parties have been improperly joined to create a case cognizable or removable under the act, the court shall dismiss the suit or remand it, as justice may require. *Held* that, where persons largely interested in a Pennsylvania corporation, desiring to institute a suit in the federal courts of Pennsylvania for a receiver, caused certain bonds and stock of little or no value to be assigned to a citizen of New Jersey, who was a mere stenographer in the office of one of the corporation's attorneys, for no other consideration than that he should sign the bill, which the corporation's attorneys thereafter filed, such transaction constituted a fraud on the court's jurisdiction sufficient to defeat it, though the assignment was absolute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 862.]

Buffington, Circuit Judge, dissenting.

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

For opinion below, see 140 Fed. 944.

T. R. White, for appellants.

Francis S. Brown and Ira Jewell Williams, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Eastern District of Pennsylvania, denying the prayer of the appellants, as interveners, in a certain suit in equity, wherein Stirling W. Cole was complainant and the Philadelphia & Easton Street Railway Company was defendant, that the said bill in said suit be dismissed for want of jurisdiction, and the appointment of receivers therein vacated. The bill in the original suit was filed by Stirling W. Cole, as complainant, September 23, 1905. On the same day, an appearance having been entered by the Philadelphia & Easton Railway Company, the defendant, an appointment was made, by consent of its counsel, of the Excelsior Trust & Saving Fund Company as temporary receiver. On October 4, 1905, an answer was filed by said company, admitting the facts set forth in the bill, and submitting itself to the order of the court in the premises.

On the same day a petition was filed by the appellants, as receivers of H. M. Herbert & Co., who, it was alleged, had been creditors of the said defendant company, praying that they be allowed to inter-

vene. The petition set out an indebtedness of the said railway company to H. M. Herbert & Co., to a large amount, and alleged that the appointment of a receiver, on account of insolvency alone, was improper and unauthorized; that the bill had been filed by the procurement and direction of certain directors of the company, in whose interest the receiver, beforehand agreed upon by said directors, had been appointed. It also states that the interveners, at about the time of the filing of the complainant's bill in the court below, had filed a bill in the common pleas court of the state of Pennsylvania, in and for Bucks county, charging improper conduct on the part of the board of directors of the defendant corporation, and praying for divers relief and also for the appointment of a receiver or receivers of the said railway company and its property. A copy of the said bill is annexed to the petition. From it, it appears that the same was filed on Monday, September 25th, the bill of complainant in the court below having been filed on Saturday, September 23d. The petition avers that the said bill in the state court was duly served upon said company, and service thereof accepted by counsel for said company, in open court, where, at the same time a motion was made for the appointment of a receiver, to be heard on October 2d; that the bill in equity in this cause was filed in the court below, accompanied by an acceptance of service by an attorney who is in the office of the counsel who appeared for the plaintiff, and on the day of its filing, a receiver was appointed, with the consent of said counsel, as above stated. The petition also avers that the bill was filed collusively, in that the—

"Petitioners are informed and upon information believe and aver that the plaintiff in this cause is a stenographer in the office of the prosecutor of the pleas in the city of Camden, state of New Jersey. He claims to own one bond of the issue of July 2, 1901, and one of the issue of November 12, 1904, being bond No. 745, which H. M. Herbert & Co. sold in July, 1904, to A. C. Patterson, president of the Excelsior Trust & Saving Fund Company, and certain shares of capital stock. Your petitioners believe and aver that the said plaintiff holds these securities merely colorably, for the purpose of giving an apparent jurisdiction of the case to this honorable court."

The petition therefore prayed that the bill be dismissed, and the appointment of the temporary receiver be vacated.

On October 14, 1905, the petition of Amos Johnson, who averred that he was a citizen of the state of New Jersey, and asked for leave to intervene as a creditor and stockholder of the defendant company, was filed; and on October 16, 1905, the petition of John I. Beggs, who averred that he was a citizen of the state of Wisconsin, and, as trustee in bankruptcy, a creditor of the said defendant company, was filed, asking leave to intervene as party plaintiff, both petitions asking leave to join in the allegations and prayers of the bill. On December 5, 1905, a decree was entered, appointing receivers and granting the prayer of both of the said petitioners. On October 5, 1905, a rule was granted to the appellants, to take depositions in the matter of the want of jurisdiction, alleged in their said petition. After the taking of the testimony, to wit, on October 25, 1905, an answer by Stirling W. Cole, the appellee, was filed to the petition of the appellants, denying and controverting the allegations of their petition, and

asking that the same should be dismissed. On November 6, 1905, the court below filed an opinion on the issues joined between the defendant and the appellants, as interveners, refusing to dismiss the bill of the complainant-appellee, and confirming the appointment of the temporary receiver.

The learned judge, after considering the evidence, taken on the rule granted the petitioners for that purpose, sustained the jurisdiction of the court below, saying in his opinion:

"The evidence shows that the bonds and stock were transferred to the plaintiff, who is a non-resident of this district, for the purpose of filing this bill. It also shows that he is the absolute owner, as there is no agreement that he shall collect for the transferrors. or that they have the least interest in the securities. This being the case, there is no question but what this court has jurisdiction. Of course, where property has been colorably and collusively transferred to a non-resident for the sole purpose of giving the federal courts jurisdiction, and where the nominal parties are not the real parties and the real owners of the property in dispute, the federal courts will dismiss the case when that fact is made to appear, but the court will not inquire into the intention or motive of the parties when it is established that the nominal parties are the real parties, even though there be no consideration for the property transferred, so long as they are the real bona fide owners and are not merely holding it for the sole and only purpose of enabling them to bring suit in the United States courts."

He then quotes the language of Justice Harlan, in the case of Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 336, 16 Sup. Ct. 311 (40 L. Ed. 444), and thus concludes:

"In this case, it is established that the grantor or vendor of the stock and bonds has not reserved, nor does he claim a right or power to compel or require a reconveyance or return to him of the property, and we think this court has jurisdiction."

The specifications of error in the decree appealed from, challenge the correctness of this conclusion of the court below, upon the evidence disclosed in the record.

A question of jurisdiction is fundamental and underlies all other questions arising in the course of a litigation. Such a question may be raised at any time, in any mode, and at any stage, as every step taken in the progress of a cause is an assertion of jurisdiction, and the court may, of its own motion, make the objection or institute such investigation as may be necessary to establish or defeat it. This is especially true of the federal courts, as being courts of limited or statutory jurisdiction. The reasons for extending judicial power of the United States to controversies between citizens of different states, are historical and need not be now rehearsed. It suffices to say that the federal courts have, from the beginning, jealously guarded against all attempts to found jurisdiction upon controversies that were not really and substantially such between citizens of different states. Butler v. Farnsworth, 4 Wash. C. C. 101, Fed. Cas. No. 2,240.

The facts upon which the jurisdiction in the present case is challenged were established by the testimony of Stirling W. Cole, the complainant therein, upon whose testimony alone the appellant relies. We have accordingly carefully examined this testimony, the important parts of which we quote from the record, as follows:

"By Mr. Page: Q. Where do you reside? A. No. 116 North Sixth street, Camden, N. J. Q. What is your business? A. Stenographer. Q. To whom? A. Frank T. Lloyd, prosecutor of the pleas, Camden, N. J. Q. How long have you resided in Camden, and how long have you been employed by Mr. Lloyd? A. I have resided there about three and one-half years, and have always been employed by him ever since I came to Camden. Q. How old are you now? A. Twenty-two last March. Q. There has been a bill in equity filed here, copy of which I hand you. Was this filed on your behalf? A. Yes, sir. Q. By your direction? A. Yes, sir. Q. Did you take the affidavit which is at the back of it? A. I did; yes, sir. Q. Did you take it on the 23d of June, 1905? A. No. Q. When did you take it? A. To-day. I took it originally, to one like this, about two or three weeks ago; I won't be sure of the date. Q. See if you can recall the date you took that oath. A. I don't even remember the day of the week. Q. In what week was it? A. I should say, just thinking back, in the neighborhood of two or three weeks ago. Q. Say three weeks ago, where would that bring you? A. That would bring it back in the neighborhood of the 18th or 20th, but I am absolutely unable to say accurately. Q. Perhaps you might fix it by the events surrounding it. Where was the affidavit taken? A. There was one affidavit taken in Mr. Lloyd's office, and one was taken in Mr. Williams' office. Q. Were they both taken the same day? A. The two were taken on the same day. Q. When you say there were two, what do you mean; was one like this to the bill, or was it to an affidavit or what? A. One was an affidavit to the whole bill: was in the form of an affidavit to which I swore, and then there was a small affidavit to which I also swore. Q. Did you swear to a bill at that time? A. I did. Q. Then did you take two oaths or three oaths? A. I took two oaths on that day. Q. One was at Mr. Lloyd's office and one at Simpson & Brown's office? A. That is right. (Witness shown paper.) Q. Is that the affidavit you swore to? A. That is apparently a carbon copy of the affidavit. Q. You swore to that? A. Yes. Q. Was this done in Mr. Lloyd's office? A. No; in Mr. Williams' office. Q. The bill then was sworn to in Mr. Lloyd's office? A. A small affidavit on a page at the back of the bill was sworn to at Mr. Lloyd's office. Q. Was the bill attached to it? A. Yes, sir; if I remember correctly. Q. What time in the day, in Mr. Lloyd's office, did you swear to the affidavit? A. In the morning. Q. At what time did you swear to the bill? A. In Mr. Williams' office; it was in the forenoon, or very nearly 12 o'clock, probably a little after 12. I think I left Camden about 12. Q. Having previously sworn to the affidavit in Camden? A. Yes, sir. Q. In both the bill and affidavit it is asserted that you own two bonds of the Philadelphia & Easton Railway Company? A. Yes, sir. Q. And 100 shares of stock? A. Yes, sir. Q. Will you be good enough to tell me when you obtained possession of this stock and these bonds? A. I obtained possession of one bond at the time I swore to the two first affidavits, and the stock and the remaining bond to-day, but they were taken charge of by Mr. Williams for me on the day on which I made the original affidavit. Mr. Williams held them for me as my counsel. Q. Did you ever have possession of these securities prior to the time which you have now stated? A. What do you mean by the time now stated? Q. You state one of these bonds was placed by you with Mr. Williams as your counsel at the time you signed the bill, and you said you got the other securities to-day. A. Actual and physical possession of them, but at the time I signed the original affidavit, it was understood they belonged to me, but they were left in Mr. Williams' possession. Q. When you say it was understood, do you mean to say you understood, or who understood? A. I understood. Q. Before that bill was filed and Mr. Williams received charge of one of these bonds for you, had you paid a single penny for that bond? A. I had not. Q. Had you paid a single penny for the other bond or the stock? A. No. Q. When was it that you first paid for these bonds and this stock? A. There was no actual money paid. Q. From whom did you obtain them? A. From Mr. Williams. Q. Mr. Ira Jewell Williams? A. Yes, sir. Q. One of these bonds, you say, was of the old issue, No. 745, and the bond of the new issue was No. 841. Which bond did you get when you first signed the bill? A. I do not recall. I did not take notice of the numbers at that time. Q. Was it a bond of the old issue or the new issue, the issue of 1901 or 1904? A. I am unable to state that either. Q. Did you have the stock in your hands at all, the certificate of stock? A. Yes, sir.

Q. In whose name was the certificate made out? A. In the name of one Rosenberger, I believe. Q. You do not know him, do you? A. I don't know him personally. Q. You did not buy it from him? A. No. Q. You made no bargain to buy it from him? A. I did not. Q. In fact you did not have anything to do with getting it from him? A. Not from Mr. Rosenberger; no, sir. Q. Has the stock ever been transferred to you? A. I believe it is transferred in blank from Mr. Rosenberger in blank. Q. You mean indorsed on the back? A. Yes, sir. Q. That is, the power of attorney on the back is indorsed in blank? A. Yes. Q. Your name as a stockholder does not appear on the certificate? A. No, sir. Q. And so far as you know, your name does not appear in the stock book and you have never requested that it should be put in your name? A. I have never requested that it be transferred. Q. Did you or did you not direct or request Mr. Williams or anybody else to purchase these bonds and this stock for you? A. I did not directly request it; no, sir. Q. As you only received that bond, one of the two bonds you speak of in your bill, and left it in the hands of Mr. Williams, never having seen it before, that being the day you signed the bill, would you be good enough to tell me why you filed a bill against the Philadelphia & Easton Railway Company, not being up to that time interested in the company at all? (Objected to by Mr. Williams.) A. I filed the bill in consideration of the bonds being transferred to me; they were to be transferred to me in consideration of the filing of the bill. Q. Is that true of the stock also? A. Yes, sir. Q. So that, if I understand you, the sole consideration that you gave for these securities was the filing of this bill? A. Yes, sir. Q. Was it after your work on Saturday that you came over to Mr. Williams' office to do this thing? A. I think it was on Friday; I don't think it was a Saturday. Upon looking again, I should say it was September 22d. Q. But are you not yet positive? A. I am not exactly positive, but I am pretty sure it was on a Friday. Q. After you came over, did you direct the bill to be filed? A. I did not say in so many words to file the bill, but the bill speaks for itself in that respect, I should think. Q. Would you be good enough to tell me with whom you made this arrangement, whereby the consideration of your action was the receipt of these securities? A. With Mr. Williams. Q. May I ask you when you entered into that arrangement? How long before you came to his office? A. At his office. Q. Was it at that time or some time prior to the time when you swore to the bill? A. At the time I swore to the bill. Q. Who brought you the affidavit to Mr. Lloyd's office, which you took? A. It came by mail. Q. Was there a request in that that you should take affidavit to that bill? (Objected to by Mr. Williams.) A. I think there was. Q. And that was the first time your attention was drawn to the consideration of the question? A. That was the first time it was directly drawn to the question. Q. You have had no correspondence or arrangement with regard to your action until the affidavit was presented to you at Mr. Lloyd's? A. None. * * * Q. Mr. Cole, having entered into this arrangement, as suggested by Mr. Williams in his letter, and having come over to the office to sign the bill and swear to it, what arrangement did you make, if any, with regard to the costs, expenses, etc.? A. I made no arrangements whatever. Q. Did you or did you not expect to pay for the costs of this litigation? (Objected to by Mr. Williams.) A. No, I did not."

Upon cross-examination, Mr. Cole states that, when he swore to the bill in Mr. Williams' office, one of the counsel for the defendant corporation, a certain Mr. Lugar, whom he had never met, but who, he was told, was secretary and general manager of the defendant corporation, informed him as to the general condition of the road, and upon that information he swore to the averments of the bill. From this, it is apparent that the bill was filed at the instance of the corporation itself, or at least of some of its managers, Mr. Cole's appearance as plaintiff having been procured by its general counsel, who filed the bill in his name.

Apart from the requirements of the statute presently referred to, we think these facts, testified to by the plaintiff himself, would have fully

justified the court below in dismissing the bill, on the ground that it had been made to appear by the plaintiff's own statement, that there was no real controversy between him and the defendant corporation, that his interest was a nominal one, and that the real interest was in those who controlled the corporation defendant and were in large part its stockholders and creditors. The results of granting the prayers of the bill and the appointment of the receivers would be substantially, if not altogether, for the benefit of these controlling creditors and stockholders, and infinitesimally, if at all, for the benefit of the nominal plaintiff. The real interest was in, and the real controversy was between, citizens of the state of Pennsylvania, and neither the Constitution nor the judiciary law framed in pursuance thereof, can or should be so construed as to permit such controversies to be justiciable in the federal courts, or the limitations upon their jurisdiction to be evaded by artifices so transparent as those disclosed in the testimony above recited. That such jurisdiction cannot be created by such devices, had been decided by the Supreme Court long prior to the enactment of the statute of March 3, 1875. The mandatory provisions of section 5 of that act (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511]), set at rest any doubts that may have been entertained, as to how far courts might go in putting a stop to all "collusive shifts and contrivances for giving such jurisdiction." The act is entitled "An act to determine the jurisdiction of Circuit Courts of the United States," etc., and the fifth section reads, in part, as follows:

"That if, in any suit commenced in a Circuit Court, or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of the said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

It is hard to conceive how any case would more certainly be within the meaning of this language than the one at bar. It is apparent from the testimony which we have quoted, that not only was there no real and substantial controversy between the plaintiff, Stirling W. Cole, and the defendant corporation, but that the complainant was made a party to the suit collusively, and by the direct procurement of those interested in the defendant corporation. Counsel for complainant frankly avow that the bonds and stock were transferred to Cole for the purpose of creating a jurisdiction on the ground of diverse citizenship, and were so transferred in consideration of his signing the bill for that purpose. They contend, however, that the transfer of these two bonds and the shares of stock was absolute on its face, leaving no interest therein in the grantors, and accompanied by no trust in their favor, and they cite the cases of Lehigh Mining & Mfg. Co. v. Kelly, supra, and South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 291, 48 L. Ed. 437, as authority for the proposition that, no matter for what motive such a transfer may be made, if ab-

solute on its face it cannot be challenged as insufficient to give jurisdiction. We do not think, however, that these cases support this proposition to the extent necessary to sustain jurisdiction on facts like those in the present case, or that either of them support a doctrine different from that stated by the Supreme Court in Dickerman v. No. Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, also cited by the appellee, as follows:

"It is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance."

The case of the Lehigh Mining & Mfg. Co. v. Kelly, which seems to have been relied upon by the learned judge of the court below, was a case in which the tract of land in controversy was owned by the Virginia Coal & Iron Company, a corporation organized under the state of Virginia. In order to prosecute certain litigation against another citizen of Virginia, in reference to said land, the stockholders of the Virginia Coal & Iron Company organized the Lehigh Mining & Manufacturing Company, under the laws of the state of Pennsylvania; the land in controversy was then conveyed by the former company to the latter, thus vesting the title to the subject-matter of litigation in a citizen of Pennsylvania. Here was a complete and effective transfer of title, absolute on its face and leaving no interest whatever in the grantor, the old corporation. It is true that Judge Harlan used the language quoted in the opinion of the learned judge of the court below, to the effect that a citizen of one state, a bona fide purchaser of property, cannot be debarred of his privilege to maintain a suit in the Circuit Court of the United States against a citizen of another state, because of the "motive that induced his grantor to convey * * * provided such conveyance or such sale and delivery was a real transaction, without the grantor or vendor reserving or having a right or power to compel or require a reconveyance or return to him of the property in question." But this was a preliminary statement, evidently made to guard against its being thought that the court intended to sanction so extreme a proposition, as, that a bona fide purchaser of property, where the sale and delivery was a real transaction and not a collusive one, should be denounced as a fraud on the jurisdiction, simply because the motive for such transfer or conveyance was that the grantee might be able to bring a suit in a federal court. Certainly there is no such hard and fast rule, as would denounce every such case, irrespective of its circumstances. After thus guarding himself, however, Mr. Justice Harlan proceeds to the consideration of the case in hand, and in the course of his opinion says:

"The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the federal court must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that court, as well as a

wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case.

"This conclusion is a necessary result of the cases arising before the passage of the act of March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]. The fifth section of that act provides that if, in any suit commenced in a Circuit Court, it shall appear to the satisfaction of that court, at any time after such suit is brought, that it 'does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit.' This part of the act of 1875 was not superseded by the act of 1887, amended in 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]). Its scope and effect were determined in Williams v. Nottawa, 104 U. S. 209, 211, 26 L. Ed. 719, and Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690. In the first of those cases the court, referring to the act of 1875, said: 'In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction.'

"The organization of the Pennsylvania corporation and the conveyance to it by the Virginia corporation, for the sole purpose of creating a case cognizable by the Circuit Court of the United States is, in principle, somewhat like a removal from one state to another with a view only of invoking the jurisdiction of the federal court."

In Morris v. Gilmer, supra, it was decided that a removal from one state to another, for the purpose of enabling the person so moving to bring suit in the Circuit Court of the United States, was a fraud upon its jurisdiction, and the following language of Mr. Justice Washington, in Butler v. Farnsworth, supra, is quoted with approval:

"If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been."

Mr. Justice Harlan also cites with approval from the case of Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114:

"It (the act of 1875) was intended to promote the ends of justice, and is equivalent to an express enactment by Congress that the Circuit Courts shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act."

The facts in the case of South Dakota v. North Carolina, 192 U. S. 287, 24 Sup. Ct. 291, 48 L. Ed. 437, are such as to entirely distinguish it from the present case. These facts, briefly, are that certain persons were owners of the bonds of the state of North Carolina; that that state had for a long time defaulted. The holders of these bonds decided to donate a portion thereof to the state of South Dakota. The whole transaction, together with the purpose and motive thereof, are clearly set out in the letter of gift, addressed to the Treasurer of the state of South Dakota. It is as follows:

"Hon. Charles H. Burke—Dear Sir: The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second-mortgage bonds issued by the state of North Carolina, to donate ten of these bonds to the state of South Dakota. The holders of these bonds have waited for some thirty years in the hope that the state of North Carolina would realize the justice of their claims for the payment of these bonds. The bonds are all now about due, besides, of course, the coupons, which amount to some one hundred and seventy per cent. of the face of the bond. The holders of these bonds have been advised that they cannot maintain a suit against the state of North Carolina on these bonds, but that such a suit can be maintained by a foreign state or by one of the United States. The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate. These bonds can be used to great advantage by states or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor. If your state should succeed in collecting these bonds, it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating state, rather than accept the small pittance offered in settlement. The donors of these ten bonds would be pleased if the Legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.

"Very respectfully, Simon Schafer."

It also appears in the record of this case that the treasurer of the state of South Dakota was specially authorized, by an act of the Legislature, to receive donations or gifts of money, bonds or choses in action, which, or the proceeds of which, when collected, were to be "appropriated to the State University or to the public schools, or to state charities, as may hereafter be directed by law." And the Attorney General is specially directed to bring suit in the name of the state, in any court of competent jurisdiction, state or federal, to collect or reduce in possession any such bonds or choses in action. The existence of this state law in South Dakota doubtless suggested the gift of these bonds to the state. It is to be observed that, not only was the gift out and out, but the consideration therefor was a "good one," in the sense that it was for a charitable use. No suit could be brought by any private holders, and the purpose is therefore avowed of turning over all these bonds for the charitable purposes indicated in the South Dakota law, because the donors preferred they should be so devoted, rather than accept the trivial sum offered in compromise by the state of North Carolina. If the state succeeded in its litigation, it alone was benefited, the donors being, from their situation, excluded from all participation therein. The state was to use its own discretion as to the collection by suit, and was to bear the entire cost of all litigation resorted to. It was as if the owners of these bonds had said: "Take these bonds; we can never collect them, and if you can make anything out of them, you may have it for the charitable purposes designated by the laws of your state." It is hardly worth while to pursue further the manifest difference between the facts of this case and those of the case with which we are here concerned. In any suit to be brought by the state of South Dakota against the state of North Carolina, the controversy between the parties to said suit would be real and substantial, and the parties thereto would not be improperly or collusively made, within the meaning of the act of 1875.

In Little v. Giles, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, the facts are somewhat complicated, but it is sufficient for our purpose to state that certain conveyances of land were made to Giles, bona fide and absolute on their face; that there was evidence to show that the purpose for which the conveyance was made was to enable Giles to invoke the jurisdiction of the federal court, on the ground of diverse citizenship. A bill in equity was filed in the state court against him, as well as others, to set aside conveyances prior to those to Giles himself. Giles procured a removal to the Circuit Court of the United States, on the ground of his diverse citizenship, and a motion to remand, made by the complainants on the ground that Giles was not a real party in interest, and that the transfer to him was collusive, was refused by the Circuit Court. In reversing this action of the Circuit Court, on appeal, Mr. Justice Bradley, delivering the opinion of the court, says:

"But we are also satisfied that the other ground is well taken—that the deed to Giles was collusively made for the mere purpose of giving jurisdiction to the courts of the United States; and that for this reason the case should have been remanded to the state court. We have examined the evidence on this subject with some care, and have come to that conclusion. Whether, under the former practice of the court, the deed to Giles, being binding between him and his grantors, Wheeler and Burr, would have been deemed sufficient to give jurisdiction to the Circuit Court, although made for the purpose of such jurisdiction, it is not necessary to inquire. We are satisfied that, by the act of 1875, Congress intended to introduce a rule that shall put a stop to all collusive shifts and contrivances for giving such jurisdiction. The language of the fifth section of that act is as follows:"

After quoting the section, Mr. Justice Bradley continues:

"Here the words 'really' and 'substantially,' and the expression 'improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable,' are very suggestive, and show that, by giving the Circuit Courts authority to dismiss or remand the cause at once, if these things are made to appear, it was the intent of Congress to prevent and put an end to all collusive arrangements made to give jurisdiction, where the parties really interested are citizens of the same state. Of course, where the interest of the nominal party is real, the fact that others are interested who are not necessary parties, and are not made parties, will not affect the jurisdiction of the Circuit Court; but when it is simulated and collusive, and created for the very purpose of giving jurisdiction, the courts should not hesitate to apply the wholesome provisions of the law."

The facts of the case before us, showing collusion for the purpose of obtaining jurisdiction, are much stronger than any of those cited or which we have examined, where jurisdiction was denied. The complainant, a young man 22 years of age and a stenographer in the office of certain attorneys in the city of Camden, N. J., just across the river from Philadelphia, is called upon to file a bill in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania, against a street railway corporation of that state, and operated entirely within its territory, for the purpose of having a receiver thereof appointed. He testified that until the day on which the bill was filed, he knew nothing of the matter in controversy, but signed the bill merely at the request of counsel for the defendant corporation; that one of the bonds which it is asserted he owns, he re-

ceived after signing the affidavit to the bill, and the other he testifies he never saw, but that it was retained for him by one of the counsel for the railway company. The value of these bonds does not appear from anything contained in the record, but presumably neither the bonds nor stock of an insolvent corporation could have been anything near their par value. He testifies that he paid nothing for the transfer, the only consideration being that he should sign the bill as complainant; that it was understood that he was to be at no expense and be responsible for no costs. It is perfectly apparent that his interest in the suit was infinitesimal, in comparison with that of the directors of the corporation and other creditors, who held securities amounting to many hundreds of thousands of dollars, and at whose instance he became a party to the suit. After the signing of the bill, complainant, with his single bond, worth a few hundred dollars at the most, and the other in the possession of one of the counsel for the defendant corporation, to be held, as he says, for him, and his worthless certificate of stock, returns to the city of Camden without further concern or interest in the litigation, which is left entirely to the management of those who have the substantial interest in the controversy, and to the attorneys of the defendant corporation. If the contention of counsel for appellees is correct, that wherever, in a case like this, the transfer of property, for the avowed purpose of creating jurisdiction, is absolute on its face, there is a hard and fast rule that the jurisdiction thus obtained is valid and indefeasible, the purpose of the act of 1875 is, in large measure, if not altogether, defeated, and the jurisdiction of controversies may be forced away from the state courts, contrary to the manifest intention of the federal Constitution, and the laws made pursuant thereto, by simply placing, by an apparently out and out transfer, a portion of the property about which the proposed litigation is concerned, so small in value as to be negligible, in the hands of the citizen of another state. That this cannot be so, we think is apparent from a mere reading of the act of 1875, as well as of the decisions of the Supreme Court prior to its passage.

Not only must it appear that the controversy between the parties to the suit is real and substantial, but that the parties have not been collusively made or joined for the purpose of creating a case cognizable under the judiciary laws of the United States. If the action of the parties in this case be not declared collusive, within the meaning of the act of 1875, its provisions in that regard "would," to use the language of Mr. Justice Harlan in the Lehigh Mining Case, supra, "become of no practical value, and the dockets of the Circuit Courts of the United States would be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

Appellees further contend that, however this may be, jurisdiction exists in this case by reason of the interventions, respectively, of Johnson and Beggs, as creditors and bondholders, both being bona fide residents of other states than the state of Pennsylvania, and that their diverse citizenship with the defendant is sufficient to sustain jurisdiction, even though, for the reasons stated, there was no valid

jurisdiction at the time of the filing of the bill. This proposition is manifestly unsound. Unless a valid jurisdiction has been asserted in the original suit, no intervention therein can be entertained. The right to intervene must be predicated primarily on the existence of a suit of which the court has jurisdiction. Where there is jurisdiction of a suit on the ground of diverse citizenship, intervention, if otherwise proper, may be allowed, even though the interveners be citizens of the same state as the defendant. In such cases, the jurisdiction is tested alone by the diverse citizenship existing at the time the bill was filed, "and it is to that point of time that the inquiry as to jurisdiction must necessarily be referred." Rouse v. Letcher, 156 U. S. 47, 15 Sup. Ct. 266, 39 L. Ed. 341.

The case, therefore, is remanded to the court below, with instructions to enter a decree dismissing the bill.

ILLINOIS CENT. R. CO. v. WARREN.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,533.

1. CARRIERS—PASSENGERS—ANNOUNCEMENT OF STATION—INVITATION TO ALIGHT.
The announcement of the next station by a porter on a railway passenger train, though made on the near approach to the station, is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1224.]

2. SAME—POSITION IN TRAIN—CONTRIBUTORY NEGLIGENCE.
Plaintiff and his brother-in-law were riding on a railroad train, guarding a negro. On the announcement of the station where they intended to alight, plaintiff, for the purpose of resuming custody of the negro and of getting off quickly, left his seat in the smoking compartment while the train was in motion, and went forward through the colored compartment to the front door of the car, which he opened, and stood there waiting for the train to slow down, with his right foot on the door sill, his left foot on the platform, and his right hand on the door facing, from which position he was knocked or pushed by the train porter, so that he fell from the car while the train was in rapid motion, and was injured. *Held*, that plaintiff was guilty of contributory negligence in taking the position he did, and was not entitled to recover, in the absence of proof that the action of the train porter was willful.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375, 1376.]

3. SAME—WILLFULNESS.
In an action for injuries to a passenger by being pushed from a car platform by the car porter while the train was in rapid motion, evidence *held* insufficient to warrant a finding that the porter's act was willful or other than accidental or negligent.

4. EXCEPTIONS, BILL OF—CONSTRUCTION.
Where, in an action for injuries to a passenger, defendant claimed that certain acts occurring at the trial with reference to the extent of plaintiff's injuries unduly influenced the sympathies of the jury, and applied for a new trial on that ground, but the trial judge in denying a new trial did not specifically find that undue influence and prejudice had in fact occurred, the bill of exceptions on a writ of error should be construed to

mean that, while the facts were as stated, the jury were not unduly influenced thereby.

Shelby, C. J., dissenting.

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

This is a suit brought originally by James Warren against the Illinois Central Railroad Company to recover damages for personal injuries received under the following circumstances, as detailed by himself on the witness stand:

"Q. Is this James Warren?
"A. Yes, sir.
"Q. Now, you speak to the jury over here, these gentlemen sitting in that box. Where do you live, Mr. Warren?
"A. I live in Pontoc county, close to Thaxton, a mile the other side of Thaxton; what they call 'Butter Milk Springs.'
"Q. Are you the plaintiff in this case against the railroad company?
"A. Yes, sir.
"Q. Just tell these gentlemen here how you came to bring this suit, and what caused this. Did you have anybody in your employ? If so, who?
"A, Yes, sir; I had a nigger, Andy McGlon.
"Q. Where were you living when you had him in your employ?
"A. A mile and a half the other side of Thaxton; the other side of Cain Creek.
"Q. How old are you, Mr. Warren?
"A. Thirty-two years old, going on 33.
"Q. When were you hurt by the railroad company?
"A. Last February, a year ago.
"Q. What was your occupation at the time you were hurt?
"A. Farming.
"Q. Have you any family?
"A. Yes, sir.
"Q. What?
"A. My wife and two children.
"Q. The little fellows here?
"A. Yes, sir.
"Q. Where did you go that day?
"A. Taylor's depot.
"Q. What did you go for?
"A. I went after Andy McGlon, that nigger.
"Q. Now, you went there after Andy. Do you know what day of the week that was?
"A. Tuesday.
"Q. Well when you got down there, Mr. Warren, what did you do at Taylor? Did you get him or not?
"A. Yes, sir.
"Q. Anybody with you?
"A. Yes, sir.
"Q. Who?
"A. J. H. Kelly.
"Q. Is he here now?
"A. Yes, sir.
"Q. Well, did he come or not with you from Taylor's?
"A. Yes, sir.
"Q. Now, when you were coming north on the train from there—Taylor's is south of here, is it not?
"A. Yes, sir.
"Q. You came from Taylor's here. Who came with you on that trip?
"A. Me and Andy McGlon and J. H. Kelly.

"Q. What occurred, if anything, when you were nearing the station of Oxford? Tell the jury now about that in your own way.

"A. Well, the porter came running through the train hollowing 'Oxford! Oxford!'

"Q. What porter?

"A. The nigger porter.

"Q. Porter of what? Train porter, or what?

"A. Yes, sir; the train porter.

"Q. Go on, now. He came through hollowing 'Oxford! Oxford!'

"A. Yes, sir; and I set there a while and got up and walked in through that box into the other one—

"Q. You say box—what do you mean by 'box'?

"A. Well, car; box car.

"Q. Were you in the smoking compartment, or negro coach, or ladies' coach, or where?

"A. I was in one part of the smoker. There is a partition in the car there.

"Q. You were in which one?

"A. I was in the back part of it, and I got up and went in where the nigger was, in the coach where the niggers were; and I told him to get up, that we were at Oxford now, and I was fixing to get off, and I walked to the door, and the nigger gets up and follows me.

"Q. Where was Kelly?

"A. Just behind the nigger.

"Q. How close was he there?

"A. He was right there behind the nigger, and the nigger was right at me.

"Q. Did you see them?

"A. Yes, sir.

"Q. Now, when you got to that door, was that the front end or the back end of that car?

"A. The front end.

"Q. Of the car?

"A. Yes, sir.

"Q. Had you passed the overhead bridge here south of the depot at Oxford when you got there to the front door?

"A. Yes, sir; it had passed there.

"Q. Passed the bridge?

"A. Yes, sir; and I opened the train door with this hand.

"Q. Which hand is that?

"A. The left hand; and I caught the facing of the door with this hand.

"Q. That is your right hand?

"A. My right hand; and I stepped with my left foot out in front of the door with my right foot on the door facing, standing, there waiting for it to stop for me to step off, and the nigger porter run against me and knocked me off.

"Q. Did he have anything in his hand?

"A. He had a lantern; a light.

"Q. Did you see him waving that, or anything of the sort?

"A. Yes, sir; he was waving a light and hollowing 'Oxford!'

"Q. You say he knocked you off?

"A. Yes, sir.

"Q. Did you strike anything when you went off?

"A. Yes, sir; hit my head on the switch.

"Q. Struck your head against the switch?

"A. The switchboard, they said that's where I hit. I don't recollect nothing about it after I got knocked off.

"Q. You say the porter with that lantern in his hand ran against you and pushed you off?

"A. Yes, sir; he run against me and knocked me off.

"Q. What were you doing at the time?

"A. I was just standing still, perfectly still, with my hand on the facing of the door.

"Q. You say he called the station out how many times?
"A. He called it out two or three times. He called it out as he went through, and he called it out as he came back through.
"Q. And that's the time you were taking this Andy McGlon out at the front end?
"A. Yes, sir.
"Q. And he run against you and knocked you off?
"A. Yes, sir; he run against me and knocked me off."

On cross-examination he testified:

"Q. Now, Mr. Warren, who went with you, did you say, to Taylor's?
"A. Mr. J. H. Kelly.
"Q. What did you go there for?
"A. Andy McGlon.
"Q. What had Andy McGlon done?
"A. I had him hired, and Andy went off and never come back, and I went after him.
"Q. Well, you got him, did you?
"A. Yes, sir.
"Q. And you three came back on the train?
"A. Yes, sir.
"Q. When you got on at Taylor's depot, you and Mr. Kelly both got on the train with Andy in the colored coach?
"A. No, sir; we didn't.
"Q. Are you sure about that?
"A. Yes, sir; I am sure about it. I went in the colored coach with him, but I went out.
"Q. How came you to go out?
"A. The conductor asked me did I have him under arrest, and I told him 'No'; that I did not.
"Q. What then?
"A. I had him because he was owing me and had run off from me.
"Q. Why did you get in the colored coach with him?
"A. Well, I wanted to keep him with me. I didn't want him to have any chance to get away from me.
"Q. You were, then, guarding him, were you?
"A. Yes, sir.
"Q. You were watching him pretty close, too, weren't you?
"A. Yes, sir.
"Q. When you got to Oxford and the station was called, you were then riding in the rear part of the coach, the smoking compartment?
"A. I was back in the white coach.
"Q. The colored coach where you went first and where Andy stayed was divided into two compartments, was it not?
"A. Yes, sir.
"Q. The front part of the coach was for colored passengers?
"A. Yes, sir; and one part of it was used for the whites.
"Q. For a smoking car, was it?
"A. It had white people in there. I don't know what it was used for.
"Q. Now, when the conductor asked you if Andy was a prisoner and you told him 'No', he told you to get back in the other coach, didn't he; that you couldn't ride in the colored coach?
"A. Yes, sir.
"Q. And when the station was called out you got up and went out of the white people's coach through the colored coach to the front door?
"A. Yes, sir.
"Q. Why did you do that?
"A. I done that because I wanted to get off and get away as quick as I could.
"Q. Wasn't it easier to get off at the end of the coach in the part that you were in, and isn't that the place that people usually get off out of that part of the coach?
"A. [No answer.]

"Q. Isn't it true that people in that part of the car riding there usually get off at the rear end of that coach, at the end between that and the ladies' coach?

"A. I don't know much about that part of it. I generally get off at the front end of the car.

"Q. Even if you have to go no further to do it, and even if you have to go through the colored coach to do it, isn't that true?

"A. No, sir; I wouldn't have went through the colored coach if I hadn't had him there.

"Q. What 'him' did you have there?

"A. I went through there after my nigger.

"Q. And you went to the front door to be there when he got off, isn't that true?

"A. I went to the front door to be with him when he got off.

"Q. To keep him from escaping?

"A. Well, I don't know as he would have run off, but I didn't want to give him no chance to get away from me. It was dark.

"Q. And that is why you went that way?

"A. Yes, sir.

"Q. Now, this colored porter, you say he came first from the colored coach into the white coach calling out the station?

"A. Yes sir.

"Q. Said, 'Oxford! Oxford! all out for Oxford!'?

"A. 'All out for Oxford!'

"Q. And you got up and preceded him back to the front end, didn't you; went ahead of him?

"A. No, sir.

"Q. Well, who got there first to the front end of the car?

"A. I got there first.

"Q. Then the colored porter came into the front end of the car after you did?

"A. Yes, sir; he came running right in behind me.

"Q. He was running, was he?

"A. He wasn't you [to] say running. He was trotting.

"Q. With a lantern in his hand.

"A. Yes, sir; with a light in his hand.

"Q. What did he do when he got to the door?

"A. I was still standing in the door, right foot on the facing of the door, and left foot on the platform, and right hand on the facing of the door, waiting for the train to stop at the station and to step off, and he run against me and knocked me off.

"Q. Well, what was he doing? You said something while ago about his signaling?

"A. He was waving his little light, or little lantern."

Warren's brother-in-law, J. H. Kelly, corroborated Warren's evidence, and further testifies that after Warren was knocked off the train he, Kelly, ran out of the door and ran to the bottom of the steps and stood there until the train slowed up and he got off.

The railroad company pleaded the general issue and contributory negligence. On the trial in the court below, after all the evidence was offered, counsel for railroad company moved the court for a peremptory charge to the jury to find for the defendant, which charge was refused and exception duly taken. The jury returned a verdict on which there was judgment for the plaintiff in the sum of $10,000. A motion for a new trial on many grounds was made and overruled.

The bill of exceptions duly signed and allowed concludes as follows:

"During the entire progress of this trial the plaintiff, James Warren, was brought into the courtroom upon a cot, and with the appearance of a hopeless and helpless cripple for life, with a pale, pinched face and emaciated form,

gave constant evidences of intense and extreme suffering, with frequent groans and pitiable exhibitions of his helpless condition, constantly attended by his wife and two small children, who, in turn, ministered to him, which picture was paraded before the jury with every detail faithfully carried out to play upon and unduly excite the sympathies of the jury. When counsel asked his doctor to examine him, Warren exclaimed with an agonizing appeal not to touch him. Later his attorney proposed to exhibit his physical condition to the jury, but Warren protested so appealingly that the jury with one accord asked that he be not molested. These heart-rendering scenes were so frequent and constant that they, in fact, constituted the opening and closing argument in the case. Its far-reaching appeal and powerful influence upon the jury is forcibly mirrored by their verdict in the case."

The principal errors assigned in this court are:

"Third. The court erred in refusing to grant the peremptory charge asked by the defendant below, wherein it was sought to have the court instruct the jury to find for the defendant below; which was then and there excepted to, as shown by the bill of exceptions on file."

"Fifth. The court erred in refusing to set aside the verdict rendered by the jury in this case (1) because the verdict was excessive, and clearly the result of prejudice and passion excited by the claim that the negro porter had knocked a white man (plaintiff) off the car; (2) and as a result of sympathy for the plaintiff, who was paralyzed, and was lying upon a cot, and was constantly giving evidence of extreme pain and suffering, and was attended by his wife and several small children."

Edward Mayes, for plaintiff in error.

W. V. Sullivan, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). On a railway passenger train the announcement of the next station, although made on near approach to said station, is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops. This proposition is supported by Adams' Adm'r v. Louisville, etc., R. Co., 82 Ky. 607; Railroad Co. v. Asbell, 23 Pa. 147, 62 Am. Dec. 323; Jeffersonville, etc., R. v. Hendricks' Adm'r, 26 Ind. 228; England v. Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1; Lewis v. London, etc., R. Co., L. R. 9 Q. B. 66; Bridges v. North London, etc., R. Co., L. R. 6 Q. B. 377.

According to Warren's evidence, corroborated by his main witness, his brother-in-law, Kelly, on the announcement of the train porter that the next station was Oxford, Warren, for the purpose of resuming custody of the negro McGlon and of getting off and away quickly, left his seat in the smoking compartment while the train was in motion, and went forward through the colored compartment to the front door of the car, which he opened, and stood there waiting evidently for the train to slow down, with his right foot on the door sill, his left foot on the platform, and his right hand on the door facing, from which position he was knocked or pushed, so that he fell off the car while the train was in rapid motion, and thereby was injured In thus going to the front of the car and taking the position described while the train was in rapid motion Warren was guilty of negligence, which unquestionably contributed to his subsequent injury. See Alabama R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403; Blodgett v. Bartlett,

50 Ga. 353; Beemis v. Railroad Co., 47 La. Ann. 1671, 18 South. 711; Quin v. Railroad Co., 51 Ill. 495; Rockford Co. v. Coultas, 67 Ill. 398; Railroad Co. v. Green, 81 Ill. 19, 25 Am. Rep. 255; Malcomb v. Railroad Co., 106 N. C. 63; 11 S. E. 187; President, etc., v. Cason, 72 Md. 377, 20 Atl. 113; Goodwin v. Railroad Co., 84 Me. 203, 24 Atl. 816; Secor v. Toledo, Peoria & W. R. Co. (C. C.) 10 Fed. 15. According to Warren's evidence, he was pushed or knocked off by the train porter. Neither he nor any of his witnesses testify as to whether the action of the train porter was accidental, negligent, or intended and willful. If the action of the train porter was accidental or even negligent, but not willful, Warren cannot recover from the railroad company, because in taking his position in the door and on the platform of the car, under the circumstances conceded in his evidence, he was guilty of negligence which contributed to his own injury. If the action of the train porter was willfully intended, then Warren can recover, because it is the duty of a common carrier to warn and protect and not to injure a passenger, who may have even negligently exposed himself to injury. A careful analysis of the evidence of Warren and his witnesses, giving full effect thereto and reinforcing the same with the deductions that reasonable men may draw therefrom, brings us to the conclusion that there was no evidence nor deduction from the same sufficient to warrant a finding that the train porter was guilty of willfully pushing or knocking Warren as he stood in the door and on the platform of the moving car. On the whole evidence, direct and circumstantial, the jury would have been fully warranted in finding that the train porter had nothing whatever to do with pushing or knocking Warren from the car.

We conclude that on the evidence of the plaintiff and his witnesses the peremptory instruction to find for the defendant on the issue of contributory negligence should have been given. If the concluding statement in the bill of exceptions means that the jury was unduly influenced in their verdict by their feelings and sympathies for the plaintiff, Warren, and his miserable condition, the trial judge should have granted a new trial on that ground. As, however, the statement of the judge does not specifically find the undue influence and prejudice as a fact, and as he refused a motion for a new trial based on this and other grounds, we must construe the bill of exceptions to mean that, while the facts were as stated, the jury was not unduly influenced thereby.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to set aside the verdict and grant a new trial.

SHELBY, Circuit Judge (dissenting). I respectfully dissent from the opinion just read.

The record shows that on February 3, 1904, James Warren was a passenger on one of the passenger trains of the plaintiff in error. As the train was approaching the station at Oxford, the porter announced the fact by calling, "Oxford! Oxford!" Warren arose from his seat, went to the front door of the coach, opened it, and while standing with one foot on the platform just outside the door, and one foot in the car or on the door sill, holding the door facing with his right hand,

one of the plaintiff in error's servants, the porter of the train, with a lantern in his hand, ran against him and knocked him off the platform, causing him to fall against a switch. By the fall his thigh bone was broken, and the doctor called to see him found the end of the bone "sticking out of his back." He was otherwise so mangled that he died, his death occurring subsequent to the trial and verdict below, and the writ of error is prosecuted against his administratrix.

Warren's account of the accident has been given in the statement of the case by the court. His version is corroborated by J. H. Kelly, who, after describing Warren's position in the door "with his hand placed on the door facing," said that the porter "came rushing through with his lantern, ran against Warren, and knocked him out of the door and clean off to the ground." The plaintiff in error, being a common carrier, was bound, so far as practicable, to protect its passengers, while it was carrying them, from violence committed even by strangers; and there surely can be no doubt that it undertakes absolutely to protect them against the violence and misconduct of its own servants engaged at the time in executing the contract. Stewart v. Brooklyn & Crosstown R. R. Co., 90 N. Y. 588, 591, 43 Am. Rep. 185, and cases there cited; Dwinelle v. N. Y. Central & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611.

It is said in the opinion of the court that "on a railway passenger train the announcement of the next station is not an invitation to a passenger to leave his seat and attempt to alight before the train actually stops." I cannot see how the cases cited to sustain this statement are applicable, because the evidence on which Warren submitted his case to the jury was to the effect that the railway porter had knocked him off the train when he was standing holding to the door facing. Neither of the two witnesses on which he relied to show the negligence or violence of the porter testified that he left his seat and made "an attempt to alight before the train actually stops." It is stated in the opinion of the majority that, "on the whole evidence, direct and circumstantial, the jury would have been fully warranted in finding that the train porter had nothing whatever to do with pushing or knocking Warren from the car." Conceding that to be true—while I take a different view of the evidence—the court has not the right, I think, to take a case from the jury because there is evidence which would warrant a verdict for the defendant. The question of the credibility of Warren and Kelly was for the jury.

The court below submitted the question of contributory negligence to the jury. The opinion just read is to the effect that Warren, on the evidence quoted, was guilty of contributory negligence as matter of law, for it is decided that the trial court should have instructed a verdict for the defendant. In Washington & Georgetown R. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 580, 13 Sup. Ct. 557, 37 L. Ed. 284, the court, commenting on a case where the person injured was standing on the step of the car, observed:

"There was a conflict of evidence as to the condition of the platform, the position of the plaintiff, and the circumstances surrounding the accident. It is conceded that to be upon the platform, or even upon the step, might not

be negligence in all cases, *and certainly not negligence in law*, but it is insisted that the plaintiff was voluntarily riding upon the step of the car when moving, without any means of support, and that this, in the absence of justification or excuse, would necessarily be negligence." (The italics are mine.)

I cannot concur in the view that it is negligence per se for a passenger to arise from his seat when the porter calls the station where he is to alight, and to walk to the door of the car and take the position described in the evidence. Under the circumstances, it could not be deemed negligence per se "if he stood on the steps of the car." Brashear v. Houston Central A. & N. R. Co., 47 La. Ann. 735, 17 South. 260, 28 L. R. A. 811, 49 Am. St. Rep. 382; Watkins v. Bham Ry. & E. Co., 120 Ala. 147, 152, 24 South. 392, 43 L. R. A. 297; Pa. R. Co. v. Reed, 60 Fed. 694, 9 C. C. A. 219; Doss v. M. K. & T. R. R. Co., 59 Mo. 27, 38, 21 Am. Rep. 371. If it is "certainly not negligence in law" to stand on the steps, can it be negligence in law to stand in the door, holding the door facing with the right hand, when the station which is the end of the passenger's journey has been called, and the car is about to stop?

If it were true that Warren was guilty of negligence in taking the position he assumed, it would not be a defense to this action if the conduct of the company's employé, while engaged in the master's service, was intentional and willful. Contributory negligence is not a defense against a willful injury. Beach on Cont. Negl. (3d Ed.) §§ 64, 65; 7 Am. & Eng. Ency. of Law, p. 443. From the violence of the assault which the porter made on Warren, as well as from other facts and circumstances shown in the evidence, the jury might reasonably have concluded that the assault on him was intentional and willful, and in that event the defense of contributory negligence could not have prevailed. In either aspect of the case, the learned trial judge, in my opinion, ruled correctly in refusing to direct a verdict for the defendant.

If the evidence of Warren and Kelly was true, the jury was reasonably justified in finding a verdict for the plaintiff. Taking the case from the jury, therefore, cannot be reconciled with the principles announced in Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, nor with the decisions of this court. Nelson v. N. O. & N. E. R. Co., 100 Fed. 731, 40 C. C. A. 673; Texas & Pacific Ry. Co. v. Carlin, 111 Fed. 777, 49 C. C. A. 605; Southern Pacific Co. v. Covey, 109 Fed. 416, 48 C. C. A. 460; Mexican Central Ry. Co. v. Townsend, 114 Fed. 737, 52 C. C. A. 369. In Jones v. E. T., V. & G. R. R. Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, Mr. Justice Miller made an observation, evoked, I think, by the fact that trial courts have been too quick to take cases involving personal injuries from the juries:

"We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

A similar admonition is found in a single sentence of a recent act of Congress—"All questions of negligence and contributory negligence shall be for the jury." Act June 11, 1906, c. 3073, § 2, 34 Stat.

232. The act has no application here, except to show, as does Mr. Justice Miller's observation, that no evolution of the law is in progress that tends to deprive an injured plaintiff of the right to submit his case to a jury.

CARNEGIE STEEL CO. v. BYERS.

(Circuit Court of Appeals, Sixth Circuit. January 8,. 1907.)

No. 1,573.

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE—BURDEN OF PROOF.
   In an action for injuries to a servant by alleged defective machinery, the servant must not only show that the machinery was defective and that the injury was due to the defect, but also that the defect was known to the master for a sufficient time to have enabled him to repair, or should have been known, if there had been due inspection according to the ordinary course of prudent employers.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 877, 888.]

2. SAME—RES IPSA LOQUITOR.
   In an action for injuries to a servant by the alleged sudden raising of an elevator, caused by an alleged defect in the hydraulic cylinder, the mere fact of the accident was insufficient to establish negligence on the part of the master.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 881.]

3. SAME—EVIDENCE.
   Evidence *held* insufficient to warrant a finding that the sudden raising of an elevator, by which the servant was injured, was caused by a defect in the appliances by which it was operated.

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

C. A. Manchester, for plaintiff in error.
Charles Koonce, Jr., for defendant in error.

Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. An action in tort for personal injury sustained by the plaintiff while in the service of the Carnegie Steel Company. There was a jury, and verdict for the plaintiff and judgment thereon.

The question upon which the case must mainly turn is whether there was any evidence from which the jury might reasonably find the plaintiff in error negligent. This question was saved by a motion, at the close of all the evidence, to instruct a verdict for the defendant below, and an exception reserved. The facts necessary to be stated are these: The defendant below is a steel manufacturing company. The plaintiff was an employé engaged about the mixer house in the operation of an electric locomotive. Cars, consisting, practically, of great metal ladles, set on wheels, were used for carrying molten iron from the furnaces to the mixer house for further steps in its conversion into steel. These ladle cars were pulled from

the furnaces, over railway tracks, to the mixer house by a steam engine. There it was the business of plaintiff to take one such ladle car at a time and pull it on to the platform of an elevator, sometimes called a "jack," which platform was crossed by tracks connecting with the permanent way from the furnaces. When such a ladle car filled with molten metal was properly set upon the platform of the "jack," the elevator, upon a signal, would raise it up to an upper floor, where its contents would be emptied and the car lowered in same manner and returned to the furnaces. This elevator was operated by hydraulic pressure; the admission of water being regulated by valves controlled by a lever upon the top floor, under the management of a fellow servant, whose business it was to raise or lower the elevator as needed. These valves were of a standard kind, known as the "Aiken Valve." When in normal condition, the full pressure of water would raise the loaded platform slowly and with a steady motion. The plaintiff's petition states that on October 27th, about 8 p. m., it became necessary for him, in the performance of his duty, to move his electrical locomotive across this elevator platform, it being at rest, and that while doing so the platform, suddenly and with great force, and a jerky motion, rapidly arose from its position for some eight feet, thereby causing the front part of said locomotive to be raised with said jack, while the rear part was still upon the main track, whereby the said car was so tilted as to throw him with great force from his position in said locomotive, causing a severe injury. This result must have been a consequence of the operation of the lever controlling the power which operates the elevator, or of some defect in the valves by which water was admitted without the intentional movement of the lever opening and closing the valves. Confessedly, if the movement was due to the negligence of the employé in control of the lever, there would be no responsibility to the plaintiff, for it would be an injury due to the fault of a fellow servant. There was no evidence directly tending to show that the servant so in control of the lever had made any untimely movement. Indeed, he testified that at the time of the accident he was upon an errand in another part of the room, having left his lever at rest upon a center. Neither is there the slightest evidence of any defect in the lever, and no evidence tending to show that it might move automatically.

The specific negligence averred, and to which all of the evidence was directed, was that there was a defective valve, whereby water was permitted to pass through it, under pressure, in sufficient quantity to force the elevator up, and that the Carnegie Company had knowledge of such defective valve, or should have had knowledge if they had used due care in inspecting this elevator and its valves. Concerning the possibility that the lever above had been inadvertently or negligently handled, the circuit judge said to the jury that there was "no direct evidence" of such manipulation, though he very properly added that "the inference could be drawn from all the circumstances that it was in that way that the jack had been put in motion." In respect to the alleged defective valve, the court said:

"If from all the evidence in the case you are satisfied, by a preponderance of the evidence, that the cause of the elevation of the jack, resulting in the in-

jury, was some defective condition of the valve, whereby water was permitted to pass through it under pressure, and that it was not caused by any movement originating in the lever on the third floor, then I say to you that the fact that the water did so enter the valves and in consequence of this the jack rose * * * will permit an inference of negligence on the part of the defendant; that is to say, the circumstances of the jack rising under these conditions would itself speak, as the law puts it, and amount to primary proof of negligence on the part of the defendant."

Recurring to this, the learned judge later said:

"You are not permitted to guess or speculate as to the cause of the accident. The burden, as I said, is upon the plaintiff to show, by a preponderance of the evidence, what its cause was; but, if the plaintiff has shown such a condition of things as I have just referred to, then that shifts the burden to the defendant of showing, by a preponderance of the proof, that it was in the exercise of ordinary care."

We shall not stop to consider the objections to this charge based upon the fact that the plaintiff was an employé, and that, as between servant and master, there is no presumption of negligence from the mere proof of the happening of this accident. In such a suit it is not enough to show that there was a defective tool or machine and that the injury was due to such defect. The servant must go further, and show that the defect was known to the master for a sufficient time to have enabled him to repair, or should have been known, if there had been due inspection according to the ordinary course of prudent employers. Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Illinois Cent. Railroad Co. v. Coughlin, 132 Fed. 801, 802, 65 C. C. A. 101. In Cincinnati, etc., Ry. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, we gave elaborate consideration to the circumstances under which the fact of negligence may be inferred from the nature of an accident, and noted the distinctions to be observed in applying the rule of res ipsa loquitur in suits between employers and servants and those in which liability to passengers or strangers is involved. It was not enough to show that this accident had occurred through an erratic and unexplainable rising of the elevator. That might have made a prima facie case of negligence in favor of a passenger or stranger; but the plaintiff was an employé, and the burden was upon him to show that this sudden erratic upward movement was due to some defect in the mechanism which was known, or should have been known, to the Carnegie Company, and which they had neglected to repair. The distinction referred to is pointed out in the cases cited above. The pinch of the case was, not only whether the plaintiff had shown a defective valve which might have produced such an unexpected and rapid movement as that described by the plaintiff, but also whether the defect was known or might have been known if ordinary care had been exercised.

The court denied a request to instruct a verdict for the defendant evidently upon the theory that there was evidence from which the jury might infer that the trouble was due to a defective valve, and that, if they found that to be so, the burden would shift to the defendant to show that the defect was not known or discernible by

ordinary care. We find ourselves unable to discover evidence upon which a jury might reasonably ascribe plaintiff's injury to a defective valve. For this reason, it was error to refuse the instruction to find for the plaintiff in error. The plaintiff's pleading averred that the negligence of the defendant consisted in having "negligently omitted to repair the spools of said jack and the parts thereto belonging, including the leathers thereof, and permitted same to become so worn and out of repair that they did not operate in the manner for which they were intended and as a result permitted said jack, without being controlled by said lever, to rise. * * *" Counsel for defendant in error now insist that there was evidence that the spools were working loose, and expert evidence that under such conditions water would leak in and when the cylinders filled cause the jack to move up. We have given the facts a careful scrutiny, and are persuaded that if there be any evidence from which the jury might infer this movement of the jack which injured the plaintiff was due to a defective valve, and that the defect was known or might have been known by ordinary care in inspection, that such evidence is not such as in law would justify a finding for the plaintiff.

Plaintiff's injury occurred about 8 or 8:30 o'clock p. m., upon a Sunday night. He introduced as a witness one Seaborn, who, at the time of this accident, was second helper to the millwright foreman, Davis. Seaborn testified that about 6 o'clock p. m. of the day of the accident Davis said to him that the spools in jack No. 2, the one here involved, "had been reported working loose," and that witness and Ward, who was first helper, must go and see what could be done with them. Davis' statement that the spools of No. 2 were reported as working loose cannot establish the fact that they were loose. The evidence was competent only to show notice to Davis, if by other and substantive evidence it should appear that in fact the spools were "working loosely." Seaborn then testified that, in accordance with this order, he and Ward took out the spools after cutting off the pressure, but found "nothing wrong with them." This examination, if the witness is credible, occurred only about two hours before the accident. In passing, we may observe, though any question of credibility would be for the jury, that Davis denied that any such report as to the spools of jack No. 2 had ever been made to him or that he ever so told Seaborn, or that he directed either Seaborn or Ward to examine that valve. Although every one engaged on or about this elevator was examined, no one, including Ward, ever heard of any examination of this valve at 6 o'clock or at any other time during the afternoon of the accident, and all deny that the operation of the elevator could have been stopped for such a purpose without their knowledge. But, if Seaborn is to be credited at all, he not only does not testify that he found the spools working loose, but that he found nothing wrong with them. Thus, unless there is some other testimony as to the fact that the spools were working loosely, plaintiff had no case to go to the jury. The only other scrap of evidence is that of Ward, who Seaborn says made with him the examination before referred to. After denying that Davis ever told him of any reported

looseness of the spools of this valve or that he made any examination at 6 o'clock p. m., he says that the rule of the company was that these valves should be examined every Saturday or Sunday, and that under this general custom he made the usual weekly examination of the valves of No. 2 jack on Sunday morning about 8 o'clock a. m. Touching this, Ward said, after having his attention called to the day of Byer's injury:

"Q. What time did you go to work on that Sabbath?
"A. 6:30.
"Q. In the morning?
"A. In the morning.
"Q. You may state whether you made any inspection of the valve of the No. 2 jack that morning?
"A. Yes, sir; I fitted the spool up, put new leathers on.
"Q. About what time?
"A. Well, it was between 8 and half past 8.
"Q. That was in the morning?
"A. Yes, sir.
"Q. Now, tell the jury what you did in inspecting.
"A. Well, the leathers on these, we call them 'cups' sometimes—these cups get cut more or less, or would get soft, and I put all new cups on those valves and greased them and put them back in.
"Q. Did you remove the spools in making that inspection?
"A. Yes, sir.
"Q. Took off the nuts at the end, did you, of the spool?
"A. Yes, sir.
"Q. And put in new leathers?
"A. New cups; yes, sir.
"Q. Did you put in good leathers in those places?
"A. Yes, sir; we never used anything but good leathers?
"Q. Did you observe the condition of the valve; whether it was worn?
"A. Yes, sir; it was not an old valve. We hadn't used it very long.
"Q. Did you observe the condition of the slippers of the valve?
"A. Yes, sir.
"Q. And what was their condition?
"A. Well, there was a little lost motion on the top walking beam, but none to hurt it."

Ward also testified that after this examination he turned on the pressure and found that there was no leak whatever. The "slippers" referred to are rings of brass, one above and one below the spools, and are intended to save wear of the cast parts with which the ends of the spools otherwise come in contact. Whether the slight "lost motion," referred to by Ward, was the result of wear or some other cause, is not explained. Plaintiff's expert did express an opinion that the slippers might by wear leave a space between the top and bottom of these spools and the slippers, which would cause the spools to work loosely and bring about a leaky condition of the valves which might result in causing the jack to rise. But, if plaintiff's witness, Seaborn, is to be believed about an examination made by him two hours before this accident, there was then no loose working of the spools. If Ward is to be credited, and he is not contradicted, he put in new leathers at 8 o'clock on the morning of the day of the accident, and left the valve in good working condition; the slight lost motion he found in the slippers having no effect in causing the spools to work loose. If the spools of this valve were working loosely from as early as

the morning of this accident, it is not likely that the defect would display itself in a single erratic movement of the jack, or that the jack should resume normal operation immediately after and without any repairs. A loosely working spool resulting in a leak of water into the high pressure cylinder is a condition which is remedied only by replacements or repairs. The plaintiff's expert testified that a leak due to the loose working of the spools is a condition which will inevitably display itself by the automatic movement of the jack within a short time. The force of this evidence was felt, and plaintiff's counsel endeavored to modify it by this question:

"Q. And there can be a leakage which will cause the spools to work loose, can there, without causing the jack to rise immediately?

"A. No. That is, if there is a leakage in the spools for it to get to the cylinder, yes; it would cause the jack to rise, maybe not immediately, but a few seconds before it would take effect.

"Q. I want to know in a case where the spools are working loose in an appliance of this kind, they could not be working loose for a couple of hours without causing any rise in the jack?

"A. No; they could not be working loose without causing a rise."

The expert, Popewich, did, indeed, suggest conditions which might suddenly drop a spool below the intake port; but such conditions were not here shown to be present, and such evidence could only widen the field over which conjecture might range. There was absolutely no shred of evidence of torn or worn leathers, none of a worn cylinder, or the metal sleeves of the spools. The only scintilla of evidence touching any possibly worn part was in respect to the slippers. But they were metal, and, if worn so as to cause a loose up and down motion in the spools, the cause was continuing and not sporadic. Neither would a mere leaky condition due to worn leather or slipper produce so sudden and swift a rise in the jack as that described by plaintiff. The very character of it tends strongly to show that the full force of the pressure must have been suddenly thrown into the cylinder by such an opening of an inlet port as could result only from the operation of the lever controlling the valve. This seems to be established by the evidence of certain experts of an experiment made by producing a leaky valve by scoring a number of places in the leather washers and center spool, and then putting on the full pressure without opening a port. The result was that the jack was raised only one foot in 2 minutes and 40 seconds. Thus it is plain that a mere leaky condition would not occasion so sudden a rise as that claimed.

To repeat by way of summary, we are persuaded that the sudden rising up of this jack was not due to a defective valve: (1) By the absence of any affirmative evidence of such condition; (2) by the fact that the valve worked normally for hours prior to the accident; (3) by the fact that it worked normally immediately after the accident without repair; (4) by the fact that by an examination made either ten or two hours before the accident, or at both times, revealed no defective or leaky condition; (5) by the expert evidence that a leaky condition from loosely working spools would result in a slow rise and not a rapid one as that which occurred.

The indications point very strongly to a premature movement of the lever by the servant who had charge of the movements of this jack, notwithstanding his statement that he was not near the lever. The burden, however, was upon the plaintiff to make substantive proof of some negligence—the omission of some duty which the defendant owed to him. It was incumbent upon him to show either that the jack was an improper appliance, or that the company had been negligent in keeping it in reasonably safe repair. Looney v. Metropolitan Railroad Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; Illinois Cent. R. R. Co. v. Coughlin, 132 Fed. 801, 803, 65 C. C. A. 101; Texas & Pacific Railroad Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. There was no substantial evidence from which the jury might reasonably find that this accident was due to negligence. Its cause is wrapped in doubt and uncertainty. It may have happened from some cause for which the defendant was not liable or from actionable negligence. It was the duty of the plaintiff to make a case from which a jury might reasonably find negligence. This it did not do.

Reverse, and award a new trial.

LOWDON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1906.)

No. 1,588.

1. CRIMINAL LAW—INDICTMENT—PLEA—FILING—TIME.

A plea attacking an indictment alleged that it had been found by a grand jury two of the members of which had been chosen from the bystanders, which had "greatly prejudiced defendant." The plea was not filed until after the indictment had been filed and entered, or until 17 days after defendant had returned to the state. The only excuse given for not interposing it sooner, was that defendant was not present when the grand jury was selected, but was absent, and remained absent from the state until a time later than the return of the indictment. *Held*, that the plea was not filed in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 643.]

2. SAME—TRIAL—ARGUMENT OF COUNSEL.

Where accused offered no evidence to prove his good character, and was therefore entitled to rely on a legal presumption that his character was good, it was prejudicial to accused for the prosecuting attorney, in making a strong appeal to the jury to assume that defendant's character was bad because of his failure to prove the contrary, defendant's objection thereto having been overruled, and the district attorney not having withdrawn the argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1673, 1674.]

3. SAME.

Where, in a prosecution of certain bankers for violating the national bank act, one of defendants' attorneys in argument appealed to the jury saying: "Six of you cannot return a verdict, nor 11, but it takes 12 men to reach a verdict," the intent being to acquaint each juror with his power and responsibility, it was prejudicial error for the district attorney in reply to state that, if a juror decided that defendants were not guilty, when

the juror returned home "his neighbors might conclude that the jingle of the broken bankers' unlawfully and ill gotten gold in his pocket" had influenced his action and decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1676, 1680.]

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

Geo. E. Miller and S. P. Hardwicke (Matlock, Miller & Dycus and Hardwicke & Hardwicke, on the brief), for plaintiffs in error.

William H. Atwell, U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The defendants, James G. Lowdon, president, and Otto W. Steffins, vice president, of the American National Bank of Abilene, Tex., were indicted in the court below for violations of section 5209 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3494]. There were 31 counts in the indictment. The district attorney withdrew or dismissed 2 of the counts. Lowdon was found guilty on 16 counts, and Steffins on 6 counts. Judgment was entered on the verdict, and the defendants were sentenced to be confined in the penitentiary for a period of five years. They brought the case here on writ of error.

The indictment was returned and filed on March 21, 1906. Nineteen days afterwards, when the case was called for trial, the defendant Lowdon filed a plea in abatement. The substance of the plea was that of the regularly summoned grand jurors, only 15 were in attendance, whereupon the court ordered the marshal to summon two more grand jurors in order that the grand jury should be composed of 16 members. It is alleged in the plea that the marshal called two men who were in attendance on the court, and who had been summoned as petit jurors. As a reason for not interposing the plea sooner, it was stated:

"This defendant says that he was not present in said court at the time of the selection, summoning, and impaneling of the grand jury aforesaid, he then being absent from the state of Texas, and remained so absent from the state of Texas until a time later than the return of the said indictment."

The plea contained no averment of specific facts to show that the defendant had been prejudiced or injured by the selection of the two grand jurors in question. The general statement was made that the defendant had been "greatly prejudiced" by the improper and illegal selection, etc., but no fact was alleged showing injury, except that the grand jury so organized found the indictment. The government, by the district attorney, demurred to the plea, because it failed to show that the defendant was injured, and because it failed to show that the requisite number of jurors did not return the bill of indictment. The court sustained the demurrer, and this action of the court is assigned as error.

Section 808, Rev. St. U. S., c. 86, 13 Stat. 500 [U. S. Comp. St. 1901, p. 626], is as follows:

"Section 808. Number of grand jurors; completing jury. Every grand jury empaneled before any district or circuit court shall consist of not less

than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the by-standers, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."

The contention of the defendant is that this statute was violated by the procedure, because the marshal completed the grand jury by summoning two bystanders. It does not appear in what terms the order of the court was made, or that any order was entered on the minutes. We do not think the plea makes a statement that calls for a construction of the statute. An objection of this kind should be made at the earliest day that the defendant has an opportunity to make it. The plea may be true, and yet the defendant may have delayed 17 days in filing it after his return to the state, and after the bill was filed and entered. In Agnew v. United States, 165 U. S. 36, 45, 17 Sup. Ct. 235, 41 L. Ed. 624, a delay of five days was noted in treating the plea as insufficient. In that case, it was also held that the general words, that the action complained of "tended to his (defendant's) prejudice," was not sufficient. Without considering whether the statements of the plea were otherwise sufficient, we hold that the demurrer was properly sustained on the authority of Agnew v. United States, supra.

On the trial of the case below, exceptions were taken by the defendants to certain arguments and statements made to the jury by the district attorney. For convenience of reference, these statements or arguments will be numbered 1 and 2. They are as follows:

"(1) Now, gentlemen, has a single man come upon this stand and told you about the character of Lowdon as to his honesty? That matter has been put in issue by these charges and this testimony here. Has one? No one; not one; not one! I concede you, my friends, that it is hard, but I am going to say it, it is a hard thing to say, but I ought to say it; that is what I am here for. I am here to prosecute this case, as I say, God Almighty being my helper, as fiercely and strongly as I may consider is fair. When that man is charged with an offense, or any other man, right at that instant his reputation comes in question, and he may support it by the testimony of his people as to its goodness. I could not put a witness on and show that it was not good, except as I have done by the testimony in this case. It is then passed up to him; it is his play. Another thing, you need not tell me that these five attorneys here—the best that could be gotten—strong men personally, and strong men mentally; you need not tell me that these attorneys overlooked any bets—to use the common expression. Don't you know that if he could have found any witness who would have testified to his good character he would have done so? But he brings not one! Not one. * * *

"(2) As Mr. Cunningham has said to you, that six men cannot return a verdict of guilty in this case, nor can eleven; that it is required that 12 men shall agree before these men can be convicted. In this connection I want to suggest to you, gentlemen of the jury, that I would hate to be the obstinate man on this jury who would hang out against a verdict of guilty with his fellows in a case like this, where a national banker is on trial for embezzlement, misapplication and abstraction of the property and funds of this bank, to the detriment of suffering depositors; because, when I returned home my friends and neighbors, who possibly are not versed and familiar with the various technicalities and intricacies of the law, might conclude that the jingle of the broken bankers' unlawfully and illy gotten gold in my pocket had influenced my action. Occupying the position I do, I can-

not do less than my whole duty in this case in the prosecution of these defendants, for fear that it might be said of me that I had received money in addition to my salary."

When each of the foregoing arguments was made to the jury by the district attorney, the cousel for the defendants made objection. The court overruled the objections, and permitted the district attorney to proceed with the argument, whereupon exceptions were duly reserved by the defendants. After the conclusion of the argument in the case, the defendants requested charges which, in effect, instructed the jury to disregard these arguments, the charges being properly framed to remove any improper influence that the arguments might have had upon the jury. The court declined to give each of these charges, and exceptions were again duly reserved. The bill of exceptions shows that the attorneys for the defense, in their arguments to the jury, had, without objection, made observations to which, it is claimed, the district attorney's remarks were intended to reply.

The chief function of the legal profession is the administration of justice. The duties of the bench and bar are, to this extent, alike. The purpose of both is to establish the truth, and to apply the law to it. To ascertain the truth is often difficult, and the united labor of the advocate and the judge often, it is feared, fails to accomplish the desired result. But the experience of all civilized countries shows that a trained body of men, advocates and judges, each class performing its respective duties, is required even to approximate success in the establishment of the truth. Forensic strife and the cross-examination of witnesses are the methods best adapted to the ascertainment of the truth. It is the duty of counsel to make the most of the case his client has given him. It is essential that all that is relevant to the case that can be said for each party in the determination of the fact and law should be heard. The very fullest freedom of speech, within the duty of his office, should be allowed to counsel. In addressing either court or jury, the advocate should be allowed to select and pursue his own line of argument, his own method of dealing with the evidence, and the application of the law to it. Every fact the testimony tends to prove, every inference he may think arises out of the testimony, the credibility of the witnesses, their intelligence, want of sense, or means of knowledge, are all legitimate subjects of discussion. Illustrations and analogies may be used, based on the testimony, history, science, literature, or current events. The court would never stop the advocate in his attempt to draw inferences, or to establish intention, from evidence that has been offered. Whether an inference of counsel is rightly drawn from the evidence is for the jury to determine. He may, of course, urge a fearless administration of the criminal law, and he may complain that juries are more inclined to acquit than to convict. On the other hand, for the defense, he may warn juries against harsh and hasty verdicts, and may invoke the mercies of the law. The field of legitimate speech and appeal is broad—broader than we can indicate here. But it is necessary to the proper administration of the law that there should be a limit to what the advocate is permitted to say to the jury. Cases are to be decided by

juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not. And counsel cannot be permitted to make a statement of facts, which, under the rules of evidence, would not be received if offered, the natural tendency of such facts being to influence the finding of the jury. To adopt any other view would enable the advocate to put before the jury for their consideration statements not tested by cross-examination and facts which the law excludes.

Having said this much in relation to the subject generally, we first consider an assignment of error made by Lowdon alone. He offered no evidence to prove his good character. He unquestionably had the right to rely on the legal presumption that his character was good. Mullen v. United States, 106 Fed. 892, 46 C. C. A. 22. The excerpt from the argument of the district attorney, numbered 1, is a strong appeal to the jury to presume that the character of Lowdon was bad because he failed to offer evidence that it was good. This was not only getting out of the record, but going contrary to the legal presumption to which the defendant was entitled. It was assuming that the defendant's failure to offer such evidence created a presumption that his character was bad. This was not a legitimate and proper argument, and, on objection being made, the trial court should have stopped the district attorney and should have taken steps to remove, as far as possible, its influence upon the jury. But it is urged on behalf of the government that, conceding that the argument was not legitimate, it does not constitute reversible error. It is true that in like cases where the court sustains the defendant's objection to the argument and the words are at once withdrawn, it is held that the injurious effect is removed, and the incident does not constitute ground for a new trial. Dunlop v. United States, 165 U. S. 486, 498, 17 Sup. Ct. 375, 41 L. Ed. 799; Wright v. United States, 108 Fed. 805, 48 C. C. A. 37; Kellogg v. United States, 103 Fed. 200, 43 C. C. A. 179. But in this instance the district attorney did not withdraw the argument, and was sustained in making it by the action of the trial court. The principle which secures to every one accused of crime a fair and impartial trial on the evidence adduced is violated when the court permits the district attorney, against objection, to comment in argument to the jury upon the failure of the defendant to offer evidence of his previous good character. McKnight v. United States, 97 Fed. 208, 38 C. C. A. 115; Bennett v. The State, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465; Davis v. The State, 138 Ind. 11, 37 N. E. 397; Fletcher v. The State, 49 Ind. 124, 19 Am. Rep. 673; Thompson v. The State, 92 Ga. 448, 17 S. E. 265; The People v. Evans, 72 Mich. 367, 40 N. W. 473.

The exceptions and assignments of error that relate to the second excerpt from the district attorney's argument were taken, and are made, by both of the defendants. One of the defendants' attorneys appealed to the jury, saying:

"Six of you cannot return a verdict, nor eleven, but it takes twelve men to reach a verdict."

The intention was evidently to acquaint each juror with his power and his responsibility. Counsel on either side have a right to appeal to the conscience, sympathy, or sense of justice of the individual juror in any fair and legitimate argument. Each juror acts, in a measure, on his own judgment and conscience, influenced and aided, of course, by the counsel, advice, memory, and experience of his fellow jurors. But if defendants' counsel should submit an unlawful argument, or improper appeal to the jury, his violation of law or ethics would not justify the prosecuting attorney in taking a like course. His remedy would be to ask the court to stop the defendants' attorney when he clearly departed from a legitimate line of argument, or to request instructions that would remove the harmful effect. If a departure from the field of legitimate argument by one side was sufficient excuse for the other side to pursue the same course, it would possibly lead to the trial of cases upon the assertions and statements of counsel, and not on the evidence adduced.

In the second excerpt from the district attorney's argument, he asserted, in effect, that if a juror decided that the defendants were not proved to be guilty, when he returned home, "the neighbors * * * might conclude that the jingle of the broken bankers' unlawfully and illy gotten gold" in his pocket had influenced his action and decision. The plain meaning was, if you decide to acquit, your neighbors will say you have been bribed with money—with the "illy gotten" money of the defendants. Although we acquit the learned district attorney of intending any threat, a juror unacquainted with criminal procedure might reasonably have concluded that he was warned against a probable charge of receiving a bribe or of conspiracy.

In the case of People v. Mull, 167 N. Y. 247, 60 N. E. 629, the court of last resort in New York reversed the judgment of the trial court on account of the argument of the prosecuting attorney, although the court said that the "evidence in the record was ample to sustain the verdict." The argument of the prosecuting attorney in that case was that "a failure to convict cannot fail to excite widespread comment and indignation among the whole body of citizens of this country." In his address, the attorney said:

"If there is a man who sits in those chairs that is willing to brand himself with suspicion by saying that Archie Mull did not commit this crime, my judgment of his character is not at all correct. * * * It is no wonder that your neighbors have concluded that the integrity and decency of this panel of jurors, instead of Archie Mull, is on trial here today."

The court held that this speech being permitted made it doubtful "whether the defendant had been fairly convicted," and the judgment was reversed.

In Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509, the defendant, an officer of the United States, was convicted of extortion in exacting moneys from Chinese immigrants for permission to land and remain in the United States. The defendant proposed to show by witnesses that, while he was acting in such official position, "there were more females sent back to China than ever were sent back before or after." The representative of the government objected to this evidence as irrelevant, saying in open court, and presumably in the hearing of the jury:

"No doubt, every Chinese woman who did not pay Williams was sent back."

The Supreme Court said:

"The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objections to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial."

In Hall v. United States, 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003, the judgment of the trial court was reversed, because the district attorney was permitted to make an argument, against the objection of the defendant, not based on evidence, which tended to prejudice the jury against the defendant. We would not embarrass free discussion, so essential to the proper administration of the law. We would not regard many hasty and exaggerated expressions of attorneys made in the heat of debate, which are not expected to become factors in the formation of the verdict. We wish to follow established rules, and to avoid introducing another element of uncertainty in the trial of criminal cases by making a new precedent for the reversal of judgments. The difficulty of drawing a line between legitimate and improper arguments admonishes us that the trial judge often has a delicate and difficult task imposed on him. But, under the circumstances of this case, considering the character of the argument, the refusal of the trial judge to interfere at the time the objection was interposed, or to correct the probable effect of the argument by a subsequent instruction, and because it does not appear affirmatively to us that no injury was done to the defendants, we are constrained to hold that the judgment should be reversed, and a new trial granted to both defendants.

We do not think it necessary to decide other questions raised. Demurrers were filed to each count of the indictment, and they were all overruled. The learned district attorney says in his brief that "if the court should conclude that the demurrers to counts 5 and 6 should have been sustained because of alleged duplicities," there still remain 14 "unimpeached and unassailable counts." We concur in the view of the district attorney that there are a number of good counts in the indictment, and, in view of the fact that the defendants may not again be put on trial on any count which the district attorney may now deem insufficient, it seems useless to enter on the examination of the various assignments of error relating to the demurrers to the several counts.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CROOKSTON LUMBER CO. v. BOUTIN.*

(Circuit Court of Appeals, Eighth Circuit. November 30, 1906.)

No. 2,418.

1. MASTER AND SERVANT—HAZARDOUS BUSINESS—CARE REQUIRED.
Where a master was engaged in operating a steam sawmill, it owed a duty to its employés to exercise all reasonable care to provide them with suitable and reasonably safe machinery and instrumentalities with which to perform their work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 203.]

2. SAME—DEATH OF EMPLOYÉ—NEGLIGENCE—QUESTION FOR JURY.
In an action for the death of a sawmill employé, by being pushed against the saw by the log carriage, the fact that the carriage mechanism was so out of repair that the carriage would creep along the track toward the saw when the controlling lever was in a position intended to keep the carriage at rest was sufficient to present a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1650.]

3. SAME—ASSUMED RISK.
Where decedent, a sawmill employé, gave notice to defendant of a defect in the log carriage, and secured a promise from the superintendent of the mill to repair the same, decedent did not assume the risk of injury caused by the defect in the carriage in continuing to work for a time thereafter reasonably sufficient to enable defendant to repair the carriage, unless the risk was so obviously and imminently dangerous that a person of ordinary prudence would not have taken it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574, 583, 587, 641, 644.

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

4. SAME—CONTRIBUTORY NEGLIGENCE—PROMISE OF REPAIR.
That decedent, a sawmill employé, gave notice to defendant of the defective condition of a log carriage, and secured a promise to repair, did not relieve him from the necessity of exercising reasonable care for his own safety in performing his duties, nor deprive the defendant of the defense of contributory negligence in case decedent failed to do so and was injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 675, 676, 706–709, 724, 727, 729.]

5. TRIAL—QUESTIONS OF LAW OR FACT—DISPOSITION.
A question of law always arises at the close of the evidence in any case in the federal courts, whether there is any substantial proof warranting a verdict in favor of plaintiff; and, in determining such question, all the evidence and reasonable inferences therefrom must be considered in the light most favorable to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 339, 402.]

6. SAME.
In order to justify the direction of a verdict, in an action tried in the federal courts, the undisputed evidence must be so conclusive that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion therefrom, and that the court, in the exercise of a sound judgment, would be required to set aside a verdict returned in opposition thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 338, 340, 379, 383.]

* Rehearing denied February 12, 1907.

7. MASTER AND SERVANT—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Decedent, an employé in a sawmill, before operations had commenced in the morning, took a position on the sawyer's side of the pulleys over which the band saw was operated, practically in front of the saw, and within two feet of it while it was being run at a high rate of speed. Decedent placed his left foot on the rail of the carriage track, and his right foot was raised and resting on a lower extension of the guard plank, his back being toward the log carriage. In this position plaintiff endeavored to clean sawdust from the upper pulley with a stick, and while doing so, the log carriage, the mechanism of which was defective, noiselessly crept up from behind him unobserved, and before he could escape, forced his body against the teeth of the saw, by which he was instantly killed. Decedent had knowledge of, and had complained of the creeping motion of the carriage, and had received a promise of repair two or three days before the accident; but, while standing in the position he occupied, he took no precautions to ascertain whether the carriage was still. The position that decedent took to clean the pulley was peculiar to him, and he could easily have occupied a different position where he would have been perfectly safe from the danger. *Held*, that decedent was guilty of contributory negligence, as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 729.]

8. SAME—REPAIR OF DEFECTS.

Where the repair of a log carriage mechanism in a sawmill would probably have involved a reconstruction of the valves leading into the carriage cylinder, and have required a general overhauling of the mill under and on which the connections between the boiler and the carriage were located, and an employé complained of a defect in the carriage, and obtained a promise of repair, it was the height of recklessness for him to presume, in the absence of any evidence that such repairs were in progress, that they had been made two or three days after the promise was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 643, 645, 675, 706, 729.]

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

Marie F. Boutin, as administratrix of the estate of Frank Boutin, deceased, brought this action against the lumber company to recover damages for the death of the decedent who was her husband. The lumber company was operating a steam sawmill at Crookston, Minn. Logs were hauled from the river and rolled upon a deck at the north end of the mill from which, as needed, they were separately rolled upon a carriage which carried them up against a vertically running band saw to be worked into lumber. This carriage was about 60 feet long, constructed of wood and iron, and sufficiently heavy, bulky, and strong to steadily support and carry a large log. It was connected with a piston rod driven by steam conducted from the boiler to the cylinder through adjustable valves connected by rods and cranks with the operating lever located on the west side of the track on which the carriage ran. The head sawyer, by operating the lever, could so open and close the valves as to run the carriage back and forth past the saw as business required. When the carriage was not in operation, the lever stood upright or perpendicular. A forward push of the lever started the carriage forward from the log deck, and a backward pull stopped the progress of the carriage and returned it to the starting point for another similar movement. The day crew began work at 7 o'clock in the morning, but at 5 minutes before 7, the mill was started up to secure the proper speed of the saw, before work began. The saw was a continuous band of steel with teeth on one edge only, so operating around two large pulleys revolved by steam power, and so located at the west side of the track as to present its toothed edge

to the end of the carriage as it brought a log up against it for sawing. This preliminary start put the pulleys and saw only into motion. It was not intended to, and did not, cause the forward and backward movement of the carriage. The crew consisted among others of the head sawyer, who, among other duties handled the lever for operating the carriage, and whose place was in front of the pulleys about three feet west of the carriage track, and a tail sawyer, who, among other duties, took off the sawed product from the carriage after the log had passed the saw, and whose place was behind the pulleys, a safe distance west of the track. The flying sawdust produced by the operation of the mill collected on the inside of the rim of the upper pulley, and, in order to keep the machinery in proper adjustment, required frequent removal. The rim was about 12 inches wide, and was supported by spokes leading from the hub to it, leaving a few inches on either side of the spokes so exposed as to be readily cleaned by holding a stick fast against it and permitting the revolving wheel to pass it. This operation of cleaning off the sawdust was generally performed while the mill was speeding up preparatory for beginning work. The head sawyer's business was to clean the side of the rim next to him, and the tail sawyer's business the side next to him. The place where the head sawyer stood to operate his lever was so near to the rim of the pulley that he could reach it with the usual stick employed for the purpose of cleaning it. There was a guard consisting of an upright plank between his standing place, and the revolving pulley over which he could safely perform the cleaning process. There were other places on either side, and close to the upright plank, where one might stand with comparative safety and perform the operation.

There is evidence tending to show that, by reason of improper adjustment of valves intended for admitting steam into the cylinder, it had for some time before October 8, 1904, forced its way slightly into the cylinder and against the piston so as to move it and the rod connecting with the carriage, thereby giving the carriage what is called a "creeping, advancing motion," even when not desired or expected, and when the lever was locked in an upright position. Although denied by defendant's witnesses, there is evidence tending to show that such creeping motion had frequently occurred just before October 8th, during the time the mill was being speeded up before the hour of starting came. The decedent had been working for the lumber company for several months in the capacity of tail sawyer. He had frequently noticed this apparently automatic creeping motion of the carriage, had warned other workmen of it and had cautioned them to exercise care. A short time before October 8th he told witness Munn to watch the carriage, that he could not tell when it might start. Two or three days before that day he complained to defendant's superintendent about it and secured a promise that it should be repaired and put in order. On that day decedent went to his work as usual. After the speeding of the mill had begun and about 2 or 3 minutes before 7 o'clock he went to his place, back or south of the pulleys, took the stick, and cleaned the inside rim next to him. The evidence shows that the duties of his employment usually kept him on the south side of the pulleys, and did not require him to go to the north side except when a newly filed saw was to be substituted for a dull one, on which occasion only he was required by the terms of his employment to be on the north side to help the head sawyer make the change. But there is evidence tending to show that decedent frequently went over to the head sawyer's side and performed for him the service of cleaning the rim on that side.

On the morning in question, October 8, 1904, after cleaning the rim on his side, the head sawyer, not having gone to his lever, but standing some distance across the carriage track eastwardly thereof examining directions for the work of the day there posted, the decedent went over to the north side apparently to help the head sawyer. Instead of taking the position of absolute safety behind the upright guard plank, or either of the other positions of comparative safety a sufficient distance away from the carriage track, he took a position practically in front of the saw, within two feet of it, while it was running at the rate of 5,000 feet per minute, with his left foot on the west rail of the carriage track, and his right foot raised and resting upon

a lower extension of the guard plank; and there with his back to the carriage that might at any time, as he knew, noiselessly start and bear down upon him, he stood holding the stick against the rim of the pulley in the process of cleaning it. While so doing, and without any backward look by him, the carriage did start, and, without observation by him, moved down upon him, forced his body against the teeth of the saw, and he was instantly killed.

At the close of all the evidence defendant's counsel moved for an instructed verdict in its favor. The motion was denied and exception duly allowed. A verdict and judgment followed in favor of the plaintiff, and this writ of error was prosecuted to secure a reversal of that judgment.

Thomas J. Davis (Theodore Hollister, on the brief), for plaintiff in error.

Charles Loring (Halvor Steenerson, on the brief), for defendant in error.

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

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

The defendant was engaged in a hazardous business. It owed a duty to its employés to exercise all reasonable care to provide them with suitable and reasonably safe machinery and instrumentalities with which to do their work.

The evidence, we think, was sufficient to go to the jury on the issue of negligence as charged. It tended to show that defendant did not exercise reasonable care in keeping the log carriage well in hand or sufficiently under control during the preliminary period of speeding up its mill, to prevent its insidious and dangerous movement along the track where employés were likely to be. There was also substantial evidence tending to show that the decedent complained to the superintendent of defendant company about the dangerous condition of the machinery, and particularly about the sudden and uncontrolled movement of the log carriage, and secured a promise from him to repair the same. The last mentioned facts, unless the risk of remaining was so obviously and imminently dangerous that a person of ordinary prudence would not have taken it while the promised repairs were being made, warranted the decedent in continuing to work for the defendant for a time thereafter reasonably sufficient to enable it to make good the promise, without assuming the risks ordinarily incident to the use of known defective machinery (Hough v. Texas Pacific R. Co., 100 U. S. 213, 225, 25 L. Ed. 612; District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946; Northern Pacific Railroad Co. v. Babcock, 154 U. S. 190, 200, 14 Sup. Ct. 978, 38 L. Ed. 958; Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306, 125 Fed. 470, 473; Homestake Min. Co. v. Fullerton, 16 C. C. A. 545, 69 Fed. 923; Roccia v. Black Diamond Coal Min. Co., 57 C. C. A. 567, 121 Fed. 451); but they did not relieve him from the obligation to exercise reasonable care and precaution for his own safety while so continuing to perform the work.

Defenses predicated upon assumption of risk and contributory negligence are essentially different. Choctaw & Oklahoma, etc., R. R.

Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 Fed. 495, 501, 63 L. R. A. 551; Narramore v. Cleveland C. C. & St. L. Ry. Co., 37 C. C. A. 499, 96 Fed. 298, 304, 48 L. R. A. 68; Cleveland C. C. & St. L. Ry. Co. v. Baker, 33 C. C. A. 468, 91 Fed. 224; Peirce v. Clavin, 27 C. C. A. 227, 82 Fed. 550, 553; Miner v. Connecticut River Railroad, 153 Mass. 398, 403, 26 N. E. 994. Therefore, notwithstanding the fact that decedent, by giving notice to defendant of the defective condition of its machinery and securing a promise of its reparation, might have escaped for some time the personal assumption of the risk ordinarily attendant upon continued service with such defective machinery, he might, and as will be presently seen, did not thereby relieve himself from the necessity of exercising reasonable care for his own safety in performing the service, or deprive the defendant of the defense of contributory negligence if he failed to do so.

In District of Columbia v. McElligott, supra, the Supreme Court, in commenting upon the care required of a person situated like the decedent, said:

"If he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the district supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received."

In St. Louis Cordage Co. v. Miller, supra, this court, after announcing the general doctrine of assumption of risk in ordinary cases, and calling attention to the exception relieving an employé from its obligation after making complaint and securing a promise of reparation said:

"Of course cases which fall under the exception are not governed by the rule, but the only defense remaining in such cases is that of contributory negligence."

And in Homestake Min. Co. v. Fullerton, supra, this court said the rule which permits an employé to recover in cases coming within the exception is subject to the proviso:

"That the servant exercised due care and that the defect complained of did not render the machinery so imminently and immediately dangerous that he should have declined to use it at all until it was repaired."

See, also, 1 Labatt on Master & Servant, § 432.

In the light of the foregoing exposition of the law, we cannot agree with plaintiff's counsel that the complaint of defective machinery and the promise by defendant to repair it rendered it liable in this action—notwithstanding any negligence of the decedent. Such is not the law. He might have been relieved from the assumption of ordinary risks attendant upon the use of defective machinery, but he still remained under the obligation of exercising reasonable care for his own safety.

The rule defining reasonable care in any given case to be that care which ordinarily prudent persons commonly exercise *in like circumstances* is probably a sufficient generalization, provided emphasis is placed upon the last italicized words. The circumstances surrounding a person at the time of his injury naturally, as well as a matter

of law, furnish an important consideration in determining whether due care is observed by him. When he has such knowledge of danger incident to the use of machinery as prompts him to complain to his master about it, and to require its repair as a condition for remaining longer in his service, such circumstances indicating imminent personal peril would most naturally suggest to an ordinarily prudent person the necessity for unusual care and watchfulness for his own safety. The triers of the fact should therefore take into consideration this naturally prudent instinct in determining whether on a given occasion one has exercised ordinary care as just defined. Labatt on Master & Servant, supra. It is a well-settled rule, recognized by the courts of the United States, that a question of law always arises at the close of the evidence in any case, whether there is any substantial proof warranting a verdict in favor of the plaintiff. In applying this rule, consideration most favorable to plaintiff must be given to all the evidence and reasonable inferences arising therefrom (Mt. Adams, etc., Ry. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463); the undisputed evidence must be so conclusive (1) that all reasonable men in the exercise of an honest and impartial judgment can draw but one conclusion from it (Chicago, etc., Ry. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423); and (2) that the court would in the exercise of sound judgment set aside a verdict returned in opposition to it (Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Delaware, etc., Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Elliott v. Chicago, Mil., etc., Railway, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068). The rule just announced is equally applicable when the issue of contributory negligence is involved. Elliott v. Chicago, Mil., etc., Railway, supra; Pyle v. Clark, 25 C. C. A. 190, 79 Fed. 744; Missouri Pacific Railway Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921; Claus v. Northern Steamship Co., 32 C. C. A. 282, 89 Fed. 646; Rich v. Chicago, Mil., etc., Railway (just decided by this court) 149 Fed. 79.

Tested by the rule just announced in any or all its phases, we entertain no doubt about the contributory negligence of the decedent in this case. Conceding to him the full right of going to the head sawyer's side of the pulleys, and conceding that it was his duty to clear that side of the rim of the upper pulley as well as his own, both of which are disputed by defendant, his method of doing the work according to the undisputed evidence was peculiar to himself. There is no substantial proof that any one else ever undertook to clean that side of the rim when standing as and where the decedent did. There is satisfactory proof that no head sawyer whose employment expressly comprehended that duty ever undertook to do it that way. Only one witness out of many who were examined testified that he had ever seen decedent do it in that way, and this witness said that it could have been done some other way, but that it appeared to be the easier way to do it by standing in the place where decedent stood. It must be borne in mind that the cleaning could not have been done when the saw was not in motion. The pulley necessarily had to revolve in order to clean the rim, and with its revolution the saw was also necessarily in motion, so that any proximity to the saw while cleaning the rim was potentially dangerous.

The decedent was in the prime of early manhood, and possessed of unimpaired faculties of mind and body so far as the record discloses. He knew of the creeping tendency of the carriage, and was aware of its lurking danger and horrible consequence. He had only a few days before warned a fellow laborer of its liability to suddenly start and move upon the tracks toward the saw, and cautioned him to be careful. Only two or three days before, he had given notice to his employer that he could not continue in its service, if it did not put a stop to that dangerous action. With all this knowledge, at a time when the mill was speeding up and when alone the creeping motion could occur, and when, as known by him, it was liable to occur, he took his place on the track over which the carriage would necessarily move, in front of and close to the rapidly moving saw, and occupied himself intently with cleaning the rim of the pulley. He was in a place of imminent danger, in such circumstances, and with such knowledge of his peril as, under the rule requiring him to exercise the care which ordinarily prudent persons do under like circumstances, imperatively demanded immediate, constant, and anxious vigilance and watchfulness on his part. He exercised no vigilance at all. He could have detected the approach of the carriage by looking, but he did not. He paid no heed to the momentary possibility well known to him of the carriage moving down upon him, but stood there, back towards its approach, until about the moment it struck him, when, by its touch and a warning shout of one of his co-employés, he was aroused from his danger too late to save himself from the inevitable consequence. Tested by any expression of the rule governing the subject, found in text-books or adjudicated cases, the conduct of the decedent, as disclosed by uncontradicted and indisputable, proof, was so heedless of consequences, so hazardous and reckless as to clearly constitute contributory negligence on his part, and to warrant and require the court to say so as a matter of law.

Counsel for plaintiff ask us to say that, because of the promise to repair made two or three days before his death, the decedent had a right to assume that the machinery had, during those two or three days, been so repaired as to prevent the creeping motion of the carriage. Such repairs probably would have involved a reconstruction of the valves leading into the cylinder, and possibly of the pipes leading from the boiler to the cylinder, and of the rod leading from the piston to the carriage, and any of these repairs probably would have required a general overhauling of the mill under and upon which the connections between the boiler and the carriage were located. It is inconceivable that this work could have been done without attracting general attention; but whether the repairs might have been made in two or three days or not is wide of the mark. Considering the imminent peril and danger of doing what the decedent did unless the repairs had been made, it was the height of recklessness to blindly assume without inquiry, and in face of the improbability of their being done without his knowledge, that they had been made, within the short period of time mentioned, and on such mere assumption to have incurred the great risk which he did.

Again counsel contend that the decedent, being a short man, could not conveniently reach over the upright guard plank from which the head sawer always cleaned his side of the rim of the pulley. That may be so, but whether convenient or not he could have done it, and he could also have performed the act of cleaning while standing at the side of the plank, somewhat nearer to the revolving pulley. There was no special urgency on the morning when the casualty in question happened which required any impetuous, hasty, or unusually prompt action by the decedent. He had ample time to do the work before 7 o'clock. A place from which he could have performed his task in perfect safety was provided by defendant, and he was not justified from any considerations of personal convenience or otherwise in ignoring that provision and adopting the terribly dangerous method which he did. Morris v. Duluth, etc., Ry. Co., 47 C. C. A. 661; 108 Fed. 747; Gilbert v. Burlington, etc., Ry. Co., 63 C. C. A. 27, 128 Fed. 529.

After a careful consideration of all the evidence, and of all the propositions of law contended for by learned counsel for the plaintiff, we are constrained to say that contributory negligence was so apparent from all the evidence that the Circuit Court erred in not instructing the jury to find for the defendant. The judgment must be reversed, and the cause remanded, with instructions to grant a new trial; and it is so ordered.

CONEY ISLAND CO. v. DENNAN.

(Circuit Court of Appeals, Sixth Circuit. January 19, 1907.)

No. 1,568.

1. CARRIERS—ACTIONS FOR DEATH OF PASSENGER—QUESTIONS FOR JURY.

Defendant operated a passenger boat between the city of Cincinnati and a pleasure resort a few miles up the river. Passengers in going to and from the vessel at Cincinnati passed over a wharfboat, between which and the steamer there was a railed bridge three feet wide, and on the side of the steamer, where it rested, there was a space in the railing nine feet wide. Guards were usually stationed at such space on either side of the bridge to protect passengers going off the boat from stepping or falling off. Plaintiff's intestate, a boy 12 years old, with his mother, her sister, and two small children, returned on the boat late one evening with some 1,000 other passengers. There was much crowding at the bridge, and each of the women carried a child. In passing onto the bridge in some way plaintiff's intestate went to one side, and fell between the boats and was drowned. There was evidence tending to show that there were no guards stationed at the sides of the bridge. *Held*, that the question of defendant's negligence was one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1315, 1319.]

2. WRIT OF ERROR—REVIEW OF INSTRUCTIONS—EXCEPTIONS.

An exception to a charge, in order to found a right to review, must be sufficiently distinct and specific to direct the attention of the court to the particular error which is the subject of complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1141; vol. 46, Trial, §§ 689–603.]

3. TRIAL—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE OF CHILD.

In an action to recover for the death of a boy 12 years old through the alleged negligence of defendant, a requested instruction, stating generally

that plaintiff could not recover if the deceased failed to exercise reasonable care, was properly refused, where it did not explain or define what would constitute reasonable care in one of his age.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 489; vol. 37, Negligence, § 393.]

4. NEGLIGENCE—DEATH OF CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT.

In an action by a mother to recover for the death of her son, 12 years old, by falling from a boat on which he was a passenger with her, through the alleged negligence of the defendant, which was operating the boat, an instruction that plaintiff was bound to exercise ordinary care for the safety of her son, and if she failed to do so, "and her failure in any way contributed" to her son's loss, she could not recover, was properly refused, as covering any negligence of plaintiff which may have contributed to her son's death however remotely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 396.

Imputed negligence, see Chicago, G. W. Ry. Co. v. Kowalski, 34 C. C. A. 4.]

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

Chas. H. Stephens and Lawrence Maxwell, Jr., for plaintiff in error.
C. C. Benedict and J. Hartwell Cabbell, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This was an action brought by the administratrix of Clarence M. Henry to recover damages for wrongful negligence of the defendant, resulting in the death of the person whose representative she is. It is founded upon a statute of Ohio, giving a remedy in such cases for the benefit of the relatives of the deceased who have suffered pecuniary loss from the death.

The circumstances out of which the cause of action is supposed to have arisen are these: Coney Island is a pleasure resort a few miles up the Ohio river from the city of Cincinnati. The Coney Island Company is a corporation organized under the laws of West Virginia, and was in 1904 the owner of the Island Queen, a steamboat plying between the city and the resort during the summer months of that year for the carriage of passengers. At the landing at the city, for the purpose of embarking and discharging passengers, the company had a wharfboat, over which passengers passed from the landing to the steamer and from the steamer to the landing. On the afternoon of August 26, 1904, the deceased, who was a boy of about 12 years of age, with his mother and a sister of hers and two young children of the latter, took passage on the steamer from the city to the resort, and, after spending some time there, returned to the city on the last trip of the steamer for that evening. This was about half past 11 o'clock. The mother, her sister, and the children passed together from the steamboat toward the wharfboat. Both vessels at the passageway were much crowded. The mother was carrying one of the small children and her sister the other. The boy, Clarence, was by the side of his mother. Having difficulty in getting along in the crowd, his mother told Clarence that if he should get separated from her he should wait for her on the wharfboat. This was while they were nearing the wharfboat and moving slowly. In front or somewhat to one side of their course was

the gangway or bridge for crossing from the steamer to the wharfboat. There was an opening in the railing around that side of the steamer of about nine feet, and in the middle of this was the bridge, about three feet wide, and having rails on each side to prevent people from falling off. This bridge was movable, and when in use rested partly on the steamer and partly on the wharfboat, and was intended to provide passageway from one vessel to the other. There was an open space of about three feet on each side of the bridge, extending to the post at the end of the railing. The vessels were near together, but there was an opening down between them of the width of from 7 to 20 or 24 inches, as estimated by different witnesses. Soon after the mother's direction to the boy, above stated, he got separated from his companions. He followed a lady who went over the opening at one side of the bridge, but in some way lost his footing, fell down through the opening, and was drowned. There was evidence tending to show that the crowd was dense about the gangway, moving in a mass. The sister of the boy's mother testified: "We had just to move with the crowd; we couldn't get one way or the other." More than 1,000 people, men, women, and children, were on the steamer. The boy was bright and capable beyond his years, but neither he nor his mother had ever been on a steamboat before. The evidence tended to show that the bridge was liable to get misplaced from the rocking and listing of the boats, and that the wide opening in the railing was to accommodate the changing relation of the boats, and that the company kept a guard of from two to four men around the bridge to keep it in position, and also to keep passengers from going over the openings at the sides of it. But there was also evidence that on this occasion either there were no guards there, or, if there were, they did not stop or warn passengers who crossed at the sides of the bridge. We have stated the case in this detail because of the contention that the court erred in not instructing the jury to find for the defendant. The jury found a verdict for the plaintiff, and assessed the damages at $4,000.

Counsel for the plaintiff in error submit four questions for our consideration on this review:

(1) Whether the court erred in refusing to give the peremptory instruction asked. (2) Whether the court erred in its instructions in stating the nature of the contributory negligence of the plaintiff which would bar the recovery. (3) Whether the court erred in refusing to charge the jury that, "if there was an open space between the boat and the wharfboat, which might have been seen by Clarence Henry if he had used reasonable care while leaving the boat, and you find that he walked or fell into such open space for want of reasonable care, the plaintiff cannot recover." (4) Did it err in refusing to instruct the jury that:

"The plaintiff, the mother of the deceased, was bound to exercise ordinary care under all the circumstances for the protection and safety of her son; and if she failed to do so, and her failure in any way contributed to her son's loss, then she cannot recover herein."

1. In view of the facts (those either not disputed or such as the jury might find from the evidence) we think there were grounds upon which

the jury might conclude that the company was at fault in not providing more ample means for safely passing from the steamer to the wharfboat. There was a large crowd of passengers, many of them women and children, and the bridge was narrow. The boats were so near together as to tempt the unwary, the bridge being crowded, to pass over at the opening by the sides of it, and yet there was danger, as the sequel showed, that passengers might by a false step fall down through the opening. That there was danger of it, which the company itself appreciated, is shown by the fact that its practice was to station guards there, whose duty it was to see that passengers did not pass between the bridge and the end of the railing; but more especially, because the passage in that way was dangerous, and the company owed a duty to its passengers to maintain a guard there, to prevent accidents which were liable to happen from attempts to pass over the open space, and the evidence, as we have said, tended to show either that the guards were not stationed, or, if they were, they did not attend to their duty in this regard, and that the accident resulted from this fault. With respect to the contributory negligence charged by the defendant, we shall have more to say further on. We think it would have been palpable error for the court to have charged the jury that the evidence would not justify a finding that the defendant was negligent in the discharge of its duty to the deceased.

2. In his charge to the jury, the presiding judge, after referring to the circumstances of the accident, and coming to the subject of the contributory negligence of the boy, wherewith he was charged by the defendant, said:

"In view of all these conditions that I have attempted hastily to sketch, and which you must carry in your minds, did that boy, at that time, know and appreciate the danger, if he attempted to step from the boat over to the wharfboat, of falling into the river? Do the conditions presented require or justify that conclusion? If he, for the sake of getting over to the wharfboat ahead of the great body of people on board who were pushing over the bridge, took the risk, then it was his own negligence that caused him to fall into the river; but if he did not appreciate it, if because of his age he did not understand and did not appreciate the danger, but believed that he could pass in safety, that he might follow the woman who was passing over, and he was not advised to the contrary, then you would not be warranted in saying that he assumed the risk, or that he was negligent in following the woman over to the wharfboat in that way—the woman who preceded him."

And in varying forms of expression this instruction was several times repeated in the course of the charge. The complaint made of this instruction is that it supplied a wrong test of the negligence of the boy, and that the court, instead of instructing the jury that his negligence depended upon his actual appreciation of the danger, should have told them that it depended upon the appreciation which he ought to have had of the danger, because it is said his lack of appreciation may have arisen from his carelessness and inattention and the failure to exercise the faculties he possessed. But we think the criticism is too sharp, and does not fairly interpret the language of the court. In the circumstances of the case the jury were compelled to judge of the boy's knowledge of the danger by the test of probability. Taken altogether, the instruction of the court was that, if the boy had the means

of knowing the danger, and chose that way instead of going by the bridge, he was negligent. "Knowing the danger," said the court, "fully appreciating it, did he deliberately choose that way, with all the risks it involved, rather than the way over the bridge?" It may be admitted that the boy, if he was not pressed on by the crowd and had freedom of action, and so was given a choice, was bound to exercise the faculties he possessed, and whether he did this in a reasonable way was to be determined from all the circumstances. Deliberately choosing necessarily implies the exercise of the faculties of the boy upon the knowledge which he possessed. In the case of Klatt v. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791, which is cited for the plaintiff in error, the court stated the grounds of the rule which is invoked as follows:

"The exercise of ordinary care includes the fair use of one's faculties and opportunities of observation, in order to learn and comprehend the dangers which are naturally incident to the situation."

This as a general statement is undoubtedly correct. But it has more reasonable application to a case where the injured party is an adult, and has had previous opportunity for learning the dangers of the situation. It has, however, a much feebler influence when the injured person is a mere youth without experience, brought into peril on the instant without previous opportunity for observation; for how could there be a duty to remember what he had never known, or to act upon an apprehension of danger which he did not at the time understand? But, whatever may be said of the technical merit of the distinction adverted to in its application to the facts of this case, other considerations incline us to overrule this assignment of error. Notwithstanding the fact that the court repeatedly gave its instruction upon this point in the language stated, its attention was at no time called to the modification which the counsel now insist should have been made. At the close of the charge the court said to the jury:

"I want to say to you, gentlemen, that if Clarence Henry knew and appreciated the danger in attempting to step over onto the wharfboat, he was guilty of negligence that would deprive the plaintiff of the right to recover."

Counsel for the defendant said: "We cannot hear, your honor." Whereupon the court rejoined:

"I will repeat, for the benefit of counsel, that if Clarence Henry knew and appreciated the danger of attempting to pass over from this open space to the right of the bridge, onto the wharfboat, he was guilty of negligence, and it would be no excuse that the woman in front of him was using that way in passing over; he could not justify his action by following the woman in front, or anybody else."

The counsel, without any suggestion of the error now complained of, filed eight exceptions to the charge, of which one was to so much of it as related to the subject of contributory negligence, reciting brief parts of it, but not indicating any ground on which the exception was rested. Nor was there any disclosure of the point now raised in the motion for a new trial, though from the opinion of the court it would seem that it was raised at the hearing of the motion. We must therefore suppose that the counsel did not at the trial intend to present or have in mind the distinction between actual knowledge and the obliga-

tion to act upon it, and that it was developed upon subsequent examination of the record. In that case, error could not be assigned upon the instruction, though faulty. Counsel were bound to present their point at the trial, so that the court might consider it, and cannot, under a broad exception not aimed at it, upon subsequent search for error and finding it, bring it forward as a ground for reversing the judgment. It is a well-settled rule that an exception, in order to found a right to review, must be sufficiently distinct to direct the attention of the court to the particular error which is the subject of complaint. A challenge which is aimless, and points to nothing in particular, either in what is expressed or omitted, does not perform the object of an exception. And it is equally well established that when without special request the court gives an instruction which is in the main correct, but requires some modification or addition to make it quite so, it is the duty of counsel for the party whose interest requires the modification to ask for it or challenge the instruction because of the defect, and if they fail to do this they are deemed to be content with it. This assignment of error is also overruled.

3. The third request of the defendant for instructions was this:

"If there was an open space between the boat and the wharfboat, which might have been seen by Clarence Henry if he had used reasonable care while leaving the boat, and you find that he walked or fell into such open space for want of reasonable care, the plaintiff cannot recover."

Unless a request for instructions is entirely correct, and may properly be given without qualification or liability to be misunderstood, there is no error in refusing it. Brooks v. Marbury, 11 Wheat. 78, 6 L. Ed. 423. While, perhaps, this instruction might in general be applicable to the case of an adult, it would need to be accompanied by an explanation of what due care is in the case of a young and inexperienced person. What care does this request imply was required of him? Was it care in attempting to cross at the opening, or was it care in crossing? It should have specified, so as to direct the jury to the point of its application. Besides, we think that, although this instruction was not given in the language or form in which it was expressed, the court did in substance state this rule, explained as it should be by reference to the youth and inexperience of the boy. If, in the language of the court, he attempted to cross at the opening because from his youth and inexperience he did not understand and appreciate the danger, he was not guilty of that want of due care which would bar the action.

4. It is also assigned as error that the court erred in not giving the sixth instruction requested by the defendant. It was as follows:

"The plaintiff, the mother of the deceased, was bound to exercise ordinary care under all circumstances for the protection and safety of her son, and if she failed to do so, and her failure in any way contributed to her son's loss, then she cannot recover herein."

It would seem that the court overlooked the averment of negligence on the part of the mother contained in the answer, for in stating the issues in the charge to the jury, after referring to the denial of negligence on the part of the defendant, the court goes on to say: "Defend-

ant further says that if he did fall from the 'Island Queen' and was drowned, it was because of his own negligence, and not the negligence of the defendant," and makes no mention of a charge of negligence on the part of the mother; and the record leaves open the possibility that the court declined this instruction because it was not supposed to be in issue. If such an inadvertence was seen, it was the duty of counsel to correct it. But it may not have been noticed, and we shall not dispose of the question on that ground. The Supreme Court of Ohio, in Wolfe v. Railway Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812, held that, in the trial of a case arising under the Ohio statute—

"the contributory negligence of the beneficiaries, who are to receive the damages, and for whose benefit the action is brought in the name of the administrator, is clearly a defense to the action, available to the person or corporation causing the injury."

Admitting, for the present purpose, that this was in such sense a construction of the statute as the federal court is required to follow, a question arises whether the defense stated by the answer that, after denying its own fault, the death of the deceased "was caused solely by his own carelessness and that of his mother," would support a defense rested upon the contributory negligence of the mother—a defense which implies co-operative negligence on the part of both parties. We have some doubt upon this question (as to which see 5 Encl. Pl. & Prac. 11, 12 and Watkinds v. South. Pac. R. Co. [D. C.] 38 Fed. 711, 4 L. R. A. 239), but prefer to rest our decision upon the ground that the request was not of itself a proper one to be given. The court is asked to say that, if the mother failed to use ordinary care for her son, and the failure in any way contributed to his loss, she could not recover; but this would not be so unless her failure to use due care contributed proximately to his loss. Any remote failure to exercise care for him, as, for instance, taking him along with her on that trip, would not bar the action. 7 A. & E. Encyc. of Law (2d Ed.) 380. Besides, if this instruction was intended to include negligence in taking the boy with her, it is to be observed that the evidence leaves no room for doubt that the company received and carried men, women, and children indiscriminately. It was therefore in no position to complain if the latter were brought along. But probably the instruction requested was intended to apply to the care the mother gave the boy while they were passing along just before the accident, and we think there was no evidence which fairly justified a finding that she was guilty of negligence. The evidence leaves no doubt that the steamboat was much crowded. The only witnesses who testified to the immediate facts were Mrs. Dunham, the mother's sister, and the mother herself. The former testified that the mother said to the boy, "Clarence, you stay right by mamma, for fear you will get lost in the crowd," and "told him if he got separated, to wait for us on the wharfboat"; and the latter testified that she "told him to catch hold of my dress, so that we wouldn't get separated." She was carrying the little child of her sister in her arms, and they had no reason whatever to apprehend such a danger as confronted them. The only apprehension they had was that they would get separated, and for this they made provision.

In these circumstances we think there was no reasonable ground for imputing negligence to the mother. The conditions were all of the defendant's creating, and she did the best she could in the circumstances in which she was placed.

We are entirely satisfied that the verdict and judgment were right, and we find no sufficient reason for disturbing the result. The judgment will be affirmed, with costs.

MILLER et al. v. MARGERIE.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1907.)

No. 1,311.

1. PUBLIC LANDS—ALASKA TOWN SITES—DECISION OF TRUSTEE—CONCLUSIVENESS.

Under Act Cong. March 3, 1891, c. 561, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467], providing for the disposition of town site lots in Alaska, and authorizing the trial of conflicting claims before the trustee on notice with an appeal to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, the decision of the trustee is final, in the absence of fraud, accident, or mistake, with reference to all questions of fact arising in such proceeding, except as the same may be reversed by the Commissioner of the General Land Office or the Secretary of the Interior.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 98.]

2. SAME—FRAUD—EQUITABLE RELIEF.

In a suit to set aside a deed by an Alaska town site trustee for fraud, the fact that the proceeding in which defendant obtained the legal title to the lot in controversy was ex parte, was not of itself sufficient ground to justify a court of equity in entering on an inquiry as to the truth or falsity of the evidence on which the trustee acted in confirming defendant's claim to the property; but it was incumbent on complainants to allege facts showing that, without negligence on their part, they were prevented by fraud or accident from appearing before the trustee and submitting evidence to establish their right to enter the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 341, 342.]

3. SAME—PLEADING.

In a suit to set aside a deed of an Alaska town site trustee for fraud, it was not sufficient to allege generally that complainants did not have knowledge of the hearing before the trustee or an opportunity to prove that the representations made by defendant to the trustee in obtaining the legal title to the property were false, but the bill must also state the particular facts and circumstances which prevented complainants from having notice of the proceeding and an opportunity to protect their rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 341, 342.]

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

E. M. Barnes, for appellants.

Malony & Cobb, for appellee.

Before GILBERT and MORROW, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This is an equitable action in which the complainants ask for a decree declaring void a certain deed by which the defendant acquired the legal title to lot 4, in block B, in the town of Juneau, Alaska. The bill of complaint also prays for general relief. The deed was executed to defendant by the trustee of the town site of Juneau under section 11 of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes." Act March 3, 1891, c. 561, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467]. The bill of complaint alleges that a trustee of the town site of Juneau was duly appointed, under the statute above referred to, and "that at all times since 1885, plaintiffs and their grantors have been and now are (the paramount title of the United States alone intervening) the owners of and in the actual and exclusive possession of, until hereinafter named, and at all times since said year 1885, have been, and now are entitled to the immediate and exclusive possession of lot 4, block B, of the town of Juneau, district of Alaska"; that the defendant "on the ——— day of May, 1903, falsely and fraudulently, and with intent to impose upon said trustee," represented to him "that he, the defendant, and his grantors, were the owners of and in possession of, and entitled to the possession of, said lot on the 13th day of October, 1893, ever since had been, and then were such owners, and were at all times in the possession of said lot, and at all times entitled to the possession of said lot; that said trustee did, on the ——— day of May, 1903, at his office in Juneau, Alaska, actually hear, and determine on said false statements as aforesaid, the said questions of said occupancy and ownership of said lot," and, acting under the belief that such statements were true, executed to the defendant a deed conveying to him the legal title to the lot in controversy. The bill then alleges:

"That plaintiffs nor either of them had any knowledge of said hearing or any opportunity to learn of said hearing or any opportunity to deny said false statements or any part thereof, or to prove said statements or any part thereof false, at any time or place."

The defendant interposed a demurrer to the bill upon the ground that "the same does not state facts sufficient to constitute a cause of action, in this: there are no allegations of fact showing how, or the means whereby, the plaintiffs were prevented from having knowledge of the hearing before the town site trustee, and there litigating the right of possession of the lot sued for, nor is it shown that such want of knowledge, or any want of opportunity to be heard before said town site trustee was induced or caused by the defendant." The District Court sustained the demurrer, and the plaintiffs, having declined to amend, thereupon rendered its judgment dismissing the action. The complainants appeal, and the ruling of the court sustaining the demurrer is assigned as error.

1. Section 11, of the act of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (chapter 561, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1467]), provides:

"That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of occupants of such

town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site. * * *"

Acting under the authority conferred by this section, the Secretary of the Interior on June 3, 1891, made certain regulations providing for the entry of town sites and the disposition of lots thereon for the benefit of the occupants thereof. 12 Land Decisions, 583. These regulations provide for the entry of the town sites and the actual survey of the same into lots, blocks, streets, and alleys, and the filing of the plats of the survey in the General Land Office. The plats were required to show what lots were occupied, and the names of the owners, the designation of the owner of any lot not, however to be "taken or held as in any sense or to any degree a conclusion or judgment by the trustee as to the true ownership in any contested case coming before him." Paragraphs 28 and 29 of said regulations further provide:

"28. As soon as said plats are completed, the trustee will then cause to be posted in three conspicuous places in the town, a notice to the effect that such survey and platting have been completed and notifying all persons concerned or interested in such town site that on a designated day he will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled under the provisions of said act. Such notices shall be posted at least fifteen days prior to the day set apart by the trustee for making such division and allotment. Proof of such notification shall be evidenced by the affidavit of the trustee, accompanied by a copy of such notice.

"29. After such notice shall have been duly given, the trustee will proceed on the designated day, except in contested cases which shall be disposed of in the manner hereinafter provided, to set apart to the persons entitled to receive the same the lots, blocks and grounds to which such persons, company or association of persons shall be entitled, according to their respective interests," etc.

After providing for the manner in which lots, in relation to which there is no controversy, shall be set apart to the persons entitled thereto, paragraph 31 of the regulations provides that the trustee shall, "where he finds two or more inhabitants claiming the same lot, block, or parcel of land, proceed to hear and determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each ten days' notice thereof, and a fair opportunity to present their interests in accordance with the principles of law and equity applicable to the case, observing as far as practicable the rules prescribed for contests before registers and receivers of the local offices. * * * If the notice herein provided cannot be personally served upon the party therein named within three days from its date, such service may be made by a printed notice published for ten days in a newspaper in the town in which the lot to be affected thereby is situated; or, if there is none published in such town, then said notice may be printed in any newspaper published in the territory." The regulations also gave to any party aggrieved by the decision of the trustee the right to appeal to the Commissioner of the General Land Office, and, if dissatisfied with his decision, to still further prosecute

an appeal to the Secretary of the Interior. Under the law and the regulations of the Secretary of the Interior above set forth, persons claiming the right to obtain from the United States the legal title to lots in the town of Juneau were required to make application therefor to the trustee of the town site, and he was clothed with the authority to investigate and determine the rights of all persons making such applications, and his action thereon has the same legal effect as that of the register and receiver in passing upon a claim of right to enter public land under the homestead or pre-emption laws; that is, in the absence of fraud, accident, or mistake, his decision of all questions of fact arising in such a proceeding was final, except as the same might be reversed upon appeal to the Commissioner of the General Land Office and the Secretary of the Interior. This rule in relation to the effect of the decisions of the officers of the Land Department in disposing of public lands of the United States is well settled. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Lee v. Johnson, 116 U. S. 50, 6 Sup. Ct. 249, 29 L. Ed. 570; Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290; Durango Land & Coal Co. v. Evans, 80 Fed. 425, 25 C. C. A. 523. Thus in Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290, the court, after stating that a court of equity will not interfere with the rightful exercise of the powers intrusted to the officers of the Land Department in matters properly before them, or review their findings of fact, "for alleged errors in passing upon the weight of evidence presented," proceeded to say:

"But where the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. Quinby v. Conlan, 104 U. S. 420, 426, 26 L. Ed. 800; Baldwin v. Starks, 107 U. S. 463, 465, 2 Sup. Ct. 473, 27 L. Ed. 526. In such cases a court of equity only exercises its ordinary jurisdiction to prevent injustice from misconstruction of the laws or the machinations of fraud. * * * And the misrepresentations and fraud mentioned necessarily affecting the judgment of the department must be such as have prevented the unsuccessful party from fully presenting his case or the officers of the government from fully considering it, such as have imposed upon its jurisdiction or turned its attention from the real controversy."

It is true that in the case from which the foregoing quotation is made, and in all of the cases above cited, the controversy was between parties who had actually appeared before the land officers and submitted evidence in support of their respective claims, but these facts do not affect the principle upon which they were decided, or render inapplicable to the cause before us the rule which they declare, namely, that the decision of the officers of the Land Department in the matter of a claim of right to enter public land of the United States, which was regularly and properly before them, cannot be set aside, except upon some one of the grounds upon which courts of equity proceed in adjudging void the judgment or decree of a court. The principle upon which courts of equity proceed in such cases is thus stated by Chief

Justice Marshall, in Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

See, also, Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216; Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; Railroad Co. v. Neal, 1 Woods, 353, Fed. Cas. No. 11,534; Brooks v. O'Hara (C. C.) 8 Fed. 529.

The fact that the proceeding in which defendant obtained the legal title to the lot in controversy was ex parte is not of itself sufficient ground to justify a court of equity in entering upon an inquiry as to the truth or falsity of the evidence upon which the trustee acted in confirming the defendant's claim to such lot, but under the doctrine of the cases just cited it was incumbent upon the complainants to allege in their bill facts showing that without negligence upon their part they were prevented by fraud or by accident from appearing before the trustee of the town site of Juneau, and there submitting evidence to establish their right to enter the lot now claimed by them. There is no allegation in the bill that the trustee failed to give the notice required by the regulations of the Secretary of the Interior, or, if such notice was given, that the failure of the complainants to be informed thereof and to appear before the trustee with their proofs was the result of fraudulent conduct upon the part of the defendant, or of some accidental cause which would be recognized by a court of equity as sufficient ground upon which to hold that they ought not to be concluded by the action of the trustee in conveying the lot in controversy to defendant. The demurrer directed specific attention to these defects in the bill, and was properly sustained. It is not sufficient to allege generally that the complainants did not have knowledge of the hearing before the trustee, or opportunity to prove that the representations made by the defendant to the trustee in obtaining the legal title to the lot described in the bill were false, but the particular facts and circumstances which prevented them from having notice of the proceeding, and opportunity to protect their rights, should be set out in the bill, so as to enable the court to determine from the facts so alleged whether the complainants show themselves to have been prevented by fraud or accident from appearing before the trustee and establishing their right to acquire title to the lot which is the subject of controversy in this action.

Decree affirmed.

UNION RY. CO. v. STANDARD WHEEL CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1906.)

No. 1,572.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—DISMISSAL—TIME.

Shannon's Tenn. Code, relating to condemnation proceedings, provides for a preliminary inquest by a jury, who, if they find for the petitioner, assess the damages sustained and report to the court, whereupon sec-

tion 1859 declares that, if no objections are made, the report shall be confirmed and the land decreed to the petitioner on payment of the damages assessed, with costs. Section 1861 gives to either party the right to appeal and have his case tried anew before a jury, and section 1863 declares that an appeal does not suspend the operations of the petitioner on the land, provided he give bond with security, etc. Section 1865 provides that the petitioner shall not enter on the land until the damages assessed and the costs have been actually paid, or, if an appeal has been taken, until a bond has been given to abide the final judgment. *Held* that, where judgment has been entered assessing the damages for land sought to be condemned for a railway right of way on the trial of an appeal taken under section 1863, the petitioner was not thereafter entitled at its election to dismiss the proceeding as to a portion of the land sought to be condemned merely because in its opinion the damages assessed were too high.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 649.]

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

McFarland & Canada, for plaintiff in error.

W. A. Percy and M. C. Ketchum, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The Union Railway Company, a Tennessee corporation, filed a petition in the circuit court of Shelby county in that state against the Standard Wheel Company, a corporation of Indiana, holding a lease of a certain tract of land on Raleigh street in the city of Memphis, for the condemnation of a portion of the leased land for the purposes of its railway. The wheel company removed the cause into the Circuit Court of the United States and there contested the proceeding. A jury of view was summoned, who reported their assessment of damages of the defendant at the sum of $2,587.50. Under a privilege given by the statute of Tennessee both parties appealed, and demanded a jury, for a trial in the common way of trial of causes in the court. At this stage of the cause the petitioner, by leave of the court, amended its petition by including a strip adjacent to the other. We are to infer that a jury of view was not summoned in respect to the new strip, as no proceeding of that kind is shown by the record. In the proceedings in the cause a distinction of the two parcels was maintained to the end, the verdict and judgment being separate as to each; that is to say, they show what sum was assessed and adjudged as damages for each. At the trial the jury assessed the wheel company's damages for the taking of the first-mentioned portion of the land at $4,000 and for the other at $6,566.40. A judgment was entered for the amount of these two sums. The railway company moved for a new trial upon several grounds, among them that the damages were excessive. The court overruled all the other grounds, but held that the damages were excessive, and required the wheel company to remit $500 from the verdict for the first tract and $2,500 of the verdict from the other. This being done, the judgment was amended and reentered. By this judgment it was by the court "ordered, adjudged and decreed that the defendant, the Standard Wheel Company, do have and recover of the petitioner, the Union Railway Company, as damages

for the taking of the thirty-four foot strip [which was the parcel brought in by the amendment of the petition] * * * three thousand, eight hundred and eighty-four and 30-100 dollars," that being the amount of the verdict, less the remittitur, with interest. In the same entry there was included a judgment for the damages in respect of the other parcel, and in the final statement of the amount of the recovery the sums allowed for each were added and judgment was rendered for the aggregate sum, and execution was awarded for the whole amount. And it was by the judgment further ordered that upon the payment of the damages so determined the right, title, and interest of the defendant in the easement thus condemned should be divested out of the wheel company, and the petitioner be put in possession. Thereupon the petitioner asked leave to dismiss its amended petition and abandon its proceedings thereon, and that the judgment be vacated so far as it goes against it for the taking of the land brought in by the amendment. The ground on which the motion was made was not stated. The motion was overruled and the petitioner excepted. The error assigned is in this ruling.

The statute of Tennessee relating to this subject provides for a preliminary inquest by a jury, who, if they find for the petitioner, assess the damages sustained by the defendants. They report to the court Thereupon it is provided by section 1859 of the Code (Shannon's Code) that:

"If no objection is made to the report, it is confirmed by the court, and the land decreed to the petitioner, upon payment to the defendants, or to the clerk for their use, of the damages assessed, with costs."

Section 1861 gives to either party the right to appeal from the finding of the jury and have his cause tried anew before a jury in the common manner of the trial of causes. Section 1863 is as follows:

"The taking of an appeal does not suspend the operations of the petitioner on the land, provided such petitioner will give bond with good security, to be approved by the clerk, in double the amount of the assessment of the jury of inquest, payable to the defendants, and conditioned to abide by and perform the final judgment in the premises."

Section 1864 authorizes a preliminary survey by the petitioner. But section 1865 provides that:

"No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way, until the damages assessed by the jury of inquest and the costs have been actually paid; or, if an appeal has been taken, until the bond has been given to abide by the final judgment as before provided."

The question which we are required to determine is whether at the time when the petitioner asked leave to dismiss its amended petition, and that the judgment so far as it related to the new parcel brought in by the amendment be vacated, it had that right. The authorities quite generally recognize that the right to discontinue such proceedings at some stage of their progress exists; but there is a great divergence of opinion as to the time when the right ceases. The principal difference is in the holding that the right is ended by a final judgment fixing the damages and entitling the petitioner to take possession on

payment of them, and the holding that the right continues until he elects to take the property at the value fixed by the judgment. It would be a tedious task to canvass the great number of cases upon this subject which the industry of counsel has collected in their briefs. Many of them will be found upon examination to have turned upon the particular language of the statutes under which the proceedings were taken. But many others were decided upon general principles of justice and expediency. In the absence of any statutory provision leading to one conclusion or the other, we should be much inclined to think that the weight of reason and analogy would require that when the amount of damages to be paid the respondent has been adjudged upon a trial, and the right is adjudged to the petitioner to take the property upon payment of the damages, the obligations of the parties should be regarded as fixed. When such a proceeding is carried forward to a trial before a court and jury in the ordinary course of causes between party and party, it becomes subject to all the rules and incidents of such causes. It was because of such characteristics that the Supreme Court held in Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, that the Circuit Courts of the United States might take jurisdiction and adjudicate the case in the same manner as in ordinary civil actions. We cannot think that the condition stated in the judgment that the damages shall be first paid is of much importance in settling the question we are considering. It results from a constitutional requirement that it should be so. It is the order required by the nature of the proceeding. Besides, an adjudication that a man have a right to a beneficial privilege upon his performing some condition, and adjudging also that he perform the condition, is no strange thing in jurisprudence. There may be cases where, subsequent to the judgment, it appears that the petitioner cannot, for reasons beyond its control, obtain or use the benefit of the judgment, as by disclosure of lack of title in the defendant, or the loss or cessation of power to use the property, the court on these facts being shown will relieve the petitioner and excuse it from compliance with the judgment. But this must be upon sufficient reasons, of which the court will judge. It is not a sufficient reason that the petitioner is dissatisfied with the price it is required to pay. Mutuality of obligation between parties to a judgment is a principle in its foundation. In such a proceeding as the present the judgment binds the defendant. He has no choice but to surrender the property at the price which is determined by the contest he has been compelled to make. If the other party is free, nothing has been gained by the defendant. He may be pursued again and again until at last the other party has got a jury to fix a price which will be satisfactory to him. The result of the abandonment is to leave things as they were at the beginning; and we are aware of no rule of law which would prevent the party from proceeding anew as in the ordinary case of voluntary dismissal or nonsuit. When a party undertakes to subject another's property to his own use, he must be deemed to be willing and intend to pay a fair price for it, and that such fair price shall be fixed by the verdict of a jury to be approved by the court. Good faith requires that he shall not use the power of the court to

vex the other party with successive experiments in the effort to get what he wants at his own price. And the public has an interest in the finality of the judgment. It will endure one litigation between parties, but not a repetition of it, to give one of them a chance to get a better result. The statute of Tennessee, whose laws we are required to administer, confirms these views in their application to the present case. By section 1863 of the Code, above cited, the petitioner may take possession of the land on the coming in of the verdict of "the jury of inquest" by giving bond "conditioned to abide by and perform the final judgment in the premises." It is true that in this case the report of a jury of inquest was waived, and the petitioner did not take possession. But this does not affect the construction of the statute, which plainly contemplates that the final judgment is to be binding upon the petitioner, and the final judgment fixes the price he is to pay. On the appeal the cause is to be tried as a cause between party and party. The jury is to assess the damages. The court is to render judgment. The defendant is bound by it, and so is the petitioner, on principle as we think, but also by force of the statute.

We are referred to no decision of the Supreme Court of Tennessee directly in point upon the construction of this statute as it affects the case in hand or upon the general principles applicable to the subject. The cases which are thought most nearly so are White v. N. & N. W. R. Co., 7 Heisk. (Tenn.) 518, and Stephens v. Duck River Nav. Co., 1 Sneed (Tenn.) 237. In the former case the railroad company had taken possession of White's land. In a suit brought by him to recover damages he obtained a judgment. Execution therein was returned nulla bona. He then brought suit to enjoin the use of the land until his damages were paid. And the court sustained him, holding that the title had not passed, and would not until the owner was compensated. The court said:

"The most that can be claimed by the appropriation is an inchoate right that may ripen into a perfect title upon the payment of the price."

Nothing was adjudged or said that is here disputed. In the case of Stephens v. Duck River Nav. Co., upon the return of the verdict of the jury assessing the damages and before the entry of the judgment, the petitioner moved to quash the proceedings for the reasons, among others, that the object for which the navigation company was organized had become impracticable and the company had abandoned the project, and, further, that a bill had been filed for its dissolution. The motion was resisted upon the ground that the defendant had acquired by the verdict of the jury a right to the damages assessed. But the Supreme Court held otherwise, and said:

"We cannot assent to this reasoning. On the contrary, we think that an utter abandonment of the contemplated scheme of improvement in good faith, at any time before the final judgment of the court upon the report of the jury, would take away the right of the party to insist upon the value of his property, and transfer of the title to the company, and leave him to recover such damages, under all the circumstances of the case, as he may have sustained by the erection of a dam during its continuance. Of course, in such case, the abandonment of the enterprise, and total removal of the cause of injury must be established by plenary evidence, and the evidence of abandonment must be of a character to be, in law, binding and conclusive upon the company."

The right to abandon the proceeding after final judgment was not in issue, and was not decided. But the facts were such as to challenge the attention of the court to the time to which the right to abandon continued, and it may well be thought that the language of the court, stating that in certain circumstances a dismissal might be allowed "at any time before the final judgment of the court upon the report of the jury," was used deliberately. The court in which the trial is to be had is one of general jurisdiction in respect to the relief it may render. In this case it rendered a judgment that the defendant recover the damages found and awarded execution, which, as we are inclined to think, though we do not decide, was a proper exercise of its authority. At all events, it was a judgment which it had power to render, and, if it erred in its exercise, the remedy was to take measures for its reversal. The petitioner, however, took the ground that it had the privilege to disregard it altogether and to demand that the court vacate the whole proceeding on its amended petition. The case of Baltimore & Susquehanna R. Co. v. Nesbit, 10 How. 395, 13 L. Ed. 469, is cited by counsel for the petitioner as an authority for the proposition that it had the right to withdraw from the proceeding at any time before it should pay the damages and take possession. In that case, Mr. Justice Daniel made use of some language, arguendo, from which, if we did not regard the statute of Maryland, such an opinion could fairly be deduced. But the case arose under a statute which did not contemplate a trial and the judgment was rendered upon an inquisition. Besides, there was no affirmative judgment in favor of the defendant that he recover the damages. The petitioner did not tender the damages, and five years after the Legislature passed an act requiring the court to set the judgment aside and direct a new inquisition as if it had itself set the verdict aside and ordered a new inquisition. The court set aside the judgment, but the petitioner did not ask for a new inquest. On the contrary, claiming that the act of the Legislature was void, the railroad company, seven years after the judgment, tendered the amount thereof, with interest. The question before the court was whether the act of the Legislature directing the vacation of the judgment was void for the reason that it impaired the obligation of the contract which it claimed to have with the state by reason of its charter in which it was given the power of eminent domain. It seems a singular contention, but it is enough to say that it did not claim to have a contract with the owner of the land. The court held the act was a valid exercise of power, that the railroad company had no contract with the state which prevented it from providing that there should be another inquisition for the damages, assuming even that the petitioner had not lost its right by its long delay in following up the judgment by tendering the damages, which the court did not admit. From this examination of the case it is apparent that it decides nothing in conflict with the views we have expressed. The radical difference between an inquest and a trial would be of itself sufficient to distinguish it.

We think the court did not err in denying the motion; and its order is affirmed, with costs.

COMMERCIAL PUB. CO. v. SMITH.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,557.

1. LIBEL—ACTION—DEFENSES.

The publication of a statement that a person has been arrested on a criminal charge is not actionable if the statement is true, but if there is added to it by way of comment words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact that the person was arrested on the charge stated is no justification for the words imputing guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 148.]

2. SAME—CONSTRUCTION OF PUBLICATION—QUESTION FOR JURY.

A publication must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it, and the whole, including display lines, should be read and construed together, and its meaning and signification thus determined. When so read, if it is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether it is defamatory or not; but if it is capable of two meanings, one of which would render it libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those by whom it might be read.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 357–359.]

3. SAME.

An item published by defendant in its newspaper, under the heading "Murderer Arrested," stated that a sheriff had arrested the plaintiff, who was wanted in another state for the murder of a man, the incentive being robbery; that rewards had been there offered for plaintiff's arrest; that he did not deny being the man wanted, but claimed that he did not do the killing. In an action for libel because of such publication, the declaration admitted that plaintiff was arrested as therein stated, and alleged by innuendo that the article charged plaintiff with murder, and that rewards had been offered for his arrest, which statements were false and untrue; that plaintiff had been injured thereby, etc. *Held*, that the question whether the article would be understood by readers to so charge, and was therefore libelous, was one for the jury, and that the court erred in charging that it was libelous per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 357, 358.]

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

E. E. Wright, for plaintiff in error.

H. D. Minor, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Action for libel. Jury, and verdict and judgment for plaintiff. Defendant has sued out this writ or error. The alleged libelous publication consisted in the publication in the newspaper published by the plaintiff in error of a special dispatch from its

own special correspondent at Augusta, Ark., in words and figures as follows:

"Murderer Arrested.

"Augusta, Ark., Feb. 10th.—Sheriff Marshal Patterson arrested Fred Smith, camped in a tent ten miles north of Augusta, on White river. Smith is wanted at Kennett, Mo., for killing old man F. E. Porch, the incentive being robbery. The state of Missouri offered $300, the county $200, and the citizens of Malden $600, for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing."

The declaration, by innuendo, averred that the meaning of the said publication was:

"That the said plaintiff was a murderer; that he had murdered an old man named F. E. Porch for the purpose of robbing him; that a reward was being offered for the arrest of said plaintiff; and that he, the said plaintiff, on being arrested, did not deny that he was the man wanted."

The declaration admitted that so much of the item as stated that the plaintiff had been arrested by Sheriff Patterson at the time and place stated was true, but that the statement that "a murderer had been arrested, and that the said plaintiff was 'wanted at Kennett, Mo., for killing old man Porch, the incentive being robbery' and that 'the state of Missouri had offered $300, the county $200, and the citizens of Malden $600,' for the arrest of plaintiff, and that the plaintiff did not deny being the man wanted," were false and untrue, and that by this false publication plaintiff had been greatly injured, etc.

The defendant interposed three pleas: First. Not guilty. Second. That the publication did not refer to the plaintiff but to one Fred Smith, a different individual. The third plea was in these words:

"For further plea, filed by leave of the court, the defendant says that the plaintiff was arrested by Sheriff Marshal Patterson in a tent near Augusta, Arkansas, on a charge of murder, and under the belief by the sheriff that he was guilty of that offense, and that the plaintiff did claim that he did not do the killing for which he was arrested. The substance of the publication complained of is that the plaintiff was arrested on the charge of murder, and that he claimed that he was innocent of that charge. The sheriff may have made a mistake in the matter. The defendant says the article complained of did not state that the plaintiff is guilty of murder, nor does the language used bear that meaning. It only says and means, in substance, that the plaintiff was arrested on the charge of murder. Wherefore pleads this special justification as to the truth of the words herein referred to in bar and defense of this action."

The case turned below upon the sufficiency of this third defense, and must turn here upon the question as to whether the meaning of the item was for the jury. In respect of the construction and interpretation of the item, the court said:

"I charge you, gentlemen of the jury, that the publication set out in the declaration is libelous per se—that is, it is actionable on its face—and if you believe from a preponderance of the evidence in the case that the defendant published the article, and if you further believe that it was published of and concerning the plaintiff, and that it was untrue, then the plaintiff would be entitled to a verdict at your hands."

He denied a request to charge that it was the province of the jury to determine the meaning of the objectionable item, and that if they should find that the article or item only conveyed to those who read it

"the meaning that the plaintiff was arrested by the sheriff on the charge of murder" etc., that the plaintiff could not recover if they should find as a fact that the plaintiff had been arrested by the sheriff upon a charge of murder, although the sheriff might have made a mistake in so doing. The publication of the fact that one has been arrested, and upon what accusation, is not actionable, if true. But a newspaper has no greater justification for the publication of defamatory matter than pertains to any private person. The defense against an action for writing or saying of one that he has been arrested upon a particular charge is that the fact is true. But if to this fact there is added, by way of comment, words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact that the person was arrested upon the charge stated is no justification for words imputing guilt. Newell on Slander & Libel, p. 574; Usher v. Severance, 20 Me. 9, 11, 37 Am. Dec. 33; McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465.

The plaintiff's case depended upon whether the publication in question went beyond a mere statement of the fact of his arrest upon the charge of murder. By innuendo he placed an interpretation upon the words printed, which, if established, signified that the plaintiff was guilty of the murder of Porch, and was the person for whom the rewards had been offered as a fugitive from justice.

The defendant's third plea was, in effect, an admission of the publication, but a denial that the words printed of him, when read together, meant more than that he had been arrested under a charge of being the man who had murdered Porch, and for whom rewards were offered. If this is the meaning which is fairly attributable to the article by those to whom it was addressed, the plaintiff's case must fail. In such case the article would be justified by the truth of the only facts stated or implied, to wit, that the plaintiff had been arrested upon the charge of having murdered Porch with intent to rob him. The issue presented by the defendant's third plea and the request for a special charge, referred to above, was as to the meaning of the article published concerning the plaintiff. The court, in effect, instructed the jury to find for the plaintiff by saying to them that the publication was "actionable on its face," and that if it was published of and concerning the plaintiff and untrue, then the plaintiff would be entitled to a verdict. This was not excepted to. But the special request proffered at the conclusion of the charge was in direct opposition. By it the court was asked to submit to the jury the meaning of the article, with an instruction that, if they found that the item "only charged or conveyed to those who read it the meaning that the plaintiff was arrested by the sheriff on the charge of murder, and that the plaintiff claimed that he was not guilty thereof, that these words, under such a meaning, would not be libelous and actionable, if you find that the plaintiff was in fact arrested by the sheriff for murder, although the sheriff made a mistake by so doing." This charge was denied. This was error. A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus de-

termined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. Newell on Slander & Libel, § 290; Townshend on Libel & Slander, §§ 281, 286; 13 Enc. Pleading & Practice, 106; Sturt v. Blogg, 10 Q. B. 908; Capital & Counties Bank v. Henty & Sons, 7 App. Cases 741, 744; Watson v. Nicholas, 6 Humph. (Tenn.) 174; Bank v. Bowdre Bros., 92 Tenn. 723, 740, 23 S. W. 131; Dexter v. Taber, 12 Johns. (N. Y.) 239; Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752; and Twombly v. Monroe, 136 Mass. 464, 468.

The plaintiff by innuendo assigned a meaning to the news item alleged to be libelous, which, if established, would attach a meaning and signification imputing to the plaintiff an indictable crime of heinous character. In Cunningham v. Underwood, 116 Fed. 803, 807, 53 C. C. A. 99, we said that:

"When antecedent words are capable, as a matter of law, of being understood in more than one sense, it is the office of an innuendo to designate that meaning which the plaintiff proposes to establish as the meaning intended by the defendant and understood by those who heard or read them."

But the court relieved the jury of all discretion in the matter of the signification of the printed words by the instruction set out and by the refusal to give the instruction asked. In Sturt v. Blogg, cited above, and quoted with approval by Lord Selbourne in Capital & Counties Bank v. Henty, cited above, it was said by Wilde, C. J.:

"It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but where the judge is satisfied of that, it should be left to the jury to say whether the publication has the meaning ascribed to it."

The publication here involved was not so free from reasonable doubt as to its meaning and signification as to justify the learned circuit judge in ascribing to it, as matter of law, the signification sought to be put upon it by the innuendo. There was room for the jury, taking into consideration the display line and all other parts of the dispatch, and all the circumstances in evidence, to conclude that it would only convey to the readers of the paper the information that the plaintiff had been arrested under the charge of being the person accused with the murder of Porch, and for whom a reward was offered, and that plaintiff had admitted that he was the person wanted by the sheriff who made the arrest, but that he denied that he was the murderer of Porch.

The case is to be retried. This fact makes it proper that we should express no opinion as to whether this meaning is the most natural interpretation, or one which imputes to the plaintiff the crime of murder.

Judgment of the court below reversed, with direction to order a new trial.

MERCHANTS' NAT. BANK OF TOLEDO, OHIO, v. COLE.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,560.

1. APPEAL—MASTER'S FINDINGS—REVIEW.
In a case brought to the Circuit Court of Appeals, on appeal from the judgment of the trial court after a hearing of the case on the merits, and not on exceptions to the findings of a master, the appellate court was entitled to review the case independent of the master's findings.

2. BANKRUPTCY—ACT OF BANKRUPTCY—FRAUDULENT CONVEYANCE.
Decedent on March 23, 1898, executed a guaranty of payment of all her sons' notes to a bank and all renewals and new loans made by the bank to them. Decedent was a woman of advanced years, without special business experience. The bank then extended further credit to the sons, and during the five succeeding years they took care of their paper as it matured; it appearing that over $250,000 of their paper was discounted by the bank during that period. On September 2, 1903, decedent owned no personal property, except household goods, but owned real estate of considerable value, and had no creditor, except N., to whom she owed a large sum, other than her indebtedness on the guaranty, and on that day she conveyed her real estate to N. in payment of her indebtedness to him. At the time of this conveyance none of the outstanding notes discounted by the bank for her sons, had matured, and it did not appear that she had any knowledge of her liability on the guaranty. *Held*, it was not shown that the conveyance to N. was made with intent to hinder, delay, and defraud her creditors, or with intent to prefer N. over her other creditors, so as to constitute an act of bankruptcy.

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

C. Brown, for appellant.

A. L. Smith and G. W. Kinney, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from a judgment of the court below refusing to adjudge Lucy A. Cole a bankrupt. The act of bankruptcy relied on in the petition was the conveyance by Lucy A. Cole, on September 2, 1903, of all her real estate to her creditor, John T. Newton. It was charged she did this with intent to hinder, delay, and defraud her creditors, and that, being then insolvent, she did it with intent to prefer Newton over her other creditors. The answer denies she was insolvent at the time she made the conveyance, and denies that she made it either with intent to hinder, delay, or defraud her creditors, or with intent to prefer Newton over her other creditors. The petition was filed June 1, 1904, the answer June 28, 1904, and on December 23, 1904, the court, against the objection of the respondent, ordered the cause to be referred to a master, who was to have the powers of masters in chancery, under the rules of equity, to take "the proofs offered by the parties upon the issue made herein as to the insolvency of said Lucy A. Cole, and report the same to the court, with his findings of fact and conclusions of law thereon."

Beginning on April 10, 1905, the master took certain testimony, and

on June 9, 1905, submitted his report, in which, after stating his findings of fact, he reported as his conclusions of law that on September 2, 1903, Lucy A. Cole was insolvent, and made the conveyance in question with intent to prefer one of her creditors over others, and to hinder, delay, and defraud her other creditors. To this finding, exceptions were taken and the matter was heard by the court below. The character of this hearing is in dispute. A careful examination of the record satisfies us that the court acted twice upon the matter—first upon the exceptions, and then upon the entire case. The cause was referred to the master solely upon the issue of the insolvency of the alleged bankrupt at the time of making the conveyance of September 2, 1903. The master found she was then insolvent. The court overruled the exceptions to this finding and affirmed the report in this respect. Having done this, the court went on and heard the case upon the petition and answer and reply and the evidence, and "upon a consideration of the proofs in said cause and arguments of counsel the court found that the facts set forth in said petition were not proved, and that the said Lucy A. Cole was not a bankrupt as alleged in said petition." Thereupon the court dismissed the petition, from which this appeal was taken.

After the entry of this judgment, there was an application by the petitioner for the reopening of the case and leave to offer further proof, which was denied; the court saying:

"It is true that the court inadvertently treated this as passing upon the report of the master, when, in fact, it came originally before the court. The fact is that the court considered the case as if originally before it, and disposed of it on the merits."

From the record it appears that the case is here, not simply upon the testimony taken before the master, but also upon a certificate of evidence made by the court setting forth certain stipulations, admissions, and testimony produced before the court which were not before the master. We have gone into this matter in some detail, because the point is pressed by counsel for the petitioner that, since the defendant did not take a cross-appeal, the findings of the master are binding here. The case is here, not upon exceptions, either primarily or secondarily, to the master's findings, but upon an appeal from the judgment of the court below, after a hearing of the case upon the pleadings and evidence—in other words, upon the merits—so that we are in no wise hampered by the master's findings and conclusions, but the whole case is before us. Ridings v. Johnson, 128 U. S. 212, 218, 9 Sup. Ct. 72, 32 L. Ed. 401; Elliott v. Toeppner, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200; Loveland on Bankruptcy (3d Ed.) § 326.

Coming to the merits, it appears that on March 29, 1898, F. E. Cole and G. H. Cole were engaged in the contracting business, paving streets and constructing sewers in Toledo, Ohio, and paving streets in Lima, Ohio. They had from time to time borrowed money from the petitioner, the Merchants' National Bank of Toledo, to aid them in their business, and at that time owed the bank $13,200, represented by seventeen promissory notes, all executed during January, February, and March, 1898. Lucy A. Cole was the mother of the Cole

brothers, and on March 29, 1898, she signed the following paper, prepared by the cashier of the bank and presented to her by one of her sons, G. H. Cole:

"March 29, 1898.

"I hereby guarantee the payment of all notes of F. E. and G. H. Cole held by the Merchants' National Bank; also all renewals of the same, and any new loans made to either F. E. Cole or G. H. Cole by the said bank.

"Lucy A. Cole."

Lucy A. Cole was then a woman advanced in years, who, while the owner of certain real estate in Toledo, was not engaged in business, and was apparently without special business experience. Subsequent to the giving of this guaranty, the Cole brothers extended their business operations, taking contracts in Tennessee and in Philadelphia, and the Merchants' National Bank enlarged their credit as needed from time to time, until their indebtedness in the fall of 1903 aggregated over $40,000. During these five years, from 1898 to 1903, the Cole brothers took care of their paper as it matured, either paying or renewing the same, and the evidence shows that over $250,000 of their paper had been discounted in this bank during that period. Of the outstanding notes of the Cole brothers, only one matured on September 2, 1903, a note for $6,000. The others matured later. On this day Lucy A. Cole owned no personal property, except household goods, but owned real estate of considerable value in Toledo, and, so far as appears from the records, had no creditor, except John T. Newton, to whom she owed a large sum, unless she was then liable to the Merchants' National Bank upon her guaranty. On this day she deeded all her real estate in Toledo to Newton.

The court below took the view that the testimony did not make out a case of intent on the part of Mrs. Cole, either to defraud her creditors or to prefer one over the others, and it reached its conclusion because the testimony did not satisfy it that Mrs. Cole knew, at the time she made the conveyance, that she was insolvent, or that she had any creditor other than Newton. We can find no good ground in the record to withhold our approval of these conclusions. Mrs. Cole was not a business woman. She signed the guaranty at the request of one of her sons, understanding, as she testified, that it referred solely to the business her sons were then carrying on in Toledo. Some years passed. They extended their operations to Tennessee and Philadelphia, the bank at the same time enlarging their line of credits; and, according to the testimony, the guaranty was never mentioned to Mrs. Cole, either by her sons or by any officer of the bank. It is not an unreasonable inference that this paper, which had been prepared at the bank and signed by her on request, had passed from her mind. It naturally would, for the Toledo business—the notes held by the bank when the guaranty was given, the renewals thereof, and the new notes made in connection therewith—all had been settled or taken care of. The only one who was calling his claim as a creditor to her attention on or shortly before September 2, 1903, was Newton, to whom she had obligated herself in behalf of her sons, and whom she had promised to make a conveyance of her real estate in satisfaction of his claims, whenever he might demand it. She states in the record that she did make the

conveyance in August, 1903, and that the conveyance of September 2, 1903, was made for the purpose of correcting the description of her premises in the deed made in August. There was nothing in the fact that Newton demanded the conveyance in August, and afterwards, on September 2d, requested another conveyance to correct the first. There was nothing in this to put her upon notice that her sons were, or were about to be, in trouble with the bank, or that she would be involved on account of the old guaranty.

It is not necessary for us to pass upon the nature of the guaranty; but, conceding it was still in force—a thing we are not to be taken as deciding—there was certainly no liability as against her until her sons had failed to pay one of the notes or loans which the guaranty secured, and there could have been no failure of that kind until the close of September 2, 1903, when the note of $6,000 fell due and became payable, the other outstanding notes not maturing until later. No notice of the fact that her sons had failed, or would probably fail, to meet any of their obligations to the bank, was brought home to her on or before September 2, 1903, when she made this conveyance. As the case stands in the record, she had knowledge on this day of but one creditor, Newton, to whom she made a conveyance at his demand in fulfillment of her agreement. She had a right to pay him, and she could not have made the transfer with intent to prefer him, unless at the time she had known, or had reason to know, of the existence of other creditors. And this is true of the intent to hinder, delay, and defraud her creditors. That intent must be established by proof, fraud must be shown, and the good faith of the transaction must be successfully impeached. Lansing Engine & Boiler Works v. Ryerson, 128 Fed. 701, 703, 63 C. C. A. 253. Now, this has not, in our opinion, been done. The testimony goes no further than to cast a suspicion.

The judgment is affirmed.

UNION NAT. BANK OF KANSAS CITY, MO., v. NEILL.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1906.)

No. 1,546.

1. PARTNERSHIP—TRADING PARTNERSHIP—AUTHORITY OF PARTNER—BORROWING MONEY.

   In an ordinary trading partnership, a partner has implied authority to borrow money on the credit of the firm, to draw, and accept, make, and indorse bills of exchange and notes, in the name of the firm.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 241–255.]

2. BILLS AND NOTES—BONA FIDE PURCHASER—AUTHORITY OF MAKER.

   Though a member of a trading partnership has no implied power to sign the firm name as an accommodation indorser of a note, yet, if he does so, his unauthorized act constitutes no defense to the firm as against a bona fide purchaser for value in due course; the paper being such as to be subject to the law merchant.

3. SAME—BONA FIDE PURCHASER—REQUISITES.

   Where the holder of negotiable paper acquired it before maturity from another, who was apparently the owner, and gave a consideration there-

for, he obtained a good title, though he had knowledge of facts and circumstances that would cause him or a man of ordinary prudence to suspect that the person from whom he obtained it had no interest therein or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained such facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 869.]

4. SAME—NOTICE OF SURETYSHIP.

Where a note when presented to petitioner for discount was signed on its face by three persons, the fact that the name of a partnership subsequently adjudged a bankrupt appeared as the second signer was not notice to petitioner that the firm signed only as surety for the first signer.

5. SAME.

Where a series of notes discounted by petitioner were all signed by three persons, a partnership which subsequently became a bankrupt being the second signer, the notes on their face did not indicate a contract of suretyship by which the second signer on being compelled to pay the entire note did so to the extent of two-thirds thereof as surety for the others.

6. SAME—JOINT AND SEVERAL LIABILITY.

Where a series of notes were signed by three persons, the second signer being a firm which subsequently became a bankrupt, the firm's contract as principal was to pay the entire amount of the notes, and this was not changed by the fact that other signers had made the same promise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 542.]

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

For opinion below, see 143 Fed. 553.

M. L. Crawford (W. I. Ford and W. L. Crawford, Jr., on the brief), for appellant.

C. A. Keller, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The appellant presented to the referee in bankruptcy for allowance against the bankrupt firm of A. F. Hardie & Co. 12 notes for $2,500 each, aggregating $30,000. The claim was at first allowed. Afterwards, on motion of the appellee, it was disallowed by the referee and expunged from the list of claims. The appellant excepted to the disallowance of its claim, and presented to the district court its petition to review the decision of the referee. The district court affirmed the referee's decision, and the case is brought here by appeal. The 12 notes are all alike, except as to the date of maturity, and are in the following form:

"$2,500.00. Dallas, Texas, February 16, 1905. April 10, 1905, after date we promise to pay to the order of Spence and Leonard Hardie twenty-five hundred dollars, at Dallas, Texas, with interest from date until paid at six per cent per annum. If this note is not paid at maturity and is collected by suit or attorney, we further promise to pay ten per cent. additional on principal and Interest for attorney's fees. Value received.

"Hardie Rose Co.
"(By A. F. Hardie, Pres.)
"A. F. Hardie & Co.
"A. F. Hardie."

The firm of A. F. Hardie & Co. was composed of A. F. Hardie, James M. Hardie, and Max Kaliski. It was a trading partnership,

engaged at the time the notes were made and negotiated in the purchase and sale of merchandise at San Antonio, Tex. The notes in question were signed in the firm name in the handwriting of James M. Hardie. Each note was indorsed on the back as follows:

"Spence Hardie, Leonard A. Hardie. Notice and protest waived. Pay Union National Bank, Kansas City, Mo., or order, Swofford Bros. Dry Goods Co. By J. J. Swofford, Pt. Notice & protest waived. Spence Hardie, Leonard A. Hardie."

The Swofford Bros. Dry Goods Company had for a long time kept an account at the appellant bank, and the bank was in the habit of discounting commercial paper for the company. On March 30, 1905, the bank discounted for the company the 12 notes in question, paying for them $30,206.80. This amount was placed in the bank to the credit of Swofford Bros. Dry Goods Company, and shortly afterwards checked out by it. It is not shown in the record how or from whom the Swofford Bros. Dry Goods Company received the notes, nor is it shown what hands they passed through before they came to the Swofford Bros. Dry Goods Company. The District Court found that no proceeds of the notes ever came to the firm of A. F. Hardie & Co., and that Max Kaliski, who was an active member of the firm and who furnished a large part of its capital, received no benefit from the notes, and did not know of their execution.

It was clearly proved, and found as a fact by the referee and the District Court, that the appellant bank purchased the notes, paying for them their full value in cash before their maturity, and that it had no notice of any infirmity in them, unless such infirmity is disclosed by the notes themselves. The sole question decided below, and to be decided here, is whether or not the appellant is an innocent purchaser without notice of the 12 notes. As they were purchased before maturity and full value paid for them, and as the bank had no notice of any extrinsic fact tending to show any infirmity in the notes, it must be held to be an innocent purchaser without notice, if the notes, in the form in which they appear, are prima facie legal and binding on the firm of A. F. Hardie & Co. The question to be considered, therefore, relates to the form of the notes. Do they convey notice to the purchaser that the transaction was not one in the usual and ordinary course of borrowing money or of other business for the benefit of the partnership? It was contended by the appellee, and held by the lower court, that "the name of the Hardie-Rose Company appearing as the first joint maker on the face of the notes, with the partnership name of A. F. Hardie & Co. immediately following, imparted notice to third parties that the transaction was not one in the usual and ordinary course of business," and that the notes, therefore, showed on their face that they did not prima facie bind the partnership. It is asserted in the briefs of counsel, and in the opinion of the trial court, that no case has been found decisive of the precise question.

It is elementary that the liability of partners, as such, depends upon the principle of agency; that any contract made by a partner for the partnership, within the actual scope of the agency, is binding upon the firm; that in an ordinary trading partnership a partner has implied

authority to borrow money on the credit of the firm, to draw and accept, make, and indorse bills of exchange and promissory notes in the name of the firm; and that, even when the partner exercising such power abuses his trust for his own pecuniary advantage and to the injury of his firm, his copartners will be bound, unless the other party to the contract is chargeable with notice of the facts. It is well settled, however, that the power of a partner, implied from the contract of partnership, to act as agent for his copartners and to bind them by contracts in the firm name, is limited to transactions within the scope of the partnership business. Applying this limitation, it has been held that the power is not implied to sign the firm name as an accommodation indorser (Lemoine v. Bank of North America, 3 Dill. 44, Fed. Cas. No. 8,240), nor to make contracts of guaranty or suretyship. Bank v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; Foot v. Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208; Mauldin v. Bank, 2 Ala. 502; Brettel v. Williams, 4 Exch. (W. H. & G.) 623. But where such unauthorized contract is made, if the paper is of such a character as to be subject to the law merchant, an innocent indorsee acquiring it in the usual course of trade for value and before maturity can maintain an action against the partnership. Kimbro v. Bullitt, 22 How. 256, 16 L. Ed. 313; National Exchange Bank v. White (C. C.) 30 Fed. 412; 1 Daniel's Negotiable Instruments (5th Ed.) § 368, and cases there cited. The statement of these principles shows that the correct decision of the case at bar turns on the question as to whether or not the appellant is an innocent purchaser.

There are conflicting decisions of the state courts on what is sufficient to put the purchaser of negotiable paper on notice of facts that deprive him of the character of an innocent purchaser. Here we are, of course, governed by the law as settled by the federal courts. It is held by this court, speaking by Pardee, Circuit Judge, that since the leading case of Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934, one who acquires mercantile paper before maturity from another who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. Bank of Edgefield v. F. C. M. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201; Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193. In Magee v. Badger, 34 N. Y. 247, 249, 90 Am. Dec. 691, the court held that the purchaser of negotiable paper "is not bound, at his peril, to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." This case is cited approvingly in Brown v. Spofford, 95 U. S. 474, 478, 24 L. Ed. 508. It is not, therefore, a question as to whether the notes on their face would excite the suspicion of the vigilant, or wheth-

er the appellant was negligent in not making inquiries as to the authority of the signing partner to bind the firm by the making of the notes; but the question is: Do the notes, on their face, show an illegal and unauthorized use of the partnership name and credit?

In Gelpcke v. City of Dubuque, 1 Wall. 175, 203 (17 L. Ed. 520), the court said:

"When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

The principle announced seems to us equally applicable to the negotiable notes of a partnership. If a trading partnership, under any circumstances, has the implied right and power to make promissory notes of the kind and in the form in proof, one to whom they are offered in the market has a right to presume that they were issued under the circumstances which gave the requisite authority. National Exchange Bank v. White (C. C.) 30 Fed. 412, 416; 1 Bates on Partnership, § 352.

The alleged inherent defect that, it is claimed, imparted notice of the illegality of the notes as a partnership transaction, that is first urged, is that the name of the Hardie-Rose Company appears as the first joint maker, and that the name of the partnership, A. F. Hardie & Co., immediately follows. The idea is that the partnership, being the second signer of the note, must be the surety of the first signer. There is no question about the authority of a partner in a trading firm having the authority to use the firm name to raise money on the partnership's negotiable paper. There is no doubt, so far as the objection now considered is concerned, about his having the right to accept others as the sureties of the firm on such note. It follows that, if the notes in question were signed by A. F. Hardie & Co. only, their validity would be unquestionable; or if they were made by A. F. Hardie & Co. as principal, and the other two joint makers as sureties, they would not be subject to the objection now considered. What, then, is the alleged infirmity which is so potent as to carry notice? It is simply the fact that of the three names that of the partnership is second. This can be an infirmity only upon the hypothesis that a presumption arises that the first signer of a joint note is principal and the others are sureties. No authority is cited showing that such presumption arises from the order in which the signatures are attached to a joint note. In Summerhill v. Tapp, 52 Ala. 227, it was held, Brickell, C. J., speaking for the court, that the fact that the name of one of several makers of a note was first in the order of signatures did not cause the "presumption of suretyship" to arise. On the contrary, the court held that "all who sign a promissory note, joint, or joint and several on its face, are esteemed joint, or joint and several promissors, unless the note expresses that they bear another relation." In Paul v. Berry, 78 Ill. 158, 160, the court said:

"As between the makers, there arises no presumption simply from the note or the judgment that the first signer, or any other number less than the whole,

is or are to be treated as principal or principals, and the others as co-sureties, but it rests in evidence, to be introduced aliunde the note and judgment, to determine what relation they sustain towards each other."

Brandt says (1 Brandt on Suretyship & Guaranty, § 33):

"Where several persons execute a promissory note and there is nothing on its face to show their relations to each other, there is no presumption from the order in which they sign that any, or which, of the signers are sureties."

Where the words of a note show it to be a joint obligation, and it contains no word to the contrary, and it is signed by several makers, two, three, or ten, there is nothing in the mere order of signing which creates any presumption of suretyship. Where there are three joint makers, as in this case, it would be just as reasonable to presume that the first two were principals and that the third was a surety as it is to presume that the first one is the only principal and the second and third are sureties. If we once abandon the words of the contract and resort to presumptions based on the order in which the makers' names are affixed to the note, we would find difficulty in applying the doctrine to notes signed by varying numbers of makers.

In cases where evidence is admissible to show that a joint maker was in fact a surety, it would be admissible without regard to whether the alleged surety was the first, second, or third signer; but no question as to other evidence than the notes themselves arises in this case.

The learned attorney for the appellee argues that the fact that the attorneys for neither party have been able to find a single decision in which it was held that a member of a firm has a right to sign a joint note with others and to bind his partners is "incontrovertible evidence that such a transaction is unusual and beyond the ordinary scope of the partnership business." The want of authority on the exact point probably does not come from the fact that partnerships do not join others in making negotiable joint, or joint and several obligations, but it springs rather from the fact that those engaged in mercantile business and litigation are of the opinion that the right of a partner in a trading partnership to execute negotiable paper is not limited to instruments in which he, for his firm, is the sole maker or drawer. Many cases, we think, may be found in which the partnership is sued on such joint paper; no question being raised as to its having any infirmity on its face. Faler v. Jordan, 44 Miss. 283, was a suit on a note made by Daniel McLaurin, W. I. Draughn, and the firm of Faler, McLaurin & Co. A copy of the note is not given in the report of the case, but it appears clearly that the firm of Faler, McLaurin & Co. was the last of the three signers. The partnership was composed of Cornelius McLaurin and Faler. Neither of the first two signers of the note were members of the firm. Faler, a member of the firm, which firm was the third signer, interposed the defense that he did not sign the note, or authorize another to do so for him, but that the same was signed by some person to bind the firm of Faler & McLaurin as sureties for Daniel McLaurin, without his knowledge or consent. There was no suggestion made in the case that the partnership could not be legally bound by a joint, or a joint and several, note. The court said, citing as authority Winship v. Bank, 5 Pet. 529, 8 L. Ed. 216, that "the pow-

er of each partner to put the name of the firm to negotiable paper is so essential to the conducting of its business that it is implied from the very existence of the firm"; and the learned court added, speaking, it must be remembered, of a joint promissory note in which the partnership which was sought to be charged was the third signer:

"Whenever a partnership name appears on commercial paper, the firm is prima facie bound, and the onus is on the firm and each member to show that it or he is not liable."

In Van Tine v. Crane, 1 Wend. (N. Y.) 524, suit was brought by the plaintiff as the indorsee of a promissory note made by the partnership of Crane & Platt and one Robert F. Van Tine. The note was joint and several. The suit was brought against the partnership alone, which plead in abatement the nonjoinder of the other maker. The court, in deciding the case, said:

"The note, having been signed by one of the partners in the partnership name, was the note of the firm, and not of the individuals composing it, so far as the remedy to enforce payment was concerned."

There is no hint in the case that the firm could not join in a joint and several note that bound the firm to pay the whole amount of the note. A joint and several note, signed by a partnership and three other makers of the note, was held valid and binding on the partnership for the entire amount of the note in Re Holbrook, 2 Lowell, 259, Fed. Cas. No. 6,588. It is true that in that case the evidence, aliunde the note, showed that the last three signers were sureties, but there is no intimation in the case that the note on its face showed any infirmity arising from the want of power of a partnership to make a joint note.

If the inhibition against joint promissory notes by partnerships is to prevail, the principle would also be applicable to bills of exchange. While the drawer of a bill of exchange is generally a single person, copartnership, or corporation, yet two or more persons may unite in drawing a bill. In such case they become, of course, joint obligors. A person uniting with a drawer or drawers could do so as a surety, and such person is called a "surety drawer." 1 Daniel on Negotiable Instruments (5th Ed.) § 95, and cases there cited. If the principle contended for by the appellee were established as to promissory notes, it would be equally applicable to bills of exchange. It would follow that a partnership could not become a joint drawer of a bill of exchange, and in the event it became a second signer of a bill of exchange the presumption would arise that it was surety for the first signer, and the bill would be, prima facie, not binding on the partnership. This view could not be reconciled with the decision of the Supreme Court in Kimbro v. Bullitt, 22 How. 256, 16 L. Ed. 313. In that case a member of a firm, which, acting by another partner, was a joint drawer and second signer of a bill of exchange, was held liable at the suit of the drawees and acceptors, who paid the bill. It appears in the opinion that the bills were drawn by Morgan McAfee and the firm of Dement, Kimbro & Sons, addressed to Bullitt, Miller & Co. The bills were accepted and paid by the drawees, and suit was brought by them against Kimbro, a member of the firm of Dement, Kimbro

& Sons. Kimbro defended upon the ground that the principal acting partner of his firm had no power to draw the bills sued on. It did not seem to occur to court or counsel that the firm had no power to become a joint obligor with Morgan McAfee as drawers of the bill, nor that the firm was to be presumed to be the surety of Morgan McAfee, the first drawer, or the drawer whose name was first signed. The court affirmed the judgment of the Circuit Court against Kimbro, holding that a partner in a trading firm has a right, without the consent of his associates, to draw bills of exchange, and that the right of the acceptors who had paid the money to recover from the drawers could not be affected by the fact that one of the drawers had applied the money to an unlawful purpose. If it had been the law that a second signer of a joint bill is to be presumed to be a surety, or that a partner had no right, prima facie, to bind his firm in a joint bill, we cannot believe that these defenses would have been disregarded by the court and counsel.

The learned attorney for the appellee insists that, if these notes do not show that A. F. Hardie & Co. was surety for the whole $30,000, they certainly do show that it was surety for two-thirds of the amount of the notes. The contention is that, treating the notes as joint notes of the three makers, the presumption is that each of the makers received only one-third of the consideration, to wit, $10,000, and that the partnership of A. H. Hardie & Co. therefore became the security of the other two makers for $20,000. The idea is that, as each maker is jointly bound for the whole note, if the first and third signers fail to contribute to the payment of the debt, the second signer, A. F. Hardie & Co., would have to pay all, and that, therefore, the firm is at least security for the other two signers for two-thirds of the debt, and that it follows that the paper comes within the rule against the firm name being used as surety by a partner without the consent of his copartners. This argument, while seemingly sound, avoids the real question. It may be true that a joint note, or a joint and several note, contains, as between the makers, some of the elements of suretyship, in that, if one should fail to pay, another may be required to pay more, or that one, paying all, may require contribution from the others. But such consequences come from occurrences subsequent to the making of the note, and are based on relations between the parties that would have to be shown by evidence other than the notes themselves. No contract of suretyship appears in the note. As between the makers and the payees, there is no element of a contract of suretyship. The payees, or their indorsees, can look to all equally for payment, and the debt is the debt of all. In the case of a joint and several note, any one maker, at common law, could be sued alone for the entire debt. The joint and several note, though written on one piece of paper, is held by the law to be several notes—the separate note of each maker and the joint note of all. 1 Daniel on Negotiable Instruments, § 94. In the jurisdiction where the notes in question were made and were payable, although they are joint and not several in terms, any one of the makers could be sued alone for the entire debt. Rev. St. Texas 1895, § 1203. The notes on their

face do not constitute an agreement by A. F. Hardie & Co. as principal to pay one-third, and as surety to pay two-thirds, if the two joint makers fail to contribute to their payment. The firm's contract is, as principal, to pay the entire amount of the note. The fact that others make the same promise does not alter the contract of A. F. Hardie & Co. The inhibition against one partner's binding the firm as surety is not an inhibition against making any contract out of which may arise some of the consequences, remedies, or liabilities usually relating to a contract of suretyship. A partner may assign, or indorsè, in the firm name, a negotiable note owned by and payable to the firm. If the maker should not pay it, the firm would be liable to the indorsee; and in that way the firm would become, in a sense, the surety of the makers. It would be secondarily liable on the paper; the makers failing to pay it. Stearns on Suretyship, § 121, p. 191.

In Gano v. Samuel, 14 Ohio, 593, it was held that one partner, for the benefit of his firm, in order to raise money for the firm, could use the partnership name in accepting a bill of exchange to be exchanged for the acceptance of another firm; it being in substance but the giving the name of the partnership to secure an indorser. And in Morris v. Maddox (Ga.) 25 S. E. 487, it was held that a member of a mercantile partnership, to raise money for the firm, has the power to exchange the promissory note of the partnership for the promissory note of another of like amount, the proceeds of which are intended for use in the partnership business. In both of these cases, the partnership assumed liabilities, to say the least, that were analogous to that of suretyship.

The conclusion we have reached in this case is, of course, not dependent upon the correctness of the judgments of the learned courts in the last two cases we have cited.

The second objection to the notes which we have just considered—that they show on their face that A. F. Hardie & Co. is surety for two-thirds of their amount—is not, like the first objection to them, based on the order of the signatures. If the second objection is sound, it is available when the partnership name is signed to the note first in order, for, if it be true that a firm, as one of the three makers of a joint note, is surety for the other two makers for two-thirds of the note, that condition would accompany the contract whether the partnership signed first or last. The singular result would follow that while the partnership note, signed with its name only, would be regular, exciting no suspicion and showing no infirmity, the same note, with other solvent names signed to it under the partnership signature, would become irregular and show on its face an infirmity giving notice to purchasers.

We are of opinion that the appellants are entitled to the protection afforded by the law to bona fide purchasers.

It is to be regretted that, in a case like this, a partner who has been guilty of no wrong may be subjected to loss by the wrongdoing of his copartners. But, when the question arises as to which of two innocent parties shall suffer, the loss should be made to fall upon the

one who has put it in the power of the guilty persons to perpetrate the fraud.

The court is of opinion that, on the record before us, the 12 notes are provable claims against the estate of the bankrupts.

The decree of the court of bankruptcy is therefore reversed, and the cause remanded.

UNION NAT. BANK OF KANSAS CITY, MO., v. NEILL.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1906.)

No. 1,547.

BANKRUPTCY—REVIEW—FORM OF PROCEEDING.

Bankruptcy Act July 1, 1898, c. 541, § 25, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals in specified cases, including a judgment allowing or rejecting a debt or claim of $500 or more. *Held* that, where a decree rejected a claim for $30,000 which petitioner offered to prove against the bankrupt's estate, petitioner's remedy was by appeal, and, having obtained relief by appeal, his petition to superintend and revise should be dismissed.

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

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Texas.

M. L. Crawford (W. I. Ford and W. L. Crawford, Jr., on the brief), for petitioner.

C. A. Keller, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a petition to this court invoking its jurisdiction to superintend and revise as matter of law a decree of the bankruptcy court. The decree in question is one rejecting a claim for $30,000 which petitioner offered to prove against the estate of A. F. Hardie & Co., bankrupts. The controversy was also brought to this court by appeal, and the opinion in the appealed case, which has just been handed down, shows a full statement of the proceedings in the court below. 149 Fed. 711.

Section 25 of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals in certain specified cases; the third being "from a judgment allowing or rejecting a debt or claim of $500 or over." In this case the petitioner's proper remedy was by appeal, and on appeal the decree below has been reversed.

The petition is therefore denied, and the petitioner will be taxed with the costs.

THOMPSON-STARRETT CO. v. FITZGERALD.

(Circuit Court of Appeals, Seventh Circuit. October 29, 1906.)

No. 1,309.

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

In the construction of a steel building, the contractor laid a platform of loose planks across the floor beams of the lower floor near an elevator, onto which laborers were required to wheel materials brought in to be sent up on the elevator. A plank on one side extended for several inches over a drop of four inches in the floor beams, and when plaintiff, who was one of such laborers, stepped on it the plank tipped and threw him and his barrow into the cellar causing his injury. *Held*, that the question of the contractor's negligence and failure in its duty to provide its employés with a reasonably safe place to work, and of plaintiff's contributory negligence were properly submitted to the jury, in an action to recover for the injury, the projection of the plank without support not being obvious to one on the platform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1050, 1089–1132.]

2. SAME—PLACE OF WORK—LIABILITY OF MASTER FOR IMPROPER CONSTRUCTION OF STAGING—NEGLIGENCE OF FELLOW SERVANTS.

If the building of stagings and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master for an injury resulting from their negligent construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 479.]

3. APPEAL—PRESENTATION OF OBJECTIONS IN TRIAL COURT—PLEADING—VARIANCE.

A defendant who contests a case on the merits without objection to the evidence offered on the ground of a variance, which might have been cured by an amendment of the pleadings, cannot assign such variance as a ground for reversal in an Appellate Court.

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

Amos C. Miller, for plaintiff in error.

B. J. Wellman, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. The plaintiff in error, defendant below, was engaged as contractor in constructing a steel frame building. On the first floor a temporary platform had been made by laying boards across the beams. From this platform a hoist took bricks and other materials to the upper floors. Common laborers wheeled bricks along a runway from without the building to the platform, left there the loaded barrows to be hoisted, and went out wheeling the empty barrows that had been let down. Plaintiff, one of these common laborers, went to the side of the platform to get an empty barrow whose wheel was over the edge, and fell into the basement, receiving the injuries complained of.

Under the assignment that the court erred in allowing the case to go to the jury, defendant's first contention is that there was not sufficient evidence of negligence in the construction and maintenance of the platform. From a careful reading of the entire bill of exceptions, it seems to us that the jury were warranted in finding that the platform was made and continuously maintained of two layers of plank supported by beams 10 feet apart; that the planks of the lower layer were 12 to 14 feet long; that some planks of the upper layer were as short as 8 feet; that at the edge where plaintiff fell there was a drop of 4 inches in the top surface of the supporting beams, which was occasioned by the construction of an ash pit; that the lower plank extended part of its width beyond the edge of the 4-inch drop; and that the upper plank was laid so that one of its ends did not reach one of the supporting beams. There was evidence that it was customary to build such platforms without fastening down the planks in any way, but not that it was customary to rest the outer planks upon insufficient supports. This structure might fairly be inferred not only from the testimony of witnesses who described the platform, but also from plaintiff's account of the manner of his fall. He says that the plank at the edge tipped sidewise, and that he and the barrow and the plank went down. Defendant's foreman testified that "the top of the iron work was all level," but on going into particulars he showed that the ash pit was 14 feet long north and south; that the beams, extending over it north and south 10 feet apart, were dropped 4 inches below the general level of the floor; and that "flanges" on top of the north 7 feet of these beams came up to the floor level. So this platform, built out over the ash pit, at its south edge would encounter a 4-inch drop, unless these 14-foot steel beams were constructed so that the south 7 feet thereof would have been 4 inches above the floor level if they had not been dropped, as the witness says they were. No such unusual form of beams was testified to.

On the basis that defendant, as master, had undertaken to provide its servant a safe appliance in the performance of his work, a finding of negligence was justified by the foregoing view of the evidence.

As the extending of the outer planks beyond the edge of the small jog in the beams was not necessarily apparent to a laborer who went on the platform in the performance of his work, there was no error in submitting the question of contributory negligence to the jury. And as there was no evidence that plaintiff had notice or knowledge of the defect, the risk was not assumed.

It is further contended under the same assignment that the alleged negligence was not that of defendant, but of fellow servants of plaintiff. If the building of stagings and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master; but if it is the duty of a body of servants to construct a staging as an incident of the work upon which they are employed in common, the master performs his full duty by providing suitable and sufficient materials and men, and he cannot be held by one of the body for the negligence of any of the

others. Phœnix Bridge Company v. Castleberry, 131 Fed. 175, 65 C. C. A. 481; National Refining Company v. Willis (C. C. A.) 143 Fed. 107. There was evidence that the staging or platform in question was built by a scaffold gang under, and according to the direction of a scaffold foreman, who hired men for that purpose; that this foreman was also the foreman of the common laborers of whom plaintiff was one; and that he "took any of the laborers who happened to be around to build the scaffolds." But plaintiff did not take part in building this platform, nor was it shown that he had ever performed or been called on to perform such work. Indeed, he testified that he did not know that his foreman was also the foreman of the scaffold gang. From this evidence it might be inferred that scaffold building was a separate branch of work, not within the scope of plaintiff's employment. And conceding that a contrary inference might also be drawn, the question was one for the jury.

Complaint is made that the case proven varies from that declared. But inasmuch as defendant was willing to contest the merits of the proven case without objection, and without calling attention to the variance, which could have been cured by amendment on proper terms as to costs and continuance, there is no just grievance.

The court refused defendant's request to charge the jury that, if the accident happened through the negligence of the foreman or workmen in directing or constructing the scaffold, the plaintiff could not recover. The giving of the instruction would erroneously have withdrawn the case from the jury.

The judgment is affirmed.

THE VOLUNTEER.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

No. 36.

1. TOWAGE—LOSS OF TOW BY COLLISION WITH WRECK—LIABILITY OF TUG.

A finding affirmed that a tug was in fault for the loss of her tow by running her upon a sunken wreck at night, upon evidence showing without contradiction that a lantern showing a red light, and capable of burning for 24 hours after each filling, was filled, lighted, and set above the wreck on the evening before, and that it was burning brightly two hours before the collision, and that the tug maintained no sufficient lookout.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 11, 17–19, 36.]

2. ADMIRALTY—PLEADING—ESTOPPEL.

In a suit in admiralty to recover for the loss of a tow by collision with a sunken wreck at night, in which the tug and the owner of the wreck are both made defendants, and charged with fault, the libelant is not precluded from recovering against the tug alone because the libel charges the owner of the wreck with a fault which, if proved, would exonerate the tug, which charge is admitted by the answer of the tug, but is not sustained by the evidence; the practice in admiralty being to bring all parties before the court, and to determine the controversy on the merits as it appears from the proof, regardless of technicalities of pleading.

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

Libel filed by the owner of a cargo of coal on board the barge McNally and by the master of the barge, to recover, respectively, for the loss of the cargo and for the personal effects of said master. The libel alleged that the tug Volunteer was negligent in towing the McNally upon the wreck of the barge Doherty, which lay sunk in the channel at South Norwalk, Conn. It also alleged that the owners of the Doherty were at fault in not maintaining a light above said wreck. The collision occurred about 20 minutes after 12 on the night of October 13, 1903.

The district judge condemned the tug and her claimant appeals to this court.

Lawrence Kneeland, for libelants.

De Lagnel Berier, for The Volunteer.

La Roy S. Gove, for The Doherty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. If there were a light above the wreck at the time of the collision the tug was at fault; if not, the owners of the Doherty were at fault for failing to keep a light there. The question thus presented was one of fact and was decided by the district judge after hearing and seeing the witnesses. We have repeatedly held that such a finding will not be disturbed unless clearly against the weight of evidence.

That a lantern showing a red light had been set above the wreck, capable of burning for 24 hours after each filling, is proved by uncontradicted testimony. It was refilled on the day in question between 4 and 5 o'clock in the afternoon and was seen burning brightly at 10 o'clock. There is a presumption that in such circumstances the light continued to burn. If there had been a vigilant lookout on the Volunteer who had testified that he saw no light, such testimony, especially if corroborated by the wheelsman and other members of the crew in the actual discharge of their duties, might be sufficient to overcome the presumption. There was, however, no such evidence, Those on the tug and tow whose testimony was given were attending to other matters and giving little heed to the situation ahead. The master of the tug died before the trial. The only two witnesses who testify on the subject are the master of the McNally and the deck hand of the Volunteer. They were walking about and talking, and it is not pretended that either was giving his undivided attention to the business of looking out. Their evidence was unsatisfactory and the district judge gave little credence to their statements.

The case, in this respect, is wholly different from The John H. Starin, 122 Fed. 236, 58 C. C. A. 600, where the captain and quartermaster of a large passenger steamer, both licensed pilots and mariners of many years experience, were in the pilot house and a competent lookout was at the bow. These witnesses united in saying that they saw no light ahead, although each was at his post attending vigilantly to his duty. This testimony was held to outweigh the testimony offered on behalf of the injured schooner that a light was set in the rigging and was seen burning half an hour before the accident, there being no satisfactory proof that the lantern was properly filled and trimmed.

The case at bar is similar on the facts to The Fin MacCool, 147 Fed. 123, where it was held by this court that the testimony of a listless and inattentive crew that they saw no light on a sunken wreck was insufficient to overcome the positive testimony that a light was there.

The libelants proceeded against the tug and the owners of the Doherty, the libel alleging that the latter were negligent in failing to maintain a light. In its answer the tug admitted this allegation and now asserts that by reason of this admission the libelants are precluded from recovering upon the theory that the light was burning.

If this were a common law action between the libelants and the owner of the tug there would be great force in the contention, but it has little application to a suit in the admiralty where the aim and purpose of the court is to bring all parties before it and determine the controversy on the merits as it appears from the proof. The libelants might have proceeded against the tug alone, in which event her owner would unquestionably have brought in the owners of the Doherty. The Hudson (D. C.) 15 Fed. 162; Admiralty Rule 59, Supreme Court. The libelants were entitled to recover from the tug or the owners of the Doherty. The question of light or no light was one of vital importance to these two parties, but of little interest to the libelants. The tug by admitting the allegation of the libel as to the fault of the owners of the Doherty could not preclude them from proving that they were free from fault. This they succeeded in doing to the satisfaction of the district judge and having ascertained where the truth lay it was his duty to decree accordingly. It would be a travesty of justice to turn a meritorious libelant out of court because one of the respondents admits that the other was at fault.

The decree is affirmed with interest and costs.

THE WINNIE.

(Circuit Court of Appeals, Second Circuit. December 4, 1906.)

No. 56.

TOWAGE—INJURY OF TOW—LIABILITY OF TUG.

A tug is not liable merely because a tow was injured while in its custody, but in an action against it to recover for the injury, the burden rests upon the libelant to affirmatively prove negligence or fault, which cannot be presumed merely because the injury is not otherwise accounted for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 34.]

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

On appeal in admiralty from a decree of the District Court of the United States for the Southern District of New York awarding $612.98 damages and costs against the steam tug Winnie for negligent towage of libelant's canal boat Fermoil. The opinion of the District Court is reported in 137 Fed. 166.

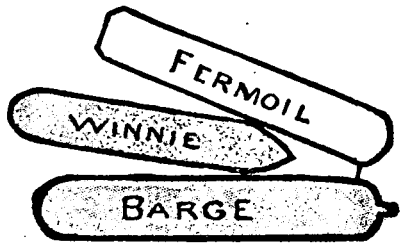
H. G. Ward, for appellant.

La Roy S. Gove, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The important facts are stated in the opinion of the district judge.

The tug Winnie was engaged to tow the libelant's canal boat Fermoil and a larger boat, the barge Gildersleeve, from the Atlantic Basin to a stake-boat off Liberty Island in New York harbor. The Fermoil was made fast to the port side of the tug and the Gildersleeve to the starboard side, the bows of both vessels extending about 45 feet beyond the bow of the tug. The tide was ebb and a choppy sea was running. When the canal boat reached her destination it was found that two planks on her starboard side were broken. The main fault imputed to the tug is that the tow was improperly made up, the bows of the two boats being drawn together so that they were not more than five or six feet apart, as illustrated by the following diagram:



This theory is supported by one witness only, the master of the Fermoil.

The claimant insists, on the contrary, that the tow was made up in the usual way, with the boats securely lashed to the tug and parallel to each other, their bows being 18 or 20 feet apart. The claimant's contention is sustained by the master, pilot, fireman and deck hand of the tug and by the exceedingly persuasive presumption that no tugman, with even a superficial knowledge of the requirements of the service, would make up his tow in a manner so unprecedented that no plausible motive or reason can be assigned therefor. Not only would such an arrangement augment the hazard but it would render the service more difficult, requiring increased power to propel such a clumsy flotilla through the water.

The district judge was clearly of the opinion that the weight of testimony was with the claimant on this issue, but he found for the libelant upon the theory that the damage could be accounted for in no other way.

He says:

"The preponderance of the testimony, as well as the probabilities in view of the additional strain put upon the tug, are with the claimant, but unless something of the kind contended for by the libelant was done, I see no way of accounting for the damage."

We are unable to give our assent to this reasoning. The burden was on the libelant to prove fault on the part of the tug; in this he failed. The testimony preponderates overwhelmingly in favor of the claimant to the effect that the tow was made up in the usual way. This being so we cannot escape the conclusion that liability cannot

be predicated of a finding that the tow was made up in an unusual way. The libelant alleged negligence and failed to prove it. It was then the duty of the court to dismiss the libel.

It is not at all unlikely that the damage was caused by the swells of passing ferry boats, but the court is not called upon to enter the realms of conjecture in an attempt to ascertain how the accident was caused. It is enough for the present case that the tug did not cause it. There was nothing in the condition of the wind or water to make towing unusually hazardous. The master, according to the great preponderance of proof, exercised the reasonable care, caution and maritime skill required. The tug was not an insurer, and cannot be held liable merely because the Fermoil received an injury while in her custody.

The case is easily distinguishable from the Gennessee, 138 Fed. 549, 70 C. C. A. 673, where the make up of the tow was such as to invite disaster while the flotilla was lying to during a storm and the tug made no effort to mitigate the risks due to an unusually perilous situation.

The decree is reversed with costs, and the cause is remanded to the District Court with instructions to dismiss the libel.

BEE et al. v. BARNES.

(Circuit Court of Appeals, Fourth Circuit. November 19, 1906.)

No. 630.

TAXATION—SALE OF LAND—SEPARATE INTERESTS—TAX TITLE—VALIDITY.

Where each of two tracts of land was assessed for taxation at its true value as the property of the owner of the fee, and she paid the full amount of the taxes due thereon, notwithstanding an outstanding one-sixteenth interest in any oil that might be produced from the land, a sale of such interest for nonpayment of taxes assessed thereon was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1267.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

For opinion below, see 138 Fed. 476.

This was a suit instituted in the Northern district of West Virginia, the object of which is to cancel a tax deed executed on the 19th of January, 1903, by W. R. Merservie, clerk of the county court of Ritchie county of that state, to B. W. Bee for one-sixteenth interest in gas and oil and mineral on a tract of land of 69½ acres and also another tract of land of 2½ acres, making 72 acres in all. The court below has stated the facts upon which this controversy is based in a clear and succinct manner as follows:

"John K. Kelley and Clara V. Kelley, on March 29, 1898, by deed which was admitted to record April 2, 1898, conveyed to plaintiff, Barnes, a citizen of Ohio, 'one-sixteenth part of all oil and gas and other mineral substances in and under' two parcels of 69½ and 2½ acres of land, situate in Ritchie county, this state, fully described in the deed by metes and bounds, for the consideration expressed of $2,000 cash. By deed of September 21, 1898, recorded September 24, 1898, Barnes conveyed a half of this, or one thirty-second interest in all, to Mallory Bros.; but they subsequently, by deed dated March 29, 1903, reconveyed back this interest to Barnes. The surface and remaining fifteen-sixteenths undivided interest of the 'oil, gas, and other mineral substances' remained vested in Mrs. Kelley. On the land books of Ritchie

county, Mrs. Kelley, for the year 1898, was assessed with these two tracts separately, as 69½ acres and 2½ acres, in fee, as situate on 'wts. of Bonds Creek,' N. E. 9 miles from court house, valued each at $6.50 per acre, and a total valuation of $425, for the 69½ acres, instead of $451.75, the true total at that rate, and for the 2½ acre tract of $15, instead of $16.25, the true valuation at that rate. She was assessed for state purposes on the 69½ acres at the rate of 25 cents on the $100, the sum of $1.13, the full amount due on the true valuation, 6¾ cents more than due on the valuation given; 45 cents for state school purposes, at a rate of 10 cents, the correct amount on the true valuation, 2½ cents too much on the valuation given; $1.81 for county purposes, at a rate of 40 cents, the correct amount on the true valuation, 11 cents too much on the valuation given; $2.26 for road purposes and teachers' fund, respectively, each at the rate of 50 cents, the right amount on the true valuation, 12½ cents too much on each for the valuation given; and $1.36 for building fund, at a rate of 30 cents, the correct amount on the true valuation, 8½ cents too much on the valuation given. The 2½-acre tract also shows that, while the valuation was fixed at $15, instead of $16.25, the taxes were assessed upon the true valuation, and not the valuation given. These tracts had been acquired by Mrs. Kelley by different deeds from different parties. In pencil on the assessment book just after Mrs. Kelley's name is written, '1–16 oil reserve to G. W. Barnes'; but the plaintiff, although his deed bore date two days before April 1st, the assessment date fixed by law, was not assessed in any manner for that year on account of his one-sixteenth undivided interest in the 'oil, gas, and other mineral substances in and under' said two parcels of land.

"For the year 1899 Mrs. Kelley is assessed with these same two tracts separately, as having title in fee, and the same location, bearing, and distance from the courthouse is given, as also the same valuation of $6.50 per acre each, and the same erroneous total valuations of $425 and $15, respectively. This year, however, she was not assessed at the given rates upon the true total valuation, as was the case in the preceding year, but upon the false total valuations given for both years. In this last year following her name, in parenthesis, are the words, 'less one-sixteenth oil, &c.' For this year 1899, when by the records Mrs. Kelley was shown to be vested with fee-simple title in the surface of and in fifteen-sixteenths undivided interest in the 'oil, gas, and other mineral substances in and under' these two tracts, an one thirty-second of the latter, undivided, was in plaintiff, Barnes, and the remaining one thirty-second thereof was in Mallory Bros., the said Mallory Bros. were assessed with nothing, so far as shown, because of their interest; but plaintiff, Barnes, was assessed with 'one-sixteenth oil &c., reserve' in 72 acres, claimed now to be the 69½ and 2½ acre tracts consolidated, at the rate of 50 cents per acre, or a total valuation of $36, upon which taxes amounting to 78 cents in all, according to the fixed rates, were charged: These taxes were not paid by Barnes, by reason of which this interest was returned delinquent and sold by the sheriff, January 13, 1902, and purchased by defendant Bee, who paid a total for taxes and expenses of $2.35, and on the 16th day of January, 1903, had a surveyor's report made, and on January 19, 1903, received from the clerk of the county court a deed therefor, which surveyor's report and deed was on said last day admitted to record. It is to be noted that neither the report nor deed bound the 72 acres as a single tract, but simply copy the metes and bounds of the 69½ and 2½ acres, respectively, apparently from the deed of Kelley and wife to Barnes, to which both refer.

"Meanwhile, on the 20th day of October, 1902, Kelley and wife and Barnes made a lease, in which Mallory Bros. did not join, to Upham & Rolston, whereby they granted the lessees all the oil and gas in and under these lands, described as 70 acres, and described generally by reference to the abutting owners, for the period of two years, upon usual terms, for the payment of one-eighth royalties and other conditions not necessary to set forth. This lease was assigned by the lessees to Sarber Bros. & Co., and on January 14, 1903, the lease and assignment were together admitted to record. A valuable 200-barrel oil well resulted, and this one-sixteenth undivided interest became of value estimated at from $5,000 to $6,000. Defendant Bee insisted upon his being the owner of the interest under his tax deed, refusing to

surrender his claim; hence this suit, brought to set aside said tax deed as a cloud upon his title, and the appointment of a receiver herein, to whom has been paid over the proceeds arising from the sale of oil due to this interest."

Thos. P. Jacobs and Geo. W. Johnson, for appellants.

Mason G. Ambler (B. M. Ambler and C. D. Merrick, on briefs), for appellee.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

PRITCHARD, Circuit Judge (after stating the facts). It appears from the record that the two tracts of land of 69½ and 2½ acres were assessed in 1898 as the property of Mrs. Kelley at $535 and $15, respectively, and these same tracts were assessed to her in 1899 at the same valuation, and she paid all of the taxes in full for the year 1899. The tax deed in question is based on an assessment for the year 1899 against Barnes; the defendant claiming title under this deed, which was executed to him by the clerk of the county court by virtue of a tax sale on account of the nonpayment by Barnes of the taxes due for the year 1899 on his undivided interest, of one-sixteenth of oil, etc., in the two tracts of land in question.

We have read and carefully considered the opinion of the court below, and fully concur in the conclusions reached therein. Inasmuch as each of the tracts of land was assessed as its true valuation for taxable purposes for the years of 1898 and 1899, as the property of Mrs. Kelley, and the full amount of the taxes due thereon by virtue of such assessment being paid by her, we are of opinion that the sale of the premises described for the nonpayment of taxes by Barnes was unauthorized, and that the deed made in pursuance of such sale is void.

For the reasons stated, the decree of the Circuit Court is therefore affirmed.

THE MARS.

(Circuit Court of Appeals, Third Circuit. January 16, 1907.)

1. SEAMEN—PERSONAL INJURIES—LIABILITY OF VESSEL.

Where libelant, a fireman on a tug, was scalded while attempting to tighten the packing on the valve of an ash hoist, resulting from his turning a screw the wrong way and the machinery was not materially defective, the tug was not liable for his injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 189, 186; vol. 34, Master and Servant, § 758.]

2. SAME—MEDICAL ATTENDANCE.

Where a fireman on a tug was injured in the course of his employment, the fact that the tug was engaged in comparatively short coast-wise trips did not relieve her from the usual obligation of a vessel to her crew to furnish care and maintenance to effect a cure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 39, 187.]

3. SAME.

The obligation of a vessel to furnish medical attendance, etc., to a seaman injured in her service does not end with the termination of the voyage, where there was not sufficient time or facilities for the vessel to have then performed its duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 43, 187.]

4. SAME—FORFEITURE OF RIGHT.

A seaman injured in the course of his employment by his own negligence does not thereby forfeit his right to cure and maintenance at the expense of the vessel, where the injury was not caused by his gross negligence or willful neglect of orders, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 187.]

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

For opinions below, see 138 Fed. 941; 145 Fed. 446.

John F. Lewis, for appellant.

Howard M. Long, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. On March 29, 1904, the tug Mars, being at Philadelphia and contemplating a towing trip to New England ports and return, shipped Manides, the libelant, as a fireman. He went to work on the 30th. About midnight of that day, while the tug and her tow were lying at Reedy Island in the Delaware awaiting the tide, Manides, in trying to turn a nut to tighten the packing on the valve of an ash hoist, was badly scalded. He was placed in a hospital at Philadelphia, where he remained a considerable time, and was discharged before a cure was effected. He filed a libel against the Mars for damages for his personal injuries. The court held he was not entitled to recover, saying:

"There is considerable evidence offered for the purpose of showing that the machinery was generally out of order, but I am not convinced that this was the case. It was the ordinary experience with machinery that requires constant attention in order that it may be kept up to the standard. It was not defective or out of repair to an extent that the tug should be liable for any injuries resulting therefrom, and for this reason we do not think the respondent is liable to the libelant in damages for the injury. There was no failure of ordinary care on the part of the owners of the tug to furnish a safe place for the libelant to do his work, and the machinery about which he was working and the implements used in the performance of his work were safe and in good condition, save and except the ordinary current repairs necessary to keep them in such condition. The injury to the libelant was the result of an accident while performing certain work with which he was acquainted, and which should have been performed in a careful manner to avoid the very injury he received. He is therefore not entitled to recover damages against the respondent."

Under a prayer for general relief, however, the court decreed the tug should pay him $291 for expenses for maintenance and cure; $50 being for future medical attendance. From the decree for payment thereof the tug took this appeal.

The evidence bearing on this branch of the case is not printed. In its absence, and in view of the fact that the court only allowed $291 of $1,593.68 claimed, the presumption is that the moderate amount decreed was justified by the proofs, and that the sum of $50 allowed for future treatment was to finish a course of treatment interrupted by his discharge from the hospital. The only question, therefore, for us to consider is whether Manides was entitled under his employment and the finding of the court noted above to any allowance whatever for cure and maintenance. The fact that the tug was engaged in

comparatively short coast-wise trips does not relieve her from the usual obligation of a vessel to her crew. One of these is to furnish at the vessel's expense, care and maintenance to a seaman injured in her service. The Osceola, 189 U. S. 175, 23 Sup. Ct. 483, 47 L. Ed. 760. This right extends to a fireman. The North America, 5 Ben. 486, Fed. Cas. No. 10,314. The word "cure" is used in its original meaning of care, and means proper care of the injured seaman and not a positive cure which may be impossible. The Atlantic, Abb. Adm. 451, Fed. Cas. No. 620. The duty is to furnish means of cure and to use all reasonable efforts for that purpose. Brown v. Overton, Fed. Cas. No. 2,024. In the nature of things the end of the voyage does not end the obligation, if there was not sufficient time and facilities for the vessel to have then done its duty. Its unfulfilled obligation may continue after the voyage ends. McCannon v. Dominion Atlantic Company (D. C.) 134 Fed. 762; Henry B. Fiske (D. C.) 141 Fed. 191; The Svealand, 136 Fed. 109, 69 C. C. A. 97; Reed v. Canfield, 1 Sumn. 195, Fed. Cas. No. 11,641. It is claimed, however, that libelant lost his right to cure because the injury resulted from his own negligence. The testimony, however, discloses no gross negligence, willful neglect of orders, or indeed any such facts as are in some cases (The Ben Flint, 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, and cases cited) recognized as affecting a seamen's right. The most that can be said is that the libelant in trying to tighten the screw mistakenly turned it the wrong way, thus loosening it and permitted the steam which scalded him to escape. Neither the ancient codes or the modern decisions show any reasoning or authority for holding that, where the injury to the seaman in the performance of his accustomed duties was received through remissness or not unusual carelessness on his part, he thereby forfeits his right to cure and maintenance. The Osceola, supra; The City of Alexandria (D. C.) 17 Fed. 395; The Ben Flint, supra.

The decree of the District Court is therefore affirmed.

PORT v. SCHLOSS BROS. & CO.

(Circuit Court of Appeals, Third Circuit. January 16, 1907.)

No. 53.

WRIT OF ERROR—PARTIES—JOINT JUDGMENT.

Where two members of a firm were jointly sued on a firm debt and judgment was entered against both, a writ of error could not be maintained by one of them alone in the absence of summons, severance, or a sufficient showing for nonjoinder of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1802, 1806, 1811.]

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

Leslie A. Howard and F. P. Tams, for plaintiff in error.

Joseph Stadfeld, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court of the United States for the Western District of Pennsylvania. In that court Schloss and others, citizens of Maryland, brought an action of assumpsit against Clarence A. Port and W. J. Snyder, citizens of Pennsylvania, partners trading as Port & Snyder, for a merchandise account in excess of $2,000. Both defendants were served. Port appeared and defended the suit. Snyder entered no appearance, but was called as a witness. The jury was sworn against both defendants without objection by Port, and after a trial on the merits a verdict was rendered in favor of the plaintiffs for the full amount of their claim. After entry of judgment against both defendants Port alone sued out this writ of error, then for the first time raising the question that a judgment for default should have been entered against Snyder; that the jury was improperly sworn against both defendants; that the judgment against Snyder was invalid, and therefore there was error in entering judgment against him, Port.

Before passing on these questions, we are met by a motion of the defendants in error to dismiss this writ. In support thereof it is contended that, there being a joint judgment against both Port and Snyder, a writ of error will not lie unless both join in it. There has been no summons, severance, or sufficient ground for nonjoinder shown. The motion to dismiss is supported by authority. In Feibelman v. Packard, 108 U. S. 14, 1 Sup. Ct. 138, 27 L. Ed. 634, it was said:

"Moses Feibelman and George Woelker, as partner, sued the defendants in error to recover damages for the seizure of their partnership goods by Packard, marshal of the United States for the district of Louisiana. A judgment was rendered against them. Their interests in the suit was joint, and the judgment affects them jointly and not separately. Feibelman alone has brought this writ of error, and there has been no summons and severance or other equivalent proceeding. It follows that the writ must be dismissed on the authority of Williams v. Bank of the United States, 11 Wheat. 414, 6 L. Ed. 508; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Simpson v. Greeley, 20 Wall. 152, 22 L. Ed. 338."

To the same effect, in addition to the case cited, are Estis v. Trabue, 128 U. S. 228, 9 Sup. Ct. 58, 32 L. Ed. 437, and Mason v. United States, 136 U. S. 582, 10 Sup. Ct. 1062, 34 L. Ed. 345.

In view of these decisions, the motion to dismiss must prevail.

PITTSBURGH RY. CO. v. CLUFF.

(Circuit Court of Appeals, Third Circuit. January 17, 1907.)

No. 37.

STREET RAILROADS—INJURY TO PERSON ON TRACKS—CONTRIBUTORY NEGLIGENCE.

A plaintiff who, after seeing a street car approaching while he was still upon the sidewalk, started to cross a curved track which led into a cross street without again looking, and was struck by the car and injured, was chargeable with contributory negligence as matter of law, and cannot recover for the injury; nor is he relieved from such negligence by the fact that there was another track, which went straight ahead past the corner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 207, 208.]

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

James C. Gray, for plaintiff in error.
Thomas M. Marshal, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

DALLAS, Circuit Judge. The defendant in error brought an action against the plaintiff in error to recover damages for personal injuries to the plaintiff below, caused by his having been struck, while crossing one of the streets of the city of Pittsburgh, by an electric railway car operated by the defendant below. At the close of the trial the court was requested to charge, that "under all the evidence the verdict must be for the defendant"; and the refusal of this request, amongst other things, is here assigned for error.

It may be assumed that the defendant's servants were not as careful as they should have been, for we rest our decision solely upon the ground that it was conclusively shown that the proximate and decisive cause of the accident was lack of ordinary prudence upon the part of the plaintiff himself. There was no conflict of evidence. The defendant offered none. By the plaintiff's own testimony it plainly appeared that while he was still upon the sidewalk he saw the car coming. He did not wait, however, nor look again, but stepped directly in front of it. It was moving rapidly—perhaps too rapidly; but he realized this, and therefore should have been especially careful. He did not know that it would leave the straight track and follow the curve by which it reached the point at which he was struck; but the curved track was as plainly within his view as the straight one, and there was nothing to justify him in proceeding upon the assumption that the car would not make the turn. In short, there was no support whatever for any inference other than that the accident was directly due to the plaintiff's own heedlessness, and consequently the binding instruction for which the defendant asked ought to have been given.

The judgment is reversed.

AMERICAN TIN PLATE CO. v. SMITH.

(Circuit Court of Appeals, Third Circuit. January 4, 1907.)

No. 34.

MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—ASSUMPTION OF RISK. A judgment on a verdict for plaintiff in an action by a servant against the master to recover damages for a personal injury in which the defense was the assumption of risk by plaintiff affirmed.

For former opinion, see 143 Fed. 281.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

PER CURIAM. We think that the opinion rendered and decision made when this case was before this court at a former term (American Tin Plate Co. v. Smith, 143 Fed. 281) requires that the judgment brought up by the present writ of error should be affirmed, and therefore it is so ordered.

MOLINE TRUST & SAVINGS BANK v. WYLIE.

(Circuit Court of Appeals, Eighth Circuit. December 22, 1906.)

No. 2,457.

APPEAL AND ERROR—DISMISSAL OF APPEAL—VIOLATION OF RULES OF COURT.

A Circuit Court of Appeals may dismiss an appeal where the appellant fails to comply with rules 11 and 24 of the court (90 Fed. cxlvi, clxiv, 31 C. C. A. cxlvi, clxiv) respecting assignments of error and briefs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3101.]

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

On motion to dismiss appeal.

Geo. W. Wood and J. A. Hanley, for appellant.

Walter H. Petersen and Walter M. Balluff (Wm. M. Chamberlain, E. E. Cook, and F. L. Dodge, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges

PER CURIAM. The appeal in this case is dismissed on the motion of the appellee upon the authority of City of Lincoln v. Sun Vapor Street Light Co., 8 C. C. A. 253, 254, 59 Fed. 756, 758, Oswego Township v. Travelers' Ins. Co., 17 C. C. A. 77, 70 Fed. 225, Sovereign Camp of Woodmen of the World v. Jackson, 38 C. C. A. 208, 97 Fed. 382, and Western Assurance Co. v. Polk, 44 C. C. A. 104, 104 Fed. 649, for the failure of the appellant to comply with rules 11 and 24 of this court (90 Fed. cxlvi, clxiv, 31 C. C. A. cxlvi, clxiv), which relate to the assignment of errors and the briefs required.

The motion of the appellant to amend its brief is denied.

BUSH CO. v. CENTRAL R. CO. OF NEW JERSEY.

CENTRAL R. CO. OF NEW JERSEY v. BUSH CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1906.)

Nos. 42, 43.

WHARVES—SINKING OF CAR FLOAT AT FLOAT BRIDGE—UNSEAWORTHY CONDITION.

Findings of the trial court affirmed that the sinking of libelant's car float at the float bridge of respondent railroad company, while it was unloading cars therefrom, was due to her unseaworthy condition caused by her having two feet of water in her hold, and that respondent was not negligent either in the manner of discharging her, or in failing to inspect her and measure the water in her hold, it appearing that it was her

master's duty to notify it of her condition, and that no such notice was given, and her condition was not apparent without inspection.

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

These causes come here upon appeals from final decrees on cross libels, dismissing the libel of the Bush Company in the first action, and awarding damages and costs to the libelant, the Central Railroad Company, in the second action. The opinion of the court below is printed in 130 Fed. 222.

Albert A. Wray, for Bush Company.

George Holmes, for Central Railroad of New Jersey.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The issues herein raised by questions of fact were presented by testimony in open court, and were disposed of in favor of the railroad company.

The findings and decisions are chiefly challenged on the ground that the railroad was negligent:

"(1) In failing to inspect the vessel and measure the water in her hold before she was toggled fast to the bridge.

"(2) In toggling the boat to the railroad bridge with the bow nearly two feet above its normal position in the water, and attempting to unload her while in this position."

And that the evidence was insufficient to establish that the float was unseaworthy.

The libel alleged, and the trial of libelant's case against the railroad company proceeded upon, the theory that the negligence complained of consisted in the fact that:

"While the respondent's said locomotive and drill car were employed to haul said cars from off said car float, they were so negligently, carelessly, unskillfully, and improperly handled, that the said drill car was brought violently into collision with the forward car upon said float, and the force of said blow drove said three cars to the extreme outboard end of said car float, where they remained for upward of half an hour, greatly straining said car float by the uneven and improper balancing of the weight of her load. That said automatic brakes were out of order, and were negligently suffered to remain so, and did not work, and the brakes upon said locomotive and the locomotive itself were not employed to lessen the force of the blow when the cars collided as aforesaid, and to stop said drill car before said collision took place."

This theory was disproved by the great preponderance of testimony, and the claims of negligence now advanced were introduced by amendment at the close of the hearing.

The finding of the court that the railroad was not negligent in failing to inspect the vessel and measure the water in the hold is supported by the admission of the man in charge of the car float, Independent Stores No. 3, that the yardmaster asked him if he had any water in the float, and how much he had, and by the failure of the Bush Company to introduce any evidence to show that it gave any notice or information as to the presence of water in her hold. The utmost that can be claimed in favor of the Bush Company as to evidence

on this point is that if an outside boat comes to the float and anything is wrong, it is the duty of her captain to give notice thereof, but that if the condition of an outside boat is such as to challenge the attention of the float master, or if he is notified by her captain that anything is wrong, he would not let the boat in, and that otherwise he would. But the evidence fails to show that any such condition was apparent in this float, and, as already shown, proves that no actual notice was given. The claim of negligence in toggling the bow of the boat above her normal position was asserted solely on the strength of a statement by one witness for the railroad company. But it appeared that this statement was made under a misunderstanding of a question, and it was seasonably corrected by the witness in his subsequent testimony. The evidence abundantly supports the finding of the court below that the proximate cause of the loss was the unseaworthiness of the float.

The decree upon the libel of the Central Railroad Company is affirmed, with interest and costs. The decree dismissing the libel of the Bush Company is affirmed, with costs.

UNITED SHIRT & COLLAR CO. et al. v. BEATTIE et al.

(Circuit Court of Appeals, Second Circuit. October 18, 1906. On Rehearing, January 30, 1907.)

No. 219.

1. PATENTS—ANTICIPATION.
   A patent for a successful machine is not void for anticipation, because a prior machine intended for a different purpose may possibly be capable of use as an inefficient substitute for the later machine.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 66–72.]

2. SAME—INVENTION.
   The conversion of an abandoned machine, which was a failure, into one which is operative and successful, by the introduction of new and ingenious features, however simple, constitutes invention, which may be protected by a patent.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 73.]

3. SAME—ANTICIPATION—SUFFICIENCY OF PROOF.
   A patent will not be held void for anticipation by an unpatented machine on the oral testimony of witnesses, the accuracy of which depends upon their unaided recollection of events which occurred 25 years previously, unless it is exceptionally clear and convincing.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 78.]

4. SAME—PERSONS ENTITLED TO PATENT AS INVENTORS.
   The right of one who conceives an invention to patent the same as the sole inventor is not lost because he lacks the mechanical skill to embody his invention in a machine, and employs another to construct such machine.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 68, 118, 125.]

5. SAME—INFRINGEMENT—SUFFICIENCY OF PROOF.
   A decree for infringement of a patent will not be reversed on appeal, because the proof shows that the infringing machine was sold by a concern doing business under a different name and style from that of the partnership of defendants as alleged in the bill, where it also fairly shows that

the defendants were the proprietors of such concern, and the fact that they made the sale was not contested in the trial court.

6. SAME—INVENTION AND INFRINGEMENT—FOLDING MACHINE.

The Pine patent, No. 645,871, for a machine for folding the edges of blanks for making cuffs, collars, and like articles, was not anticipated in the prior art, and covers a true combination, although of old elements, which discloses invention; also *held* valid as against the claim that the patentee was not the inventor, and infringed as to the first four claims.

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

On appeal from a decree of the Circuit Court for the Northern District of New York holding valid and infringed the first four claims of letters patent No. 645,871, granted March 20, 1900, to the complainant, United Shirt & Collar Company, as assignee of James K. P. Pine, the inventor, for an improvement in machines for inturning the edges of collars, cuffs and like articles. The application was filed October 3, 1894. The other complainant, Reece Folding Machine Company, is the sole licensee and is engaged in making and leasing machines under the patent. The defenses in the Circuit Court were lack of novelty and invention, prior use, patentee not sole inventor and non-infringement, particularly of claim 4. The assignment of errors present the same questions in this court.

The opinion of the Circuit Court is reported in 138 Fed. 136.

George A. Mosher, for appellants.

E. H. Brown, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The Pine patent relates to improvements in machines for infolding the edges of cuff blanks by which the infolds are formed in the blanks and are pressed with the fabric folded back on itself by the combined action of the support on which the blanks are placed, a templet defining the form of the blanks, and infolders actuated to carry the subtending edges of the blanks inwardly or over the defining edges of the templet. The infold thus formed is fixed in the blanks by pressure between the support and the infolders before the templet has been removed and the infolders withdrawn from the folded edges of the blanks. Two blanks are then placed together with the folded over edges concealed between them and united by a line of stitching along their folded edges, the stitching being done, of course, on another machine. The patented device may be used not only for folding cuffs but for collars and other similar articles.

Five pages of drawings containing seven figures, illustrating the machine in its minutest details, accompany the description. The claims involved contain, substantially, the same elements. The first claim which is a sufficient exemplification of the others is as follows:

"(1) In a machine for infolding cuff-blanks or analogous articles, the combination of a support for the blanks, a templet having expanding and contracting plates, edge portions of which are adapted to bear directly upon the blanks upon said support, and within edge portions of the blanks, infolders constructed to move inwardly and outwardly whereby the edge portions of the blanks may be folded over the edge portions of the templet, and means whereby the folds of the blanks may be pressed between the support and the infolders after withdrawal of the plates of the templet from the folds and thereby fixed with a sharp fold."

The combination here claimed contains the following elements in a machine for infolding cuff blanks: (1) A support for the blanks. (2) A templet, having expanding and contracting plates with edge portions bearing directly upon the blanks within the edge portions of the blanks. (3) Infolders constructed to move inwardly and outwardly for folding the edges of the blanks over the edges of the templet. (4) Means whereby the blanks may be fixed with a sharp fold by being pressed at the infolds between the support and the infolders after the templet has been contracted and withdrawn. An analysis of the other claims is unnecessary, further than to say that the fourth claim is specifically limited to "means for forcing the bed against the infolders," whereas the other claims are broad enough to include means for forcing the infolders down upon the support. The infolders of this claim are "constructed to move inwardly and outwardly on all sides simultaneously."

The operation of the machine is as follows: A blank is placed on the bed, or support, and the templet is brought down on the blank with the expanding plates resting thereon. By means of a lever these plates are moved outwardly over the blank. The folders are then moved inwardly carrying the edges of the blanks over the outer edges of the plates. The plates are then drawn out of the folds by reversing the lever. By means of a foot treadle the support is forced up pressing the infolds between it and the infolders. The templet is then raised and the infolders are moved outwardly leaving the blank smoothly and sharply folded on the support. The patentee takes pains to explain, what the law probably implies, that the machine can be made applicable to folding square corners and blanks of other forms and that other, equivalent, means can be substituted for the pressing upward of the support without departing from the spirit of the invention.

We do not think that Pine has made a "pioneer invention," but we cannot resist the conclusion that he has made a valuable improvement, which, for the first time, placed in the hands of manufacturers of collars and cuffs a practical working device which does the work faster and better than previous devices. Though not entitled to a broad range of equivalents the complainants are entitled to protection against one who has admittedly appropriated the identical combination of three of the claims in controversy. Time will be saved if the concession be made at the outset that the elements of the claims, considered separately or in different environments, were, speaking generally, all old. The question here is was the combination old? That the claims cover a combination, and not an aggregation, we have no doubt, even though the operations of the separate elements do not synchronize. Forbush v. Cook, 2 Fish Pat. Cas. 668, Fed. Cas. No. 4,931; Heath Cycle Co. v. Hay (C. C.) 67 Fed. 246; Int. Recording Co. v. Dey (C. C. A.) 142 Fed. 736, 744.

The patent chiefly relied on by the defendants is the one granted to George Boxley, January 29, 1878, No. 199,615. The judge of the Circuit Court carefully considered this patent and the machine alleged to be built under it, and, as we agree, in the main, with his conclusions it is unnecessary to repeat what he has so well and care-

fully stated. The admission by the defendant that the Boxley patent does not disclose the fourth element of the claims as stated, supra, removes it at once from the list of anticipating references.

The Circuit Court did find, however, that the Boxley machine was capable of being used to perform this pressing operation by withdrawing and raising the templet and then extending the blades of the templet and lowering it upon the blades of the infolders still extended over the folded edges of the blank. Although such use was possible the court was not satisfied that the machine ever was so used and was of the opinion that it was not constructed for such use and if so used it would soon be worn out and destroyed. This view is, we think, as liberal for the defendants as the proofs warrant. The Boxley prior use has not been established beyond a reasonable doubt for the following reasons:

First. It is most improbable that a machine which could do the work of the Pine machine would be permitted to go out of existence when skillful men, knowing the needs of the business, were searching for such a machine.

Second. No writing supports the defendants' contention and human memory is not to be relied upon as to minute details of transactions occurring twenty-five years before. Keasbey & M. Co. v. Carey Mfg. Co. (C. C.) 139 Fed. 571, and cases cited.

Third. The omission of the pressing mechanism from the specification, which was prepared after the machine had been in operation and was well understood by the patent solicitor, is most significant, and the same is true of the 1882 patent to Boxley.

Fourth. The machine as constructed was not adapted to accomplish the pressing work, the edge portions of the templet plates, which were to force the infolders down upon the folded edges of the blanks, to be pressed between them and the bed, were thin and flexible and were supported far from their operative edges. In other words, they were wholly unsuited to do the heavy work of pressing the edge portion of the folded blanks.

Fifth. Various other matters of construction in the Boxley machine tend to strengthen the conclusion that it was not intended to accomplish the purpose of the Pine machine in the particulars under discussion and that it was incapable of being so used as a practical operative device.

Of course, if it be true that Boxley, even though ignorant of the fact, had previously made a machine capable of doing the work of the Pine device in the same way, the patent of the latter cannot be sustained. But, on the other hand, if Boxley intending to accomplish a different result ignorantly stumbled upon a structure which, in the light of Pine's achievement, can be distorted into a temporary and inefficient substitute for the successful machine, quite a different proposition is presented. If Pine did nothing more than take an old abandoned failure and, by the introduction of new and ingenious features, no matter how simple they may be, convert the rusty relic into a living machine which does the required work better, faster, cheaper than it was ever done before, he is entitled to the protection which his

patent is intended to give. Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Clough v. Barker, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134. Pine seems to have added to the prior devices the one feature necessary to make the machine a marked commercial success.

The patents to Norris, No. 502,678, granted August 1, 1893, and No. 520,535, granted May 29, 1894, are exceedingly complicated and their operation is not made altogether clear by the experts or the models. It would seem, however, that the press plate of the Norris machine is not collapsible and that in drawing it out the folded blank will be disarranged. It also appears that the machine is incapable of folding and pressing the folds on all sides of the blank and that it is capable of acting only upon a limited variety of blanks.

The Rumrell patent, No. 64,038, granted April 23, 1867, for an improvement in machines for making book covers, belongs to a different art and fails to disclose the combination of the claims of the Pine patent in controversy. Assuming that Pine had knowledge of the complicated device of Rumrell and adapted it to do successful work in the collar and cuff industry we are by no means sure that the language of the Supreme Court in Potts v. Creager, supra, would not apply:

"It often requires as acute a perception of the relations between cause and effect, and as much of the peculiar inventive genius which is characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device de novo."

A mere mechanic could learn nothing from Rumrell which would enable him to construct the Pine machine. He might find some valuable suggestions for minor mechanical details, but not the combination which makes the Pine machine successful. The Rumrell specification says:

"The press plate so prepared is brought down again, and this time on top of the fold, which is thereby pressed to the cover, and, being covered with paste, will be firmly secured."

The pressure here referred to is apparently that imparted by the hand of the operator. This is not the action of the Pine structure where folds are pressed between the infolders and the support. Topliff v. Topliff, 145 U. S. 164, 12 Sup. Ct. 825, 36 L. Ed. 658. We have grave doubt whether the Rumrell device could without several important changes, be adapted even for inefficient use in the art of folding cuffs and collars.

The Wenstron patent, No. 298,643, granted May 13, 1884, for a hat rounding machine, belongs to an art still more remote, and, so far as we can see, is wholly irrelevant to the present controversy. It shows, what no one has controverted, that prior devices somewhat similar to the templet of the patent had been made to expand and contract.

The McKinney and Shippee patents (Nos. 485,130, 463,171, respectively) have only a remote bearing upon the question at issue. This may be demonstrated by quoting from the Shippee specification that portion which is said to approximate most closely the Pine combination. It is as follows:

"The folding plates having been closed, the operator with his left hand will pull the form-plate longitudinally out from between the folding and clamping plates and out from the edge folds of the blank or material just laid over it leaving the folded edges m^1 held clamped between the plates a and b where the folded edges are closely creased."

The foregoing are the principal patents relied on to defeat the patent in suit. If singly or combined they are ineffectual to accomplish this result the other patents in evidence, which are still more remote, will not aid the defendants, The Pine patent is for a combination and it is enough to say that this combination is not, in our judgment, disclosed by any of the prior patents in evidence.

It is alleged that one George A. Brockway made a machine prior to the date of Pine's invention, which was a complete anticipation at least of the combination of claim 4. The complainants assert that the Brockway machine was not made before, and even though it were so made the proof is insufficient to establish prior use. Upon both of these propositions the burden is on the defendants and it is enough to say that there is sufficient doubt as to the details and date of the Brockway machine to warrant us in rejecting it as an anticipation.

We have already adverted, when dealing with the Boxley machine, to the unsatisfactory character of testimony depending upon the unaided recollection of witnesses of events occurring years previous. Courts are loth to destroy a patent upon testimony so unreliable. It suffices to say that the defendants' testimony is neither clear nor convincing. We are in doubt as to its truth.

It is said that Garry J. Dormandy was the sole inventor or the joint inventor with Pine. The Patent Office, after full hearing, granted the patent to Pine which is at least prima facie evidence that he was the inventor. The court must be convinced by strong and satisfactory proof that Dormandy was sole or joint inventor before destroying the patent. Pine, having disclosed his invention to Dormandy, in the spring of 1893, and, having employed the latter as his machinist to construct the machine, the presumption is strong against Dormandy's contention that he supplied the brains which made the machine operative, especially after the Patent Office on interference had decided in favor of Pine and against Dormandy.

The question is at best a technical abstraction. No rights of rival inventors are involved, as the complainant, the Shirt & Collar Company, was assignee of both Pine and Dormandy, and that company, with full knowledge of the facts, took the patent, in accordance with what appeared to them to be the truth, in the name of Pine. A decision against Pine now will benefit infringers but will be no benefit to Dormandy. We think the testimony fails to establish the defendants' contention; on the contrary it shows that Pine first conceived the invention and employed Dormandy to carry it out. Read as a whole, in connection with the position, character and intelligence of the two men, respectively, as disclosed by the record, the history of the invention makes it quite clear that the inventive faculty was Pine's, the mechanical skill Dormandy's. "Every machine before it can be used must be constructed as well as invented. If one man does all the inventing and another does all the constructing, the first is the

sole inventor." Walker on Patents, § 46; Agawam Co. v. Jordan, 7 Wall. 583, 602, 603, 19 L. Ed. 177. We think the proof sufficient to connect the defendants with the machine known as "Complainants' Exhibit Defendants' Machine."

The bill of complaint is "against William Beattie and Walter J. Beattie, both citizens of the state of New York, jointly doing business under the firm name and style of William Beattie & Son, and having a place of business at Cohoes, in the said Northern district of New York." The answer admits this. On July 5, 1902, the machine in evidence was purchased and a bill rendered to the purchaser, which contains among other statements the following printed matter:

"Beatties' Machine Works. W. Beattie & Son. W. Beattie, W. J. Beattie. Cablegram 'Beattie.' Sole Manufacturers of Beatties' Patent Loopers, Cohoes, N. Y."

On July 17th Beatties' Machine Works acknowledged receipt of $380.44, the amount of the bill of said machine. It is true that this proof might have been more specific and probably would have been if the complainants had anticipated that an attack would be made upon it for the first time in the appellate court. It is asserted, and not denied, that throughout the entire litigation in the Circuit Court the exhibit in question was treated as having been sold by the defendants. The name "Beattie" appears six times on the bill-head and if the complainants had had the slightest hint that a distinction existed between "W. Beattie & Son" and "Beatties' Machine Works" they could have offered proof showing their indentity. We are of the opinion that the complainants made out a prima facie case. Hutter v. De Q. Bottle Co., 128 Fed. 283, 285, 62 C. C. A. 652.

It is conceded by the defendants that the machine referred to supra infringes the first three claims of the Pine patent. It is argued, however, that it does not infringe claim 4 for the reason that it does not employ "infolders constructed to move inwardly and outwardly on all sides simultaneously." This contention gives, we think, an unnecessary strict construction of the word "simultaneously," which means "at the same time," and if the infolders, at any time during the operation, move simultaneously they are within the claim, even though their respective movement may begin and end at different times. As is said by the complainants' expert:

"By the same continuous operation of the operating handle, the four infolders are simultaneously moved and continuously from start to finish. I do not understand, however, that the actual folding of each edge of the blank is performed in precisely the same time as the rest. The folding is, however, accomplished on all edges of the blank by the same operative movement of the single operative handle."

We are of the opinion that infringement of the fourth claim is established.

The decree is affirmed.

On Rehearing.

PER CURIAM. After careful examination of the questions presented at the reargument, we are constrained to adhere to our former opinion that the claims in controversy cover patentable combinations and are not for mere aggregations.

AMERICAN CARAMEL CO. v. THOMAS MILLS & BRO.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 36.

1. PATENTS—INVENTION—TESTS.
   While utility is not necessarily a test of invention, it may help to determine the question, increased efficiency being accepted as an important factor, and it is also regarded as significant that there has been a recognized need of such a machine as that of the patent, and that the efforts of others to meet it have been without success which the patentee has attained only after continued experiment.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 39.]

2. SAME—PRIOR PUBLIC USE.
   A patent is not invalidated because a machine like that of the patent was made and used by the patentee more than two years before the application was filed, where such use was for the purpose of experiment only, nor is such use a public use, which will defeat the patent because the product of the machine during the time was sold.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 103.]

3. SAME—INVENTION AND INFRINGEMENT—CANDY CUTTING MACHINE.
   The Hershey patent, No. 532,554, for a machine for cutting candy, covers a combination which was new, although the elements were old, and discloses patentable invention; the machine being of greater efficiency than any of the several which preceded it in the art. Also *held* valid as against the claim of prior public use, and infringed.

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

For opinion below, see 138 Fed. 142.

Henry E. Everding, for appellant.

A. B. Stoughton and Henry P. Brown, for appellee.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The patent in suit is for a machine to cut caramels and other similar candy products issued to M. S. Hershey January 15, 1895. The bill was dismissed upon the ground that there was nothing patentable in the device; all the elements being old, and there being no invention in putting them together in the way that was done. (C. C.) 138 Fed. 142. The machine consists in a stationary table, suitably supported, having a transverse slot or opening, through which a feed roller projects upwards from below, and over which a blade roller, armed with circular cutting discs or knives, is hung, conformably to the feed roller; the two being so geared and journaled that their meeting surfaces move forward together in the same direction. To carry the material to be cut, a blade or pad is provided, which is drawn with such material, along the table as a rest or guide, between the cutting and the feed rollers, by the frictional action of the same, during the course of which operation the cutting takes place. The table may be level, or may incline from the feed to the delivery end; and the rollers may or may not be vertically adjustable to suit different thicknesses of the candy. The plate or pad is preferably made of some

flexible and yielding material, such as pasteboard, blotting paper, felt, or rubber, into the surface of which the knife edges are arranged to sink or bite, so as not only to insure a clean and complete cut, but to assist in moving the pad forward through the rollers, by frictional contact with the blades. By the projection of the feed roller through the slot in the table, an arching of the pad is also produced at the point of contact with the knives, which adds to the efficiency of the operation.

The claims of the patent are as follows:

"1. The combination, with a slotted table, of a shaft having blades and journaled above said slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a plate or pad adapted to be drawn between said blades and the roller by the frictional action thereof, for the purpose specified.

"2. The combination, with a slotted table, of a shaft having blades and journaled above said slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a flexible plate or pad adapted to be drawn between said blades and the roller by the frictional action thereof, for the purpose specified.

"3. The combination, with a slotted table, of a vertically adjustable shaft having blades and journaled above the slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a flexible plate or pad adapted to be drawn between the blades and the roller by the frictional action thereof, substantially as and for the purpose specified."

The only difference in these claims is that in the second and third the pad is flexible, and in the third the cutting shaft is vertically adjustable.

No such combination, as is so specified, is to be found in the prior art, however the different elements of which it is composed may appear there. The Wunderle machine (unpatented), which is the first reference made, is a very old and primitive affair, built in 1874, in which there is nothing but the merest rudiments. It was used for fig paste, and consists simply of an upper shaft, vertically adjustable, with large circular disc-like scoring or cutting blades, and a smaller under roller, the material to be cut being put through between the two, on a board, first in one direction, and then at right angles, so as to divide the paste into squares. The two rollers are independent of each other, and not geared together as in the device in suit; the only function of the lower one being, as a slide, to facilitate the passing through of the board which carries the material. And, as further distinguishing it from the present device, there is no table of any kind, slotted or otherwise, nor is the board flexible, like the plate or pad specified in the second and third claims. This machine, also, after having been used by Wunderle for a couple of years was thrown aside, his competitors, as he says, getting out a better looking and more salable candy than he could by means of it; and it was sold soon afterwards to the defendants, in whose stockroom it has been stored away ever since, unnoted and unused, until resurrected for the purpose of this suit. Whatever virtue, therefore, it may have originally had, as it stands, it must be regarded as in the nature of an abandoned experiment, of which no notice need now be taken.

The so-called "chewing-gum machine"—also unpatented—is a stage in advance of this, but not by any means to the extent of being an

anticipation. It was built by the defendants in 1889 for a factory in North Carolina, and upon the failure of that concern was taken back about a year later. Another was built about the same time for a Baltimore man, and still another for Mr. Hershey, the present inventor. It has the usual upper and lower rollers, which are geared together, the former being vertically adjustable, and being provided with blunt circular scoring blades or edges, with transverse, or cross, edges at intervals. There is no slotted table, however, although it must be confessed that the shelf or rest and the sloping discharge slide, on opposite sides of the lower roller, come pretty near to that. But distinctly there is no pad; the material being its own conveyor, and being fed into the machine on one side and allowed to shoot down the slide on the other. And it is, moreover, essentially a scoring and not a cutting machine; the gum or candy still remaining in a sheet, the cutting edges only going partially through it. Nor is this materially different in the modified form, with knives instead of scoring edges on the upper roller. And whatever its efficiency with chewing gum, as used by Hershey for caramels it was not successful. The only other machine in the immediate candy cutting art which calls for notice is the B. Parker (1883). This was a cutting, and not a mere scoring, machine, as argued; the knives going clear through, although a pasteboard pad was sometimes required to hold the material up to the knives, in order to have them do so. It was the one successful caramel cutting machine prior to that in suit, and was expressly designed for that use. It was extensively employed by Hershey in his factory, and it was in fact by his experiments with it that he came to invent his own machine. Notwithstanding this, however, the two are not at all alike; the only things in common being the upper vertical adjustable cutting roller and the removable pad or board on which the material is placed. There is no under or feed roller, and, instead of a stationary slotted table, there is a traveling carriage, on which the boards are set, and by which the material is carried under the knives. The carriage and the cutting roller are geared together, and both move forward at the same time, but not at the same rate; the cutting edges being given a greater velocity, in order to make a better cut. Certain leather embossing and cutting machines are also referred to, which have some common features, and to a certain extent act in the same general manner as the Hershey, but they deal with a different character of material, which presents different conditions, calling for different treatment, and do not need to be specially considered. The same is true of the Baumgartner noodle cutter (1874), the only significance of which is that it shows an arched flexible strawboard plate or pad, into the surface of which the knife edges cut or bite, making this feature and function old.

From this review of the prior art, it thus appears, as already stated, that there was nothing which directly anticipated the present device. No doubt the instrumentalities made use of by the inventor were at hand, cutting machines being found in various arts, with knives, and rollers, and tables or beds, and flexible pads, similarly, if not suggestively, used. But that does not dispose of the one in hand. The combination which is there found is new; and the only question is whether

it amounted to invention to put together the elements made use of in the way that was done. It is not easy to say in any case what does and what does not constitute patentable invention; and it is a delicate matter to declare that a device, although novel, is devoid of it. Utility is not necessarily the test. McClain v. Ortmayer, 141 U. S. 419, 427, 12 Sup. Ct. 76, 35 L. Ed. 800. Although it may help to determine the question; increased efficiency being accepted as an important factor. Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177. So, also, is it regarded as significant that there has been a recognized need for such a machine, and that the efforts of others to meet it have been without success, which the inventor has attained only after continued experiment. Gandy v. Main Belting Co., 143 U. S. 587, 594, 12 Sup. Ct. 598, 36 L. Ed. 272. All these are considerations which are of force here, not in a large way, it may be, but sufficiently. At least three different and distinct attempts, by as many parties, were made, as we have seen, to produce a candy-cutting machine of this character, none of which was altogether satisfactory; one, however, being regarded as of sufficient merit to receive a patent. On account of the imperfect work turned out by the best of them, Hershey set about to see whether he could not get up something which would answer. To this end he conducted extended experiments, with not a little outlay of money, before he got what he thought would do, the result of which was a marked success; the production of the factory being increased from three to five fold, and considerable labor at the same time dispensed with. The machine makes a clean and thorough cut—the essential thing—and operates with such accuracy that a definite number of caramels are able to be taken without being weighed to make up pound and half-pound packages, materially saving in the work of handling and packing them. There are also other advantages, operative and functional, some of which have been alluded to above, on which it is not necessary to dwell. Taking all things into consideration, a case would seem to be presented in which the exercise of inventive faculty was shown. The mechanism, of course, is not intricate, and a high order of invention may not be involved. It also, no doubt, follows the same general lines already marked out by others, in this and other arts, from which, indeed, there is little opportunity to depart. But, unless the possibility of there ever being anything patentable in candy cutting machines is to be denied, it would seem to be found here. Not only is there a judicious selection by the inventor of the mechanism employed, but there is a discriminating adaptation of it to the work to be performed, which suggests something more than the mere skill of the ordinary mechanic, and partakes rather of the inventive insight and discovery which it is the design of the patent law to foster and protect. A presumption exists in favor of the device by reason of the patent granted to it. But without resting the case upon that we are of the opinion that actual inventive merit is shown sufficient to meet the requirements of the law, and that it should have been so held in the court below.

It is urged, however, that the patent is invalid, because the machine was in public use for over two years before the patent was applied for.

Not only is this not negatived, as it is said, by the usual affidavit required of inventors—that executed by Hershey being made August 24, 1892, nearly nine months before the application, leaving a gap which is thus uncovered—but is conceded, also, by Hershey in his testimony, the machine having been used, as he says, in his factory since the spring of 1891, to which he admits that he did not know there was any objection. But in whatever uncertainty the subject may seem to be left by that which is so referred to, it is put at rest by the other evidence. The first two machines which were designed for commercial use were built by Blickenderfer by contract, and were not completed until October 31, 1891; the patent being applied for May 3, 1893, a year and a half later. This is established beyond controversy by the charges in Blickenderfer's books, and is confirmed by his testimony, as well as by that of Blair, Robinson, and Brooks, all of whom agree. There was no doubt an earlier machine, more or less complete, which was being experimented with, from along in March up to the latter part of August, 1891, when it was found to work satisfactorily, and it is to this that Hershey evidently refers. But the use made of it was purely experimental, and does not count. Nor is this affected by the fact that caramels cut on it were sold. Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Bryce v. Seneca Glass Co. (C. C.) 140 Fed. 161. It is denied that there were any such sales. But, assuming that there were, the caramels did not have to be thrown away to escape the charge of a public use.

The patent being valid, infringement is clear. The defendants manufacture two kinds of machines, the one for hand and the other for steam power. In the hand power machine the duplication beyond question is complete, and so also, in our judgment, is it in the steam power, the exact combination claimed in the patent appearing in both. A distinction is sought to be made in the latter that the cutting blades and the feed roller, instead of being one larger than the other, as in the Hershey machine, are both of the same size, and are so geared together that the feed roller runs faster, dominating the motion of the material, the other being confined to the single function of cutting, where in the Hershey it is arranged to assist in feeding also. This, as it is claimed, is a material difference; Hershey having gained his patent on the assertion of the frictional contact of blades and pad, by which the latter is positively moved. No doubt this functional advantage was claimed in argument in the Patent Office, and not a little made of it there. And it was also put into the specifications, where it now appears, before the patent was allowed. But at the most it is merely descriptive of the supposed action of the machine, and not a limitation upon it, to which the inventor committed himself; there being no amendment or restatement of the claims by which the invention was defined. It is the mechanical combination there specified which is patented, and not the particular functions or advantages claimed for the different parts; and infringement is not escaped where there is a substantial appropriation of the mechanical construction, even though, by slight variations, unimportant changes in the mode of operation may be made.

The decree is reversed, with directions to reinstate the bill and grant the relief prayed for.

STUART v. AUGER & SIMON SILK DYEING CO.

(Circuit Court of Appeals, Third Circuit. January 11, 1907.)

No. 25.

PATENTS—ANTICIPATION—PROCESS AND MACHINE FOR LUSTERING SILK.

The Stuart patents, No. 705,715, for a process of intensifying the luster of silk fiber, and No. 705,716, for a machine for carrying out such process, are both void; the former for anticipation by the Hendrie British patent, No. 10,938 of 1845, and the latter for anticipation by the Brizon French machine, from which that of the patent was copied, and for lack of patentable novelty, in view of the prior art.

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

For opinion below, see 139 Fed. 935.

James C. Chapin, for appellant.

Joseph A. Stetson, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from a decree of the Circuit Court of the United States for the District of New Jersey dismissing a bill in equity brought by Charles Stuart, the appellant, against The Auger & Simon Silk Dyeing Co., charging infringement of United States patents Nos. 705,715 and 705,716. Both patents bear date July 29, 1902, and were issued to the appellant; the application for the former having been filed January 17, 1902, and for the latter January 20, 1902. Patent No. 705,715 is for an alleged improvement in the "Process of Intensifying the Luster of Silk Fiber" and patent No. 705,716 is for alleged improvements in "Machines for Increasing the Luster of Silk." In the description of the former patent Stuart says:

"The object of the invention is to give to silk fiber and the fabric into which it is woven a glossiness or permanent luster of great brilliancy; and it consists in taking the skein of silk fiber as it comes from the hydro-extractor after being dyed, stretching it while damp, and subjecting it while so damp and stretched for three or four hours to a drying heat of a temperature of about 120° Fahrenheit until completely dry. The old process of drying the fiber before placing it in skeins two or three at a time on stretching-posts in a steam chest or stretcher, where it is treated to a bath of live steam, which is admitted into the steam-stretcher, completely enveloping and moistening the fiber for about three minutes while it is being stretched, leaves the silk damp after being stretched in the steam-chest, and in drying afterwards invariably shrinks and loses its luster, while my process has in practice given better results, producing a more brilliant and permanent luster, which is retained and shown in the finished fabric."

There is only one claim, and it is as follows:

"The process of intensifying the luster of silk fiber, which consists in taking the skeins directly from the hydro-extractor after dyeing, and, while still damp, stretching them and simultaneously maintaining them in a stretched condition and subjecting them in a closed chamber to dry air at a temperature

of about 120° Fahrenheit, thereby preventing shrinking during the drying, as set forth."

In the description of patent No. 705,716 the patentee says:

"My invention relates to a machine for increasing or intensifying the luster of silk; and the object of my improvements are first, to provide a machine that will give to the silk fiber a permanent and more brilliant luster, which will be retained and shown in the finished fabric; second, to afford facilities for the treatment of a large quantity of fiber at one time; third, to reduce the cost of the treatment of silk fiber after it is dyed by the saving in time and labor required in its preparation for manufacturing purposes; fourth, to produce a machine upon which the moistened fiber after it is dyed may be held and stretched and prevented from contracting while being submitted to a drying heat in a suitable room or compartment, so that the gradual drying will exert a strain upon the fiber until it is dry, after which it will not shrink."

The charge of infringement relates to all of the claims, which are three in number and as follows:

"1. In a machine for increasing the luster of silk, the combination of a frame, means for suspending therefrom a series of interdependent skeins of wet silk, flexible means connecting each series with a mechanism located in the lower portion of the frame, and which is adapted to stretch the silk, and to maintain it in a stretched condition while being dried to prevent shrinkage, substantially as set forth.

"2. In a device for increasing the luster of silk, the combination of a frame, a series of horizontal rods suitably connected and depending from said frame, said rods being adapted to hold skeins of silk stretched between each pair, flexible means connected to the lower portion of the frame, and to the lowest rod of each series for stretching the wet skeins and for preventing the contraction of the same while drying, and ratchet means for holding the said flexible means, as set forth.

"3. In a device for increasing the luster of silk after it is dyed, the combination of a frame, horizontal rods suitably connected and depending from said frame, said rods being adapted to hold skeins of wet silk stretched around each pair, flexible means connecting the lowest rod with a mechanism in the lower portion of the frame, and such a mechanism for stretching the wet skeins and for preventing the contraction thereof while drying, substantially as set forth."

The substantial defences are invalidity of the patents in suit and non-infringement. It is unnecessary to discuss the latter defence as we are convinced that the former is supported by the evidence and required the dismissal of the bill. Patent No. 705,715 was, we think, anticipated by the British patent No. 10,938, granted to Robert James Hendrie, in 1845, for "An Improvement in the Preparation of Silk." Hendrie in the description of his invention says:

"My improvements in the preparation of silk apply to that article in the form of hanks or skeins, dyed or undyed, and consist in a novel mode of treatment or preparation, intended to improve the appearance of the silk by producing upon the surface of its fibres a beautiful lustre. The manner of effecting this improvement is by submitting the silk in the hank or skein, when damp, to the action of currents of air, whilst the fibres of the silk are held in tension. There may be various contrivances employed for carrying out this object. One of these I will explain in reference to the accompanying drawing, which exhibits such an apparatus as I have found to answer the purpose, though I do not intend to confine myself to the employment of such a construction alone. * * * It must be obvious that skeins or hanks of silk may be distended by various contrivances; I therefore do not intend to confine myself solely to the use of the machine above described," &c.

The first claim of the patent was as follows:

"Firstly, preparing silk by submitting it in tightly distended skeins, or hanks, when damp, to the action of heated air or air of the ordinary temperature, in which it must remain until dry, for the purpose of producing upon its surface a lustre or gloss."

By the Hendrie process skeins of damp silk were stretched by mechanical means and submitted while subjected to such stretching to the action of "heated air or air of the ordinary temperature" until dried. By the process of patent No. 705,715 in suit the skeins of silk while damp are stretched by mechanical means and submitted while subjected to such stretching to the action of "dry air at a temperature of about 120° Fahrenheit." The "heated air" of the earlier patent includes the "air at a temperature of about 120° Fahrenheit" of the later patent. The heated air in either case is employed to dry the silk, and the mere designation in the later patent of the approximate degree of heat does not differentiate the process from that of the earlier. The claim of the patent in suit, it is true, requires that the drying of the silk should be effected in "a closed chamber." The essence of the invention is that damp silk while subjected to stretching shall be dried by the air to which it is exposed, in order to impart lustre, and whether this is effected in a closed chamber or in the open air is immaterial so far as identity of the process with that of the earlier patent is concerned. Certainly drying the silk by the action of heated air, includes drying in "a closed chamber" as well as drying in an unclosed space. We perceive no ground on which the claim of the process patent in suit legitimately can be restricted to the method of operation of the specific mechanism illustrated by the drawings or mentioned in the description. The cases cited on the part of the appellant in this connection are not analogous to that now under consideration and fail to sustain his contention. Indeed, Stuart in the description of his machine patent No. 705,716, the drawings of which are exact copies of the drawings of his process patent, says:

"As the mechanism shown is capable of many modifications which may be made in the construction of the machine without departing from the essential principles involved in my invention, I do not wish to limit myself strictly to the specific construction shown, and will hereinafter claim, broadly, a machine embodying such elements as the invention necessarily implies."

Nor do we perceive the materiality of the appellant's contention in this regard, for on the assumption that the process should be treated as limited to the method of the specific mechanism shown, the broader claim of the Hendrie patent would still work an anticipation.

The machine patent in suit, No. 705,716, we think is void for lack of patentable novelty in view of the prior art. There is no color for an assertion of patentable invention aside from the arrangement of horizontal bars, referred to in the evidence and argument as "equalizing levers," for stretching the skeins of silk, and the device for maintaining them in a stretched condition while being dried, to prevent shrinkage or contraction. The counsel for the appellant in their brief admit that "his equalizing levers for so stretching the silk, and mechanism for locking the silk stretched against shrinkage is the invention

of his machine patent." There was nothing new in the idea of a ratchet or other equivalent device for maintaining the skeins of silk in a tense condition until dry. Figure 2 of the drawings in the Hendrie patent, above referred to, shows such an equivalent device, and in the description Hendrie explains its operation as follows:

"The socket d, with its arms f, f, f, are made to ascend or descend upon the shaft b, by means of a vertical screw g, working in a screw-box h, h, fixed in the upper part of the hollow shaft, which screw g is turned by a capstan or lever i, i, attached to its top. * * * I take any convenient number of hanks or skeins of silk, and extend several of them over each of the pairs of parallel arms, c, f, as represented at k, k, k, in Fig. 2. All the radial arms, c, c, c, and f, f, f, being then charged with the skeins or hanks of silk, I then, by means of the capstan or levers, i, i, turn the screw g, for the purpose of raising the socket d with its arms f, f, f, by which rising of the arms f, f, f, the skeins or hanks of silk will become stretched and held in tension. * * * It must be obvious that skeins or hanks of silk may be distended by various contrivances. I therefore do not intend to confine myself solely to the use of the machine above described, though I consider it to be perfectly effective," &c.

If there was anything new in the mechanism of the patent in suit, it was in the flexible arrangement of horizontal bars operating as equalizing levers, by means of which the skeins of silk are subjected to a more uniform tension, calculated to produce a more uniform lustre. Such a flexible arrangement of bars operating in like manner as equalizing levers, however, was contained in the Weidemann machine for imparting lustre to silk, which was in use prior to 1885; the difference between it and Stuart's machine being that, while in the former weights were employed to hold the silk against contraction or shrinkage when in a stretched condition, in the latter a ratchet or locking device is used for the same purpose. But, as has been stated, the Hendrie machine employed a locking device to accomplish the same result. Without referring to the other evidence adduced by the appellee touching the prior art, we regard the disclosures of the Hendrie and Weidemann machines as wholly negativing patentable novelty in that of Stuart. We further think that the mechanism of patent No. 705,716 was anticipated by the Brizon machine, which was imported to this country from France in May and erected in June, 1900, in the silk dyeing establishment of Emil Geering in Paterson, New Jersey, where the appellant was employed at the time and knew of its erection and use. The fact of the importation and erection of the French machine at the time and place above stated is clearly established by the evidence and is not disputed. This antedated the application for the machine patent in suit by more than a year and a half. The appellant's machine beyond all doubt is a close copy of that of Brizon. Stuart claims that he devised five machines for imparting lustre to silk, and that they were erected and used in July, 1899, February, 1900, July or August, 1900, the fall of 1900 and the spring of 1901, respectively; and that the first two were erected prior to the importation of the Brizon machine, and the remaining three subsequently. He testifies to the effect that the first machine was erected for only experimental purposes. He admits that the third, fourth and fifth were imitations of the French machine. Of the third he says that "the machine was constructed according to the pattern of the French

machine," and that it resembled it "as closely as I could construct it, to give it strength and durability." He states that the fourth machine was "the same; practically the same" as the third; and that the fifth was "constructed after the pattern of the third and fourth"; and further, that the model which he supplied to his patent solicitor was "made according to how I constructed the machine, after the pattern of the French machine," and the drawings of the patent in suit were made "from the machine I constructed, after the pattern of the French machine, from either one, either third, fourth or fifth, as they are alike." Under these circumstances it was necessary in order to avoid anticipation that Stuart should carry the date of his invention back of the importation of the Brizon machine. This he has endeavored to do by the production of evidence in support of his alleged machine of February, 1900. As the date of the application for a patent presumptively is the date of the invention embodied in it, and as the French machine which clearly embodies the mechanism of the machine patent in suit was brought into this country and there used with the knowledge of the appellant about twenty months prior to the date of application, the burden rested upon him to establish by satisfactory and convincing proof, that his invention antedated the arrival of the foreign machine. But this he has failed to do. The evidence in support of the construction and operation at an earlier date of his alleged first and second machines falls far short of the full and clear proof that was requisite. Indeed, the evidence taken as a whole creates the gravest suspicion of bad faith on the part of the appellant in making his contention of invention prior to the date of his knowledge of the Brizon machine.

We are satisfied that the decree of the court below should be affirmed with costs. And it is so ordered.

THOMAS et al. v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1907.)

No. 1,561.

1. PATENTS—ACTION FOR INFRINGEMENT—DEMURRER.
The question of the validity of a patent on its face may be raised by demurrer in an action at law for its infringement.
2. SAME—NOVELTY—CAR TRUSS.
The Thomas patent, No. 570,148, for a lateral support for the sides and ends of cars, consisting of truss rods extending from the stakes on the outer sides and ends of the car to a plate beneath the car, is void on its face for lack of patentable novelty.

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

Greer & Greer, for plaintiffs in error.
G. S. Payson, for defendant in error.
Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action to recover damages for the infringement of letters patent No. 570,148, issued to W. A. Thomas, October 27, 1896, for a lateral support for sides and ends of cars. A demurrer to the declaration was sustained upon two grounds: First, because it did not contain certain averments required by section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382], and, second, because the patent itself upon its face lacked novelty and invention. The object of the invention, as stated in the specification, "is to provide a simple, inexpensive and efficient truss for car sides and ends * * * which, at the same time that it supports the sides against lateral pressure, will act as an anchor to prevent the sides from working upward away from the car floor." The invention itself consists of a truss rod extending from a seat or stirrup attached to the upper end of the stake on the outside of the side or end of the car diagonally downward through the side and bottom frame of the car to a truss plate where it is secured. In other words, it is a U bolt, which, instead of being applied to the lower end of the stake, as usual, is applied higher up, and, instead of extending directly inward, so as to be secured to the side, extends inward and downward, so as to be secured to the bottom of the car and for this purpose is necessarily lengthened.

There is nothing new in this device. The U bolt applied to stakes on the sides and ends of the cars has been in common use for many years. When lengthened and used as this device is, it becomes a truss or stay which is of as universal and familiar employment as perhaps any known mechanical device. Buildings, bridges, vessels, cars, derricks all use substantially the same appliance, or an appliance performing the same function, as that covered by the Thomas patent. The masts of a vessel are held in place by stays, the timbers of a derrick are supported in the same manner, while trusses hold together the frames of bridges and buildings. This is a matter of such common knowledge that the court below took judicial notice of it, and

properly held the patent void on demurrer for lack of novelty. The fact that the action was one at law did not place the initial pleading beyond the reach of the demurrer. Brown v. Piper, 91 U. S. 37, 42, 23 L. Ed. 200; Slawson v. Railroad Co., 107 U. S. 649, 652, 2 Sup. Ct. 663, 27 L. Ed. 576; Black Diamond Co. v. Excelsior Co., 156 U. S. 611, 616, 15 Sup. Ct. 482, 39 L. Ed. 553; Richards v. Chase Elevator Co., 158 U. S. 299, 301, 15 Sup. Ct. 831, 39 L. Ed. 991; Richards v. Michigan Cent. R. Co., 102 Fed. 508, 43 C. C. A. 583; Id., 179 U. S. 686, 21 Sup. Ct. 918, 45 L. Ed. 386; Id., 186 U. S. 479, 22 Sup. Ct. 942, 46 L. Ed. 1259; American Fibre Chamois Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 C. C. A. 62; Strom Mfg. Co. v. Weir Frog Co., 83 Fed. 170, 172, 27 C. C. A. 502; Northwood v. Dalzell, etc., Co., 100 Fed. 98, 40 C. C. A. 295; Drake Co. v. Brownell & Co., 123 Fed. 86, 59 C. C. A. 216; Baker v. Duncombe Mfg. Co. (C. C. A.) 146 Fed. 744.

The judgment is affirmed.

NOTE.—The following is the opinion of McCall, District Judge, on sustaining demurrer:

McCALL, District Judge. This is an action brought by the plaintiffs against the defendant to recover damages for an infringement of certain letters patent, No. 570,148, granted by the United States government to the plaintiffs Ocober 27, 1896, for a period of 17 years, to be used as a new and useful improvement in the lateral support for sides and ends of cars. The plaintiffs claim that, in violation of said letters patent, the defendant company has built, equipped, and does now use, and has used for about five years, railroad cars with a device for the lateral support of their sides and ends which is in all essential and material points identical with and substantially the same device described in the declaration and letters patent, to the damage of plaintiffs in the sum of $25,000, for which they sue. Profert is made by the plaintiff of said original letters patent. To this declaration the defendant interposes a demurrer.

The first cause of demurrer is general, and will be passed.

The second cause of demurrer is special, and states in substance that the declaration does not contain the necessary averment required by section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382]; that is, there is no averment that the alleged improvement said to be covered by said patent was not known or used by others in this country, and not patented or described in any publication in this or any foreign country before the alleged invention or discovery thereof, and was not in use or on public sale for more than two years prior to the application for said patent, or that it was abandoned. "It has been held in an action for infringement that allegations of the requirements contained in section 4886 (Revised Statutes) prior to the amendment, were necessary and material." Elliott Co. v. Fisher Co. (C. C.) 109 Fed. 330, and cases there cited. I am of the opinion, therefore, that the declaration in this respect is fatally defective, and this cause of demurrer is sustained.

The third cause of demurrer is that the said letters patent No. 570,148, granted to the said Thomas, October 27, 1896, are wholly void on their face for want of patentable novelty and invention. It seems to be usual for patent cases to be disposed of upon bill, answer, and proof, yet "there is no objection," says Mr. Justice Brewer, "if a patent be manifestly invalid upon its face, to the point being raised on demurrer, and the case being determined upon the issue formed." Richards v. Chase Elevator Company, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, and cases there cited. In examining those cases where this rule is laid down, it appears that most of them, if not all, were cases in equity.

My attention has not been called to any decision holding that a like rule would not hold good in a court of law, and I know of no such holding. Indeed, I can see no valid reason why, if the question of the validity of the patent

for want of novelty and invention may be determined upon a bill in equity and demurrer thereto, a like practice would not hold good in a court of law.

The question then presented is whether or not the patent in question is in valid for want of novelty and invention. In the letters patent the plaintiff, Thomas, the alleged patentee, declares that what he claims in his patent is a truss seat, a truss rod, a truss plate, used in combination on a gondola or coal car to support the sides and ends of the car attached, and passing down through the bottom of the car, where the ends of the truss rod are secured in a truss plate or washer, and thus to hold the sides and ends of the car from bulging or rising. A careful examination of the model forces me to conclude that there is nothing new in the several parts which compose the device or appliance. What is termed the "truss seat" is a hook projecting from a plate of which the hook is a part, and is familiar to every one who suspends his hammock on his porch, and has been in use from time immemorial. The truss rod is but an elongated U-bolt, made to conform to the parts of the car around which it is looped or bolted. The truss plate is but a piece of flat metal, with two holes to secure the ends of the so-called truss rod. The novelty, if any, consists in the combination and application, and new and useful results thereby accomplished. The arrangement of the different parts in combination is, therefore, the essence of the invention, if it be one.

To any one who has examined an ordinary gondola car, a section of which is illustrated in the brief of counsel for defendant on page 13, and which is copied from Car Builders' Dictionary, 1879, at page 241 and 488, it will appear at once that it is the same combination that we have in the case at bar. The difference in the present case is, the U-bolt is much longer and engages the stake at a point near the top, and the two ends of the U-bolt, instead of passing through the sides of the car and fastening on the inside, passes down the side of the car astride the stake through the bottom, where it passes through a plate and is secured by a nut. This is but a change in degree and the carrying forward of an old idea which is held not to be invention. Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Ansonia Co. v. Electrical Co., 144 U. S. 11, 19, 12 Sup. Ct. 601, 36 L. Ed. 327; Penn. R. R. Co. v. Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222.

In Goodyear Rubber Company v. Rubber Wheel Company, 116 Fed. 363, 53 C. C. A. 583, the Circuit Court of Appeals of the Sixth Circuit said: "The bringing together of old parts, allowing each to work out its own effect, without producing some new machine or product, is not invention. A combination of old elements, to be patentable, 'must produce a different force or effect or result, in the combined forces or processes, from that given by their separate parts. There must be a new result produced by the union, if not it is only an aggregation of separate elements.' "—citing Reckendorfer v. Faber, 92 U. S. 347–357, 23 L. Ed. 719. See, also, Lovell Mfg. Co. v. Carey, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; Capitol Sheet Metal Co. v. Kinnear & Gauger Co., 87 Fed. 333, 31 C. C. A. 3.

I am of the opinion that the patent is void on its face for want of invention, and the demurrer is sustained.

NEW YORK BELTING & P. CO., Limited, et al. v. SIERER et al.

(Circuit Court, S. D. New York. January 14, 1907.)

1. PATENTS—INVENTION—SUBSTITUTION OF MATERIALS.

It is not invention to substitute rubber for an unyielding material in the construction of interlocking tiles for floors, walls, or the decks of ships, to enable the covering to respond to strains more quickly, readily, and safely; such result being due solely to the elasticity and resiliency of the material, which is a well-known quality of rubber.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 23.]

2. SAME—TILE FLOORS.

The Furness & Watts patent, No. 527,961, for a tiled floor or wall composed of a series of tiles of yielding material having interlocking tongues and being removable, is void for lack of patentable invention in view of the prior art, which shows interlocking tiles of wood or stone, tiles of rubber not interlocking, and also a covering for floors, the decks of ships, etc., made of rubber in interlocking sections.

In Equity. Suit to restrain alleged infringement of United States letters patent No. 527,961, issued October 23, 1894, to Frank Furness and David H. Watts for "tile floor, wall," etc. The application was filed March 31, 1894. The main defenses are want of patentable invention in view of the prior art; also noninfringement if complainants' patent is valid.

Howson & Howson (Charles Howson and Joseph C. Fraley, of counsel), for complainants.

J. Burnet Nash (Robert H. Parkinson, of counsel), for defendants.

RAY, District Judge. The patent states that the object of the invention "is to prevent tile floors from cracking or opening at the joints because of tension or compression strains." It is not confined to floors, for the patent also says:

"By the use of the above-described tile, a floor can be laid or a wall or ceiling tiled which will yield sufficiently under tension or contraction without the joints between the tiles opening, as all the tiles are locked together."

It thus appears that the art involved is not only the construction of floors, but of walls and ceilings. This is important when we come to consider the prior art. The patent also says:

"My invention relates particularly to the tiling of floors and decks of vessels, and especially the floors of ocean steamships; but it will be understood that my tiling can be used in other places without departing from my invention."

In the drawings is shown what the patent says is the preferred form of tiles, "in which one tile interlocks directly with another," and also another form, where the tiles interlock "indirectly through the medium of key tiles." All are interlocking tiles in some form or other, and all are of "yielding material." The patent is broad enough to cover all tiled floors or walls composed of yielding material having interlocking tongues, and so interlocked as to be removable. The patent also says:

"Referring particularly to Figs. 1 and 3, A is the tile made of yielding material, preferably rubber, of such a density that it will hold its own under

ordinary circumstances, but will yield sufficiently when great strain is placed upon it, or will yield under pressure. The tile is quadrangular in shape in the present instance, and at each side are cavities, a, with receding sides forming at each corner undercut arrow-head projections, b. Interlocking with these tiles, A, as shown in Fig. 1, are tiles, D, having undercut projections, d, at each side, which lock into the cavities, a, of the tiles, A, so that when the tiles are placed in position on the floor and properly cemented the entire floor of tiles is interlocked, so that any expansion or contraction will be taken by the entire floor, preventing the tiles from parting on the division lines."

And again:

"It will be understood that any form of lock may be used to unite the tiles, but I have shown a dovetailed lock as the preferred form."

The patent also says:

"By the use of the above-described tile, a floor can be laid or a wall or ceiling tiled which will yield sufficiently under tension or contraction without the joints between the tiles opening, as all the tiles are locked together. In some instances the tiles may be laid in combination with unyielding tiles, either of pottery or other material, so that while the yielding tiles will expand and contract with the strains, the joints between the tiles will not open; but I prefer to lay a floor entirely with yielding tiles."

The patent has but one claim, and that reads:

"I claim as my invention a tiled floor or wall composed of a series of tiles of yielding material, said tiles having interlocking tongues, and being removable, substantially as described."

As to the advantage of using tiles the patent says:

"The great advantage of using a tile of rubber in place of the ordinary strip rubber is that ornamental designs can be worked out upon the floor by the use of different colored tiles, and the floor can be repaired in the event of one or more of the tiles being destroyed or badly injured."

This, probably, is the reason the patentee confined himself to interlocking tiles of a yielding material, as such floors of strip rubber, interlocking, were old in the art, as shown by British patent to David Gaussen, No. 3,377, dated August 19, 1880, and in which it is expressly stated that the rubber mats may be joined by interlocking, and used on the decks of vessels. Tiled floors and tiled walls of stone and wood and other unyielding material were old long before this patent was applied for. Interlocking tiles of wood, stone, and other unyielding material were old long before Furness came into the field with this patent, and there is nothing new or novel in so interlocking them that one may be removed without materially disturbing the others when occasion demands. Interlocking by means of key blocks, as shown in figures 2 and 6 of the patent, were also old. So what is in fact a tiled floor made of tiles in fact, composed of india rubber or other elastic material, was old in the art as far back as 1860. October 16, 1860, letters patent No. 30,417, were granted to Thomas J. Mayall of Roxbury, Mass., manufacturer of tiles for flooring. In this patent he says:

"Be it known that I, Thomas J. Mayall, of Roxbury, in the county of Norfolk and State of Massachusetts, have invented certain new and improved manufacture of tiles or slabs for floors, etc. * * * The tiles heretofore in common use have been generally made of marble or other stone or slate, and their great cost has prevented their being generally employed for floorings, etc. The present invention consists in forming a cheap and durable substitute for

stone tiles, which is softer to tread upon, and prevents the liability of a person slipping thereon, and makes no noise when walked upon. I effect these results by making the tiles of a composition of india rubber or gutta-percha and sulphur, made into sheets, and then heated, and afterwards cut out in the desired size and shape by dies or knives, or moulded in proper moulds. I take 3 lbs. of sulphur and 12 lbs. of rubber or gutta-percha rags or trimmings, well known by rubber manufacturers, and mix them thoroughly together in the usual mode by grinding them between hot rollers. The composition is then formed into sheets of any desired thickness by being passed between calender rolls. * * * The tiles thus produced are possessed with peculiar elasticity or softness, which resembles that of rich carpet, whereby not only is a flooring produced that is very pleasant to walk upon, but is also noiseless and almost incapable of wear. As it is evident that any of the well-known compounds made by rubber manufacturers, into which other ingredients than those above stated enter, may answer the purposes of my invention, I shall not confine myself in my claim to the use of the substances I have mentioned, or to the exact proportions in which they are combined, although I prefer the composition described, as it can be made at a very small cost. * * * What I claim as my invention, and desire to secure by letters patent is the new manufacture of tiles and slabs for flooring, the same consisting of an india rubber or gutta-percha composition, which, when combined with various coloring ingredients, made into sheets of suitable thickness, cut or molded into desired patterns and vulcanized, produce tiles of the peculiar softness and nature herein described."

This patentee, Mayall, says nothing of interlocking the tiles of elastic material, or of the yielding of the entire tiled floor or wall when subjected to strain, tension, contraction, or expansion, or to the "weaving," heaving, or bending motion of the deck of a vessel at sea. He does speak of the elasticity, softness, and noiselessness. In short, he has provided tiles of "yielding material." In 1857 letters patent No. 16,692 were granted to Charles Mettam, of New York, N. Y., for a new and useful improvement in the mode of connecting the blocks or plates (nothing more nor less than tiles of iron) of iron pavements. The patent says:

"This invention consists in casting each block or plate with a number of hooks projecting laterally from its lower part, and turning upwards vertically in the form of tenons, and with a corresponding number of mortises in its lower side; the said hooks and mortises being so formed and arranged that when the blocks or plates are laid the laterally projecting portions of the hooks of each plate will give support to, and the upturned portions will enter the mortises in, the adjoining plates, and thus the plates will receive mutual support, and be locked together in a lateral direction. * * * I do not claim the casting of the blocks or plates with lateral projections on the lower parts to extend under the adjacent blocks or plates; neither do I claim the casting of the blocks or plates with tenons to enter mortises in the adjacent blocks or plates, when such tenons stand out laterally from the sides of the blocks or plates. But what I claim as my invention, and desire to secure by letters patent, is: Casting each block or plate with a number of hooks standing out laterally from below the general level of the bottom thereof, and turning upwards in the form of vertical tenons, and with a corresponding number of mortises in the lower faces, so that when the plates are laid together the vertical tenons of one block or plate enter mortises in adjacent ones, and the mortises receive tenons of adjacent ones, while the laterally projecting portions of the blocks or plates make them mutually supporting, substantially as herein described."

In this each plate or tile of iron is removable without disturbing the others materially, and all are locked together and receive mutual support in a lateral direction. The motion of pushing or pulling of the one is communicated to all. June 15, 1869, letters patent No. 91,364,

"improved mosaic covering for floors," were granted to Shadrach H. Pearce, of Boston, Mass. He says in his patent:

"Mosaic floors have heretofore been composed of sectional blocks or tiles of clay, stone, glass, or wood, of various sizes, forms, and colors, laid in hydraulic cement, or otherwise, to produce the pattern desired. A mosaic floor thus formed, especially when laid upon wooden foundations, is objectionable for the following reasons, viz.: It is inelastic, and does not yield to the expansion and contraction of the wooden foundation caused by atmospheric dryness or moisture. Considerable noise proceeds therefrom when walked upon, and the materials of which it is composed are cold to the feet, being poor conductors and retainers of heat, and much skill is required in their construction, which is attended with considerable expense. * * * To remedy the above-mentioned objections and defects, and to furnish a mosaic covering warm to the feet, and adapted to any, and especially to wooden, floors in lieu of carpeting, is the purpose of my invention, which consists in a series of elastic sections, blocks, or tiles of various sizes, forms, and colors, composed of india rubber, gutta-percha, felt, or compounds of these, or any other suitable elastic materials, each block or section bearing its respective color or colors throughout its entire substance, in contradistinction to one having its surface only colored, by which construction I am enabled, with or without the use of cement, to furnish a warm, noiseless, elastic mosaic covering for floors, etc., the design of which, formed by the various colors, is comparatively imperishable, and will remain permanently undefaced by use, and is easily repaired, by replacing with new any injured sections, its cost being less than that of an ordinary mosaic floor, while, from its elastic nature, it is easily adjusted to inequalities of surface which may exist or occur from the expansion, contraction, or warping of the groundwork upon which it is intended to be laid. To enable others skilled in the art to understand and use my invention, I will proceed to describe the manner in which I have carried it out. In the said drawings, A represents a wooden flooring or foundation, over which is smoothly spread a thin layer of cement, a, upon which, snugly fitted together, is placed a series of small hexagonal blocks or sections, B, composed of india rubber, gutta-percha, felt, or compounds of these or any other suitable elastic materials, each block bearing its respective color throughout its entire thickness or substance, so that when worn from constant use the original design will remain uneffaced upon the surface of the material covering the floor. I prefer to employ for this purpose a material known as 'kamtulicon,' which is composed of rubber and cork, ground and incorporated together, on account of its elasticity, durability, and moderate cost. The blocks or sections, B, are cut from strips of the elastic material employed, or they may be molded in the desired form; the color being incorporated with the material during the process of manufacture. * * * What I claim as my invention, and desire to secure by letters patent, is a covering for floors, &c., composed of a series of elastic blocks, sections, or tiles, substantially as described."

Here we have not only the tiles of yielding material, but the idea plainly expressed and stated of yielding sufficiently under the tension or contraction of the floor, as expressed in the Furness patent in suit; for Pearce says that the old floors, composed of sectional blocks or tiles, are objectionable for the reason they are inelastic, and do not yield to the expansion and contraction (swelling and heaving in places) of the wooden foundation (such as a ship's deck), caused by the atmospheric dryness or moisture, and that he seeks to remedy these defects. He also says that by the use of these elastic blocks or tiles he has a floor easily repaired "by replacing with new any injured sections," and also "while, from its elastic nature, it is easily adjusted to inequalities of surface, which may exist or occur from the expansion, contraction, or warping of the groundwork upon which it is intended to be laid." It would also, evidently, yield, being elastic, to any bend-

ing, warping, weaving, expansion, or contraction of the groundwork occurring after being laid; but of course there would be a crack or opening during such action in many cases. Should the floor swell and upheave, it would raise these elastic tile, and form a crack along the line of upheaval, and this would generally close, substantially, when the upheaval subsided. Looking further into the prior art, we find that February 24, 1880, there was granted to William J. Mitchell, of San Francisco, Cal., letters patent No. 224,938, for "paving tile." He says: "In the formation of my tiles I employ any suitable substance." It may be rubber, stone or brick; a yielding or a nonyielding material. There is no limitation. What is his purpose and claim? He says:

"My invention relates to certain improvements in tiles and blocks which are employed for paving purposes, and it consists in the formation of a block, so that its upper half will project beyond the lower half upon two adjacent sides, while the lower half projects beyond the upper half upon the two opposite and adjacent sides; said projecting portions being provided with dovetail depressions and interlocking projections, as hereinafter more fully described and claimed. By this construction the projecting upper half of each block will rest upon the corresponding projections of the lower halves of the two blocks lying next to it upon these two sides, and each block thus supports two others, and is, in turn, supported by two others. In combination with this construction, I form a dovetailed locking-groove upon the upper side of each of the projections of the lower halves, and similar dovetailed projections upon the under sides of the projecting ledges of the upper halves, so that they will fit into the corresponding grooves of the adjacent blocks or tiles, and thus lock them together, and prevent them from becoming separated. * * * It will be seen that when the tiles are laid each of the ledges, C, will support a corresponding ledge, B, from an adjacent block or tile, and the lugs, E, will be locked into the depression, D, so that the blocks will be mutually self-supporting, and will at the same time be bound together and prevented from separating. The tiles are thus easily and rapidly laid, and, being bound together, will not rock or become easily displaced when the foundation is imperfect. * * * Having thus described my invention, what I claim as new and desire to secure by letters patent is: The paving tile or block, A, with its ledges, B, provided with the dovetailed projections or lugs, E, and the ledges, C, provided with the corresponding dovetailed depressions, D, whereby the tiles are supported and locked to prevent lateral separation, substantially as herein described."

Here we have the interlocking to bind the tile together, and prevent separation, rocking, and displacement. How far and wherein does this differ from the idea of the patent in suit? February 14, 1888, was granted to one Frank F. Gibford, of Englewood, Ill., letters patent No. 378,000, for "artificial stone pavement," and figure 2 of the drawings is almost an exact counterpart of figure 1 of the patent in suit, showing the interlocking of the tile. In the Gibford patent the tile shown are of stone and oblong. But this is immaterial so far as the mode of interlocking is concerned. Of his invention the patent says:

"My invention has relation to artificial stone pavements, and the object is to provide a simple, cheap, and durable pavement of the class described, that will present a true surface for wear, and at the same time obviate all tendency to cracks, separation at the joints, or irregularities in the surface; and to these ends the novelty consists in the construction of the same, as will be hereinafter more fully described and particularly pointed out in the claim. * * * The pavement proper consists of a series of blocks, A, provided with integral projections, a, and recesses, b, said projections and recesses being flush with the bottom of the block, and extending upward about one-half the thickness of the block. The top surface of the blocks is a true square, and consequently the pavement may be extended indefinitely by simply alternating the sides of

the blocks as they are laid—that is, so arranging them that a side with a projection will be contiguous to a side with a recess. It will be observed that the projections are rectangular in form, while the recesses flare inward, so that when the pavement is set in a bed or layer of cement the cement will fill up the interstices, and when it hardens or sets make it practically a solid sheet of pavement. * * * What I claim is, as a new article of manufacture, a block for pavements, having two of its sides provided with projections, and its two opposite sides provided with recesses, as set forth."

Here we have an artificial stone pavement formed of stone tile or a tiled floor in the street, and the tile are interlocked by means of "interlocking tongues," as are the tiles of the patent in suit, and the object of the interlocking is, as declared by the patentee, to "present a true surface for wear, and at the same time obviate all tendency to cracks, separation at the joints, or irregularities in the surface; and to these ends the novelty consists in the construction of the same, as will be hereinafter more fully described," and then follows a description of the interlocking, which is substantially a counterpart of the patent in suit. Substitute rubber tile, old in the art, and wherein does this structure of this patent differ substantially from the structure of the patent in suit? The interlocking is not precisely the same, but it is the same in principle, and operates in the same way to produce the same result, viz., to "obviate all tendency to cracks, separation at the joints, or irregularities in the surface." It seems to me immaterial that the Gibford device is to be used in a street to be walked and driven on, where from frost and other causes there is liable to be heavings and weavings, while the Furness patent in suit is mainly designed to be used on ships' decks or in similar places, where the heaving and weaving of the deck is caused by the motion of the sea. Substitute rubber tile in the Gibford patent, and we have, essentially, the Furness patent in suit. This Gibford patent would then operate as does the Furness patent. With stone tile in place of rubber tile, force applied to one causes a motion which is communicated to all, but not to the same extent, perhaps, and there is a greater liability to breakage of the tile. But this is due to the difference in the character and quality of the material. To obviate this liability to breakage, it would occur to any one to substitute rubber tile or tile of some yielding and resilient material in all places where such tile are appropriate, in all places not exposed to heavy traffic. Was it invention to do this? Was it invention to conceive the idea of substituting a rubber tile, old in the art, for a stone tile, old in the art, to prevent breakage, for the reason that rubber will not break as easily or readily as stone and is more resilient when subjected to strain? In the British patent to E. J. Harland, No. 4,806, March 19, 1889, for "improvements in the manufacture of elastic tiles," we have two claims, viz.:

"(1) Elastic tiles of vulcanized India rubber, each tile being of the same colour throughout its substance.

"(2) The process of manufacturing elastic tiles consisting in heating a mixture of india rubber or india rubber compound, pigment, and sulphur in a mould."

And this patent says:

"According to this invention, I manufacture elastic tiles of vulcanized india rubber, made of the same color throughout the substance of each tile. I pre-

fer to make the tiles by exposing a mixture of india rubber or india rubber compound, sulphur, and pigment to heat in a mould in the ordinary way of making vulcanized india rubber, but the mixture may also be vulcanized in sheets, and afterwards cut into any desired shape; but this is more costly, and involves waste for some shapes. The tiles may be fixed to the floor or other surface to be covered in various ways, but I prefer to employ a cement composed of two parts of gutta-percha, one part resin, and one part Stockholm tar. I find that tiles of vulcanized india rubber have many advantages over tiles and floor cloths as heretofore used. Being soft and elastic, they afford an excellent foothold, which is a matter of considerable importance in the decks and cabins of ships at sea, whilst their slightly yielding nature renders traffic over them noiseless, and enables such flooring to better withstand the wear and tear in entrance halls and landings, and, being impervious to water, they form a cleanly floor in smoking rooms and smoking carriages."

In the Watts patent, granted November 6, 1894, but applied for June 29, 1893, which is a design patent, we find a duplication of figure 3 of the Furness patent in suit, showing the interlocking of the tiles. As early as 1815, in the MacCarthy patent (British), No. 3,915, we have:

"Streets, roads, or ways may be paved or covered, or the paving, pitching, or covering of streets, roads, or ways may be made of or with a plate or plates, or mass or masses, a piece or pieces, a portion or portions, of iron or other metal or material, formed so as that the same shall present on the superficies thereof one or more or a series of convex rising or risings or projection or projections upwards, more or less elevated, and with spaces between and surrounding each rising or projection upwards, more or less broad, as occasion may require, or as may be suitable to the shape or limits of the street, road, or way paved or intended to be paved with the new pavement, such plate or plates, mass or masses, piece or pieces, portion or portions, when laid down adjoining or contiguous or fitted into each other, are or may be retained and kept so joined or contiguous or fitted into and with each other by means of a mortise or mortises, a socket or sockets, a tenon or tenons, projection or projections, tongue or tongues, as may be deemed expedient. The figures drawn in the margin of these presents will more particularly explain and illustrate the general description hereinbefore given and made. * * * A variety of other forms to be cast, manufactured, wrought, or made of iron, or other metal or materials, more or less convex and more or less elevated, with spaces more or less broad between, and insulating or surrounding such forms, may be cast, manufactured, wrought, or made, used, and applied for the purpose of paving, pitching, or covering streets, roads, or ways, and a variety of modes or methods of using and applying, connecting, fitting, and adapting the same, may be employed by means of mortises, sockets, tenons, projections, or tongues; but those hereinbefore described, and to which a reference or references hath or have been made, are sufficiently and certainly descriptive of the nature of my said invention, and in what manner the same is to be performed."

In the British patent to Geary, No. 8,085, dated 1839, "improvements in paving, covering streets, roads, and other ways," we have:

"Now know ye, that in compliance with the said proviso, I, the said Stephen Geary, do hereby declare that the nature of the said invented improvements, communicated to me by a certain foreigner residing abroad, consists in forming the pavements of streets, roads, courtyards, stableyards, and other public and private places and ways of blocks, composed either wholly of wood or other suitable material, or partly of wood and partly of the bituminous concrete hereinafter described, or other suitable material, or of blocks wholly of wood or of other suitable material superposed on blocks, consisting wholly of the said bituminous concrete or other suitable material, and which blocks, howsoever composed, are so shaped, formed, and connected that they shall mutually sustain and support one another; and I declare that the manner in which the said invented improvements are to be performed is particularly described and

ascertained in and by the following description thereof, reference being had to the illustrative drawings hereunto annexed, and to the indicial letters and figures marked thereon, that is to say: The said improved pavements may be of any of the forms represented in the drawings hereunto annexed, numbered from I to XVIII, inclusive. In Number I the blocks are superficially of a square form, but are dovetailed laterally into each other, while at the front and back they are connected by rabbit or by tenon and mortise joints to the blocks next adjoining, whereby every block and every row of blocks at once supports and is supported by those adjoining it, and a pavement of great solidity and uniformity is obtained."

In the British patent to Bayly, No. 4,878, granted November 8, 1881, we have:

"This invention consists of a contrivance to be bedded in mortar, each brick being fitted or locked one into the other, to render walls, chimney shafts, and other structures proof against gales of wind or other strains. The object of the invention is to erect walls, chimney shafts, and other structures made from clay in a mould or box of the different shapes or forms described on the drawings, and burn in a kiln constructed for that purpose, in two respective forms locked together, one form or shape which is laid in one course constructed with a tenon, dovetail shape on the bottom, and a recess or mouth to receive the tenon constructed in the bricks in the next course on the top, these bricks being fitted one into the other, and bedded in mortar to receive the next course of the other shape or form, which are constructed with half a dovetail shape tenon at each end of the brick on the bottom, and half dovetail shape recess at each end of the brick on the top, this shape brick being made to slide into the bricks of the course beneath the other shape, properly bedded in mortar or cement; the different shape bricks being locked one into the other, laid in alternate courses to one another, which renders the whole structure proof against the greatest possible strain, each brick being locked one into the other, thus preventing any structure erected with these bricks giving away at the mortar joints. Bricks for angles and returns are constructed in the same way, locked one into the other. Having now described the nature of this invention and how it is to be performed, I therefore claim the following: First. I claim the shapes of the bricks, respectively, made from clay and burnt in a kiln. Second. I claim the contrivance of the bricks being locked one into the other and bedded in mortar. Third. I claim the locking of every brick one into the other to render any structure proof against every possible strain."

Here again we have the whole idea of the patent in suit except yielding material such as rubber, and the idea of placing the structure on a weaving curved deck or floor; but that is old, for in the David Gaussen British patent of 1880, No. 3,377, we find:

"My invention relates to the manufacture of sheets of what is known as vulcanized india rubber, or other india rubber compounds, and is designed for floor coverings, mats, coverings for seats, and various other purposes, and my said invention consists in corrugating, fluting, or arching the material on both sides, and also in uniting the corrugated sheets to produce cylinders or tubes. By my invention I am enabled to produce an article combining lightness and economy of material, with stability, resisting power, and elasticity, at same time securing thorough ventilation and dryness of surface, as the air can circulate freely through the material, and moisture will run off the same. * * * The material is adapted for various useful purposes, such as the following: Mats for wells at doors of houses and for ships at cabin doors. Do for footboards of carriages, railway carriages, especially smoking compartments, and for floors of boats, etc. Carpets for the floors of post office railway vans, relieving the clerks and letter sorters of much jar and vibration, which is now most injurious to them in long journeys, during which they are occupied in a standing position; also for smoking cabins, companion houses, stairs, deckhouses, etc., of steamers, for tents, bathrooms, billiard rooms (giving an elastic and luxurious tread), corridors of public offices, law courts, aisles of churches,

libraries, concert rooms, and all other places where absence of noise is desired, etc. * * * Where my corrugated material is to be used in stables as a substitute for straw litter, I cover so much of the flooring of the stall or box as may be required to form a bed for the animal, composed of several mats united together by interlocking or any other convenient method."

Here these corrugated mats of rubber are to be used for flooring or coverings for floors, and may be in pieces, large or small, and may be attached together by interlocking, as in the patent in suit. This interlocking is expressly mentioned in the Gaussen patent.

Returning, after this examination of the prior art, to the patent in suit, we find a claim for (1) "a tiled floor or wall" (old); (2) "composed of a series of tiles of yielding material" (old); (3) "said tiles having interlocking tongues" (old as to wood, stone, brick, and rubber sheets); (4) "and being removable" (old); (5) "substantially as described." I have not found in the prior art rubber tile, strictly speaking, interlocked; but I have found flooring and wall tile of other material, more or less yielding, interlocked, and also sheets of corrugated rubber, large or small, according to taste, used for coverings to floors, interlocked in any known way or manner, and the modes and manners of interlocking mentioned and described in the patent were then well known. The object and purpose of interlocking tile and their equivalents in floors, pavements, walls, and similar places was the same in the prior art as in the patent in suit, viz.:

"So that when the tiles are placed in position on the floor, and properly cemented, the entire floor of tiles is interlocked, so that any expansion or contraction will be taken by the entire floor, preventing the tiles from parting in the division lines."

As seen, this exact idea was old in the prior art. Nor is there anything new or novel in the idea of employing these tiles, or blocks, or sections of interlocking corrugated rubber flooring on the decks of vessels, or in other places where there is an upheaval or bending or weaving of the underlying support. It seems to me that, in view of the prior art, the patent in suit is devoid of patentable novelty, or of any new conception amounting to invention.

It is contended by the complainants:

"That close interlocking joints would hold elastic tiling together under such conditions was something which the prior art did not teach. It had not previously been proposed to interlock yielding materials subjected to varying and compound strains such as those to which a floor and the like is subjected."

And again:

"No prior art taught that the result of closely dovetailing rubber tiles together on all sides would be an elastic unit, so taking up, as a whole, the severest strains applied to it that the tiling would neither break nor pull apart. That rubber materials could be effectively dovetailed to accomplish any valuable result was a new thought with Furness."

The "conditions" referred to are thus described by complainants' counsel:

"He wished to provide a floor covering which would remain seamless and water-tight under extraordinary conditions of strain, due not only to exceptional expansion and contraction, but also to the constant changing of the shape of the deck."

While a patentee is entitled to the benefit of every new thing or beneficial and novel result resulting from his patented device, whether mentioned and described or not, we find that Furness makes no mention of a desire to patent a seamless and water-tight tile floor of yielding material. If so, he was clearly anticipated by the Gaussen patent, whose interlocking sections of corrugated rubber for covering floors are clearly the equivalents of rubber tiles.

I cannot agree with the contention that the prior art did not teach that close interlocking joints would hold elastic tiling together when subjected to strain, pulling and pushing at any given point, or along an entire side, or at any given point on or underneath the surface. If such interlocking would hold tiles of wood and stone and brick together under such conditions, they being slightly resilient and elastic, why would it not hold any yielding tiling, such as rubber, possessing a far greater elasticity or resiliency? That would be common knowledge, taught by common sense, and obvious to any person of ordinary intelligence, having any knowledge of the nature and characteristics of india rubber. It has been known since 1828 or 1832 that india rubber, or caoutchouc, will bend and stretch within limit without breaking, and regain its normal position when released from the applied force, because of its elastic and resilient properties. It required no prior art to teach a person of ordinary common sense and intelligence that tiles of rubber or like yielding material attached together, having resiliency or elasticity, would bend and stretch without breaking, unless the strain or tension were too great, and retained too long, and regain their normal position when the strain was removed. In 1820 one T. Hancock obtained a patent "for an improvement in the application of a certain material [rubber] to various articles of dress and other articles, that the same may be rendered elastic." In 1834 india rubber hose was patented on account of its elasticity, etc. More than 60 years ago we had vulcanized and hard rubber, and its durability and elasticity was quite well understood. It would have occurred to any one skilled in the art of floor-making or floor-covering that a series of tile made of hard rubber, or of any yielding material possessing elasticity and resiliency, would stretch and yield to upheaval and weaving, if not too severe, without breaking, and regain their normal condition, and thus prevent cracking, etc., especially when he had before him the prior art above referred to, wherein it was taught that "tiles thus produced are possessed with peculiar elasticity" (see Mayall and Pearce and Harland patents), and that these might be closely attached together, so as to form a unit (see Mettam, Mitchell, Gaussen, Geary, Gibford, and MacCarthy patents), and that a floor or floor-covering, when formed of "a series of elastic blocks, sections, or tiles," will "yield to the expansion and contraction of the wooden foundation [floor or deck] caused by atmospheric dryness or moisture," or by the swaying and weaving of a wall caused by wind (see Pearce and Bayly and Geary patents), and be mutually self-supporting (see Mitchell and Geary patents), and would "obviate all tendency to cracks, separation at the joints," and separation in or between the tiles (see Gibford and Harland patents). In short, the prior art plainly teaches everything suggested in the Fur-

ness patent in suit. If tile of stone, or brick, or wood, when interlocked by tongues or otherwise, form a unit, tile of yielding or elastic material will form when interlocked an elastic unit, which will bend and weave with the movement of the underlying foundation or floor or deck, and regain its normal position when the upheaval or weaving subsides or ceases, and, as in the Gibford patent of 1888, obviate all tendency to cracks. Every element of the patent is old, as is every idea of means and every idea of result to be accomplished. Mr. See, defendants' witness, testified as follows:

"Interlocking dovetails, and the like, represent a well-known expedient in the art for holding things together, and they carry their capacity into any structure to which they may be applied. [Page 13, D. R.] Dovetails, and similar interlocking joints, were employed for the very purpose of preventing improper separation of the united parts, and it was for this precise purpose that they were applied to the edges of tiles, viz., to keep the tiles from pulling apart and opening the joints between them. [Page 21, D. R.] If hard tiles would crack and rubber tiles would not crack, it was simply because one was brittle and the other was tough, and the prior art taught more fully than anything found in the patent in suit all about the tough but elastic yielding nature of the rubber tile as against the hard tile. Again, if the joints between uninterlocked tiles will pull open and the joints between interlocked tiles will not pull open, it is simply because one is not locked against separation and the other is so locked, and the prior art teaches more fully than anything found in the patent in suit that the opening of the joints between the tiles may be prevented by providing their contiguous edges with interlocking tongues and recesses, such as dovetails." D. R. p. 25.

Speaking of this evidence, complainants' counsel says:

"The problem was not how to keep two things together side by side, but how to make a floor covering which would remain seamless under conditions of service never thought of for any of the previous interlocking coverings."

The fallacy of this is demonstrated by a simple reference to the Gaussen patent, who not only interlocks his rubber sections, but states expressly that they are designed for use on the decks of vessels. For use there, they would be properly modified in construction and properly adapted to such a place, but the idea is flexibility, resilience, and unity, so as to conform to the shape and the weavings of the deck. The weaving of the deck of a ship is not a new discovery, a new condition to be met and provided for, but old, and, we may safely assume, was known to Gaussen and Harland. Whether Gaussen's corrugated, elastic, rubber sections, interlocked with each other, as he specifies they may be, to form an elastic unit, are to be used on the decks of ships, or the interlocking tile of the patent in suit, is a mere matter of selection, cost, and utility. The one will accommodate itself to the weavings and peculiar motion of the deck as well as the other. This is perfectly obvious. In either case the openings or joints between the sections or tile may be filled with a rubber cement if desired, or they may have an underlying carpet or support of rubber or other elastic and waterproof material. In the Harland patent of 1889 he speaks of the utility of his "elastic tiles of vulcanized india rubber when used in the decks and cabins of ships at sea." If interlocking tile of yielding material have gone quite largely into use in competition with noninterlocking tile, the fact is entitled to due weight. The commercial success of a

patented thing shows its utility, but does not establish its patentability. A thing may be new and of great utility, but not patentable. It must possess patentable novelty as well. Patentable invention must be disclosed. And here comes in the prior art. Many new and useful and novel contrivances go into use without the intervention of a patent. If the prior art discloses the claimed invention, and shows it to be old, it is immaterial that no one has used it. If all the elements are old, and the working or operation of the combination is old, and the result is old, how can one claim invention by putting it on the market, and building up a large trade in the article? Its utility and commercial value may not have been demonstrated, but to demonstrate these is not invention. Nor is it invention to merely substitute a tile of great resilience, elasticity, and durability in place of a stone or brick or iron tile, simply because it is more durable and useful. Complainants insist that what Furness did was "the attaining of a new result by giving to one of the elements of the structure, to wit, the dovetailed joint, a new character, function, and effect, making it essentially a new element." He says:

"There is no reference in this case for 'an elastic or yielding dovetail joint' having the office and function not only of joining parts of a structure and keeping them from separating, but that, of itself, responding to and communicating from unit to unit the effect of, strains, whether of tension or compression, so that a flooring or the like, composed of separate and removable tiles, will yet respond and accommodate itself as a unit to such strains, and the flooring will at the same time be practically as impervious as though consisting of a single sheet."

In all dovetailed joining of wood, or iron, or stone, the office and function is primarily to join the parts and prevent them from separating, and then, and because of such jointure, cause the parts so united as a unit to move or operate in unison, and respond to strains, upheavals, tension, or compression, or resist same, as one whole entire thing, and thus accommodate itself to all the wear and tear to which it may be subjected by reason of such strains. In this way force applied to one of the parts thus joined operates on all, and all are moved, more or less, together, or all resist, more or less, as one whole. Of course, different woods or metals may be dovetailed, as is frequently done, for the sake of appearance merely, but of such work we are not speaking.

I cannot discover that Furness has given to this dovetail joint any new function, or that in his patent it has assumed any new character, or that it operates to produce any new result or any old result in a different or better way. It is the same old joint, operating in the same old way, and producing the same old result. It is the century or more old idea of means applied to tiles of some yielding material, presumably more yielding than soft wood, which is itself a yielding material, and within and covered by the broad language of the claim. The elasticity and yielding character of the joint arises from the character and quality of the material thus joined and dovetailed together. It is yielding and elastic for the reason that the tile are yielding and elastic, and this was and is obvious.

In Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895, it was held that "the application of an old device to meet a novel exigency and to subserve a new purpose" was a useful improvement and patentable, and that the fact that defendant was able to produce the same result by another and different method did not affect plaintiff's right to an injunction." But here we have neither a novel exigency nor a new purpose. It is well settled that the end or purpose sought to be accomplished by a device is not the subject of a patent, but only the new and useful means for obtaining or accomplishing that end. Knapp v. Morss, 150 U. S. 221, 227, 14 Sup. Ct. 81, 37 L. Ed. 1059, and Wollensak v. Sargent, 151 U. S. 227, 14 Sup. Ct. 291, 38 L. Ed. 137.

In Loom Company v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, it was held that a new combination of known devices, producing a new and useful result, as that of greatly increasing the effectiveness of a machine, is evidence of invention, and may be the subject of letters patent. This proposition is supported by a long line of unquestioned authorities. But this is far from a holding that to merely substitute interlocking tile of a yielding material for interlocking tile of a nonyielding material or of a slightly yielding material to form a yielding or bending floor—one that will yield to strains—is evidence of or discloses patentable invention, when it was perfectly obvious to any one that such substitution would produce such a result more perfectly, and the prior art taught that nonyielding tile or brick or stone thus interlocked would bend or yield to strain at the joints and obviate cracks or separation at the joints.

In Western Electric Company v. La Rue, 139 U. S. 601–606, 11 Sup. Ct. 670, 35 L. Ed. 294, it was held that:

"While the promotion of an old device—such, for instance, as a torsional spring—to a new sphere of action, in which it performs a new function, involves invention, the transfer or adaptation of the same device to a similar sphere of action, where it performs substantially the same function, does not involve invention."

Yielding tile or tile of yielding material were old in the art, and there was no invention in interlocking them. Series of them were used commonly, and had been for a long time, in the construction of tiled floors. All floors or foundations for floors were subject to strains, frost, moisture, heat, etc., and liable to swell or shrink, or to do both. Tile and paving stone had been interlocked, so as to remain integral and obviate cracks under such conditions, and while the patent says, "my invention relates particularly to the tiling of floors and decks of vessels, and especially to the decks of ocean steamships," this is a similar sphere of action, and in such a place the interlocked tile perform no new function. They bend and weave and move back and forth laterally, and up and down as before, and as a unit, being interlocked, in precisely the same manner as before, and the interlocking joints perform precisely the same function in the same way, viz., hold the tile together as a unit, and prevent, or tend to prevent, the formation of seams or cracks in the tiled floor.

It is settled law that not every improvement in an article is invention. The improvement must be the product of an original conception. Pearce v. Mulford, 102 U. S. 112, 118, 26 L. Ed. 93; Slawson v.

Grand Street Railroad, 107 U. S. 649, 27 L. Ed. 576; Munson v. N. Y. City, 124 U. S. 601, 8 Sup. Ct. 622, 31 L. Ed. 586.

In Smith v. Nichols, 21 Wall. (U. S.) 112, 118, 119, 22 L. Ed. 566, approved and quoted in Burt v. Evory, 133 U. S. 349, 358, 10 Sup. Ct. 394, 33 L. Ed. 647, it was held:

"But a mere carrying forward a new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent."

What more do we have here? The original thought and conception disclosed in the prior art of floor-making and wall construction was to unite the several parts, or tiles, or paving blocks, or sections, by dovetailing or otherwise, and many methods, including the method in suit, are shown, so as to form a unit, and by such dovetailing prevent their drawing apart, separation at the joints, and the formation of cracks, etc., when subjected to strains, upheavals, etc., and allow the parts to retain and resume their original position when the strain was removed without breakage, and also to allow repair by removing one or more of the tile or sections when broken or worn, and replacing it without disturbing the rest of the floor; also to have the structure tight, so water would run off. The patentee, Furness, we will assume, has carried this idea forward, and given it a more extended application to ships' decks, in addition to the floors of buildings and the pavements of streets and the construction of walls, etc.; but he has not changed the form or the proportions of the floor, or the mode of the union of the tile or sections. He has substituted for stone, brick, iron, or cement tiles a yielding or elastic tile (and we will drop from immediate consideration the corrugated rubber sections of Gaussen, dovetailed together and used on the decks of ships); but these are equivalents, and he is doing substantially the same thing in substantially the same way, by substantially the same means, and, we will concede, with better results. He has a tile floor that responds to strains more quickly, readily, and safely. This is not invention. Burt v. Evory, 133 U. S. 349–359, 10 Sup. Ct. 394, 33 L. Ed. 647. The only new thought possible in the Furness patent is that rubber or yielding tile will bend and stretch more easily and more readily and safely than those made of wood, stone, brick, cement, or iron. To "think" that, when it was common knowledge, and only required the action of memory, was not the kind, degree, and quality of "thought" mentioned and referred to by the Supreme Court of the United States in Cash Reg. Co. v. Cash Indicator Co., 156 U. S., page 514, 15 Sup. Ct. 434, 39 L. Ed. 511. The thought there referred to is the conception or the origination of an idea, not the recalling to memory or the mere remembrance of a fact known or presumed to be known.

In Magowan v. New York Belting Co., 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781, the court said:

"None of these packings show anything which bears upon the Gately invention, except that they show piston-rod packings, but not having the construction or the characteristics found in the Gately invention. * * * In the

Gately packing the parts are kept together and in place solely by reason of the fact that the rubber has been subjected to vulcanization, thus making the packing a homogeneous whole, and not a strip rolled up upon itself, and thus kept together. Therefore, none of the patents introduced by the defendants show the Gately invention."

And then said:

"Within the requirements of Atlantic Works v. Brady, 107 U. S. 192, 200, 2 Sup. Ct. 225, 27 L. Ed. 438, we think that Gately made a substantial discovery or invention, which added to our knowledge, and made a step in advance in the useful arts; that within the case of Hollister v. Benedict Manufacturing Co., 113 U. S. 59, 73, 5 Sup. Ct. 717, 28 L. Ed. 901, what Gately did was not merely the work of a skilled mechanic, who applied only his common knowledge and experience, and perceived the reason of the failure of McBurney's packing, and supplied what was obviously wanting; and that the present case involves not simply 'the display of the expected skill of the calling,' involving 'only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation, which results from its habitual and intelligent practice,' but shows the creative work of the inventive faculty."

In Smith v. Goodyear Dental Vulcanite Co. et al., 93 U. S. 486, 23 L. Ed. 952, a case of the employment of one known material in place of another, it was held:

"Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, decides that employing one known material in place of another is not invention, if the result be only greater cheapness and durability of the product. It does not decide that the use of one material in lieu of another in the formation of a manufacture can in no case amount to invention or be the subject of a patent. In the present case the result of the use in the manner described in the specification, of hard rubber in lieu of the materials previously used for a plate for holding artificial teeth, or such teeth and gums, is a superior product, having capabilities and performing functions which differ from any thing preceding it, and which cannot be ascribed to mere mechanical skill, but are to be justly regarded as the results of inventive effort, as making the manufacture of which they are attributes a novel thing in kind, and consequently patentable as such."

That covers this case on that subject, and demonstrates that the substitution of tile of a yielding material is not invention. The tiled floor of yielding material is not a novel thing in kind, nor does it have capabilities and perform functions which differ from anything that preceded it. The difference is in degree only.

In Topliff v. Topliff and another, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, it was held:

"It is not sufficient, in order to constitute an anticipation of a patented invention, that the device relied upon might, by modification, be made to accomplish the function performed by that invention, if it were not designed by its maker nor adapted nor actually used for the performance of such function.

But this is not a case of actual and exact anticipation, but of want of invention in view of the prior art. No one, so far as appears, had dovetailed rubber tile together or tile of a like yielding material for use on a ship's deck or elsewhere. However, equivalent sections of rubber were thus united and used on ships' decks.

I am aware that a presumption of patentable invention goes with the patent, and that courts should and do go far to sustain them. In case of doubt it should be resolved in favor of the patentee, but when the court is not in doubt it should not hesitate to declare its convic-

tions I have carefully examined the evidence, including that of the experts, and am convinced that in view of the prior art the patent in suit fails to disclose invention.

There will be a decree dismissing the bill, with costs.

QUEEN & CO. v. R. FRIEDLANDER & CO. et al.

(Circuit Court, N. D. Illinois, E. D. January 16, 1907.)

No. 26,509.

PATENTS—VALIDITY AND INFRINGEMENT—VACUUM TUBES.

The Sayer patent, No. 594,036, for an improvement in vacuum or X-ray tubes, designed to automatically regulate the pressure therein (claim 1), which covers, "as a means for varying the pressure in a high-vacuum tube, a main circuit for operating the tube and a shunt-circuit for varying the pressure," is for a function only of well-known means, and is void. Claims 2 and 3 *held* not anticipated, valid, and infringed.

In Equity. On final hearing.

Henry Wallace Carter and E. Hayward Fairbanks, for complainant.

Newman, Northrup, Levinson & Becker, Offield, Towle & Linthicum, and Albert H. Graves, for defendants.

KOHLSAAT, Circuit Judge. This bill is filed to enjoin defendants from infringing patent No. 594,036, granted to H. L. Sayen, November 23, 1897, for an improvement in vacuum tubes. Claims 1, 2, and 3 are worded so broadly that they cover all the matters in dispute, so that the inquiry is practically limited to them. They read as follows, viz.:

"(1) As a means for varying the pressure in a high-vacuum tube, a main circuit for operating the tube and a shunt-circuit for varying the pressure.

"(2) In combination with a high-vacuum tube, a shunt-circuit arranged in proximity thereto, means connected with the above, and set into operation by the current in the shunt-circuit to cause gas to enter said tube, and means for varying the pressure in the shunt-circuit.

"(3) The combination with a high-vacuum tube of a shunt-circuit arranged in proximity thereto, and means connected with the above, and set into operation by the current in the shunt-circuit to cause gas to enter said tube."

Defendants insist that these claims, and especially claim 1, are functional. In the specification and drawings complainant has described his device with reference to its application to Roentgen ray tubes as "a novel method of providing them with an automatic and rapid adjustment for the pressure of gas therein." Claim 1 covers in terms every use of a shunt-circuit for varying the pressure in a vacuum or X-ray tube. The claims make no reference to the drawings or specification. The device set out in these latter shows a separate vacuum tube through which the shunt-circuit takes its course, outside the main tube, and not in communication therewith. Generally speaking, the alleged infringing device differs from that of the complainant mainly in that its shunt-circuit operates within the main tube. Both devices are intended to reduce the vacuum of the tube

whenever it becomes so high as to cease to be a conductor for the electric current. The resistance of an absolute vacuum to an electric current is theoretically absolute. The shunt device is so adjusted that it comes into service automatically whenever the resistance in the main circuit in the tube becomes greater than that of the shunt-circuit. This resistance of the shunt-circuit is regulated in the patent in suit at will, by varying the sparking-gap between the leading in or out conductors of the two circuits. To reduce the vacuum of the main tube, it is required that gas or air be introduced. This has long been done by nonautomatic means, as by heating a bulb communicating with the vacuum tube and containing some gas-producing substance. In this method a lamp was used. It can also be done by any other process whereby occluded gases within the vacuum chamber can be freed. These methods, it is evident, must be imperfect, as not being adjustable or automatic. In the use of the X-ray it is of the highest importance that the vacuum be maintained at an even pressure, in order that the ray be steady. It is claimed for both of the patents in suit that they, and they alone, severally accomplish this end satisfactorily, and that they have gone into extensive commercial use. Defendants' patent was issued to T. Friedlander April 14, 1903. It is of the gist of complainant's demands that Sayen was the first to operate the gas-supplying device to an X-ray tube by the use of the current of a shunt-circuit as one of the elements of a gas-expelling medium. Inasmuch as a function cannot be patented, this claim, to be valid as an invention, must attach to the device for accomplishing that result. All the elements of the patent are old. The shunt-circuit, provided with means for varying the pressure therein, and the vacuum-tube are confessedly old. The spark-gap, which is the means employed by Sayen to vary the pressure in the shunt-circuit, has been in use, for one purpose or another, ever since Crooke's experiments in 1899, and before that time. Lenard's article published in The Electrician prior to the discovery of the X-ray, and in March 23, 1894, describes experiments conducted by him with reference to high-vacuum tubes, and uses the following language:

"To enable the observer to control this sparking-distance and vacuum at any time, the adjustable spark-gap B (fig. 1) is introduced as a shunt to the vacuum tube."

From the testimony introduced by complainant, and from the fact that Lenard uses the following language in the same article:

"The vacuum tube was permanently attached to the pump—a Geissler Mercury pump—for although the vacuum when not used remained unimpaired for weeks together, yet the pressure during the working always increased perceptibly, so that from time to time the pumping had to be renewed."

—and also from the fact that no adequate device for varying the vaccum is therein disclosed, I am of the opinion that the German word "controliren," which in the article referred to is translated as "control," should have been translated "test" or "prove," in order to comport in sense with the rest of the article. It may properly be so translated. Giving it that meaning, the article becomes consistent. The sparking-gap of which he speaks may possibly act as a measurable

protection to the tube, by providing a shunt-course for the current. No attempt is made to show how the shunt-circuit current can be used to lower the vaccum of the tube. As pointed out by Lenard, the degree of vacuum may be tested by an adjustment of the sparking-gap, since the degree of vacuum in vacuum tubes is "commonly expressed in inches of spark-gap in free air." There seems to be no justification of defendants' position that Lenard intended in any way to suggest the application of the shunt-circuit as a means for reducing the vacuum in a tube, although the diversion of the current into the shunt-circuit might have some tendency to do so. The article, however, shows that the use of the sparking-gap and shunt-circuit in connection with vacuum tubes was not new with complainant. Nor was it new to make use of the electric current to reduce the vacuum of a tube. Dorn, in his article of November 12, 1896, suggesting an arrangement for the Roentgen tube, refers to Lenard's use of the spark-gap in a parallel circuit, and says he uses it with success, and adds:

"When using the tube, I first set the in-parallel connected spark-gap to the desired length, and, while the inductor is working, carefully warm up the potash with a Bunsen burner, till no discharge takes place through the gap."

Dr. Walter quotes Dorn's use of the Bunsen burner, and says he has had much better results from using an electric current for warming the gas-giving substance, taking the current from a three-cell storage battery. It will readily be seen that neither of these devices constitutes means for automatic regulation of the vacuum, or for varying the pressure in the shunt-circuit. In an article contributed to the Electrical Review April 1, 1896, Tesla rather indefinitely describes a device for overcoming the tendency of a vacuum to increase with use, and says:

"A convenient way to prevent this I have found to be the following: The screen or aluminum plate, S (fig. 2), is placed directly upon the wrapping of the leading-in conductor, E, but some distance back from the end. The right distance can be only determined by experience. If it is properly chosen, then during the action of the bulb the wrapping gets warmer, and a small bright spark jumps from time to time from the wire, E, to the aluminum plate, S, through the wrapping, W. The passage of this spark causes gases to be formed, which slightly impair the vacuum, and in this manner, by a little skillful manipulation, the proper vacuum may be constantly maintained."

It is thus apparent that he had the idea of automatic adjustment of the variation by means of gases generated within the tube itself. There seems, however, to be grave doubt as to whether the device described would be operative, and the article itself is silent as to whether Tesla had ever undertaken to demonstrate its efficiency or practicability. The details attending the introduction of the leading-in conductor into the tube, together with its wrapping and the absence of any attempt to show whether the vacuum was varied, and, if so, to what degree, and how that variation could be regulated or estimated, would seem to be so meagerly stated as to fail to furnish to one skilled in the art that degree of information required to construct the device or trust the operation. Moreover, it does not in terms employ or suggest a shunt-circuit. The experts seem unable to determine what the result of the Tesla experiment does establish.

Complainant insists the spark is no more than one of the phenomena which always accompany the production of the X-ray, while defendants find a complete anticipation of defendants' device in that the spark is generated inside the tube. One thing seems clear, if there is a shunt-circuit, it must take its course away from the main circuit and return, all within the tube. The court cannot say what the effect of this device is in the absence of any reliable demonstration. Whether or not it affects the pressure or degree of vacuum in the tube does not satisfactorily appear. The explanations given by both parties to the suit seem to me purely conjectural. The little understood operations of the electric current cannot be reduced to formulæ by the dictum of a court, which must needs lag where experts run. Tesla himself says that "by a little skillful manipulation the proper vacuum may be constantly maintained." What that manipulation is, the article does not disclose. The various attempts at producing and demonstrating tubes claimed to be made in accordance with the various descriptions of the articles introduced in evidence from the pens of physicists and certain patents have not served to elucidate the ideas of the writers and patentees, so that the articles and patents referred to must stand for what they make plain, and no more. The court is unable to justify a finding that the Tesla article in any way anticipates the patent in suit. What has been said as to the uncertainty of the experiments with the Tesla tube may be said of the three terminal tubes. They are not in practical use, nor have they ever been as self-regulating tubes, except as defendant may have combined them with its shunt-device. It is claimed for them that by disconnecting the two anodes, which are normally connected, and attaching the positive end of the coil to one anode alone, the vacuum can be changed. This two-anode arrangement tends to prevent blackening of the bulb. It also tends to produce a slight steadying effect on the electrical discharge, and also, when connected alone, gives a ray of different penetrating power. These tubes are not advertised as being self-regulating, and it is fair to assume that what was mistaken for a lowering of the vacuum was merely a decrease in the penetrating power of the ray given off when the aluminum anode alone was connected in circuit. Moreover, defendants' device has the three terminals. It does not appear why any tube requires two regulating devices.

At the first hearing of this cause, defendants introduced certain foreign patents, which were set up in their answer, viz.: (1) The German patent to Stearn, numbered 98,102, applied for October 13, 1896, and published or "ausgegeben" July 8, 1898; (2) Siemens & Halske German patent, No. 91,028, applied for March 24, 1896, and bearing no "ausgegeben" or publication date, but actually published March 13, 1897; (3) Swiss patent to Zehnder, applied for August 14, 1896, and published March 15, 1897; whereupon complainant was given time to proceed to Germany and Switzerland to obtain evidence as to the dates of publication thereof. This it did not do, but contented itself with taking proofs by way of records and other obtainable data. The order did not require complainant to go abroad, but only gave him the opportunity. The supplemental proofs adduced

are deemed sufficient to establish the dates of publication, and also the status of the Swiss patent to Zehnder. Under the patent laws of Germany, a patent when granted becomes operative from the day following the filing of the application. The publication or "ausgegeben" date is the date upon which the patent is actually issued. The dates above set out are admitted by defendants' answer. It thus appears that complainant filed his application prior (April 29, 1897) to the publication of the Stearns (July 8, 1898) patent. It satisfactorily appears from the record that Sayen was working upon his invention as early as 1896, and that he had completed the same as early as February 15, 1897—some 75 days before the patent was applied for. The testimony of Sayen upon this point is very full, and, practically, conclusively corroborated, so that the burden of proof required in such cases has been sustained beyond reasonable doubt. This being so, it follows that the dates of publication of the Siemens & Halske, and Zehnder patents are subsequent to the date of the invention of the patent in suit.

Section 4886 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382] provides that:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before the invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

In Elizabeth v. Pavement Co., 97 U. S. 130, 24 L. Ed. 1000, Justice Bradley says:

"A foreign patent, or other foreign printed publication describing an invention, is no defense to a suit upon a patent of the United States unless published anterior to the making of the invention or discovery secured by the latter, provided that the American patentee, at the time of making application for his patent, believed himself to be the first inventor or discoverer of the thing patented. He is obliged to make oath to such belief when he applied for his patent, and it will be presumed that such was his belief until the contrary is proven."

Sayen made such an affidavit. That not only he, but leading physicists of the country, so believed, is apparent from the congratulatory letters receive from Sir William Thompson (Lord Kelvin) and Dr. Roentgen, and also from the fact that Sayen was awarded the John Scott medal of the Franklin Institute after the investigation of a commission of well-known scientists, and also from scientific articles published at the time, all of which are shown in the record. It therefore appears that the Siemens & Halske and the Zehnder patents cannot avail as against the patent in suit. Furthermore, the Zehnder Swiss patent, as shown, is what is termed a "provisional" patent, and not entitled to the weight of a patent. Société Anonymé v. General Electric Co. (C. C.) 97 Fed. 604; Atlas Glass Company v. Simonds Mfg. Co., 102 Fed. 647, 42 C. C. A. 554. While Zehnder shows a main tube and an adjacent bulb in communication therewith for the

purpose of containing some gas-giving substance when subjected to heat, and says that heat may be applied by the use of electrodes, whereby an electric current can be made to pass through the bulb, yet he nowhere intimates that the current may be that of a shunt-circuit, or so arranged as to automatically adjust the vacuum in the main tube, by means of a sparking-gap or otherwise. The specification, like the drawings of this patent, are mere outlines, and fail to give one the impression that Zehnder had ever conceived the shunt-circuit automatic regulation of pressure in vacuum tubes. No reference is made in the claim to either the specification or drawings. It does not seem probable that he should have conceived the idea of automatic regulation without giving it unmistakable expression. It was too important an invention to be left to inference from general statements.

The Siemens & Halske German patent deals with Hitlorff tubes, which, it is explained, decrease in vacuum with use, being in that respect for some reason unlike ordinary Crookes tubes. It provides for the passage of the main current by a transfer of the in-conductor to the terminal, "in whose sphere of influence is a substance having great affinity to the elements of air, as phosphorous, arsenic, sulphur, iodine, etc., whereby a precipitation of gas or vapor is effected, according to Malignani's patent, causing a complete vacuum, it is claimed. The patentee adds:

"It may be mentioned that the tube can be kept rarified when, by using proper adjustable resistances, the cathode, K', were connected permanently in parallel to K, thus always absorbing the air."

The object of the patentees was to raise the vacuum in the tube by causing the cathode, K', which influences the air-absorbing substances above mentioned, to be connected to the K terminal, whereby heat will be generated, causing said substances to throw off a precipitation, which, it is claimed, will absorb the air and create a vacuum. The patentees also claim that by the insertion of a resistance in the K K' circuit, which is a shunt-circuit, a continual absorption of the air may be effected. This, if true, would seem to be automatic. It is difficult to understand how the effect of a continued current in a Hitlorff tube should be the reverse of that in an ordinary Crookes tube. This patent supplies no gas to the tube. It does not appear to have been subjected to any practical test, and should not be considered, even on its merits, an anticipation of Sayen's patent.

Stearn's German patent is for an incandescent lamp. It calls for a device where occluded gas is liberated from some suitable substance by means of a shunt-circuit, and permitted to pass into the vacuum. A resistance coil is placed in the shunt-circuit, and an unadjustable and very small spark-gap is located in contact with the gas-giving substance, evidently for the purpose of producing heat. It is provided that the resistance in the shunt-circuit shall exceed the resistance of the principal circuit as long as the vacuum in the latter is normal. Certainly, as a matter of public policy, whatever of doubt there may be as to anticipation should be resolved in favor of the American patent. The claims in suit may fairly be read upon this device if it is operative. It is, however, not apparent from the record that it has

ever been subjected to a practical test. Confusion has grown out of the indiscriminate use of the term "pressure." As used in claim 2, it undoubtedly refers to electrical pressure in the shunt-circuit, since no means is shown for varying the degree of vacuum therein. The variation of the electrical current in the shunt-circuit is one element of the means relied upon for varying the degree of vacuum in the main tube. This variation is secured through the electrical resistance supplied by the spark-gap. In claim 1 and in the specifications it refers uniformly to the degree of vacuum in the main tube. Sayen was the first to invent an automatic regulation of high-vacuum tubes by the use of a shunt-circuit. The claims in suit do not in terms call for an automatic regulation thereof, although claim 2 would seem to involve automatic regulation. Nor do they refer to the specification or drawings. But it is only from these that the court can ascertain what Sayen's invention is. It consists in supplying the shunt-circuit with a sparking-gap, apparently the most effective kind of a resistance, which would serve as a conductor for the current only when the vacuum in the tube through which the main current passed had become so intense as to practically present infinite resistance to that main circuit, and then providing automatic means for adapting that diverted current to the heating of some gas-producing substance, whereby occluded gas would be released and supplied to the over-attenuated vacuum of the tube in the main circuit. When the degree of vacuum is reduced sufficiently to permit the main current to resume its normal course through the tube, the resistance in the shunt-circuit operates to practically cut off the further flow of the current until such time as the vacuum in the tube should again become so over-attenuated as to suspend the flow of the main current through the tube, when the same process is repeated. In this manner, it will be seen, an automatic regulation of the high vacuum tube is secured. Claim 1 calls for a main circuit and a shunt-circuit as a means for varying the pressure in a high vacuum tube. The only advance on the prior art involved in the claim consists in the object sought to be attained. No device is suggested. It is simply an attempt to appropriate the main and shunt circuits to Sayen's sole use in varying pressure in vacuum tubes. All that he adds to the prior art is a function. Manifestly, he seeks to cover more than is suggested in his specifications or drawings. In the language of Carlton v. Bokee, 17 Wall. 463, 21 L. Ed. 517, he is making "ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry, and to cover antecedent inventions." This he cannot do. Claim 1 is therefore held void. Claim 2 shows the two circuits in connection with a high vacuum tube, augmented by means (a device) for causing gas to enter the tube, and means (a device) for varying the pressure in the shunt-circuit. Claim 3 is the same as claim 2, omitting the means for varying the pressure in the shunt-circuit. Taking these two claims into consideration, together with the specification and drawings, Sayen's invention must be limited to what may be called a device for automatically regulating high vacuum tubes

by means of gas engendered by subjecting a gas-giving substance to the heat generated by a shunt-circuit current supplied with means for varying the pressure thereof. Defendants' device and patent can be read upon these two claims. The claims, if good, are not dependent upon minor details. They clearly include defendants' patent, and it must be held to infringe. Complainant is entitled to a permanent injunction, and it is so ordered.

KAMPFE et al. v. J. R. TORREY RAZOR CO.

(Circuit Court, D. Massachusetts. January 11, 1907.)

No. 295.

PATENTS—CONSTRUCTION OF CLAIMS—SAFETY RAZOR.

The Kampfe patent, No. 672,984, for a safety razor, claim 7, although a hinge is not mentioned therein, must be limited to a razor having a hinged casing, when read in connection with the specification, which makes the hinged top a principal feature of the invention, and the drawings in all of which the hinge is shown.

In Equity. On final hearing.

R. H. E. Starr and Emery & Booth, for complainants.
William A. McLeod, for defendant.

LOWELL, Circuit Judge. This is a bill in equity to restrain the infringement of letters patent No. 672,984, issued to Frederick, Richard, and Otto Kampfe. Claim 7 is in suit, as follows:

"In a safety-razor, a blade-holding casing, substantially U-shaped in cross-section and entirely unobstructed in its interior from front to rear, and a guard formed on the front edge of its top, and an opening in the front of the casing extending entirely from end to end of the casing directly below the guard, substantially as herein shown and described."

The defendant contends that the patent is limited to hinged razors, although a hinge is not mentioned in the claim in suit. The complainant's commercial razor is hinged. The defendant's razor alleged to infringe is without a hinge. The defendant's contention is based upon the patent as a whole, which must, therefore, be examined with some care.

After naming the patentees and styling the invention "Improvements in Safety-Razors," the patent proceeds:

"The object of our invention is to provide a new and improved safety-razor, which is simple in construction, light, strong, and durable, holds the blade firmly in place and at proper adjustment in relation to the guard, and which safety-razor has its casing so constructed that the entire top can be swung up and back, so as to fully expose the guard, the under side of the top of the casing, and the upper side of the bottom of the casing, and so as to permit of readily and thoroughly removing the lather and hair and thoroughly cleaning and drying the blade-holder." (Lines 10–22.)

The next paragraph (lines 23–46) enumerates the drawings, 14 in number. All show a hinge, or necessarily imply its existence. In the next paragraph (lines 47–58) the "blade-holding casing" of the

claim in suit is described, and in both sentences the hinge is mentioned. Lines 59–62 mention "the hinged top, C." The next paragraph (lines 63–67) describes "the top, C," presumably hinged. Lines 68–72 mention "the hinged top," and otherwise refer to the hinge. The next paragraph (lines 73–88) deals altogether with the adjustment of the blade to the casing. The next paragraph (lines 89–95) mentions or refers to the hinge 5 or 6 times in its 7 lines. The next paragraph (page 1, line 96–page 2, line 33) describes the hinge and its method of locking, as shown in figures 1–4 of the drawings. The hinge is mentioned or referred to some 20 times. Lines 34–56 deal with two constructions of the hinge, shown, respectively, in figures 5, 6 and 7, and in figures 8 and 9. The hinge is mentioned or referred to some 12 times. The next paragraph (lines 57–65) describes still another form of hinge, that shown in figures 10 and 11, with 4 or 5 references to a hinge. The next paragraph (lines 66–78) shows still another form of hinge, that shown in figures 12, 13, and 14, with some 8 references to a hinge. The last paragraph of the specifications (lines 79–86) refers to the hinge twice. The nine claims of the patent, except that here in suit, all mention a hinge as an element of the combination claimed.

The patent not only mentions or refers to a hinge from 80 to 100 times, and in every part of its 2½ pages, but the intention is everywhere manifest to declare that the hinge, as described in its relation to the other parts of the machine, is the gist of the invention.

The patentee's scrivener has testified that he drew the claim in question—

"For the express purpose of covering a construction with an opening extending from end to end in the front, and with an unobstructed interior and of a U-shaped form, irrespective of whether it was in one part or two, or whether it was rigid or a hinged structure, and also regardless of whether there was a locking device of any specific form, or any form whatsoever." Record, p. 67.

The defendant objects that this evidence is inadmissible, and the complainant has suggested no reason for admitting direct evidence of intention to interpret the language of a written instrument in a case like this. Even if the evidence were admitted, however, it would be without weight. Under the stimulus of a present lawsuit, the witness was testifying about what had happened four or five years before. That he should designedly have omitted all reference in the specifications to the invention which he intended to claim is inconceivable. He does not say that he wished to involve his client in a lawsuit, and there could be no other motive for the act supposed.

The complainant relies especially upon the "opening in the front of the casing extending entirely from end to end of the casing directly below the guard" as the new element in the combination set out in claim 7. He contends that this clear opening makes it possible to clean the casing more easily, and that the removal of the old supporting strip at the side of the opening "prevented the lather from dripping down upon the hand." The second advantage is nowhere suggested in the patent, and the first is everywhere made to depend upon the hinge, as in the statement of the object of the invention above quoted. The complainant points to page 1, lines 73–78, and page 2, lines 82–86. These

extracts mention the opening, and do not mention the hinge. But the "bottom part, B," of lines 76 and 77, implies a hinge, as appears from line 49 et seq., and mention of "the hinge joint" is separated from the complainant's second quotation by only two words.

Under the circumstances, viz., the insistence upon a hinge throughout the specifications of the patent, its appearance in all the drawings, and its use in the complainant's commercial machine, a court, asked to save the claim, might well suppose that the omission of the hinge from claim 7 was an obvious error of the scrivener, and that it might be supplied from the context. If this contention is rejected, as the complainant contends, and if the claim be read precisely as it stands, then it is void for want of proper description in the patent of the invention to which the claim refers. In construing one patent by reference to the construction put upon another, the analogy is always imperfect, and often misleading; but in the case of O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 C. C. A. 304, the analogy seems to me to be close. There the Court of Appeals for the Eighth Circuit read a qualification into a claim in its "endeavor to find in [that] case, by a reading of both the claim and the specification, the actual invention which the patentee made and intended to claim." 140 Fed. 344, 72 C. C. A. 308.

The complainant rests an argument in favor of the validity of the patent upon the commercial success of the patented razor. But the successful razor is hinged, and, if the cause of its success does not lie considerably in its hinge, the statements of the patent are erroneous.

Bill to be dismissed, with costs.

BLAMIRE v. SHELDON AXLE WORKS.

(Circuit Court, M. D. Pennsylvania. January 10, 1907.)

No. 1, October Term, 1903.

PATENTS—INFRINGEMENT—MACHINE FOR TURNING CRANKED AXLES.

The Blamire patent, No. 663,325, for a machine for turning cranked axles, whatever the real invention, does not cover broadly the general combination of a slotted sleeve and chuck, but only the particular form of it therein described and claimed, and is not infringed by a machine which, while the general equivalent of that of the patent, doing the same work by substantially the same means and in much the same way, is yet materially different in mechanical structure.

In Equity. Suit for infringement of letters patent No. 663,325 for a chuck granted to James Blamire December 4, 1900. On final hearing.

S. B. Price, for plaintiff.

J. E. Jenkins and Thomas H. Atherton, for defendants.

ARCHBALD, District Judge. It seems to be fairly well established by the evidence that the plaintiff was the originator of the improved sleeve and chuck, by which the turning of the ends of cranked axles, by the turret or machine process, was first made possible. A sleeve and chuck for the machine-turning of straight axles was already in

use, but it was the adaptation of this device to bent or cranked axles, for which the plaintiff is apparently entitled to the credit; this being accomplished by means of a longitudinal slot made in the sleeve, and a slot and adjustable jaws in the chuck, by which the eccentricity of the axles was provided for, and the ends to be turned at the same time properly gripped and centered. It is not necessary, however, to definitely decide this question. The patent obtained by the plaintiff, whatever the real invention, does not cover broadly the general combination of a slotted sleeve and chuck, but only the particular form of it, which is there described, to which the plaintiff is consequently confined. And, if the defendants do not copy this, they cannot be charged with infringement, however much they may appropriate the principle upon which it is based.

The following are the claims to be found in the patent:

"1. In a machine for turning cranked axles, the combination with a cylindrical sleeve, each end of which is conical and slotted longitudinally, a slotted chuck upon each end provided with radially-located jaws, the inner portion of each jaw being angular in cross-section and the outer portion being cylindrical and screw-threaded and means for rotating said sleeve, substantially as described.

"2. In a machine for turning cranked axles, the combination, with a cylindrical sleeve, each end of which is conical and slotted longitudinally, of a slotted chuck on each end, provided with radially-located jaws, the inner portion of each jaw being angular in cross-section and having its inner end provided with a head and its outer end provided with a slotted recess, and the outer end of the jaw being cylindrical and screw-threaded, a screw in the recess in the inner portion of the jaw, the stem of which engages with the inner end of the outer portion of the jaw, and means for rotating the sleeve, substantially as described."

An essential element of the device, as so specified, is a cylindrical sleeve, having conical ends; and to this structural form not only is the inventor committed by the terms of the claims, but, as appears by the specifications, it was advisedly selected, permitting, as it does, as a desired feature, of a flange or rim at the outer end of the sleeve, to which the chuck may be secured, or which, by being thickened, can itself be utilized for that purpose, and a chuck as a separate feature be dispensed with. But whatever may be said of the other parts of the defendants' device, there are no conical ends to the character of sleeve of which they make use. A longitudinal slot it has; and the slotted shoe, sliding between bars, on the face of the head or bearing, and centered by means of set screws, no doubt performs substantially the same function as the plaintiff's chuck. But this is not enough. Infringement is not to be predicated upon general similarity, nor upon the adoption of the same working principle; the idea not being patented, but only the mechanical means by which it is carried out. It is not every combination of this character, in other words, which is monopolized and protected by the patent, but only the particular one which is there claimed, essential to which in the present instance is a conically ending sleeve. In the defendants' device, however, the sleeve, instead of tapering at the end, is of the same size as the bearing, from which it only varies as it is cut away towards the center, in order to economize material and weight. This distinction is substantial, and in the face of it infringement is not made out.

There is also a similar particularity of structure in the jaws of the plaintiff's chuck, which the defendants have not appropriated, with a like result. The inner portion of each jaw, as designated in the patent, is angular in cross-section, and the outer portion is cylindrical and screw threaded, to which several other somewhat minute details are added in the second claim. These may contribute to the efficiency of the device, in the conception of the inventor, but they decidedly narrow the range of the invention, and the defendants not having made use of them cannot be held to infringe. While, then, considered operatively, the one device may be the general equivalent of the other, doing the same work by substantially the same means, and in much the same way, yet in mechanical structure, having regard to the terms of the patent, they are materially different, and by this the question of infringement must be judged.

Let a decree be drawn dismissing the bill, on the ground of non-infringement, with costs.

LACROIX v. TYBERG.

(Circuit Court, S. D. New York. November 12, 1906.)

PATENTS—CONTESTS—DEPOSITIONS.

The rule of practice in the federal courts in equity causes, whereby all irrelevant or immaterial matter offered by either side must be admitted to the record, has not been adopted by the Patent Office; but, on the taking of depositions to be used in a contested case before such office, a witness will be required to answer questions where the testimony may, on one theory of the case, be relevant.

On Motion to Direct Witness to Answer Certain Questions.

James C. Rice, for the motion.

W. G. Henderson, opposed.

LACOMBE, Circuit Judge. I feel quite well satisfied that the practice followed in equity causes under Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521, whereby all irrelevant and immaterial matter offered by either side must be admitted to the record, has not been adopted by the Patent Office. The last sentence in rule of practice 153 refers evidently to the subject-matter of that rule, while rule 159 indicates that the ordinary well-settled rules of evidence are not to be disregarded in taking proof.

As to the three questions certified, however, there seems to be a theory under which it is possible that the answers elicited may have some relevancy to the issue. They are on the extreme borderland; but, on the whole, it will probably be better to allow them to be answered.

So ordered.

YALE & TOWNE MFG. CO. v. ALDER.

(Circuit Court, E. D. New York. December 17, 1906.)

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION OF LOCKS.

Complainant manufactured a padlock having a brass colored shackle and in a depressed panel on one side the word "Yale" in large letters and on the other side in another panel a trefoil symbol. Defendant, who was also a manufacturer of locks, copied the exterior form and appearance of complainant's lock for a mechanism of his own; the two being generally similar in appearance, except that defendant's had the word "Yap" in one panel, and a keystone on the reverse side. Each contained the name of the maker in small letters on the shackle and the boxes in which they were sold to dealers, each containing a half dozen locks, were dissimilar in appearance. *Held*, that the resemblances were not such as were calculated to deceive ordinarily intelligent purchasers, and that, in the absence of proof of such actual deception, defendant was not chargeable with unfair competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 81.

Unfair competition, see note to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. On final hearing.

Wetmore & Jenner (Edmund Wetmore, William A. Redding, and Oscar W. Jeffery, of counsel), for complainant.

Bartlett, Brownell & Mitchell (Robert C. Mitchell, of counsel), for defendant.

THOMAS, District Judge. The facts in this case are simple. The complainant, Yale & Towne Manufacturing Company, of Stamford, Conn., is, and has been for many years, one of the largest manufacturers of locks in the country, and in 1891 put on the market the lock claimed to have been so closely copied by Edward T. Fraim as to constitute unfair competition. The bill is filed against Fraim, and one Alder, a dealer in such locks, but the issue is practically between the complainant and Fraim. The latter is a well-known manufacturer of locks at Lancaster, Pa., and is the owner of the Keystone Lock Works.

Complainant's lock is a collocation of well-known forms of parts, brought into new assemblage, and colored a dull black, save the shackle, which with its seats is apparently brass. The place where the key is inserted shows a small circular area of similar color. In 1904 Fraim saw this lock, and having a lock of alleged new invention, he regarded it as suited to his mechanism, as it was, although not indispensable to it. Therefore he copied the exterior form and appearance, so that the difference would not be noted save upon a careful scrutiny, except in three particulars, two of which are significant and obvious. The complainant's lock bears in the depressed panel the word "Yale"; Fraim's lock bears in a similar panel the word "Yap." The complainant's shackle bears the words, in small letters, "Yale & Towne Mfg. Co.," on one side, and "Stamford, Conn., U. S. A.," on the other. The Fraim lock bears on one side of the shackle, in similarly small letters, "E. T. Fraim, Lancaster, Pa.," and

nothing save an "x" and the figure "1" on the other side of the shackle. The Yale lock has in a depressed panel on the reverse side a trefoil symbol, while in a similar position on the Fraim lock is a "keystone," Fraim's trade-mark. The paper boxes in which the locks are sold to dealers by the complainant and by Fraim differ in size, color, and construction. Complainant's box has on its top this label:

Ironsides Padlock.

To Salesmen: In making sales of this padlock call the attention of the customer to the fact that it is most easily opened by pulling on the shackle, and not by pushing on the key.

On the end of the box is this:

½ Doz. 805 2 in.
Yale
Padlocks
Finish—Bower Barff.
The Yale & Towne Mfg. Co. Stamford, Conn., U. S. A.

The Fraim box shows only this on its end:

½ Doz. 2 In. No. 815.
Yap
Padlocks
Two Solid German Silver Keys.
Manufactured by
E. T. Fraim, Lancaster, Pa., U. S. A.

It is certain that no dealer could be confused or misled, even in view of the fact that the defendant in his catalogue shows only the front of his lock, and not the keystone. But would an ordinary purchaser be misled? Some dealers, as witnesses, disclaiming that dealers would be confused, give their opinion that purchasers would be. But not an instance of such confusion is shown. Of course customers might ask for a Yale lock and be given a Yap lock, and not notice the substitution. That might be said of innumerable articles purchased over counters, when each article was legitimate in mark and form. But if a man who wanted a "Yale" lock should take in its place a "Yap" lock, it would indicate that he could not read a word written in three capital letters, or that he did not care enough what he got to try to read, and to this must be added the presumption that the hardware vendor would be too dishonest to trust, and that he would try to substitute and palm off on his customers a lock that showed in large letters that it was not the lock asked for. Now, the hardware dealers are intelligent and usually honorable, and people who have something to lock up are, as a rule, neither illiterate nor absolutely inattentive to their purchases, and it is a very violent assumption that such class of customers would ask for a Yale lock, and walk off with one labeled "Yap." This matter of careless buying may be carried so far as to underestimate ordinary intelligence. A purchaser may not carefully scrutinize certain purchases, but there are conditions so staring and obvious that he could not help seeing them unless he shut his eyes and kept them shut. Neither would a retail purchaser know about the number of locks, whether it was "805," or "815," or

any other number. The number is not on the lock itself, and the box is intended to hold one-half dozen.

The real fact is that the complainant had a form of lock that appealed to the defendant, and he thought it would dress up his lock and make it sell well. As it was suited to his mechanism, and perhaps had some economies in manufacture, he took it. He was not sensitive about availing himself of another's taste and conception of attractiveness in trade. The complainant, in its imitation of the locks of other people, had illustrated that in such matters it was untroubled by any refined sense of obligation beyond keeping within the law. But the complainant had no monopoly of form or color. That is to be obtained by patent. That it does not claim. But it claims that "Yap" is so much like "Yale" that, in connection with form and color, it constitutes unfair competition. That is a matter of judgment. But it is considered that it has the opposite effect, and that the word "Yap" boldly differentiates both to the eye and ear. Of course, if it be regarded that the trade is in the hands of knaves, and that the customers are grossly ignorant or negligent, and that upon a given purchase the vendor would unite his fraud to a purchaser's illiteracy or inexcusable carelessness, probably the Fraim lock could be sold in fraud of complainant. But ordinary respect for human honesty and intelligence precludes the hypothesis on which such a conclusion must be predicated. Fraim's conduct does not commend him to admiration, but he has kept within the law.

The bill should be dismissed.

THE OVERBROOK.

(District Court, E. D. New York. June 26, 1906.)

COLLISION—TOW AND DREDGE—UNSKILLFUL NAVIGATION.

A tug with a helper, towing 27 canal boats through the Arthur Kill, going eastward with the flood tide, *held* in fault for a collision between boats in the tow and a dredge, with her attendant scow, which were working in the channel; the evidence showing that the tow had 395 feet of clear space, which, with proper navigation, was sufficient to enable it to pass in safety. The dredge *held* not in fault for having the scow on the channel side, which was shown to be the most advantageous for the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 68, 87, 88½.]

In Admiralty. Suit for collision.

Carpenter, Park & Symmers (James E. Carpenter, advocate), for libelant.

Robinson, Biddle & Ward (William S. Montgomery and Henry G. Ward, advocates), for claimant.

THOMAS, District Judge. This libel involves the collision of the tow (27 loaded canal boats) in charge of the steam tug Overbrook, aided on the starboard side by the steam tug Brinton, with Dredge No. 2, in the Arthur Kill, whereby the dredge and her attendant dumper scow were injured. The accident happened according to the

evidence of the libelant about 6:10 p. m., according to the evidence of the claimant about 6:15 or 6:20 p. m., on August 31st. The dredge had not moved out of her working position, as the work had stopped a few minutes before the collision, but preparations were in progress for transferring the scow on her starboard side to her port side, whereupon the spuds would be raised and the dredge breasted off towards Staten Island. The dredge was in cut No. 1, which was the middle cut of the excavated channel, and was headed westward. The strong flood tide was running from Dooley's Point northerly onto the New Jersey shore, where from the coal docks of the Central Railroad of New Jersey it set up the channel, but with a tendency towards the Staten Island shore. So that, as the tow approached the point of collision, the set of the tide would tend to a degree to throw it upon the scow. The tow kept up in the direction of the coal docks, but there were two boats, lying one outside of the other, abreast of the dock, so that the available space was cut off some 50 feet in that direction, and when the tug got in that neighborhood she was obliged to port her wheel and keep up the Kill. Cut No. 1 is 25 feet to the southward of the middle line of the channel. The dredge was over the cut. From the middle cut to the nearest dock on the New Jersey shore was 475 feet, and this available space was lessened by the width of the scow, which was about 30 feet, and by the width of the boats lying at the dock, which was 50 feet, leaving some 395 feet clear space for the tow to pass. The evidence shows that it would take from 20 minutes to half an hour after work was stopped to get the dredge ready to breast off. The tug General Newton, attending on the dredge, was lying under the stern of Dredge No. 2 and ahead of Dredge No. 7, which was some 75 feet astern and somewhat southerly of Dredge No. 2. One of the boats in the tow, probably in the fifth tier, hit the scow and drove her astern of Dredge No. 2, whereupon a boat in the tow, probably in the sixth tier, was thrown across the dredge, so that her house collided with the bucket, and thereupon went around on the port side of the dredge. The dipper of the dredge had been drawn up somewhat after the work stopped and just before the collision.

There are two questions involved in the case: First, whether the dredge was in such a position that the tow could have been taken by, in the exercise of requisite skill; and, second, whether the scow alongside of the dredge should have been used on the port side, leaving greater room in the channel. The captain of the Overbrook stated that navigable skill could not have taken the tow past the dredge that night, and when asked why, then, he attempted it, he stated that he did not know that the dredge was there until after he had passed the B. & O. Bridge, when it was impossible for him to round on the strong flood tide. The evidence of Capt. Moriarty of the General Newton is that he had not known of boats rounding on the flood tide above the bridge. However, the captain of the Overbrook knew that the dredge was at work in that vicinity, and the question is whether he should not have learned what the situation was before he attempted to pass her. But it seems from the evidence of the master of the Brinton that 300 or 400 feet would have been "pretty good room" to pass, and the evidence tends to show that there was 395 feet clear space. Consider-

able skill was required to take the tow past with the power furnished for it, but even then it seems that the Overbrook had sufficient room.

The claimant insists that the dredge unnecessarily blocked the channel, because she was through work and should have been out of the way. This contention is not supported by the evidence. The claimant also insists that the scow could have been kept on the port side, and thereby left 30 feet more room. By changing the chains on the bucket, the scow could have been worked on the port side; but the starboard side has the advantage, that the scow is something of a guide to indicate the line of excavation. It is a continuance of the range.

The answer does not allege that the starboard position of the scow was a fault, and it is not found to be so. The exact location of the dredge is known, as is the distance therefrom to the dock. Thereby the space usable by the tug and her tow is mathematically ascertained. The evidence shows that it was sufficient. Certainly the dredge was lawfully where she was. Hence the libelant should have a decree.

THE LUTHER C. WARD.

THE GEORGE S. TICE.

(District Court, E. D. New York. December 13, 1906.)

1. COLLISION—TOWS MEETING—AGREEMENT FOR PASSING.
   Where tugs navigating with tows in the vicinity of New York and accustomed to passing in adverse situations agree upon the manner of passing when a sufficient distance apart to give them freedom of choice they should be concluded thereby from afterward claiming that the manner agreed upon was improper.

2. SAME—TOW AND DREDGE.
   A tug with a tow which agreed with a meeting tug to pass starboard to starboard in Arthur Kills when the two tows were 1,000 feet or more apart, and which failed to starboard her helm promptly, but afterward attempted to pass to the left of a dredge at work in the channel, *held* solely in fault for a collision between one of her tows and the dredge; it appearing that there was sufficient room for her to pass to the left of the dredge.

In Admiralty. Suit for collision.

Carpenter, Park & Symmers, for libelant James K. Symmers, advocate.

Wilcox & Green, for The Luther C. Ward.

Howard S. Harrington, for The George S. Tice.

THOMAS, District Judge. At about 9 a. m., in clear weather, and with the tide flooding eastward, Dredge No. 2 was working in the Arthur Kills. She was about 36 feet wide, and 96 feet long, and had on her port or south side a scow 35 or 40 feet wide. Some 150 or 200 feet easterly, and some 25 feet northerly was Dredge No. 7. Making due allowance for the width of the dredge and scow, and the shoal water on each shore, there was about 230 feet of navigable water on the south or Staten Island side of the dredge, and about 150 feet of such water on the north or New Jersey side of the dredge.

The Tice, with three loaded barges tandem, passed Dredge No. 7, and while in the vicinity of such dredge was herself passed by the Overbrook and a tow, which passed Dredge No. 2 on the Staten Island side, and met and passed to the port of the tug Ward, who had four light barges, of which three were in the hawser tier, and one tailed on behind, making a flotilla about 100 feet wide and some 600 feet long. This meeting was shortly after the Ward had pulled through the Baltimore & Ohio bridge, which was about 2,500 feet from the dredge. When the Ward was about half way between the bridge and the dredge, or at least 1,000 feet from the dredge, she received two whistles from the Tice, and promptly answered with two whistles. The Ward did not starboard immediately, but went quite a distance before doing so, which she attributes to the Pennsylvania tow being in her way on her port hand. But she did finally starboard, and passed between the dredge and the New Jersey shore, herself clearing the dredge by some 50 feet, but some portion of the Ward's tow hit the dredge, doing injury for which the libel is filed against the Ward, who has by petition brought in the Tice, against whom she alleges that the Tice, instead of going on the New Jersey side of the dredge, took the water on the dredge's port or Staten Island side, leaving no sufficient room for the Ward to pass, and forced her to go to the northward of the dredge. The captain of the Ward testified that when he got signals from the Tice she was under the digger's stern. The claim of the Tice is that she was close to the Staten Island shore when she gave the signals, and the evidence of the inspector on the dredge is that the Tice cleared the dredge by 150 feet, while the captain of the dredge makes the distance 200 feet. The captain of the Ward claims that the Tice should not have gone to port, but should have gone north to the dredge, and that even when she did go towards the Staten Island shore, she did not go far enough to give the Ward room to pass south of the dredge.

As to the first claim, it is sufficient that the vessels themselves settled the manner of passing each other, and, considering the distance between them, the Ward did not act under duress. If the Ward regarded the maneuver as faulty, her captain should have blown alarm whistles and stopped the proposed passing, compelling the Tice to go about, or otherwise dispose herself. The proposition that the Ward was acting under menace, if true, emphasizes the necessity for alarm whistles. It was not an easy place to pass, but such tows are accustomed to passing in adverse situations. At the moment they are the best judges of the advantages and perils, and as between themselves, in a case like the present, their agreement should exclude excuses. There was room enough for either tow to pass north of the dredge, and the event shows that if the Ward had acted more promptly, she would have cleared the dredge. Her captain hesitated. He testified that he pulled to the north "as soon as I saw how things were going." If, after exchanging signals, he waited to see how things were going, he waited too long to make a safe passage on the north side of the dredge. Such delay was negligent as to the dredge. The distance the Tice pulled to the southward of the dredge is inconsistent with the Ward's position that the Tice was leaving too little room on

the south side. Had the Ward attempted to pass to the southward of the dredge, it is presumable that the Tice would have given her more room. But when the Tice saw the Ward pull to the northward, with the obvious purpose of going between the dredge and the New Jersey shore, there was no occasion for the Tice to pursue her way farther to the southward.

It is considered that the decree should be entered against the Ward alone, and the petition bringing in the Tice dismissed.

CENTRAL TRUST CO. v. CENTRAL TRUST CO. OF ILLINOIS et al.

(Circuit Court, N. D. Illinois, E. D. October 17, 1906.)

No. 28,283.

POST OFFICE—DELIVERY OF MAIL—SIMILARITY OF NAMES—CORPORATIONS.

Complainant, Central Trust Company, a corporation of another state, engaged in business in Chicago, Ill., for a number of years, but until 1903 failed to comply with the requirements of the statute to entitle foreign corporations to do business in the state. In 1902 defendant Central Trust Company of Illinois was incorporated in that state and also engaged in business in Chicago. Confusion having arisen in respect to the delivery of mail addressed to "Central Trust Company," complainant filed its bill to require the delivery to it of all mail so addressed. *Held*, that defendant, having been the first to lawfully use the name, was prior in right, and that the bill could not be maintained.

In Equity. On demurrer to bill.

McCaskill & Son, for complainant.
Edwin W. Sims, U. S. Atty.
Pam & Hurd, for defendants.

KOHLSAAT, Circuit Judge. Complainant, the Central Trust Company, a corporation of South Dakota, filed its bill against the Central Trust Company of Illinois, William R. Dawes, its cashier, and Fred A. Busse, postmaster at Chicago, in which it sets up that it is known as the "Central Trust Company;" that in April, 1897, it began to carry on its business under that name in Chicago; that subsequent to that date certain requirements were imposed by the statute of Illinois upon foreign corporations seeking to do business in the state, which were not complied with by it until the 7th day of February, 1903, owing to the delay caused by the interference with the defendant from August, 1902, to said February 7, 1903; that the defendant was chartered under the laws of the state of Illinois on the ——— day of——— 1902; that their names being similar, there was great uncertainty as to which concern the several letters should be delivered to; that upon application to the post office department, the Postmaster General directed letters addressed to the Central Trust Company, without street or number, or other external evidence as to the party to whom it should be delivered be turned over to the Central Trust Company of Illinois, whereby the mail of the complainant was frequently opened by the defendant, and great trouble and annoyance to the complainant

arises. The bill seeks to have mail addressed to the Central Trust Company delivered to complainant, and that the defendant be restrained from opening the same. The two names differ only in this: That the Illinois corporation is known as the "Central Trust Company of Illinois," and the complainant is the "Central Trust Company." The cause is now before the court on demurrer to the bill.

It is evident that while there is a slight difference in the names of the two corporations, it is so slight that for all practical purposes that would be considered practically identical, and in a proper case made for unfair competition the court would have to so direct. It also appears from the bill that some of the mails were addressed without indicating to which company it belongs, whether to one or the other of these two companies, so that, were the prayer of the bill to be granted, the trouble would simply be shifted from the complainant to the defendant. The case is simply one of confusion in the matter of identity of parties to whom mail should be delivered, and in such a case, of course, the party causing the confusion should be charged with the burden of showing that his mail in each case was delivered to the other, so that the only question before the court now necessary to be considered is which one of these parties caused this confusion. It is admitted that the defendant was incorporated before the complainant. It is admitted that at the time it was incorporated complainant was doing business in this state, and had been for several years, but had not complied with the requirements of the statute which prohibits them from doing business in the state until the conditions are met.

While complainant first used the name Central Trust Company in the state of Illinois, yet that name having been used, and the business being transacted thereunder contrary to the law of the state, no benefit of priority can attach to complainant, and it must be treated as having been entitled to the use of the name only from the time it complied with the requirements of the statute. That being subsequent to the date of the incorporation of the defendant, it follows that complainant itself should be charged with the creation of the confusion, and is in no position to demand the relief sought for in the bill.

The demurrer is sustained.

THE ST. GOTHARD.

(District Court, E. D. New York. July 23, 1906.)

SHIPPING—INJURY TO STEVEDORE—LIABILITY OF VESSEL.

Where a vessel undertakes to furnish tackle for loading and discharging cargo, it is under duty to use reasonable care to provide such as will meet the requirements placed on it by the stevedores in conducting their work in the customary manner; and where stevedores who were discharging a cargo of sugar, with the knowledge of the vessel's officers, substituted for a wire fall provided at one hatch to hoist cargo from the hold a rope fall used at another hatch for a different purpose, which was of insufficient strength and broke when a sling caught under the hatch coaming, which was an expectable occurrence, the vessel is liable for an injury resulting to a stevedore working in the hold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 335.]

In Admiralty. Suit for personal injury.

Ullo, Ruebsamen & Yuzzolino, for libelant.
Convers & Kirlin, for claimant.

THOMAS, District Judge. The vessel in its charter party agreed to furnish tackle for loading and discharging cargo. At each hatch a fall was provided to lift the cargo (bags of sugar) from the hold, and save at the spare bunker hatch there was another fall to carry out-board, and deposit it on the dock. All falls of the first class were made of wire, and all of the second class were made of rope. At the spare bunker hatch but one fall was used, and that was made of wire. The ship discharged a part of her cargo at Yonkers and then went to Arbuckle's dock in New York, where, after the work had begun, the stevedores not employed by the ship substituted the rope fall of No. 3 hatch for the wire fall at the spare bunker hatch, for the probable reason that the wire fall was, on account of greater length, more available at No. 3 hatch. The libelant, a longshoreman, employed by the Arbuckle Company, was in the hold under the spare bunker hatch making up the slings. As a sling containing five bags was rising, it caught under the coamings of the between deck hatch, and thereupon the rope broke, and the sling fell upon the libelant's knee, causing serious injury.

Some portion of the rope was produced in court on the trial, April 4, 1906, and, as it then appeared, was unfit for the purpose of a fall. The rope has been used somewhat since the accident which was October 9, 1905. No evidence of deterioration of the rope subsequent to the accident was given. As the first officer pronounced it at the time of the accident and at the date of the trial in suitable condition for use as a fall, it may be considered that the condition had not changed. The sling came in contact with the coaming; the winch continued to work, and the rope broke. Would a good rope have broken under such strain? The hatch was 14 feet athwartship, and 5 feet 6 inches fore and aft, and through this opening, in rapid discharge of cargo, the sling was taken. The collision with the coamings at times was expectable, and a fall was required that should withstand reasonably the shock of such contact. To meet this demand, the ship had provided and rigged wire falls, and the stevedores had for their own convenience substituted the rope, and it is claimed that this relieves the vessel. There would be great force in this contention did it not assume that the stevedores with the ship's knowledge were accustomed to change the falls. Hence it was the vessel's duty to use suitable care to furnish falls that would meet the duty that the stevedores would allot to them. Moreover in the present case the vessel knew that the change had been made, and upon the first mate speaking of it, as he testifies, the foreman of the stevedores said that the rope fall was sufficient. The foreman's alleged statement did not make the rope sufficient as regards the libelant. Both the stevedores' foreman and the ship's officer were negligent in allowing the rope to be used. The vessel consented to the substitution and in effect held the rope out as a proper one to protect reasonably the men in the hold, and the stevedores's ap-

proval or disapproval would only show his advice to the officer as to the sufficiency of the rope, and bear on the question of the vessel's negligence in allowing the rope to be used.

The libelant should have a decree for $3,000.

VACARREZZA v. 567,000 GALLONS OF MOLASSES et al.

(District Court, E. D. New York. December 13, 1906.)

SHIPPING — CHARTER HIRE — ALLOWANCE TO TIME CHARTERER FOR DEAD FREIGHT.

A steamship was operated by a charterer for two or three years under a time charter and renewals thereof; the hire being paid at the end of each trip at a fixed rate per month on her registered tonnage. From time to time the charterer objected that she was not loaded to her full capacity by the master, but the charter hire was paid for such trips with knowledge of the amount of cargo she actually carried. *Held*, that any claim of the charterer on account of such shortage on such trips was foreclosed by such settlements, but that in a suit for charter hire for the concluding voyages which had not been paid, he was entitled to a deduction for the shortage of cargo carried on such voyages below her represented and actual capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 195.]

In Admiralty. Suit in rem for charter hire.

Ullo, Ruebsamen & Yuzzolino (Lorenzo Ullo, advocate), for libelant.

Wheeler, Cortis & Haight (Charles S. Haight, advocate), for claimant.

THOMAS, District Judge. The steamship Margaretha was chartered pursuant to a representation that she had a certain carrying capacity, to wit, "3,150 tons all told; loads 2,900 tons molasses." Whatever the obligation created by this representation, she had such capacity, and the charterers were by the charter entitled to the "whole reach, burthen, and passenger accommodation of the ship (not being more than she can reasonably stow and carry) * * * reserving only proper and sufficient space for ship's officers and crew, tackle, apparel, furniture, provisions stores, and fuel." The ship was operated during 1903, 1904, to August, 1905, under the charter, or the charter modified and extended. The ship carried the German flag, until in January, 1905, her register was changed, and she carried the Italian flag. Thereafter the charterer complained that the master would not load her to the capacity to which it was entitled, but stopped the loading when a certain draft was indicated by an English Plimsoll-mark which she bore. This complaint at times was justified; but at the end of each voyage, the account between the parties was scrutinized, an account stated, and the balance found due paid to the owner's agent. It is considered that such adjustment forecloses any claim on the part of the owner, that as to such voyages the ship did not carry an adequate cargo. The charterer and master knew at the end of each voyage the exact amount carried; the complaint of insufficient carriage had been made. The hire was "at the rate of 10 shillings British sterling per gross register ton, per calendar month, * * * and

at and after the same rates for any part of a month." The original charter was for four calendar months, with options for renewal, which the charterer exercised from time to time until April 25, 1904, when it was agreed that the charter should be "continued for a further period of 12 months," and "that the charterers shall have the option of continuing this charter for nine consecutive trips, trip by trip, on giving notice thereof to owners or their agents, 15 days previous to the expiration of the first-named time or any declared option, all other conditions same as present charter, except rate to be on new charter 9 shillings instead of 10 shillings as at present."

The above option was exercised for four trips, when the charter was discontinued. It is considered that in the absence of fraud or mistake, the statement and payment of the account at the end of each trip settled the existing and recognized differences between the parties. All hire was paid trip by trip, save that the charterer refused to pay for the ship's service for the last two trips, upon the ground that she had not while under the Italian flag carried a full cargo, and the charterer insisted upon a right to make deductions accordingly. The amount carried on the two last trips is known. It is evident that it was not in either case up to the carrying capacity of the ship, and the difference between such amount and 29,000 gallons should be credited to the charterer at the agreed rate per ton, and for the balance of the hire, subject to credits for coal and advances, the libelant should have a decree.

THE GRACE DOLLAR (two cases).

(District Court, W. D. Washington, W. D. November 19, 1906.)

Nos. 542, 543.

SEAMEN—RIGHT TO RECOVER WAGES—DESERTION.

Libelants signed shipping articles at San Francisco for a voyage "from the port of San Francisco, Cal., to Portland, Or., and other Columbia river ports, and return to San Francisco for final discharge, either direct or via one or more ports on the Pacific Coast, north or south of the port of discharge, as the master may direct; voyage not to exceed six calendar months." The vessel proceeded to Portland, where she took on a cargo of lumber for Los Angeles, and after its discharge made a run past San Francisco to Aberdeen, on Gray's Harbor, Wash., where she proceeded to load a cargo of lumber for San Francisco. Libelants there demanded their wages, and left the vessel without the master's consent, claiming that they had performed their voyage, although they had served less than a month. *Held*, that they were properly logged as deserters, and were not entitled to recover wages; the articles clearly giving the master the right to make other coast ports, in order to obtain a return cargo to San Francisco, within the six months' limit of time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 104, 106.]

In Admiralty. Suit by seamen for wages.

Suit in rem for seamen's wages. The libelants and interveners having signed shipping articles at San Francisco for a voyage from that port to Portland, Or., and return, and having served on board the

Grace Dollar, pursuant to the shipping articles, a period of less than one month, at Aberdeen, on Gray's Harbor, in the state of Washington, left the vessel without the master's consent, and demanded their wages, claiming that they had completed performance of their contract. Libelants held to be deserters, and a decree for wages denied.

Marquis & Shields, for libelants.
William H. Brinker, for claimant.

HANFORD, District Judge. This case has been submitted for decision upon an agreed statement of facts, substantially as follows: The Grace Dollar is an American vessel, engaged in the coasting trade, and was on the 10th day of May, 1906, at the port of San Francisco, at which time and place her captain, E. M. Olsen, hired the libelants and intervening libelants, except Mike McGinnis, to serve as part of her crew for wages at a specified rate. The shipping articles, which the men signed, specified the voyage which they were to make in the vessel and their term of service in the following words:

"From the port of San Francisco, Cal., to Portland, Or., and other Columbia river ports, and return to San Francisco for final discharge, either direct or via one or more ports on the Pacific Coast north or south of the port of discharge, as the master may direct; voyage not to exceed six calendar months."

Mike McGinnis signed the same shipping articles as a fireman, at a specified rate of wages, at Los Angeles, on the 1st day of June, 1906. The vessel made the run from San Francisco to Portland, where she took on board a cargo of lumber, which she carried past San Francisco to Los Angeles, Cal., where it was discharged, and she then made a run from Los Angeles northward past San Francisco to Aberdeen, on Gray's Harbor, in the state of Washington, where she arrived June 5, 1906, and the master then announced that a cargo of lumber was to be taken on board, to be carried to San Francisco, and the seamen were required to perform labor in taking in said cargo, which they refused to do; they claiming that they had performed their voyage, and demanded their wages. They were informed by the master that he would require them to continue in the service until the ship arrived at San Francisco, and that they would be logged as deserters if they quit the service without his consent. They did quit the service, and left the vessel without the master's consent, and he logged them as deserters.

It is not contended that the libelants had any cause for leaving the vessel without completing their contract, and there is no contention that the contract is invalid by reason of insufficiency or uncertainty in its specification of the nature of the voyage to be undertaken, the port of final discharge, or the duration of the term of service. The only difference to be adjusted by the decision of the court is in respect to the true interpretation of the contract.

I am unable to agree with the conclusions announced in the decisions in the cases of Rury v. McKay (D. C.) 84 Fed. 360, and The Laura Madsen (D. C.) Id. 362. These are both decisions by District Courts of the Ninth Circuit, and I am required by the decision of the Circuit Court of Appeals in the case of The Mermaid, 115 Fed. 13, 52

C. C. A. 607, to give consideration to the nature of the service engaged for in construing the contract. Manifestly, the object in view was to keep the vessel continuously employed, and to not return to San Francisco until she obtained a cargo to bring back; and it is plainly apparent that it was contemplated, at the time of signing the shipping articles, that the Grace Dollar might be required to visit different Pacific Coast ports north and south of San Francisco in order to obtain a return cargo, for it is specified in the contract that she might do so if her master so directed. I hold that the libelants and intervening libelants have not performed their contract, and that they were lawfully logged as deserters, for the simple reason that when they left the vessel without the master's consent she had not arrived at the designated port of final discharge, and there was a wide margin between the time of their service in the vessel and the time limited by the contract for the vessel to make that port; and I hold that there was no deviation, for the simple reason that the contract gave the master discretion to visit different ports, both north and south of San Francisco, before returning there, within the time limited.

Let a decree be entered dismissing the suit, with costs.

UNITED STATES v. 20,550 POUNDS OF UNWASHED WOOL.

(District Court, N. D. New York. December 18, 1906.)

NEW TRIAL—GROUNDS—ESTOPPEL BY STIPULATION.

Where a claimant of alleged smuggled property, after a verdict of condemnation, secured the release of half of it by a stipulated judgment, and valuable evidence was also surrendered by the government and lost to it, the claimant will not be permitted to withdraw the stipulation and be granted a new trial, on the ground of newly discovered evidence, which is of doubtful value or could have been obtained on the trial by due diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 13.]

At Law. Motion by claimant to set aside the verdict of the jury, and a stipulation made after same was rendered, and for a new trial on the ground of newly discovered evidence.

S. L. Wheeler, for claimant.
Geo. B. Curtiss, U. S. Atty.

RAY, District Judge. This was an action to condemn 20,550 pounds of unwashed wool, on the ground same was smuggled into the United States from the Dominion of Canada contrary to law. The entire wool was seized, taken from the possession of the claimant, and examined, and samples, a large number, taken and carefully kept. These were produced in court as evidence and there examined by the court and jury and government witnesses from Canada familiar with Canada wool and wool grown in the United States, and the differences between the two in staple, etc., and manner of tying, etc., pointed out. As to a small part of the wool, comparatively, government officers claimed to have seen it on a car at Hemingsford, Canada, shortly before it was brought into the United States, and to have put into it some

marked matches, and that one or two of these matches were found, after the seizure, in the wool in question, which wool, confessedly, had been opened and mixed with other wool by claimant after it came into his possession. The government showed that, at different times, Canada wool came to a certain firm in Hemingsford, a short distance from the boundary line between the two countries, and but a few miles from where the wool was seized, and in the indictment and early in the trial, which continued about two weeks, it appeared that the government claimed this wool was the wool or a part of the wool seized and claimed to have been smuggled.

The claimant therefore had ample opportunity to produce this firm, or one of its members, on the trial and account for this wool. There was time to do this after the trial opened and the claim of the government was developed. No effort was made to do this, and the new evidence relates to facts which claimant, in the exercise of due diligence, might have discovered before, or at least during, the trial. Again, after the jury had rendered its verdict in favor of the government, which was of such a nature the court would have been justified in rendering, and even required to render, a judgment condemning all the wool seized, the claimant in open court, to avoid such a judgment and save an appeal, proposed to stipulate, and then advisedly stipulated, that judgment should be rendered in favor of the government condemning 10,000 pounds of the wool and releasing the balance on condition claimant should pay costs, amounting to $1,200. Such judgment was duly rendered pursuant to such stipulation and thereupon and relying thereon the United States Attorney released to the claimant all of such wool exhibits, several hundred pounds, and he took possession thereof and turned them over to his counsel, who sold them to a wool dealer, and they have passed beyond the control and knowledge of the government and are not obtainable and could not be produced on a new trial. Through the action and procurement of the claimant, who now seeks a new trial and asks that such stipulation be set aside, this important and necessary evidence has been lost to the government and destroyed.

This fact alone requires that this motion be denied. But the new evidence consists in the alleged fact that claimant can now show by a small farmer living in Canada, near the line, who does not deal in wool, who had no use for wool, and who claims he procured it for a person who has not called for it, that he took the wool, into which it is alleged the government officials placed the marked matches, from the car in Hemingsford to his place, and has kept it ever since, and that on an examination thereof made since the trial the marked matches and all of them were found therein. Other persons, residing in Canada, have come into the United States and made affidavit that they have examined some wool at such farmer's place and found similar marked matches therein. Due diligence would have discovered all this in time to have made it available either before or during the trial. But I am not satisfied of the credibility of this farmer, and do not think this evidence would change the result in case a new trial were granted, if the government could have its evidence (the wool samples) before the jury.

By the action and conduct of the claimant since the verdict was rendered and the stipulation made the government has been induced to change its position for the worse, to surrender essential and important evidence to the claimant which he has, in effect, destroyed; and, as the government cannot be restored to its former position, on well-settled principles, the claimant cannot be relieved from his stipulation voluntarily made with a knowledge of all the facts known to the government. Again, the government had important witnesses from Canada on the trial, and it is uncertain that their attendance or testimony can be secured on a second trial.

Motion denied.

MOODY v. HUNTLEY.

(District Court, D. Vermont. December 6, 1906.)

SUBROGATION—PRINCIPAL AND SURETY—PAYMENT OF DEBT BY SURETY.

The holder of a note on which petitioner was surety brought suit against one of the makers and attached enough of his property to secure payment. About a year thereafter, and while the attachment suit was still pending, but before judgment, petitioner paid the note on demand of the holder; the judgment defendant having about a month before been adjudged a bankrupt. *Held*, that petitioner was entitled to be subrogated to the rights of the holder under its attachment lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, §§ 17, 18.]

In Equity. Petition for subrogation.

L. C. Moody, for petitioner.

E. H. Deavitt, for petitionee.

MARTIN, District Judge. The petitioner, George E. Moody, alleges, in substance, that he was a surety signer upon a note given by the bankrupt and his brother, as principals, payable to the Waterbury National Bank in three months from date, and dated the ——— day of July, 1903; that, when said note became due, neither of the principals made payment thereof; that on the 14th day of May, 1904, the Waterbury National Bank brought suit on said note and attached enough of the property of Leonard Huntley, consisting of his real estate in the town of Waterbury, to secure payment; that about a year thereafter, upon the demand of said bank, the petitioner, as surety signer, paid the amount then due upon said note; that at the time of said payment said suit upon which said attachment was made was then and now is pending in the county court in the county of Washington; that, about a month before the payment of said note by the surety signer, said Leonard Huntley was duly adjudged a bankrupt in this court.

It is apparent, from these facts, that, at the time of the payment of the note in question by the surety signer, the attachment lien by the original holder of the note had matured as against proceedings in bankruptcy, being over a year preceding the adjudication. If the bank had obtained judgment, and the surety had paid that judgment, he would be entitled to be subrogated to all the rights of the attach-

ing creditor. The attachment lien having been over four months preceding the bankruptcy proceeding, and the suit still pending in court, with a right to take judgment at any regular term of court, I can see no difference as to the rights of the petitioner whether the payment was made before or after judgment. The equity of subrogation is one calculated to do exact justice between persons who are obligated for the performance of the same duty. It is much encouraged in this country. In England, as the law was originally settled, subrogations were not encouraged. Copis v. Middleton, 1 T. & R. 229; Hodgson v. Shaw, 3 My. & K. 190.

But the hardship of this ruling led to the passage of a statute. St. 19 & 20 Vict. c. 97.

In this country the whole current of authorities is that payment of a debt by a surety or indorser is considered to operate as an assignment of it, and the equity of subrogation has received a liberal and broad construction, dependent, however, upon the preliminary question of fact whether the payment was intended as a purchase or an extinguishment of the debt. If the former, the surety signer, as the purchaser, may be subrogated to all the rights of the original creditor.

In this case the surety purchased the note and now holds it uncanceled. Wherefore the prayer of the petitioner is granted.

DESPEAUX et al. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. December 11, 1906.)

No. 44.

CONTEMPT—PREVENTING PRODUCTION OF BOOKS AND PAPERS—ANSWER TO RULE.

Officers of a corporation, who, in response to a rule upon the corporation to produce books and papers, answer that such books and papers have been destroyed, cannot be adjudged guilty of contempt as preventing such production, because their answer was based on information given by their subordinates, who, if such books and papers were in existence, would be their proper custodians, and not upon their own knowledge.

On Rule for Contempt.

James W. M. Newlin, for plaintiff.
John Hampton Barnes, for defendant.

HOLLAND, District Judge. This rule to show cause why Charles E. Pugh and Louis Neilson, respondents, should not be adjudged for contempt, is discharged, for the reason that there is not the slightest bit of evidence to show that they have disobeyed or "resisted any lawful writ, process, order, rule, decree or command of this court."

The plaintiff presented a petition upon the Pennsylvania Railroad Company to produce books. The petition was somewhat indefinite as to the books and papers required, but the railroad company answered that these books had been destroyed long since, as it had concluded the suit in question had been abandoned, because, having been brought 17 years ago, nothing had been done to dispose of it in court. The plaintiff was not satisfied that the books were destroyed, and called wit-

nesses to show they were in existence, in order that he might establish this fact to the satisfaction of the court and secure his order for their production. He called Mr. Pugh and Mr. Neilson as witnesses in support of his allegation that the papers were not destroyed. Both were examined, and they frankly stated that they had inquired about these books and papers from their subordinates, who were charged with their keeping, and were informed by these custodians that the books and papers were long since destroyed. Upon this information, they testified they had made this answer to the plaintiff's rule to produce these books and papers. They frankly told the plaintiff what their information was upon which they had made answer. They could only know this by inquiring of those who had the possession of the books and papers, and, after so informing themselves, being corporate officers, they were proper persons to make answer. They are not in contempt of court because they cannot answer of their own personal knowledge. If the plaintiff can show that Mr. Pugh and Mr. Neilson are misinformed as to the existence of the books and papers for which he calls and which are sufficiently specified in his petition, he can subpœna and examine any witness who may know about the matter on his rule to produce them. The plaintiff, through its attorney, asks this court to adjudge Messrs. Pugh and Neilson in contempt, because, as the petition alleges, they are preventing him from obtaining access to the books and papers. Their examination does not show they have done anything to sustain this charge, but it does show they have answered all questions relevant to the existence of the books put to them by the plaintiff's attorney, and in every particular complied with the orders of this court.

Rule discharged.

In re PORTNER et al.

(District Court, E. D. Pennsylvania. January 5, 1907.)

No. 2,657.

1. BANKRUPTCY—PETITION—AMENDMENT.

An application to amend a bankruptcy petition so as to allege facts within the knowledge of the petitioners at the time the petition was filed was fatally defective for failure to allege the reason for the omission, as required by general order No. 11 (89 Fed. vii, 32 C. C. A. xiv).

2. SAME—DETERMINATION.

Where an application to amend a petition in bankruptcy proceedings was defective for failure to allege the cause of the omission, the applicant would be granted time to supply the omission.

In Bankruptcy. Order on petition for amendment.

J. Howard Reber, for petitioning creditors.

Greenwald & Mayer, for alleged bankrupts.

HOLLAND, District Judge. In the answer the objection is raised that the "facts stated in the amendment being within the knowledge of the petitioners prior to the first petition, which is now at issue, the amendment should not be permitted to be filed." If this be true, it would seem that the petitioners would have no right to amend in the

particulars set forth in their petition. In general order No. 11 (89 Fed. vii, 32 C. C. A. xiv) petitioners are required to set forth certain allegations, among others, the following:

"In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."

The petitioners in their application in this case have not given one word of information as to why the omission occurred in their original petition. They have entirely ignored that provision in general order No. 11 requiring such information to be set forth in the application for the amendment. We agree to the law urged by counsel for the petitioners as to the liberality which should be applied to the allowance of amendments in bankruptcy proceedings. No case should be permitted to fail on a technicality or an inadvertent omission. All cases should be heard upon their merits, and all amendments should be allowed when it is just to do so, and which will bring about a solution of all questions on their merits, but this liberality should not be carried to such an extent as to permit petitioners to wholly ignore the plain and wholesome rules and regulations as to the mode of having the amendments allowed.

Assuming that the petitioners can give a good and sufficient reason for the omission or error in the original petition, I will allow them five days from this date to insert this information in their petition to amend, at the end of which time, in the absence of such amendment to the amended petition, an order will be entered disallowing the amendments to the original petition in bankruptcy in this case.

DE LAITTRE et al. v. BOARD OF COM'RS.

(Circuit Court, D. Oregon. January 14, 1907.)

No. 3,104.

1. STATES—PROCEEDINGS AGAINST STATE OFFICERS—PUBLIC LANDS OF STATE—PATENTS.

No affirmative relief can be had against the state or any officer thereof, whereby the state or such officer could be required or compelled to execute deeds or issue patents for state land, or to perform any act in connection therewith requisite to complete the title to the land; but the state's board of land commissioners may be restrained from doing acts in violation of the contractual relations existing between it or the state and the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, States, §§ 182, 186.]

2. PUBLIC LANDS—SCHOOL AND UNIVERSITY LANDS—DISPOSAL BY STATE—LAND COMMISSIONERS—DECISIONS—REVIEW.

Const. Or. art. 8, § 5, provides that the Governor, Secretary of State, and State Treasurer shall constitute a board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law. *Held*, that such board was the state's instrument for the sale and disposition of state school lands, and its decisions with reference to who should be entitled to a patent prior to the issuance thereof were not subject to review by the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 167.]

3. SAME—FRAUD—JURISDICTION OF BOARD.

B. & C. Comp. Or. §§ 3299, 3300, 3302, 3304, 3306, 3308, 3309, authorize the state land board to make rules for the transaction of its business, and to decide all questions of priority of settlement, etc., and other disputes between applicants for the purchase of school lands, and all its acts and decisions as to the legal title shall be final as to the right to a deed from the state. A person 18 years of age who is a citizen, or has declared his intention to become such, is entitled to buy not more than 320 acres of any one kind of land, based on an application and affidavit, including, among other things, a declaration that the proposed purchase is for his own benefit, and not for speculation, and that he has made no contract or agreement for the sale or disposition of the lands, etc. *Held* that, prior to the issuance of a deed by the state, the board, on receiving information that an application was fraudulent, had power, notwithstanding the receipt of a portion of the purchase price, to institute a hearing on notice, and on proof of the fraud to decline to issue a deed.

4. SAME—BONA FIDE PURCHASER—RIGHTS.

Where a certificate for the purchase of state school lands was obtained by fraud, the assignment thereof to a purchaser who was innocent of fraud only conferred on him the rights of his assignor, and did not entitle him to a deed from the state, notwithstanding the fraud.

[Ed. Note.—Bona fide purchasers, see United States v. Detroit Timber & Lumber Co., 67 C. C. A. 13.]

On Demurrer to Complaint.

On October 26, 1900, an application to purchase the east ½ of section 36, township 24 S., range 24 E., of the Willamette Meridian, accompanied by an affidavit, both purporting to have been signed by one George P. Cook, and the latter to have been verified before H. H. Turner, a notary public, was filed with the clerk of the board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, of the state of Oregon, whereupon, 20 per cent. of the purchase price having been paid, a certificate of sale, numbered 10,159, was issued to Cook, and delivered to Alfred T. Kelliher, it being supposed that he was the assignee from Cook. On December 17, 1900, Kelliher, for the consideration of $320, assigned to complainants, John De Laittre and Samuel S. Johnson, of Minneapolis, Minn., who subsequently made payment to the board of two additional installments of $80 each of principal, and of all interest to October 26, 1904, leaving $160, or two-fifths of the purchase price, yet unpaid. On May 10, 1905, the board of commissioners, through its clerk, notified complainants that it had information that their certificate of sale had been issued upon a fraudulent application, and directed that they show cause why the same should not be canceled, and fixed a day for hearing. Complainants appeared at the time appointed, and, evidence being submitted and a hearing had, the board found that the application, along with many others, was forged and fraudulent, and it was therefore ordered that such certificate be canceled and held for naught. No offer of repayment of installments advanced was made prior to cancellation, and the board now refuses to issue a deed upon the certificate, although the balance due of the purchase price, with accrued interest, has been regularly tendered. Reciting these facts in form to show the transactions fully, complainants now seek by their bill in equity to have the order of the board of commissioners annulled, their certificate of sale reinstated, and a further decree requiring such board to issue to them the deed of the state for the land involved. The sufficiency of the bill of complaint is challenged by demurrer.

E. B. Watson, B. B. Beekman, and William Furst, for complainants.

A. M. Crawford, Atty. Gen., for respondent.

WOLVERTON, District Judge (after stating the facts). This suit is instituted upon one of many certificates of sale, issued under similar

circumstances and conditions, to test the legality of the acts of the board of commissioners in canceling the certificates and refusing to execute deeds in pursuance thereof. The case, like that of Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, is not nominally against the Governor, Secretary, and Treasurer as such officers, but against them collectively as the board of commissioners. It is the doctrine of that case, supported by others that have preceded it in the same court, that no affirmative relief can be had against the state, or any officer thereof, whereby it or he could be required or compelled to execute deeds or issue patents for the land claimed, or to perform any acts in connection therewith requisite to complete the title to such land; but that the board might be restrained from doing acts in violation of the contractual relations existing between it or the state and the purchaser. This is perfectly manifest from the discrimination that the eminent jurist who announced the opinion of the court makes of the cases reviewed. He refers to the case of Cunningham v. Macon & Brunswick R. R., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992, where it was said, referring to the case of Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447:

"*Nor was there in that case any affirmative relief* granted by ordering the Governor and land commissioner *to perform any act towards perfecting the title of the company.*"

And again he says:

"The same distinction was pointed out in Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805, which was held to be, in effect, a suit against the state, and it was said: 'A broad line of demarcation separates from such cases as the present, in which the decrees require, *by affirmative official action* on the part of the defendants, *the performance of an obligation which belongs to the state in its political capacity,* those in which actions at law or suits in equity are maintained against defendants, who, while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void.' "

The italicization in the excerpts is the work of the writer of that opinion. And further, the following is also quoted from Hans v. Louisiana, 134 U. S. 1, 20, 21, 10 Sup. Ct. 504, 509, 33 L. Ed. 842:

"To avoid misapprehension, it may be proper to add that, although the obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued or comes itself into court, yet where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. Whilst the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contract may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void, and powerless to affect their enjoyment."

So that, in pursuance of the doctrine thus obtaining in the Supreme Court of the United States, I am bound to dismiss from further consideration all relief demanded that is affirmative in its nature, or which requires of the board of commissioners any specific acts looking to the receipt and acceptance of the balance of the purchase price tendered, or to the execution of the deed or patent to the land involved, and its delivery to the complainants. Those would be the acts of the board

in its official capacity, or of the state, and the court could not, as against the state, compel their performance.

There remains, therefore, the consideration of the one question whether the board should be restrained from disposing of the land to any other person, in violation of its undertaking by the certificate of sale issued in the name of Cook, and delivered to Kelliher.

The Constitution of the state of Oregon (article 8, § 5) provides that:

"The Governor, Secretary of State, and State Treasurer shall constitute a board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law."

In pursuance of this provision, it was held, as early as 1880, by the Supreme Court of the state (Corpe v. Brooks, 8 Or. 222), Mr. Justice Boise, a member of the constitutional convention, announcing the opinion, that:

"This board was created by the state Constitution, and by it invested with the power to dispose of these state lands, and its powers and duties are such as are provided by law. It is composed of the Governor, Secretary of State, and State Treasurer, and is a part of the administrative department of the Government, and exercises its powers independent of the judiciary department, and its decisions are not subject to be reversed by the court. It occupies in this state the same relation to the state judiciary as the land department of the United States does to the United States courts, and their decisions have not been the subject of review by the United States courts. * * * The board is the land department of this state, and their decisions as to who shall receive a patent to land is conclusive on the courts."

This view has been consistently adhered to ever since. See Robertson v. State Land Board, 42 Or. 183, 70 Pac. 614, Miller v. Wattier, 44 Or. 347, 75 Pac. 209, and Robertson v. Low, 44 Or. 587, 77 Pac. 744. In this last case the court said:

"The board is the state's instrumentality for the sale and disposition of school lands. Although constituted a part of the administrative department of the government under the Constitution, it is nevertheless governed and controlled in the exercise of its functions by the Legislature and the laws emanating therefrom."

Counsel for plaintiffs concede that the land department of the state occupies a position, as it relates to the state judiciary, analogous to that which obtains between the land department of the United States and the courts thereof. In neither jurisdiction will the courts intervene, while the controversy is pending in the land department for decision, and prior to patent, to control the discretionary or judicial action, or such as the latter department is wont to exercise. It is, however, strenuously urged that the board of commissioners occupies a position identical with that which the registers and receivers of the federal land department occupied prior to the act of Congress of 1836, permitting an appeal to the Commissioner of the General Land Office, and thence to the Secretary of the Interior, for review or revision of their acts in passing upon the qualifications of purchasers; and that, when once the board has granted a certificate of sale, it is thenceforth precluded from looking back of it, no matter what fraud has been committed by the applicant in the acquirement of

the certificate, or in what manner the board has been imposed upon whereby its issuance has been induced. And it is further asserted that the board, occupying the position of an inferior officer without revisory powers, is entirely precluded by whatsoever it does with reference to the disposal of the school lands of the state, and under no conditions can it undo what it has done in relation thereto, or correct any step that it has taken if found in error, or that it has been misled or imposed upon. This presents the principal question for consideration. It may be premised (and to this there can be no dissent) that the functions of the land department of the state, like those of the same department of the federal government, are administrative in character, and that the functionaries exercise quasi judicial powers also, and that their acts in the latter capacity, when within the authority of the law, are as binding upon every other tribunal as the adjudications of regularly constituted courts of justice. These principles are so well established that they have become fundamental, and need no citation of authority in their support.

Now, as to counsel's contention. The case of Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737, is relied upon in its support. That case goes no further, however, than to indicate that, if the law stood as it did prior to the act of Congress of 1836, support would be found in the decisions of that court for the position advanced at the hearing that, inasmuch as no special right of appeal or review is given, the decisions of the registers and receivers upon matters referred to them by law for determination are not subject to reexamination by the Commissioner of the General Land Office or the Secretary of the Interior, but are final adjudications as to those matters. In confirmation of that view, the court quoted from Lytle v. Arkansas, 9 How. 314, 333, 13 L. Ed. 153, as follows:

"The register and receiver were constituted by the act a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final."

And further referred to the case of Wilcox v. Jackson, 13 Pet. 498, 511, 10 L. Ed. 264, wherein it is said:

"That the acts of Congress have given to the registers and receivers of the land offices the power of deciding upon claims to the right of pre-emption; that upon these questions they act judicially; that, no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed."

It will be seen that neither of these cases went further than to hold that neither the Commissioner of the General Land Office nor the Secretary of the Interior possessed revisory authority over the adjudications of the register and receiver, and that no appeal or other review lay from the decisions of the latter to the consideration or reexamination of the former. Those cases did not go so far as to hold, or to intimate even, that the register and receiver might not have

revised their own findings, where induced through fraud or imposition, while yet the matter had not passed beyond their control.

In Parsons v. Venzke, 164 U. S. 89, 17 Sup. Ct. 27, 41 L. Ed. 360, a more recent case, a pre-emption entry was made upon public land, and the final receipt of the register and receiver was issued to the entryman. Subsequently a special agent of the Land Department reported to the commissioner that the entry had been fraudulently and unlawfully made; whereupon, upon notice to the entryman, an investigation was had before the local land officers, and carried in due course to the Secretary of the Interior, which resulted in the cancellation of the entry, on the ground taken by the special agent. It will now be observed that there was no appeal from the judgment of the register and receiver in issuing the final receipt; but, proceeding independently of that, on the ground of fraud, the Land Department procured the cancellation of the receipt, thus nullifying the first judgment of the local officers. In that case it was contended that neither the Commissioner of the General Land Office nor the Secretary of the Interior possessed the power to cancel or set aside the entry after the local officers had approved the evidence offered of settlement and improvement, and issued the final receipt. But it was held, on the authority of the case of Orchard v. Alexander, supra, that the action of local land officers on charges of fraud in the final proof does not conclude the government, as the General Land Office has jurisdiction to supervise such action, or correct any wrongs done in the entry, but that such jurisdiction is not arbitrary or unlimited, and is not to be exercised without appropriate notice to the parties concerned. Now the state land department has no inferior officers authorized to pass upon the qualifications of applicants, or to determine their rights to purchase under the law for the administration of the sale of school lands. All these powers and functions are exercised directly by the board of commissioners itself. Hence, there is no need of its possessing any revisory power over inferior officers. The board, therefore, constituting the whole of the administrative department for the sale of these lands, must perform all the functions pertaining thereto, and until the matters of which it takes cognizance under the law are finally concluded, it retains jurisdiction, for some purposes, at least; and it remains to be seen whether that jurisdiction extends to relieving its acts and judgments of any fraud or deception by which they were induced, or to correct wrongs that might have been imposed upon it. As it relates to the sale of school lands, the statute of the state has provided that the state land board may make rules for the transaction of business; that it shall meet to pass upon all matters properly coming before the board for consideration, to hear and decide all questions about priority of settlement and other disputes between applicants, and that all its acts and decisions as to the legal title shall be final as to the right to a deed from the state; that no more than 320 acres of any one kind of land shall be sold to one person; that any person over 18 years of age, who is a citizen of the United States or has declared his intention to become such, is entitled to purchase any of the lands of the state, and, if desiring to purchase, shall file with the state land board an application containing a precise description of the lands in

view, which shall be accompanied by the affidavit of the applicant to the effect that he is over 18 years of age and a citizen of the United States, or has declared his intention to become such; that the proposed purchase is for his own benefit, and not for the purpose of speculation; that he has made no contract or agreement, express or implied, for the sale or disposition of such lands, and that there is no valid adverse claim thereto; that payment may be made by installments, at the election of the purchaser, and that, if he so elects, the board is required, upon receipt of one-fifth of the purchase price, to deliver to him a certificate that he has purchased the lands therein described, has paid a certain sum therefor, and has undertaken to make certain other payments, specifying the amounts, time of payment, etc., and that, upon making full payment, as required, he, or his heirs or assigns, shall be entitled to a deed for the lands therein described; that duplicates of the certificates of sale so issued shall be preserved in a bound volume; that all assignments of certificates of sale shall be executed and acknowledged in the same manner as a deed to real estate, and the assignee, upon full payment of the amount due of the purchase price, and delivery to such board of the certificate and assignment, shall receive a deed for the lands described in his own name, as if he were the original purchaser. Sections 3299, 3300, 3302, 3304, 3306, 3308, and 3309, B & C. Comp.

Being bound to the observance of the law, the board is inhibited from selling to any but qualified purchasers. It cannot sell to an alien. Spencer v. Carlson, 36 Or. 364, 59 Pac. 708. Nor can it sell more than 320 acres of land to any one person. Warren v. De Force, 34 Or. 168, 55 Pac. 532. Nor, for like reasons, upon which these authorities proceed, could it sell to a person under the age of 18 years, or to any one for the benefit of another, or for the purpose of speculation. Every individual contemplating a purchase of school lands is as much bound by the law as is the board itself, and it follows as a corollary that none can obtain any valid rights with respect to such lands in violation or in defiance of the law. It is quite true that an applicant, when he has paid the requisite installment and obtained his certificate of sale from the board, acquires what is appropriately styled a "vested right" to the land involved; but that right is grounded upon the condition that he has proceeded fairly, and not fraudulently or in defiance of the law, as no valid right can be founded upon the fraud of the party seeking its sanction, unless by lawful consent or ratification of the other party to the contract. The certificate of sale is not the final act of the board in the consummation of the sale. The law prescribes that the board shall execute a deed upon the payment of the balance of the purchase price; therefore, the sale is not completed, nor the title vested in the purchaser, until such deed is executed and delivered, or such acts have been performed as are the equivalent of delivery. Shively v. Pennoyer, 27 Or. 33, 39 Pac. 396. Nor is the case of Gliem v. Board of Commissioners, 16 Or. 479, 19 Pac. 16, opposed to this view. In the meanwhile, the legal title remains in the state, and the purchaser has the equitable title only. The administrative functions of the board do not cease, and its jurisdiction

and duty to see that the title vests lawfully, or, in other words, that it is not obtained contrary to law, still remain. If it be said that the board acts quasi judicially in determining the qualifications of the purchaser, in granting the certificate, it does not lose jurisdiction of the cause by what is then done, as do the registers and receivers under the federal system. But, being intrusted with the entire administration of the sale of the state's public lands, it retains jurisdiction of the subject-matter, as does the Land Department of the general government, until the sale is finally consummated by a full compliance with the prerequisites for obtaining title, and the patent has issued. Now, such being the functions of the board, why may it not institute proceedings before itself, upon giving proper notice to the purchaser, as did the Commissioner of the General Land Office before the register and receiver in the case of Parsons v. Venzke, supra, to determine whether or not the applicant has procured his certificate fraudulently; and, if it be found that he has, then why may it not go further, and cancel the certificate? It seems only natural that it could do all this, and solely by virtue of its authority to administer the land department or the sale of the public lands of the state. The power is deducible otherwise, I think, from the authority to hear and determine all questions about priority of settlement or other disputes between applicants, and the provision that all its acts and decisions as to the legal title shall be final as to the right of a deed from the state. Scarcely greater powers are conferred upon the Secretary of the Interior under the acts of Congress, and yet it has been firmly settled that the federal Land Department is fully authorized to inquire, at any time before patent is issued, whether the original entry is in conformity with the act of Congress, and, if not, to cancel it. Cornelius v. Kessel, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; Knight v. U. S. Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591; Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157; and American Mortgage Co. v. Hopper, 64 Fed. 553, 12 C. C. A. 293.

Suppose another person, being qualified, had made application for the land in dispute, and thereby controverted the right of the plaintiffs to a deed. This would have brought on a contest, and the board would clearly have had the authority to determine, as between the contestants, who was entitled to the deed. If, therefore, it has this power to determine as between contesting parties, it has also the power to determine whether the applicant is entitled to a deed when fraud is otherwise charged against him, for the protection of the state in the disposition of its public lands. The board must do right toward the state as well as toward the purchaser, and it could not serve the state properly by executing a deed upon a fraudulent application, when it has come into the knowledge of the fact. And if it did not possess power to cancel the certificate, yet it would be grossly derelict in duty if it, notwithstanding the fraud practiced upon it, proceeded to vest title in pursuance of such an application. I am firmly of the opinion, however, that it possesses the power to cancel, and to place the land again upon

the market for a resale. The certificate, in a sense, evidences a contract between the board or the state and the applicant. But it is a contract made with reference to the law regulating the sale of school lands, and, in view of the authority of the board to properly administer the sale of such lands, and to see that right is done to both the purchaser and the state, to the state as well as to the purchaser. Ordinarily, the state or the general government would, I presume, like an individual, be required to tender back the purchase price upon rescission of the contract of sale before it could insist upon a cancellation; but the present is not a case of that kind. The contract is not as if it were made between private individuals, where, if a fraud is committed by one party or the other, it does not usually render the contract void, but voidable only, and subject yet to adoption as a valid agreement. The board, of course, can do nothing except as the law has prescribed, and, if it has been imposed upon by a fraudulent application, it cannot, notwithstanding, issue the deed contrary to law. Nor is it made conditional upon its withholding the deed that it return the portion of the purchase price advanced. Certainly the board cannot circumvent the law by refusing to refund the payments advanced, and thereby ratify an unlawful purchase. Neither can the fraudulent purchaser require the repayment of such money as a condition precedent to the withholding of the deed. Nor was it intended that the board should be driven to a resort to the courts to rid itself of the fraud, or should be required to observe all the conditions incident to private contractual relations before it can be entitled to relief; but it may, by the exercise of the functions afforded it under the Constitution and the law, determine the matter for itself, either when presented through contest between applicants, or by proceeding inaugurated in its own behalf. Knight v. U. S. Land Association, supra.

I have not examined the statute relative to the authority of the board to employ funds that have gone into the hands of the State Treasurer for the purpose of making a tender back of purchase money paid in such cases, and hence do not pass upon the question; deeming it unnecessary to a decision of the present controversy. If the board possessed such authority, it was not necessary that it exercise it as a prerequisite to its authority to cancel the certificate. If it has not such authority, the matter may appropriately be referred to the Legislature. I am impressed that equitably such portion of the purchase price as has been paid to the board should be repaid to the plaintiffs, as they evidently purchased the certificate from Kelliher without knowledge of the forgery attending the application. That circumstance, however, does not constitute them innocent purchasers for value.

This leaves one question yet to determine, and that is whether plaintiffs are innocent purchasers for value of the certificate of sale, so as to relieve them of the consequences of the fraud inducing and attending its issuance. The law permits an assignment of the certificate, and prescribes how it shall be done, but does not constitute the purchaser an innocent holder for value. The certificate lacks the qualities of negotiable paper, and therefore passes like any other contract by

assignment; the assignee stepping into the shoes of the assignor, and occupying his position, with no greater protection or rights. Neither is the assignee of the certificate a purchaser of the legal title to the land; that remains in the state. He is simply a purchaser of the contract, which transfers to him the equitable title that his assignor held before him by virtue of the same contract. While dealing with reference to the equitable title, the purchaser thereof cannot become, unless in exceptional cases, an innocent purchaser of the legal title. That remains outstanding, and he must look through his purchased and assigned contract for the acquirement thereof. If, therefore, such contract is tainted with fraud, he takes charged with the infirmity, the same as his predecessor was charged with it before him, and must abide the consequences. Hawley v. Diller, supra, American Mortgage Co. v. Hopper, supra, and Taylor v. Weston, 77 Cal. 534, 20 Pac. 62. Neither does the assignment make of the contract a different one than when first entered into. It remains the same, and the contractual relations continue the same.

These considerations require that the demurrer to the bill of complaint be sustained, and it is so ordered, and the bill will be dismissed.

UNITED STATES v. SHERIDAN-KIRK CONTRACT CO.

(District Court, S. D. Ohio, W. D. December 4, 1906.)

No. 620.

1. CRIMINAL LAW—JURISDICTION—MASTER AND SERVANT—HOURS OF SERVICE.

In a prosecution of government contractors for "unlawfully, intentionally, and knowingly requiring or permitting a laborer or mechanic, employed on public work," to wit, a dam across the Ohio river, to work more than eight hours in a single calendar day, contrary to the provisions of Act Cong. Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], "relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," the offense is not the working overtime by the laborer or mechanic, but is on the part of the contractor in requiring and permitting such overtime work to be done; and hence, where the work is directed, required, or permitted from the Ohio side of the river, the federal court for the Southern District of Ohio has jurisdiction over the offense, notwithstanding some or all of the work may have been performed south of the line which divides the states of Ohio and Kentucky.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 177, 220.]

2. INDICTMENT—COMMISSION OF OFFENSE—TIME—EVIDENCE.

The time of the commission of such an offense as laid in the indictment does not confine the proof within the limits of that period, but proof that the offense was committed on or about the dates fixed in the indictment, if confined to dates prior to the finding of the grand jury, is competent to establish the charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 548.]

3. MASTER AND SERVANT—HOURS OF LABOR—BURDEN OF PROOF.

The rule which places the burden of proof upon the party who, under the circumstances of the case, is best able to make the proof, requires, in a prosecution for violation of the eight-hour law, that the burden of show-

ing the alleged offense was justified by an extraordinary emergency shall be upon the one interposing such a defense, who from the necessities of the case is possessed of special knowledge with reference thereto.

4. SAME—EXTRAORDINARY EMERGENCY—EVIDENCE.
An "extraordinary emergency" in connection with the building of a dam across the Ohio river cannot be construed as a continuing emergency, which would suspend the eight-hour law during the entire life of the contract, nor an emergency growing out of the scarcity of labor, nor can it be made to include, not only the time of the happening of a flood, but also the time required to repair the injuries resulting therefrom; but it is such an unforeseen, sudden, or unexpected emergency as requires immediate action or remedy, and when the emergency passes the privilege ceases.

5. SAME—DEFENSES.
Where a defendant has been notified by government engineers that he can no longer rely on the construction of the eight-hour law given by that department during the years immediately following the passage of the law, he is not entitled to introduce such construction as a defense.

Submitted on Motion for New Trial.

Sherman T. McPherson, U. S. Atty., Edward P. Moulinier and Thomas H. Darby, Asst. U. S. Attys.

Lawrence Maxwell, Jr., Sayler & Sayler and Charles T. Greve, for defendants.

THOMPSON, District Judge. The indictment was found under the act of Congress of August 1, 1892 (27 Stat. 340, c. 352 [U. S. Comp. St. 1901, p. 2521]), entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," which provides as follows:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States govermnent or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

"Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof."

The indictment contains four counts. The first count reads as follows:

"In the District Court of the United States within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit, of the term of October, in the year of our Lord one thousand nine hundred and six. The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the Western division of said district, upon their oaths and affirmations, present that the Sheridan-Kirk Contract

Company is a corporation organized under the laws of West Virginia, and that said company has an office in the city of Cincinnati, Ohio; and that said Sheridan-Kirk Contract Company entered into a written contract with the government of the United States of America on or about October 27th, 1904, for the construction of a dam across the Ohio river, known and particularly described as Dam No. 37; said dam across the Ohio river being situated near Fernbank, Hamilton county, Ohio. That the construction of said dam No. 37 across the Ohio river was a public work of the United States government, duly authorized by the laws of the United States. That Thomas A. Sheridan is one of the principal owners of stock of said Sheridan-Kirk Contract Company, and is one of the managers of said company in the construction of said dam No. 37; and that W. J. Ellison is superintendent of said Sheridan-Kirk Contract Company. That the work on the construction of said dam is directed and carried on from the Ohio side of said river near Fernbank, Ohio. That said Thomas A. Sheridan and W. J. Ellison are in active charge of said dam No. 37 for the said Sheridan-Kirk Contract Company, and as agents and officers of said company have full power to employ, direct, and control laborers and mechanics employed upon said public work, to wit, dam No. 37. That the said Sheridan-Kirk Contract Company, through its duly authorized agents and officers, on, to wit, the eighth day of September, in the year of our Lord one thousand nine hundred and six, in the county of Hamilton, in the state of Ohio, in the circuit and Western division of the district aforesaid, and within the jurisdiction of this court, did then and there unlawfully, intentionally, and knowingly direct and permit one Loy Yagel, a laborer employed by said Sheridan-Kirk Contract Company in the construction of said public work, to work upon said public work more than eight hours in said calendar day. That said Loy Yagel, laborer as aforesaid, upon said day was required and permitted by the said Sheridan-Kirk Contract Company, through its duly authorized officers and superintendent of said public work, to work ten hours upon said calendar day. And the grand jurors aforesaid do further find that there was no extraordinary emergency of any character or kind to require said laborer, Loy Yagel, to work more than eight hours in said calendar day; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The other three counts name different laborers, who, at different times, were required, directed, or permitted to labor upon said public work, but are in all other respects identical with the first count.

The court instructed the jury to return a verdict of "not guilty" upon the fourth count, and submitted the other three counts to the jury, upon which they returned a verdict of "Guilty." The court has not considered all the assignments of the motion for a new trial, but only those presented at the hearing of the motion.

It was urged by counsel for the defendant:

(1) That the court erred in its instruction to the jury upon the question whether the offense charged was committed within the territorial jurisdiction of the court, and in refusing to give to the jury a special instruction upon this question requested by the defendant. The instruction given was as follows:

"It is offered as a matter of defense that there is testimony in the case which shows or tends to show that the offense was not committed within the jurisdiction of this court; that it was committed in the state of Kentucky, and not in the state of Ohio. Now, that is a question which you must decide from the evidence which has been submitted to you. The state line of Ohio extends to the low-water mark on this side of the Ohio river, and not beyond that. If the offense here charged was committed in Kentucky, then this court would have no jurisdiction. The government claims that the work was conducted from the Ohio side, near Fernbank, a village near this city, in Hamilton county, and that this man, Loy Yagel, was permitted by the defendant to

work more than eight hours in one calendar day, and that it was done in the state of Ohio, on this side of the low-water mark in the Ohio river. If the evidence does not satisfy you that the act was committed within the state of Ohio, if there is a reasonable doubt of that, the defendant should have the benefit of that doubt. It is for you to determine from the evidence whether the offense charged was committed within the boundaries of Ohio, and not in Kentucky."

The special instruction which was refused reads as follows:

"To constitute an offense within this district, the work of the laborer or mechanic must have been done within this district; that is, north of the low-water mark of the river. Unless you are satisfied of this fact beyond a reasonable doubt, you will find for the defendant."

The defendant insists that, in order to warrant a conviction, it was not sufficient to show that the laborers and mechanics named in the indictment were required or permitted to work on dam No. 37 more than eight hours in a calendar day, but that it was necessary to show that at the instance of the defendant they worked more than eight hours in a calendar day on that part of the dam which is within the Southern district of Ohio, and that the court should have so instructed the jury. If this be the true construction of the statute, then the contractor may, at will, defeat its operation by limiting the hours of labor to less than eight hours on each side of the boundary line between the states of Ohio and Kentucky, and may with impunity require or permit laborers and mechanics to work seven hours in Ohio and seven hours in Kentucky in any one calendar day. But what is the offense charged in the indictment? It is that the defendant on given days within the territorial jurisdiction of this court did unlawfully and intentionally require and permit certain named laborers and mechanics in the employ of the defendant to work upon a public work of the United States more than eight hours in a calendar day, and is the offense defined by the statute of August 1, 1892. It is not the doing of the work which constitutes the offense. It is not an offense for the laborer or mechanic to work more than eight hours in a calendar day upon a public work of the United States, but it is an offense for the contractor to require or permit it to be done. In this case the work was done on a public work of the United States, and it is immaterial whether it was done in Ohio or Kentucky, but, to justify a conviction, it was necessary for the government to show that the act of the defendant in requiring or permitting it to be done was committed within the territorial jurisdiction of this court, and the jury was so instructed.

(2) That the court erred in its instruction to the jury that it was not necessary, in order to warrant a conviction, to find that the offenses charged were committed on the days named in the indictment, but only that they were committed on or about said days. The time of the commission of an offense laid in the indictment is ordinarily not material, and does not confine the proofs within the limits of that period. The indictment will be satisfied by proof of the offense on any day anterior to the finding. Wharton's Crim. Ev. § 103. The objection made here is covered by the ruling of the court in State v. Munson, 40 Conn. 475. In that case the court say:

"It is doubtless true that the information and proof must be sufficiently certain to protect the defendant from another prosecution for the same offense, and enable him to plead in bar a former acquittal or conviction to a second complaint alleging the commission of the same crime. This information names a particular day, to wit, the 9th of December, and the evidence tends to prove the sale to have been made on some day in that month. There is possibly some plausibility in the claim that this is too indefinite to furnish adequate protection to the defendant, but we think it is not liable to that objection to such an extent as to subject the defendant to serious danger of a second prosecution and conviction. The proof on the trial of the present information substantially covered the entire month, and therefore he could well plead his former conviction in bar of a second complaint or information alleging another and similar offense on any other day in the same month. The result is that by a conviction under a single information containing but one count the defendant practically obtains immunity for a month, and has cause for satisfaction rather than complaint in the vagueness of the testimony as to time."

(3) That the court erred in its instruction to the jury that the burden of proof was upon the defendant to show that the employment of the laborers and mechanics for more than eight hours in a calendar day was justified by an extraordinary emergency. The statute, apparently in furtherance of a general policy sought to be established, limits and restricts the services of laborers and mechanics upon public works of the United States to eight hours in any one calendar day, and declares that it shall be unlawful for any contractor to require or permit such laborers and mechanics to work more than that time, except in case of extraordinary emergency. The restriction is general and absolutely prohibitory, save in the single instance of an extraordinary emergency which threatens injury or destruction of property, or other loss and injury. The fact of such an emergency would be especially within the knowledge of, and should be shown by, the contractor as a matter of defense. To require the government to show that no emergency had arisen to excuse noncompliance with the statute would practically defeat its enforcement. It would compel the government to anticipate and be prepared to prove the nonexistence of all probable or possible emergencies which might be suggested to the jury by the defendant. During the trial it was urged that a scarcity of labor, due to the prosperity of the country, presented an extraordinary emergency, which, as long as it continued, if for years, would suspend the operation of the statute for the benefit of the contractor, and according to the contention of the defendant would require the government to anticipate the defense and be prepared to prove the nonexistence of the emergency. The administration of justice would not be promoted, but hindered, by such course of procedure. An examination of the decisions of the courts bearing upon the point, as a rule, will show that the burden is placed upon the party who, under the circumstances of the case, is best able to make the proof. Nelson v. United States (C. C.) 30 Fed. 116, 117; Moody v. State of Ohio, 17 Ohio St. 110; United States v. Cook, 17 Wall. 173, 21 L. Ed. 538.

(4) That the court erred in its instruction to the jury explaining the meaning of the phrase "extraordinary emergency," as used in the statute. The claim of the defendant is, and was urged during the trial, that the phrase "extraordinary emergency" should be construed (1) to cover not only the time of its happening, but also the time spent in

repairing the injuries to the work caused by it and in restoring the work to its former condition, and (2) to cover the entire time employed in constructing the dam in question, as expressed in special charges 5 and 6 requested by the defendant and refused by the court, which read as follows:

"(5) The extraordinary emergency referred to in the statute is not necessarily one that must arise without warning during the progress of the work. You are entitled to consider whether the extraordinary emergency is not one inherent in this case to the entire work covered by the contract, from the beginning of the work to its completion.

"(6) It is proper for you to consider whether or not the entire work under this contract is emergency work of an extraordinary character within the meaning of this statute."

Upon these points the court instructed the jury as follows:

"An extraordinary emergency, in the view which the court takes of the statute, is something unforeseen, sudden, unexpected, which would call for immediate action or remedy; and when confronted with a situation of that kind, with the view in this instance, if you please, of protecting the work from being destroyed by flood, the defendant might require or permit the men to work more than eight hours—to work as many hours as might be necessary to meet the emergency and to prevent the injury that might follow. * * * The contractor may require or permit laborers and mechanics to work more than eight hours in a calendar day to protect the work from injury and destruction, threatened by an extraordinary emergency; but may not do so merely to repair losses caused thereby. When the emergency passes, the privilege ceases."

And:

"It is suggested in the argument of counsel that such work as this, building a dam across the Ohio river, is in its nature emergency work, and that all work done would fall within the provision of this statute which recognizes the right to employ labor for as many hours as men are willing to work; but the court does not approve that view. I present to you the other view as the one by which you must be bound—that the defendant has a right to employ labor more than eight hours a day to meet an emergency and to protect property and the work that is being done, but that, when the emergency has passed, it is not the court's understanding of the law that the men may be permitted or required afterwards to work 10 or 12 hours or more each day, in order to restore the original conditions. The language 'extraordinary emergency' cannot contemplate conditions of danger which necessarily exist and inhere in the work to be done and which will always be present from the beginning to the end of the work. If the statute contemplated anything of that kind, I think different language would have been used to express it."

The words "extraordinary" and "emergency" are defined in the Century Dictionary as follows:

"Extraordinary: 1. Being beyond or out of the common order or rule; not of the usual, customary, or regular kind; not ordinary. 4. Exceeding the common degree or measure; hence, remarkable; uncommon; rare; wonderful.

"Emergency: 2. A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. 3. A sudden or unexpected occasion for action; exigency; pressing necessity."

The contract does not recognize the work of constructing dam No. 37 as a continuing extraordinary emergency, a work undertaken to meet a sudden and unexpected happening, one out of the common order

or rule, nor as presenting a sudden or unexpected occasion for action. It contemplates and makes reasonable provision for the delay caused by the supervention of extraordinary and unforeseeable conditions, and excludes the assumption that the work itself is one of continuing extraordinary emergency which wholly suspends the operation of the eight-hour law. When confronted with an "extraordinary emergency" within the meaning of the statute, the laborers and mechanics may be required or permitted to work overtime in protecting property during the emergency, but not afterwards for the purpose of minimizing the losses of the contractor. Paragraph 35 of the specifications of the contract provides that:

"It is expected that each prospective bidder will visit the site of the dam, and make such examination as will enable him to form his own conclusions respecting the bearing of local conditions on the proposed work; also that he will visit the U. S. engineer's office at Cincinnati where he may obtain valuable information respecting floods, high and low water periods, and other data concerning the general character of the river necessary for the preparation of intelligent proposal."

Paragraph 20 provides that:

"Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the propopsed contract, including local conditions, uncertainty of weather, and all other contingencies."

Paragraph 31 provides that:

"The contractor will be required to commence work under the contract within thirty (30) days after the date of notification of approval of the contract by the Chief of Engineers, U. S. army, to prosecute the said work with faithfulness and energy and to complete it within three hundred and fifty (350) fair working days after the date of commencement."

Paragraph 47 provides that:

"In computing the fair working days (par. 31), allowance will be made for a total suspension of work from December 1 to June 1, and for all other days when work is stopped by ice, freshets, etc., including the necessary stoppage to protect or remove plant just before floods, and to pump out and replace plant after floods."

Paragraph 32 provides, among other things, that the department may—

"Waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or state quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract."

Paragraph 51 provides that:

"By continuous operation is meant, that excavation, filling, and laying of concrete masonry is to be carried on continuously during the 24 hours of each day (except Sundays and holidays) by three shifts of eight hours each."

Paragraph 50 provides that:

"In case of extraordinary emergency, to be determined by the U. S. engineer, work on Sundays or legal holidays may be required or permitted. Ordinarily it will not be permitted."

The defendant, as bidder on the contract, was required to visit the locality of the work, and to make its own estimates of the facilities and difficulties attending the execution of the contract, including uncertainty of weather and all other contingencies, and, to assist it in doing so, it was invited to visit the United States engineer's office at Cincinnati, where it could obtain valuable information respecting floods, high and low water periods, and other data concerning the general character of the river necessary for the preparation of intelligent proposal, before it entered into a contract. The contract required the defendant to complete the work within 350 fair working days, but in computing fair working days allowance was made for a total suspension of work from December 1st to June 1st, and for all other days when work was stopped by ice, freshets, etc., including the necessary stoppage to protect or remove plant just before floods and to pump out and replace plant after floods. And the department had authority to waive, for a reasonable period, the time limit originally set for completion, and to remit the charges for expense of superintendence and inspection for so much time as in the judgment of the said engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or state quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, etc.

In short, reasonable provisions were made to meet and protect the defendant against the difficulties and hindrances incident to the work, which experience taught might be expected, but did not, as a remedy for these difficulties, contemplate or confer upon the defendant the privilege of working the men overtime, but only an extension of the time limit and a remission of charges for inspection, etc. Nevertheless, the contract also recognized the fact that extraordinary emergencies might arise, and, in addition to the overtime which might be required of the men under the statute, provided that they might also be required to work on Sundays and holidays. The contract, however, in recognition of the eight-hour law, also provided that, excepting Sundays and holidays and cases of extraordinary emergency, the work should be carried on continuously during the 24 hours of each day by three shifts of 8 hours each. Neither the law nor the contract justify the assumption that the work was one of continuing extraordinary emergency, or that a case of extraordinary emergency would cover the time employed in repairing the injuries, and in removing the obstacles caused by the flood. The phrase "continuing extraordinary emergency" is self-contradictory. A condition or conditions which necessarily must continue for years cannot be called an uncommon, sudden, unexpected happening, which presents a sudden and unexpected occasion for action.

(5) That the court erred in refusing to admit as evidence certain letters and documents offered by the defendant. The court refused to

admit as evidence the following letters, namely: The letter of George A. Zinn, dated August 30, 1904, addressed to Brig. Gen. George A. Mackenzie, chief of engineers, United States army, and marked: "Defendant's Rejected Exhibit No. 6." The letter of William P. Craighill, dated May 15, 1893, addressed to Zimmerman, Truax & Sheridan, and marked: "Defendant's Rejected Exhibit No. 7." Copies of general orders Nos. 7 and 9, dated, respectively, August 1, 1892, and October 15, 1892, from headquarters corps of engineers, and marked: "Defendant's Rejected Exhibits Nos. 8 and 9." The printed poster headed "100 Men Wanted," marked: "Defendant's Rejected Exhibit No. 13." The letter of the defendant, dated August 19, 1904, addressed to Maj. George A. Zinn, and marked: "Defendant's Rejected Exhibit No. 14." The letter of defendant dated August 25, 1906, addressed to the chief of engineers, United States army, and marked: "Defendant's Rejected Exhibit No. 15." The letter of defendant, dated August 15, 1906, addressed to chief of engineers, War Department, and marked: "Defendant's Rejected Exhibit No. 17." The letters and orders of 1892, 1893, and 1894 evidenced the construction given to the eight-hour law, during these years, by the officers of the corps of engineers, and by the War Department, and were offered as tending to show that the defendant in requiring or permitting the men to work overtime did not intend to violate the law, and were rejected by the court upon the ground that the defendant was, by the letters of August 20 and 29, 1906, advised that that construction of the law had been repudiated by the department. By the letter of August 20, 1906, the defendant was advised that:

"(1) Receipt is acknowledged of your letter of August 15, 1906, in reference to the recent action of the department relative to the eight hour law of August 1, 1892. (2) The chief of engineers has no discretion in the matter but is required to submit to the War Department a report in every case in which 'laborers and mechanics employed by any contractor or subcontractor upon any public works of the United States are now required or have been required in the past two years to work more than eight hours in a day.' Such report will include a statement as to the emergency, if any, under which this work was performed."

And by the letter of August 29, 1906, was advised that:

"This office has nothing to add to its letter of August 20th, except to say that it will not undertake to decide what constitutes an emergency under the law."

And the defendant was put on notice that it could no longer rely upon that construction of the law, by the failure of the department to give any other or further answer to the letters of August 15 and 25, 1906, than was given by the letters of August 20 and 29, 1906. This question was fully discussed by the court at the trial, as shown by the record. The ground of the refusal of the court to admit Exhibit No. 13 has already been given in its discussion of what constitutes an "extraordinary emergency" within the meaning of the statute.

The motion for a new trial will be overruled.

WOOD et al. v. BABBITT et al.

(Circuit Court, D. New Jersey. January 12, 1907.)

1. USURY—BURDEN OF PROOF.
The burden of proof of usury always rests on the party pleading it.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, § 308.]

2. SAME—EVIDENCE—WEIGHT.
It is insufficient to establish usury that the circumstances proved render it highly probable that a corrupt bargain was made, but such bargain must be proved beyond a reasonable doubt by the decided preponderance of the evidence.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 328–339.]

3. BILLS AND NOTES—BONA FIDE PURCHASER—USURY.
Where W. became the holder of a note alleged to have been given as a bonus for a loan pursuant to a usurious contract, for full value before maturity and without notice of any illegality or infirmity connected therewith, the defense of usury was not available as against him or his executors.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 982–984.]

4. USURY—PLEADING.
Where a plea of usury failed to set forth the facts and circumstances of the alleged usurious contract with any degree of precision, and contained no direct averment of a corrupt intent, and did not precisely state the terms and nature of the usurious agreement or transaction with all the facts and circumstances relating thereto, it was fatally defective.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 272, 279–281, 285, 286, 294, 295.]

In Equity.

Collins & Corbin (Burr, Brown & Lloyd, of counsel), for complainant.

Henry H. Fryling, for defendant Anna D. Babbitt.

Samuel W. Beldon, for defendant Fidelity Trust Co.

CROSS, District Judge. The complainants, who are the executors of the last will and testament of William Brewster Wood, deceased, are seeking in this action to obtain a decree against the defendants for the payment of the amount due upon two several promissory notes made by the defendant, Anna D. Babbitt dated March 24, 1902, by one of which notes she promised to pay to the order of the said William Brewster Wood, in the city of Philadelphia, on March 24, 1905, the sum of $10,000, together with interest at 6 per cent. per annum, payable semiannually, and by the other of which she promised to pay to the order of the New York Finance Company, at its office in the borough of Manhattan, in the city of New York, the sum of $5,000, at and after the death of one Charles G. Campbell. At the foot of each of said notes, the maker thereof pledged as collateral security for the payment thereof, all her right, title, and interest in and to the estate of said Charles G. Campbell, coming to her at his death, as by certain assignments bearing even date therewith, would more fully appear. These assignments will be referred to more fully later. Prior to the making of these notes, and in the month of July, 1898, Charles G.

Campbell, above mentioned, conveyed all his property, real and personal, to the defendant, the Fidelity Trust Company, in trust, among other things, first, to pay the charges against the same; and then to pay the income therefrom arising during his lifetime, as therein directed, and, at his death, after making two specified payments of $10,000 each, "to divide the balance of said trust estate then remaining, among the heirs at law of Charles G. Campbell, according to the intestate laws of the state of New Jersey; the personal property of said estate then in the hands of the trustee to be divided as aforesaid, according to the statute of distributions, and the real property then remaining in possession of the trustee, to be divided as aforesaid, according to the statute of descent." The evidence shows that at the death of said Charles G. Campbell, which occurred on May 29, 1905, he left him surviving three children—one of whom is the defendant Anna D. Babbitt, who, at his death, became entitled to one-third of his estate remaining in the hands of said trustee, after deducting therefrom the specific payments above mentioned. It was this interest in the trust estate that Mrs. Babbitt pledged as collateral security for the payment of the notes above mentioned, not only by pledge appearing upon the face of the notes, but also by separate deeds of assignment of even date with the notes, in which her husband united, and which deeds of assignment were duly acknowledged by the assignors. The note made to the order of New York Finance Company, was, on the day of its date, duly indorsed and delivered to the complainants' testator, and the interest in the trust estate which she had assigned to the finance company, as collateral security for the payment of that note, was by a separate instrument, assigned and delivered by the finance company to William Brewster Wood, under circumstances which will be hereinafter referred to. The complainants are seeking to recover the amount due upon said two notes, for principal and interest; and, by their bill of complaint ask that the Fidelity Trust Company may account for the estate remaining in its hands, and that the amount found due upon such notes, may be decreed to be paid by it to the extent that it, as such trustee, may have funds in its hands belonging to the said Anna D. Babbitt, applicable to the payment of said notes. Each of the defendants has answered; the defendant Anna D. Babbitt by her answer claiming that the notes were given in connection with, or as a part of a usurious transaction or transactions, and that the $5,000 note represents the amount of usury which she was compelled to pay in order to procure the loan of $10,000, represented by her note for that amount; and the Fidelity Trust Company by its answer, among other things, denying that any accounting is necessary to determine the amount of the trust estate in its hands belonging to Anna D. Babbitt, because it admits that her interest therein is largely in excess of the amount claimed by the complainants to be due to them from the said Anna D. Babbitt.

The notes referred to were given under the following circumstances: Early in the month of March, 1902, Mrs. Babbitt's attention was directed to an advertisement in the New York Sunday Herald, which represented in substance that one Helffrich could

procure loans as desired, upon estates in expectancy. She thereupon called upon Helffrich, who introduced her to a representative of the New York Finance Company; which company had an office in the same building with Helffrich. There is some conflict in the evidence as to who the representative of the finance company was, to whom Mrs. Babbitt was in the first instance introduced, but at all events, after an interview between Mrs. Babbitt, such representative, and Helffrich, the latter drew up an agreement dated March 11, 1902, which recited that Mrs. Babbitt had applied to the New York Finance Company to negotiate a loan for her of $10,000, on a certain legacy or devise, as it was called, coming to her under an irrevocable deed of trust made by Charles G. Campbell, of Morristown, N. J., to Fidelity Trust Company, as trustee, which said legacy or devise, it was further recited, was to come into her actual possession at the death of said Campbell, and that said loan was to be negotiated upon certain terms and conditions therein stated, the pertinent parts whereof are as follows:

"And I do further undertake and agree with the said New York Finance Company that, in consideration of its negotiating the aforesaid loan for me, and of guarantying me against any demands for the payment of the principal thereof, and against any foreclosure of the same until after the death of the aforementioned Charles G. Campbell, and also of its paying the interest on the said loan for me as the same may from time to time accrue at the rate of 6 per cent. per annum, and also of the payment of the premiums upon a satisfactory policy of insurance upon my life as they may from time to time mature and become payable, that there shall be paid to the New York Finance Company for such services and advances as aforesaid, the sum of five thousand dollars ($5,000) together with the actual moneys advanced for interest and premiums as hereinbefore recited; it being understood and agreed, however, that the said sum of five thousand dollars, together with the afore-mentioned advances on account of interest and premiums, and together with the principal loan of ten thousand dollars, shall be paid out of the legacy and devise hereinbefore referred to."

And, in addition to the foregoing, by the last paragraph of the agreement, it was provided that Mrs. Babbitt should execute and deliver such instruments as might be necessary to secure the payment of the loan of $10,000, and the moneys to the New York Finance Company as therein above recited.

The foregoing agreement was signed and sealed by Mrs. Babbitt, and witnessed by her husband and Mr. Helffrich. In brief, it shows that the company was to negotiate a loan of $10,000 for Mrs. Babbitt, and was to be paid for its services in guarantying the continuance of the loan, and advancing interest and life insurance premiums, the sum of $5,000. The matter of procuring the loan of $10,000 for Mrs. Babbitt, was intrusted by the New York Finance Company to one Charles H. Burr, a member of the bar of the state of Pennsylvania, who, in turn, spoke of it to one James McF. Gummey, then engaged in real estate business in Philadelphia. Both of these men were directors in the finance company, and Gummey had general charge of the investments of Mr. Wood. The loan was subsequently recommended to Mr. Wood by Gummey, and he, Mr. Wood, and Mr. Burr, later went to Newark and looked at some of the real estate included in the trust, and after such examination, Mr. Wood agreed to take the loan,

and on the same day further agreed to take from the New York Finance Company, a note of Mrs. Babbitt for $5,000, which should be secured on the same trust estate, subject only to the lien thereon in favor of the $10,000 loan, which he had already agreed to take. The $5,000 loan to the company, however, was to be secured to Mr. Wood, not only by the indorsement to him, by the New York Finance Company, of Mrs. Babbitt's note for that amount, and by an assignment of her interest in the trust estate given the finance company as security for its payment, but also by the finance company's own note to Mr. Wood, for $5,000, payable in five years. After arranging the matter upon the above basis, Mr. Wood left the matter in the hands of Messrs. Burr & Gummey for completion, and the transaction was subsequently carried out on the basis above outlined. Mr. Wood, in his private books, always treated the transaction as a single loan of $15,000. So far as the evidence discloses, he knew nothing of the consideration of, or circumstances under which, the $5,000 note was given by Mrs. Babbitt. He relied on Gummey, however, to see that the papers were put in proper form, and paid over his money to Mr. Burr, who was the Philadelphia agent of the New York Finance Company. He first offered his check for the loan to Gummey, who told him, as a matter of convenience, to hand it to Mr. Burr, which he did; that this sum of $15,000 went to the New York Finance Company from Mr. Wood for the purpose above stated is incontrovertible. The evidence clearly shows it, and as clearly shows also that Mr. Wood did not, at any time, receive any bonus or usurious interest, or have knowledge that any was taken, or was to be taken by anybody, if such was the fact. It further affirmatively appears that no promise or agreement was made to Wood that he should at any time receive anything above legal interest upon the moneys he had loaned. So far as the evidence discloses, he, in good faith, made a loan of $15,000 upon the securities indicated, and received 6 per cent. interest thereon to the time of his death. Mr. Wood subsequently made other loans of a somewhat similar character through the New York Finance Company, but they have no bearing upon this transaction, since it appears that this was the first he had ever had with the company, and also the first, or nearly the first, that the company itself had had. It may appropriately be said at this point that the answer of Mrs. Babbitt grounds her claim for relief substantially, upon the allegation that Mr. Wood and the New York Finance Company were "one and the same person or concern, or if not one and the same person and concern, the said William Brewster Wood was a stockholder or partner in said New York Finance Company, or had some interest therein, or such close business relations with it as that whatever profit or money was made or attempted to be made legally and illegally by the said New York Finance Company, was shared in by, and paid to the said William Brewster Wood." Not only were these allegations not proved, but they were absolutely disproved. The evidence establishes that Wood never at any time had any interest in, connection with, or control over, that corporation or its affairs, and that he never, in any way shared in its profits or business. Briefly stated, then, Mr. Wood

loaned $15,000—$10,000 of which was secured by a note of Mrs. Babbitt to his order, accompanied by an assignment to him of her interest in the trust above referred to, and the balance of which was loaned by him to the New York Finance Company upon the note of Mrs. Babbitt, for $5,000 to the order of, and indorsed to him by, the New York Finance Company, secured by an assignment from the company of her interest in said trust held by it as collateral to the note, and also by the note of the New York Finance Company for $5,000, payable to Mr. Wood in five years from its date. Mrs. Babbitt received on the $10,000 note when the transaction was completed, $9,200 in cash, $500 additional by check to her order, which she indorsed to her broker, Helffrich, while $300 was reserved by the New York Finance Company, by her consent, until she should present to such company a satisfaction piece or discharge of a judgment entered against her in one of the courts of New Jersey, for substantially that amount. The evidence shows that, although she paid this judgment about a year ago, she never informed the company of that fact, much less produced to the company a satisfaction piece or discharge thereof, hence it was fully justified in retaining that sum under the agreement, for her account. Mrs. Babbitt has therefore received full value for the $10,000 note, which she made to Wood's order. As to the note for $5,000, it appears that the New York Finance Company has advanced, pursuant to the agreement above set forth, all the interest which accrued on the $10,000 note, prior to the death of Charles G. Campbell, and also the insurance premiums on the policy taken out on her life, aggregating in all between $3,000 and $4,000.

The burden of proof always rests upon the party setting up usury. The facts necessary to constitute it must be clearly established beyond reasonable doubt by the decided preponderance of evidence. It is not enough that the circumstances proved, render it highly probable that there was a corrupt bargain; such a bargain must be proved, and not left to conjecture. Berdan v. Trustees, etc., 47 N. J. Eq. 3, 10, 21 Atl. 40, s. c. affirmed on the opinion below, 48 N. J. Eq. 309, 24 Atl. 130; Taylor v. Morris, 22 N. J. Eq. 606, 612; Guardian Mutual Life Ins. Co. v. Kashaw, 66 N. Y. 544, 547, 548. In the view I take of this case, however, it is unnecessary to determine whether the $5,000 note was usurious in its inception or not, since I find that Mr. Wood became the owner and holder of it for full value before maturity, and without notice of any illegality or infirmity connected therewith. These facts under the "negotiable instrument law" of the state of New York, passed in 1897, render the note free from defenses available to prior parties among themselves. But aside from this, and assuming that the $5,000 note was taken as a bonus in pursuance of a usurious contract or agreement between Mrs. Babbitt and the finance company, such defense cannot be imputed to Mr. Wood, or his executors, without affirmative proof that he had some knowledge of, or interest in, the illegal transaction, which, as already stated, he did not have. Lane v. Washington Life Ins. Co., 46 N. J. Eq. 316, 19 Atl. 617, 618; Guardian Mutual Life Ins. Co. v. Kashaw et al., 66 N. Y. 544; Van Wyck et al. v. Watters, 81 N. Y. 352; Philips et al. v. Mackellar, 92 N. Y. 34.

I have considered the issue presented in this case upon its merits, and the conclusion I have reached renders it unnecessary to consider whether usury was well and sufficiently pleaded within the established rules on that subject. Nevertheless, as the insufficiency of the answer in that respect has been raised and strongly urged, it is not improper, and perhaps, upon the whole, it is better that it should be passed upon, particularly as, in my opinion, the answer is deficient in the respect mentioned. It is well nigh impossible to determine therefrom, whether the pleader intended to allege that the two notes constituted one or two transactions, or whether one or both of them were usurious, and, if so, whether they were usurious under the law of the state of New York, or of the state of Pennsylvania, or of both. At one time the allegation is made that the transaction was usurious under the law of Pennsylvania, again under the law of New York, and still again under the law of both states. Considered as a whole, the answer is loosely drawn, has no direct averment of corrupt intent, and the facts and circumstances of the alleged usurious contract are not set forth with any degree of precision. The answer is of an omnibus form, and apparently was designed to meet any and every situation which the evidence might discover. In 22 Enc. of Pl. & Prac., at the bottom of page 430, the rule of correct pleading in such cases is laid down as follows:

"The rule in regard to the pleading of usury has always been exceedingly strict. * * * It is necessary both at law and in equity, that the plea and answer should specifically set forth with the utmost certainty and distinctness, the terms and nature of the usurious agreement or transaction and all the facts and circumstances relating thereto. A general averment of usury is never sufficient."

The doctrine thus laid down is sustained by numerous authorities cited in the footnotes. See, particularly, Kase v. Bennett, 54 N. J. Eq. 97, 33 Atl. 248; Taylor v. Morris, 22 N. J. Eq. 606, 611, the former case holding (page 101 of 54 N. J. Eq., page 250 of 33 Atl.) that the rule of pleading this defense is even stricter in equity than at law.

A decree will be entered in favor of the complainants for the amount due upon the two notes, with interest besides costs.

UNITED STATES v. MacANDREWS & FORBES CO. et al.

(Circuit Court, S. D. New York. December, 1906.)

1. MONOPOLIES—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—INDICTMENT.

An indictment under section 1 or 2 of the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), for engaging in a combination in restraint of interstate commerce, or for attempting to monopolize a portion of the same, sufficiently sets out the time of the combination or attempted monopoly when it alleges the time when the several act relied on to establish the offense were done, and it is not essential to set out the precise time when the purpose was formed or the plan of the combination or attempted monopoly was first devised.

2. SAME—COMBINATION AND CONSPIRACY.

Such an indictment for engaging in a combination and also for a conspiracy in restraint of interstate commerce considered, and *held*, to sufficiently describe the combination and conspiracy.

3. INDICTMENT—DUPLICITY.

An indictment under the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), charging in separate counts a combination and a conspiracy in restraint of interstate trade and an attempt to monopolize a portion of such trade, all based in the same transactions, is not bad for duplicity as to either count, on the theory that each alleged overt act set out to support the charge of conspiracy is charged as a separate offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 337-349.]

4. MONOPOLIES—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—INDICTMENT—JOINDER OF DEFENDANTS—CORPORATIONS AND OFFICERS.

In an indictment under the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the offenses thereunder being made misdemeanors, all who aid in their commission may be charged as principals, and a corporation and its officers, who personally participate in committing the same, may be joined as defendants, although their acts may have been separate and not done at the same time.

5. SAME—NATURE OF SCHEMES PROHIBITED—EFFECT ON INTERSTATE COMMERCE.

Whether any given business scheme falls within the prohibition of the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), as a combination or conspiracy in restraint of interstate commerce, or an attempt at monopoly of a portion thereof, is to be determined by its effect on interstate commerce, which need not be a total suppression of trade nor a complete monopoly, but it is sufficient if its necessary operation tends to restrain interstate commerce, and to deprive the public of the advantages flowing from free competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, §§ 10-14.]

6. SAME.

A secret arrangement between two corporations, which together produced about 85 per cent. of all the licorice paste consumed in the United States and sold to consumers throughout the country, by which they ceased competition, fixed from time to time the prices at which each should sell, and apportioned the customers between them, and also by concerted action secured contracts with their chief, if not only competitors, which enabled them to control either the output of such competitors or the prices at which and the persons to whom they should sell, and in pursuance of which scheme they were enabled to and did advance the price of the article to all purchasers nearly 50 per cent. within a few months, was one directly affecting interstate commerce, and constitutes a combination and conspiracy in restraint of such commerce, and an attempt to monopolize a portion of the same, within the prohibition of the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

7. SAME—JOINDER OF DEFENDANTS IN INDICTMENT.

In an indictment against such corporations under the statute, their presidents, who are alleged to have personally made the arrangement and participated in carrying it out, may be joined as defendants, and cannot claim immunity on the ground that they were not personally engaged in interstate commerce.

8. CORPORATIONS—CRIMINAL RESPONSIBILITY—CONSPIRACY.

A corporation may be liable criminally for the crime of conspiracy.

9. MONOPOLIES—INDICTMENT UNDER ANTI-TRUST LAW—JOINDER OF DEFENDANTS.

A number of defendants may be charged jointly, under section 2 of the anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), with the crime of attempting to monopolize a part of interstate commerce.

On Demurrer to Indictment.

Henry L. Stimson, U. S. Atty., and Edwin N. Hill, Special U. S. Atty. (Henry W. Taft, Felix H. Levy, Edwin P. Grosvenor, and Oliver E. Pagan, Special Assistants to the Attorney General, of counsel).

A. H. Burroughs, for corporate defendants.

Ernest E. Baldwin, for individual defendants.

De Lancey Nicoll, W. W. Fuller, John D. Lindsay, and Junius Parker, of counsel for all the defendants.

HOUGH, District Judge. The indictment demurred to alleges violations of sections 1 and 2 of the act of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Sherman Anti-Trust Law," and contains three counts, the first charging a combination, and the second a conspiracy in restraint of interstate trade and commerce, while the third asserts an attempt to monopolize a portion of the same. All the counts are based upon the same allegations of fact, and, in effect, assert that the same doings, facts, and circumstances constitute at once a combination, conspiracy, and monopoly.

The indictment sets forth in the first count that: (1) Between December 8, 1903, and June 18, 1906, (2) the corporate defendants were engaged in certain business, and (3) the individual defendants were the presidents of the said corporations, and (4) by authority thereof carried on the same business, which (5) was interstate business, and (6) amounted to 85 per cent. of the whole trade in licorice paste, (7) which business should have been conducted competitively as to (8) prices, (9) relative extent of each company's trade, (10) customers sought for and obtained by each company, and (11) terms and conditions of sale, and (12) this competitive method of business the corporate defendants would have followed if (13) all the defendants had not (14) engaged in an unlawful combination, which (15) during the period first specified (16) they all did engage in, and (17) did so by the several means next described in the indictment, whereby (18) interstate trade was restrained (19) in the several ways next also described. Then follows a general description of the "ways" in which, and the "means" by which trade was restrained, during the period alleged, to wit: First competition was destroyed (this is a "way in which") because (a) the defendants agreed that there should be no competition, and (b) fixed excessive noncompetitive prices accordingly, and (c) sold for such prices only, and (d) procured others to do the like. (a) to (d) are "means by which." The second "way in which" is that all customers were apportioned among the corporate defendants and their allies; the third that production was limited, and the fourth that uniform contracts were required from customers. Ap-

propriate "means" are alleged "by which" the second, third and fourth "ways" were rendered effective.

The first (or combination) count then shows at great length very numerous "overt acts" which are really statements of intended evidence, and reveal the sequence of events and the resulting conditions as follows: Prior to and on December 8, 1903, the MacAndrews & Forbes Company (hereinafter called the "MacAndrews Company") was engaged in the manufacture and sale of licorice paste, having factories in Newark and Camden, in the state of New Jersey, and offices in the city of New York; the J. S. Young Company (hereinafter called the "Young Company") was similarly engaged at Baltimore, Md. The defendants Jungbluth and Young were (and at the time of the presentment of this indictment still were) the presidents of the MacAndrews Company and Young Company, respectively. Licorice paste is a substance made from a root not grown in the United States, and is (beside certain apparently limited uses in pharmacy) a prime necessity for the manufacture of plug and smoking tobacco, as well as of snuff and cigars. At the time first mentioned the MacAndrews Company seems to have been by much the largest producer of paste in this country, and, taken together, the two corporate defendants are said to have supplied about 85 per cent. of our national requirements for this substance. There was and is also a manufacturer in Providence, R. I.—one Lewis—and also one in New York—Weaver & Sterry—neither doing a large business, but both seemingly worthy of consideration. Collectively these four producers of paste appear to have been actually supplying almost the entire trade demand. On December 8, 1903, a written agreement was executed by and between the corporate defendants, whereby, through the device of owning control of the common stock of the Young Company, and guarantying ample dividends on the preferred stock thereof, the MacAndrews Company became for all practical purposes the owner of the Baltimore business, and after that date the Young Company, although maintaining a separate corporate existence, became the creature of the MacAndrews Company, whose officers even issued orders directly to at least one person known to the public only as an agent of the Young Company. Shortly afterward, and on December 31, 1903, the Young Company effected a written contract with Lewis, of Providence, whereby the latter agreed for the space of five years to limit his production to a fixed amount per annum, on which the Young Company guarantied him a certain profit, one-fourth of which, however, was semiannually to flow back to the Young Company, while the profit on any excess production and sale by Lewis was to go entirely to the latter company, which was also given power to regulate Lewis' sale price, provided that his minimum profit was not thereby destroyed. For reasons not shown, Lewis' price was always to be one-quarter of a cent per pound less than that of the Young Company. The subsequently alleged transactions show that the control of Lewis' business thus established extended to limiting his customers, and declaring to whom he could and could not sell his produce.

Three of the four above-mentioned producers of paste having thus been bound together by careful contracts, the Young Company, on

January 2, 1904, authorized Lewis to sell at 7 cents per pound, and on January 11 it informed the trade generally that its price was 7¼ cents. So far as alleged in the indictment trade conditions remained as above outlined until the middle of March, when the defendant Young advised Jungbluth that he thought Weaver & Sterry of New York were ready "to come to some agreement," and quoted Sterry as thinking the time ripe for a "sharp advance." Apparently some of the consumers were of the same opinion, and by May 9th Young wrote that some manufacturers had concluded to "stock up all they can," and furnished Jungbluth with a list of certain orders received by his company, tending to prove the truth of his suspicion. Whereupon, on May 14th the MacAndrews Company, having received an order from a manufacturer on Young's list, replied that they had raised their price to 9 cents per pound, and by circular letter informed the trade to the same effect. Two days later the Young Company advised the trade that their price had risen to 8½ cents, and thereafter it is alleged that the quoted rates for licorice paste furnished by the MacAndrews Company were always higher by ½ cent per pound than those of the Young Company, which in turn gave a price one-quarter of a cent a pound greater than that of Lewis. This "sharp advance" evidently did not quench the desire of some manufacturers to lay in an ample supply of paste against the possibility of a further rise, which desire was met in the instances given by informing one applicant that, "owing to political and other conditions in the licorice root producing countries," no continuing contract for deliveries could or would be made, and telling another that the quantity demanded was beyond his "normal requirements," therefore, only one-quarter of the amount asked for would be sold to him. This last applicant was the well known house of Bagley & Co., and in early June the Young Company warned both Lewis and the MacAndrews Company against this concern's tendency to "stock up," which the defendant Young had so paternally checked. By the end of June, 1904, the negotiations between Young and Weaver & Sterry had resulted in an alleged agreement, not reduced to formal contract, so far as shown, that the uniform minimum price for paste should be fixed at 9½ cents per pound after July 1st, that no contracts for furnishing an indefinite quantity even at that price should be made, and that such price agreement should endure, as between the paste producers, until the close of 1906. Jungbluth was in Europe at this time, but cabled his assent to the scheme on July 2, 1904.

Subsequent events appear to show that for the limited trade permitted to Lewis the minimum price was still to be one-quarter cent per pound lower than that charged by the Young Company and Weaver & Sterry. Immediately after July 2d, therefore, it is alleged that the Young Company advised customers of the 9½ cent price, while the MacAndrews Company quoted 10 cents as their price. Weaver & Sterry having thus been placated, and "maintaining their own prices at not less than 9½ cents," the MacAndrews Company, on July 23d, advised the New York agent of the Young Company that it was "the better policy" for Lewis to enter into "further contracts," the form of

which was then "under discussion." A short time afterwards the form and substance of the proposed contracts was declared to the trade at large, and the perfected trade arrangement is alleged to have been explained in a letter from the Young Company's New York agent to Lewis, substantially as follows: As far as pre-existing contracts would permit, the MacAndrews Company would thereafter sell to no one but the factories affiliated with the American and Continental Tobacco Companies; and in case any other manufacturer attempted to buy from the MacAndrews Company, the action to be taken by that company would "be effective"; and, so far as is shown by the indictment, it was effective, and consisted in uniformly demanding a higher price for the product than any one else suggeted. To the "independent tobacco manufacturers" (i. e., others than those comprised in the so-called "trust") Lewis and the Young Company offered a form of contract, binding for two years, whereby the supply demandable by the manufacturer was fixed at a minimum which he had to take, and a 25 per cent. greater maximum, which was all he could get, at 9¾ cents per pound from the Young Company, and 9½ cents a pound from Lewis, with a covenant on the manufacturer's part not to resell, and the price to be subject to increase for the second year. The persons with whom Lewis could make this agreement were fixed ultimately by the MacAndrews Company, which instructed both Lewis and the Young Company to sell to no one whose requirements exceeded 20 cases per annum and who failed to sign the proffered contract. Those who objected to the contract and "very small consumers" (i. e., those using less than 20 cases per year) might still obtain paste at 10¼ cents per pound from Lewis, or 10½ cents per pound from the Young Company; but, as seems to have been authoritatively suggested by the Young Company's agent, the "small people" would "not be able to get their supplies elsewhere, as the MacAndrews Company would have none to sell them anyhow."

The "independent" trade, which seems to mean the general public, did not view the result of these arrangements with pleasure. Instances are alleged of continued endeavors to get paste, first from one and then from another producer. Such infractions of discipline the MacAndrews Company met with a form of letter enjoined upon and distributed by the Young Company, stating that, "in view of present and prospective conditions mainly as to supplies of root," it was thought best to supply only those manufacturers who were "willing to join us in contracts as presented to you," i. e., the two-year obligation heretofore described. These measures were apparently "effective," and by September 2d one firm of the most persistent seekers after licorice paste not furnished under long contract at 9¾ cents per pound had telegraphed their submission, and extended with some humor their "hearty congratulations" to the defendant Young, who had forced the contract upon them; while before the close of that month it is alleged that all demands for paste from persons who had not contracted were bluntly declined for that reason, unless the applicant belonged to the class of "very small consumers," for whom the Young Company's open price was 10½ cents per pound.

If therefore it shall appear that the allegations of the indictment are well pleaded, it is admitted, for the purposes of this hearing, that within the space of eight months the corporate defendants, by the execution of corporate agreements and an arrangement of their corporate activities, in respect of which the individual defendants were the efficient devisers and performers, had obtained substantial control of a business whose produce is essential to one of the largest activities of the country, and had parceled out between themselves and their allies the trade of the Union, so that any given manufacturer's business freedom was reduced to a choice between signing a contract to take what he required from the producer selected for him by the MacAndrews Company, or paying a substantially higher price, than that named in the offered contract, provided he was permitted to buy anything after refusing such contract. During the same short period, and as a part of this successful campaign, the open price of the commodity had been raised nearly 50 per cent., i. e., from 7¼ to 10½ cents per pound, and the increase been made effective for two years—a term not expired at the date of finding this indictment, viz., June 18, 1906.

The second or "conspiracy" count charges that the defendants did "knowingly conspire" and "engage in a conspiracy" in restraint of the same interstate trade within the same period, and did the same things in the same way set forth in the same manner as in the first count; while the third or "monopoly" count charges that "in and by engaging" in the combination first charged the defendants "knowingly attempted to monopolize" the interstate trade in licorice paste.

The specifications of demurrer may be divided into those directed (1) to the form of the indictment, and (2) to the substance thereof.

In point of form it is urged: (a) That the first and third counts do not sufficiently allege the time when the pretended combination or monopoly took place or was committed. (b) That the combination count is bad, because it does not describe the combination, but only its results and effects, without any averment as to how it was to operate in restraint of trade, or that it was when the defendants engaged therein a prohibited combination. (c) That the conspiracy count is bad because it does not sufficiently describe the alleged conspiracy. (d) That all the counts are bad for duplicity, and none of them "charge" the crimes alleged. (e) That in all the counts there is an improper joinder of the corporate and individual defendants, as to which the corporations complain that they are indicted for a violation of law by their officers, while the individuals complain that they are indicted for a violation of law by their corporations, but both declare that they are not jointly indictable therefor.

In point of substance it is urged: (a) That none of the counts describe a crime under the Constitution and laws of the United States, inasmuch as the facts shown can produce at most but an indirect and incidental effect on interstate trade and commerce. (b) That the individual defendants are not alleged to have been, and were not, engaged in interstate commerce. (c) That the individual defendants cannot be guilty under the circumstances shown of any crime under

either section 1 or section 2 of the anti-trust law; every act alleged being a corporate act. (d) That the conspiracy count is bad because a corporation cannot be guilty of conspiracy. And (e) The monopoly count is bad because but one person, acting alone, can be guilty of the offense created by the statute.

(a) Time of combination and monopoly. It is true that the gist of the alleged offenses is the combination or the attempt at monopoly, but it is not true that the offenses are complete when the combination is mentally formed or the mental intention to monopolize arises. The statutory offense, and the one charged herein, does not depend upon "a single agreement, but [on] a course of conduct intended to be continued"; yet, nevertheless, "the thing done and intended to be done is perfectly definite." Swift v. United States, 196 U. S. at page 400, 25 Sup. Ct. 281, 49 L. Ed. 518. That case arose on the civil side of the court, but it is to be remembered that the same facts and acts which expose violators of this statute to civil suit also render them subject to indictment. In this case, while the time is indefinite, the thing done is definite, and that is all that the statute requires.

To show that an exact time may be, and therefore must be, assigned for the commission of the offense of combination, the defendants argue upon the meaning of the word "engage" as used in the statute, and strenuously urge that since the offense prohibited is that of "engaging in" a combination, it must be complete as soon as the accused employs his attention or effort in or about the same, that such employment of attention or effort is capable of precise assignment in point of time, and they challenge the prosecution to name the day.

The statute is not directed against such an abstraction as this. It does not require on the part of the prosecution clairvoyance to discover or locate the offense. Its prohibition is not directed against a state of mind, but against a state of facts. The facts do not simultaneously occur; the events are not contemporaneous. It may, and naturally would, require time for the working parts of the combination to become co-operative, or for the monopoly to become more than a hope; and what is forbidden and renders the actors obnoxious to the criminal law is not an undiscoverable thought or hope, but a perfectly obvious result or condition. The condition or state of facts against which the statute is directed is a continuing condition, and therefore the offense of creating and maintaining that condition is necessarily a continuing offense, and does not, from its very nature, require greater particularity in assignment than is used in this indictment.

(b) Combination not described. The argument that the indictment describes only the results and effects of the combination, but not the combination itself, rests, I think, on a misreading of that instrument. Admitting that it is necessary to charge, not only the commission of the offense, but "all the circumstances constituting" the same (United States v. Greenhut [D. C.] 51 Fed. 205; Re Greene [C. C.] 52 Fed. 104), and excluding from consideration the "overt acts," the combination count not only charges the offense in ampler words than those of the statute, but shows by the "ways in which" the offense was committed all the necessary circumstances; i. e., that the defendant de-

stroyed competition, apportioned customers, limited production, and required uniform contracts. The "means by which" of the indictment are explanatory of the above clear averments, which show both the nature of the combination and the method of its operation.

The special argument for the individual defendants on this branch of the demurrer seems to me to rest on the idea that there must have been a time when the corporations entered into a contract or contracts, which contractual relation was, in and of itself, the prohibited combination, and that the statute should not be construed to apply to those who, not being parties to such original agreement, merely participated at a subsequent time in furthering the objects thereof. "Combination" is a word not yet possessed of an accurate legal meaning; its place in the terminology of criminal law is, I believe, no older than this statute. Of itself it means no more than "co-operation"—a union of effort—and if I am right in believing the act to be aimed at the result of such united effort or co-operation, it can make no difference whether those personally assisting in or contributing to such wrongful result were original laborers in the vineyard or came at the eleventh hour; their statutory recompense is the same.

(c) The conspiracy not described. Unlike "combination," "conspiracy" is a term of art. In the anti-trust law it is to be interpreted independently of the preceding words (United States v. Debs [C. C.] 64 Fed. at page 747), and an indictment thereunder should therefore describe something that amounts to a conspiracy under the act conformably to the rules of pleading at common law, as perhaps modified by general federal statutes. The elements of conspiracy to be here considered are that it must depend upon the concerted action of two or more persons to accomplish an unlawful result by any means, or a lawful result by unlawful means. Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419. The statute declares, in effect, that if the purpose of the concerted action is to restrain trade between the states, such purpose is unlawful, and the concert of action is a conspiracy. It is wide enough to cover, not only a destruction of the trade of competitors by wrongful means, as in United States v. Patterson (C. C.) 55 Fed. 605, but any restraint of interstate trade if the same be accomplished by a predetermined and concerted action of two or more individuals. It is not necessary on demurrer to draw a distinction between the crimes of combination and conspiracy; the sole question is whether the second count states a conspiracy within the act. It is admitted that "what was done in pursuance of the alleged conspiracy is irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictments" (United States v. Patterson, supra, at page 639 of 55 Fed.; United States v. Britton, 108 U. S. 204, 2 Sup. Ct. 531, 27 L. Ed. 698). Laying aside, therefore, the details of the "overt acts," I believe, by the same reasoning hereinbefore applied to the combination count, that the conspiracy count does describe both the nature of the combined action and the illegality of the object sought to be accomplished.

(d) Duplicity, etc. The analysis of the indictment first above made convinces me that each alleged offense is sufficiently charged. The

suggestion of duplicity rests upon the assumption that each one of the alleged "overt acts" is charged as a separate indictable offense. The same analysis shows the error in this argument. The true reason for the rule against duplicity is that the "jury cannot split up a count in an indictment, and find the accused guilty of a part and not guilty of the balance; their verdict must be an entirety." State v. Smith, 61 Me. 386. I can see no possibility of the jury being thus misled in this case.

(e) Improper joinder. By this branch of the demurrer all the defendants admit that the acts alleged were done. The individuals aver that, ex necessitate rei, the acts were of the corporation. The corporations declare that, inasmuch as no corporation can commit a crime except through human instrumentality, the acts were human; but, as there was but one crime, it must be fundamentally wrong to charge both the corporation and its instrument therewith. This argument seems to depend upon the assumption that every factum set forth in the indictment is a piece of joint activity by all the defendants. This is not true. It is charged that the unlawful combination, conspiracy, or monopoly was the result of joint action, but all of the persons alleged to be jointly responsible were not necessarily all doing the same things at the same time. There is nothing inherently impossible in the corporations doing one thing and the individuals another at or about the same time, which things were utterly different; yet all, when dovetailed together, go to make up the joint product labeled by the act—combination, conspiracy, or monopoly. It is conceivable that the evidence may show that the individual defendants were not free agents, but acted under a species of corporate coercion, for which they should not be held personally responsible; but it is impossible to arrive at this conclusion on demurrer. The series of cases arising under the indictment regarding the Distilling & Cattle Feeding Company (In re Greene [C. C.] 52 Fed. 104, U. S. v. Greenhut, 51 Fed. 205, and In re Terrell [C. C.] 51 Fed. 213), show no more than that the courts have conclusively presumed that the relation between a corporation and its stockholder is not such that the latter can be held to criminal responsibility for a violation of the law in which he is not alleged to have personally participated.

It is not without significance that offenses as serious, in congressional opinion, as those created by this statute are made misdemeanors. When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemanors, and further declares that the word "person" as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. This is learnedly and fully treated by Van Brunt, J., in People v. Clark (O. & T.) 14 N. Y. Supp. 642, and I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment. This procedure has been followed in People, etc., v. Detroit White Lead Works, 82 Mich.

471, 46 N. W. 735, 9 L. R. A. 722, and Overland Cotton Mill v. People, etc., 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; nor do I think the holding in the rebates cases (United States v. N. Y. C. & H. R. R. et al., lately decided in this court, 146 Fed. 298) irrelevant to the present issue. The indictments in those cases were based upon those clauses of section 1 of the act of February 19, 1903 ("Elkins Act") chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], which declares that "anything done * * * by a corporation * * * which if done * * * by any * * * officer thereof * * * would constitute a misdemeanor * * * shall also be held to be a misdemeanor commited by such corporation," and "every person or corporation who shall * * * grant or give * * * any * * * rebate * * * shall be deemed guilty of a misdemeanor." This is not a specific authorization for a joint indictment; it is a declaration that the same act shall at one and the same time be a misdemeanor on the part both of the officer, who is the actor, and the corporation, who suffers him to act. The language of that statute seems to me to render a joint indictment permissible, but if, as in this case and under this statute, that which is complained of is not one single act, which is at the same time individual by nature and corporate by act of Congress, but a condition of facts to which both corporate and individual action may be contributed, a joint indictment is not only permissible, but, if it be desired to bring in all the actors and produce all the evidence, it may even be necessary.

Having concluded that the material allegations of the indictment are well pleaded, there remain for consideration the objections going to the merits of the charges.

(a) No direct effect on interstate commerce shown. Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. The criterion as to whether any given business scheme falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade nor a complete monopoly; it is enough if its necessary operation tends to restrain interstate commerce, and to deprive the public of the advantages flowing from free competition. Cf. U. S. v. Chesapeake & Ohio Fuel Co. (C. C.) 105 Fed. at page 93; Swift v. United States, 196 U. S., at page 375, 25 Sup. Ct. 281, 49 L. Ed. 518; Northern Securities Co. v. United States, 193 U. S., at page 382, 24 Sup. Ct. 436, 48 L. Ed. 679. Applying these general considerations and the case of Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, to the case in hand, I have no doubt that the arrangement alleged in the indictment immediately, directly, and of intention restrained interstate trade. It is enough to instance the allotment of certain tobacco manufacturers to certain paste producers by a secret agreement that only the assigned producer would or could supply the needs of the manufacturer. This is a restraint of trade surpassing anything shown in the Addyston Case. Defendants seem to regard the original agreement between the MacAndrews Company and the Young Company as the gist of this proceeding. That was but the first step, and the law looks not at any particular act, but at the

aggregate effect of all the acts. The whole series of transactions is to be judged by its fruit, and not by the legal significance of any one occurrence.

It may be admitted (to paraphrase the language of Jackson, J., in Re Greene [C. C.] 52 Fed., at page 116) that the ownership by the defendant corporations of all the licorice paste in this country is not what the statute condemns, but it does condemn the monopoly of, or attempt to monopolize, the interstate trade or commerce therein. These corporate defendants are said not only to have obtained control of their principal, if not their only, competitors, but, having done this (which may be within the decision in the case of Sugar Refining Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325), they have seen to it that their product was followed from factory to consumer, until with their system working perfectly they not only controlled the source of supply and regulated production, but regulated the consumption of every person in the land who required what they made. This conduct "directly concerned the shipment of goods from one state to another," and operated, "not alone upon the manufacturer, but upon the sale, transportation, and delivery of an article of interstate commerce by preventing or restricting its sale." Montague v. Lowrie, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, as cited in 193 U. S. 390, 24 Sup. Ct. 436, 48 L. Ed. 679. Not only do the facts alleged show a combination producing a result detrimental to interstate commerce, but they also show concerted action to bring about that result, and the result as shown constitutes that "virtual" monopoly in the interstate distribution of the substance manufactured by the corporate defendants which brings the matter within the decisions differentiating the modern use of the word "monopoly" from that grant by royal patent which was the origin of the phrase. People, etc., v. North River Sugar Ref. Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; Id., 54 Hun, 354, 3 N. Y. Supp. 401, 2 L. R. A. 33, 7 N. Y. Supp. 406, 5 L. R. A. 386; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; De Witt Wire Cloth Co. v. N. J. Wire Cloth Co. (Com. Pl.) 14 N. Y. Supp. 277; Nat. Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689; United States v. Knight, 156 U. S., at page 17, 15 Sup. Ct. 249, 39 L. Ed. 325.

(b and c) Individual defendants not engaged in interstate commerce, and every act alleged a corporate act. It is seriously urged that every act alleged in the indictment is a corporate act, and that, as the individual defendants are presidents of the corporations, therefore the acts are not their acts, even though they actively performed them; and further, even if such corporate acts operated on and related to interstate commerce, that the men who gave the orders, wrote the letters, and signed the contracts were not in so doing engaged in interstate commerce.

As to the first branch of this argument I refer to my already stated opinion, that it cannot be ascertained upon demurrer whether the acts were all corporate acts or not, or whether or to what extent the in-

dividual defendants in doing what they did were acting as mere clerks, or as advisers, devisors, or abettors.

If the second branch of the argument is sound, it must result that the president of a railroad and the president of a college are engaged in the same business, i. e., that of being president. It might as well be said that the governor of a state and the governor on a steam engine are both engaged in the business of being governor.

(d) Corporation cannot conspire. The doctrine, much older than the Dartmouth College Case, 4 Wheat., at page 636, 4 L. Ed. 629, but there fixed in federal jurisprudence, that a "corporation is an artificial being, invisible, intangible, existing only in contemplation of law, and, being the mere creation of law, it possesses only those properties which the charter of its creation confers," has been the excuse for much idle and artificial reasoning. It was long contended that even a civil liability arising from evil intent could not be visited upon an artificial being. This fiction has vanished, and corporate liability on the civil side firmly established, even for assault (Lake Shore, etc., Ry. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97), or conspiracy (Buffalo Oil Co. v. Standard Oil Co., 42 Hun, 153; Id., 106 N. Y. 669, 12 N. E. 826; West Va. Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895). It was even longer denied that a corporation could be indicted at all. Regina v. Great, etc., Ry., 9 Q. B., 314. In People, etc., v. Clark, supra, the court declares that the legal reasoning upholding this contention was the strange argument that a corporation could not plead in person, and therefore could not be called on to answer criminally. It certainly is now admitted law that not only may corporations (the art of pleading by attorney having been discovered) be indicted for nonfeasance, but for such deeds of misfeasance as are complete by the mere doing of the thing prohibited, e. g., violation of the eight hour law (United States v. John Kelso Co. [D. C.] 86 Fed. 304); receiving usurious interest (State v. First Nat. Bank, 2 S. D. 568, 51 N. W. 587); not stopping gaming at a fair (Commonwealth v. Agricultural Soc., 92 Ky. 197, 17 S. W. 442).

Authority is still producible, however, for the dogma that corporations "cannot be indicted for offenses which derive their criminality from evil intention" (Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray [Mass.] 339), nor "for any crime of which a corrupt intent or malus animus is an essential ingredient" (State v. Morris & Essex Ry., 23 N. J. Law, 260). Therefore, these defendant corporations claim that since in conspiracy evil intent is of the essence of the crime, inherent impossibility renders the accusation futile. I think this is but the remnant of a theory always fanciful and in process of abandonment. The process is slow, but in Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, a court of great authority recently held in a proceeding for criminal contempt:

"We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil."

And to the same effect State v. B. & O. R. R., 15 W. Va. 362, 36 Am. Rep. 803. It is notable that the older cases asserting the immunity here contended for are rarely decisions granting such immunity, but speak of it as something theoretically true, yet not applicable to the matter in hand. It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. There is an obvious physical difficulty in rendering a corporation amenable to corporal punishment, but there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest. The limitation of power does not depend upon the difficulty of imputing evil intent, but upon the impossibility of visiting upon corporations the punishments usually prescribed for greater crimes. The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not, in my opinion, bear discussion.

(e) Monopoly by one only. Section 2 of the act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) undoubtedly renders it possible for one single person to be punished under this statute for either a monopoly or an attempt to monopolize, whereas it is difficult to imagine one person combining, and, obviously, one person cannot conspire. But having regard to the modern use of the word "monopoly" as meaning something quite different from the royal grant of earlier law, I see no reason why any number of persons may not enjoy a monopoly, or may not attempt to monopolize. Furthermore, it is to be remembered that even when monopoly had its ancient meaning, the grant of the right was not limited to one person; the granteed were frequently in the plural.

Let the demurrers be overruled.

UNITED STATES v. MacANDREWS & FORBES CO. et al.

(Circuit Court, S. D. New York. January 17, 1907.)

1. CRIMINAL LAW—IDENTICAL OFFENSES.

Where defendants were indicted in separate counts, one for combination and the other for monopoly, in violation of the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), such offenses were not identical, but were legally distinct and justified separate punishment on conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 32, 33.]

2. MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—EVIDENCE—OVERT ACTS.

A combination in restraint of interstate commerce in violation of the Sherman anti-trust law was proven when the combination was shown to exist with intent to bring about restraint on interstate commerce; the overt acts being merely cumulative evidence from which the intent, purpose and continuance of the combination might be inferred.

On Defendants' Motion in Arrest of Judgment and to Set Aside the Verdict.

Henry W. Taft, Sp. Asst. Atty. Gen.
Delancey Nicoll and John D. Lindsay, for defendants.

HOUGH, District Judge. The indictment which was considered on demurrer in opinion filed herein December 3, 1906 (149 Fed. 823), having come on for trial, and resulted in a verdict of guilty against the corporate defendants upon the first and third counts only—i. e., those for combination and monopoly under the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200])—motion is now made to set aside the verdict upon numerous grounds, as to all which except one I have in the opinion referred to expressed my views, and to those views I adhere.

It is now urged that the charges of combination and monopoly as stated in the indictment and explained by the evidence constitute but one offense, and that, therefore, either (1) the verdict is void and judgment thereon unlawful, or (2) that no punishment can be awarded upon more than one count, as to impose a fine under both counts would amount to a double punishment for the same offense. This problem differs from that presented on demurrer. The indictment in form correctly charges both a combination and a monopoly; and circumstances certainly exist under which the evidence to support the charge of combination would be quite different from that proving monopoly. It is clear, also, that the two charges might not be provable against the same individuals; but with the testimony before the court it is apparent that the evidence here was in some sense applicable to both charges, and, as the verdict shows, affected both defendants. If all the crimes charged against a given person are committed in accomplishing one unlawful action or in bringing about one unlawfully desired result, it is clearly improper to split up the transaction into as many parts as there are crimes incident to the fulfillment of unlawful desire, and thus multiply punishment by multiplying indictments or counts.

It appears to me that the decisions relied on by the defendants depends solely on this admitted principle. Thus the forgery of a bond and mortgage is but one unlawful transaction, and separate indictments will not lie for forging the two instruments. People v. Peck, 4 N. Y. Cr. R. 148. And the obligation of street commissioners to keep the highways in repair is a single duty, and there cannot be separate indictments or counts each alleging a failure to keep a particular street in repair and all speaking as of the same date. State v. Commissioners, 6 N. C. 371. So, also, a conviction for arson is a bar to an indictment for murder in compassing the death of one burned in the building. State v. Cooper, 13 N. J. Law, 361, 25 Am. Dec. 490, because the arson and the murder were simply successive stages of one offense. The true test of the correctness of the defendants' position is whether upon a review of both the facts and the law identity exists between the offenses proved in this case and called in the first combination and in the third monopoly. If identity does exist, a conviction under either count would be a bar to a prosecution on the other, and therefore a bar to punishment on both. The rule regarding identity of offenses is to discover whether the crimes under considera-

tion are in substance precisely the same, or of the same nature or species, or that one crime is an ingredient of the other. In this case the crimes of monopoly and combination are legally distinct. The offense under the first count was complete when the combination was actually formed with intent to bring about restraint of interstate commerce. The additional overt acts were but cumulative evidence from which the true intent, purpose, and continuance of the combination might be inferred. But they were themselves the proof of the monopoly, and the monopoly consisted in their aggregate effect. That the prosecution in overwhelmingly proving the existence, and intent, and continuance of the combination proved the monopoly does not in my opinion render the offenses identical, merely because all the evidence offered was in a sense applicable to both counts. How slight the difference may be to deprive the plea of former jeopardy or autrefois convict of validity the cases clearly show. Identity of time so that it was impossible to separate the evidence regarding them, is not sufficient. People v. Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225. Identity of name, though difference in substance, is no bar. Gully v. State, 116 Ga. 529, 42 S. E. 790. An acquittal for larceny of bonds is no bar to a conviction for fraudulent conversion thereof. Commonwealth v. Tenney, 97 Mass. 50. A burglary on the second floor of a house is a different crime from robbery on the first floor, though the interval between the events is no longer than is required for the criminal to go downstairs (People v. Kerm, 8 Utah, 268, 30 Pac. 988), and an acquittal of murder by a shot from a gun is not a bar to accusation for the same murder by using the gun as a club (Guedel v. People, 43 Ill. 226). See, also, Polinsky v. People, 73 N. Y. 65, where the offense of selling adulterated milk under one statute is regarded as a different crime from bringing adulterated milk into the city for sale under another statute.

Believing that the offenses of combination and monopoly are different in law, and different in substance and effect, it is necessary to deny all the motions now pending and made by the defendants either jointly or severally. It is the judgment of the court that the Mac-Andrews & Forbes Company be upon its conviction under the first count of this indictment fined the sum of $5,000, and that the same company be upon its conviction under the third count of the indictment fined the sum of $5,000 and that the J. S. Young Company be upon its conviction under the first count of the indictment fined the sum of $4,000, and that the same company be upon its conviction under the third count of the indictment fined the sum of $4,000.

DR. MILES MEDICAL CO. v. JAYNES DRUG CO. et al.

(Circuit Court, D. Massachusetts. December 12, 1906.)

No. 300.

1. INJUNCTION—INDUCING VIOLATION OF CONTRACTS—SUFFICIENCY OF BILL.
A bill by a manufacturer of proprietary medicines, sold only to wholesale and retail druggists having direct contracts with complainant, to enjoin defendant from inducing such customers to break such contracts by

selling to defendant in violation of their terms, is sufficiently certain, although it does not specify the customers who have so been induced to violate their contracts, where it shows that, before reselling the medicines so procured, defendant removes the cartons, labels, and serial numbers from the bottles, so that they cannot be traced to any particular customer.

2. SAME.

Such a bill states a cause of action for an injunction where the contracts sought to be protected are lawful.

3. CONTRACTS—LEGALITY—CONDITION IN CONTRACTS FOR SALE OF PROPRIETARY MEDICINES—RESTRAINT OF TRADE—MONOPOLIES.

The manufacturer of an article sold as a medicine, and made under a secret process or formula of which he is the sole owner, may lawfully, by contracts with purchasers, impose such conditions as he sees fit with respect to the prices at which they shall be sold to others, or the persons to whom they may be sold; and such contracts, like similar contracts with respect to articles made under a patent or copyright, are outside the rule of restraint of trade, whether at common law or under the federal anti-trust statute. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 542, 544.

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. Crater-Crume Co., 34 C. C. A. 486.]

In Equity. On demurrer to bill.

Frank F. Reed, George L. Huntress, and Edward S. Rogers, for complainant.

Whipple, Sears & Ogden and Alexander Lincoln, for defendants.

COLT, Circuit Judge. This is a bill in equity for an injunction and an account. The defendants have demurred to the bill. The grounds of demurrer relied upon are the special ground that the allegations of the bill are insufficient for want of certainty, and the general ground that the bill does not state a case which entitles the complainant to relief in equity. The material allegations of the bill may be summarized as follows:

The complainant is the exclusive owner of certain secret formulas for making proprietary medicines, and is extensively engaged in the manufacture of these medicines. It sells these medicines to wholesale and retail druggists on what is known as the direct contract plan. Under this system of agency contracts, the medicines are sold to jobbers, retailers, and consumers at fixed and uniform prices, and the jobbers agree to sell only to retailers who have executed contracts, and these retailers agree to sell only to purchasers for consumption. The medicines are put up in various original and distinctive cartons and bottles, bearing certain labels, trade-marks, and trade-names. As a means of identifying each package, serial numbers are stamped upon the carton.

All druggists are given full opportunity of signing these contracts and of obtaining these articles at fixed and uniform prices. These contracts are in force between the complainant and nearly all the wholesale druggists of the country and over 40,000 retail druggists. The purpose of the system is to prevent secret rebates, discrimination, price-

cutting, demoralization of trade, and injury to the reputation and good will of the complainant's business.

The defendants are wholesale and retail druggists, having stores in various places in the city of Boston. Refusing the opportunity offered them to execute these contracts, the bill charges that the defendants have combined and conspired with complainant's agents, and that they have adopted a system of illegally and fraudulently obtaining these medicines. The methods employed consist in inducing retail dealers to execute contracts for the purpose of procuring these medicines from jobbers, and then turning over the medicines so procured to the defendants; in procuring contracts from retailers, and persuading jobbers to sell complainant's medicines, ostensibly to such retailers, but in reality to defendants; in persuading and inducing retail druggists under contract with the complainant to supply these medicines to defendants in violation of such contracts, or by deceiving such retailers into sales by fraudulently stating that the purchases are for consumption, and not for resale. The defendants, it is alleged, offer for sale and sell the medicines so obtained at cut rates, thereby demoralizing prices, depleting trade, and causing irreparable injury to the complainant. The defendants further employ the complainant's medicines as a means of attracting customers, and then substituting and selling other remedies, thus inducing such customers to abandon their original intention of purchasing the complainant's medicines. In case of the sale of complainant's medicines, the defendants mutilate, obliterate, or cover up the trade-marks, trade-names, and serial numbers upon the packages or cartons.

The bill prays that the defendants may be enjoined from persuading persons who have entered into contracts with the complainant from breaking their contracts by selling and delivering to the defendants the complainant's medicines, and from procuring from any retail druggist the execution of contracts with the complainant, and from passing themselves off to any jobber under contract with the complainant as representing a retail druggist who has executed a proper contract, and from procuring in any way the complainant's remedies from any wholesale or retail dealer who has entered into contracts with the complainant in violation of those contracts, and from mutilating or defacing the complainant's packages, or changing its cartons or labels, and for other relief.

The theory upon which this bill is framed is clear. The complainant's medicines are only sold to wholesale and retail druggists under direct contracts with the complainant. The complainant finds that the defendants are selling its medicines at cut rates in mutilated packages. The bill charges the defendants with having obtained these medicines by unlawfully combining with, persuading, or deceiving, the agents of the complainant to break their contracts, and thus obtaining these medicines illegally and in violation of these contracts, and the bill seeks to enjoin the defendants from pursuing this course of conduct.

The bill contains a sufficiently clear statement of all the material facts to enable the defendants to make the proper defense thereto. It is probably impossible for the complainant to make the allegations more specific by naming the particular druggists with whom the defendants

have combined and conspired, since it appears from the bill that the defendants obliterate the identifying serial numbers upon the packages they sell. By this means the complainant is prevented from ascertaining the jobber or retailer to whom the package was originally sold. The bill, however, does set forth with great fullness the title and rights of the complainant and the violation of those rights. It alleges, in various forms and with sufficient definiteness, the substantial facts of collusion, combination, and persuasion by the defendants with wholesale and retail druggists who are under contract with the complainant. It is a course of conduct which the bill seeks to enjoin, rather than any particular act. The rules of certainty do not require any more specific statements in bills of this character. Swift & Co. v. United States, 196 U. S. 375, 400, 25 Sup. Ct. 276, 49 L. Ed. 518; United States v. Bell Telephone Co., 128 U. S. 315, 356, 9 Sup. Ct. 90, 32 L. Ed. 450.

The remaining and more important question is whether the bill states a case for relief in equity. If the complainant's system of contracts is lawful, it is clear that the allegations of the bill are sufficient, for the bill charges the defendants with unlawfully combining with and persuading the complainant's agents to break their contracts, and thereby obtaining complainant's medicines in violation of those contracts, and this is a familiar and well-settled ground of equitable relief. Wells & Richardson Co. v. Abraham (C. C.) 146 Fed. 190; Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606; Angle v. Railway Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Garst v. Charles, 187 Mass. 144, 72 N. E. 839; American Law Book Co. v. Thompson Co. (Sup.) 84 N. Y. Supp. 225; Board of Trade v. Christie, 198 U. S. 236, 251, 25 Sup. Ct. 637, 49 L. Ed. 1031; Exchange Telegraph Co. v. Gregory, L. R. 1 Q. B. D. (1896) 147; Sperry & Hutchinson Co. v. Mechanics' Clothing Co. (C. C.) 128 Fed. 800. See, also, Heath v. American Book Co. (C. C.) 97 Fed. 533; Walker v. Cronin, 107 Mass. 555; Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. D. 333.

It only remains to inquire whether the system of contracts set out in the bill is lawful. It is to this point that the arguments and briefs of counsel have been largely addressed. The contention of the defendants is that these contracts are unlawful because they are in restraint of trade. In support of this position they do not rely so much upon the common-law rule as upon the federal statute. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

The bill alleges that the complainant is the exclusive owner of these secret formulas, and the exclusive manufacturer of these remedies. It follows that, until voluntary disclosure or lawful discovery, the complainant has an exclusive property in these trade secrets, and has the exclusive right to make, use, and vend the articles made thereunder. The exclusive right of property in a trade secret is, of necessity, a monopoly, the same as a patent or a copyright. The complainant may make these articles, or refrain from making them. It may sell them, or refrain from selling them. It may sell them to one person, and not to another, and at such prices and upon such conditions as it may deem most advantageous. Contracts like those set out in the bill concerning

articles made under trade secrets, the same as similar contracts concerning articles made under a patent or a copyright, are outside the rule of restraint of trade, whether at common law or under the federal statute. Hartman v. Park (C. C.) 145 Fed. 358; Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606; Wells & Richardson Co. v. Abraham (C. C.) 146 Fed. 190; Dr. Miles Medical Co. v. Goldwaite (C. C.) 133 Fed. 794; Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; Board of Trade v. Christie, 198 U. S. 236, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031; Garst v. Harris, 177 Mass. 72, 74, 58 N. E. 174; Fowle v. Park, 131 U. S. 88, 97, 9 Sup. Ct. 658, 33 L. Ed. 67; Park & Sons Co. v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; Standard Fireproofing Co. v. St. Louis Co., 177 Mo. 559, 76 S. W. 1008; Victor Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58; Heaton-Peninsular Co. v. Eureka Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Central Shade Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Good v. Daland, 121 N. Y. 1, 24 N. E. 15.

Demurrer overruled.

In re TOM HON.

(District Court, N. D. California. September 6, 1906.)

No. 9,867.

1. ALIENS—CHINESE—EXCLUSION—REGISTRATION—JUDGMENT.

A judgment in habeas corpus proceedings, remanding a Chinese person to the custody of the master of a vessel in which he immigrated, for deportation, was vacated by the subsequent passage of Act Cong. May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320], providing for the registration of Chinamen entitled to remain in the country and the registration of petitioner thereunder.

2. SAME—REGISTRATION—EFFECT—COLLATERAL ATTACK.

Act Cong. Nov. 3, 1893, c. 14, § 6, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321], requires Chinese laborers entitled to remain in the United States before the passage of the Chinese exclusion act to apply to the collector of internal revenue of their respective districts within six months for certificates of residence, and that any Chinese laborer refusing so to register should be deemed and adjudged unlawfully within the United States, and might be arrested, etc. *Held* that, where a Chinese person was duly registered under such act as a native-born citizen, such registration was not subject to collateral attack in a proceeding to enforce a judgment of deportation rendered against him before the registration law took effect.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley and Frank A. Duryea, Asst. U. S. Attys.

McGowan & Wright, for respondent.

WHITSON, District Judge. Tom Hon, a Chinaman, arrived at San Francisco aboard the steamship Oceanic on or about August 30, 1890. He was refused admission, and thereupon filed his petition in this court for a writ of habeas corpus, claiming to be a native-born citizen. The writ was duly granted, and the matter was set for hearing on the 3d day of September, 1890, at which time he was brought

into court, and, pending the hearing, which was referred to the commissioner, he was admitted to bail in the sum of $1,500. On the day fixed he failed to appear before the commissioner, who found that he was not entitled to land in the United States, and reported his finding to that effect. This finding was affirmed, and a judgment entered for his remand to the custody of the master of the vessel, and for his deportation to China. He was not apprehended under that judgment, but has since continuously remained in the United States. In August, 1906, in contemplation of a trip to China, he made application to the clerk of the court for a certified copy of the order, which he alleges he supposed had been made, discharging him from custody, to be used by him as evidence of his right to return. The clerk having identified him as the Chinaman who had been ordered deported by the judgment rendered in the habeas corpus proceeding in 1890, he was arrested by the marshal, at the suggestion of the clerk, and taken before the United States commissioner, upon the charge of being in the country contrary to the acts of Congress relating to the admission of Chinese persons. That matter is now pending before the commissioner. The present controversy grows out of the application for an alias order based upon said judgment. This is resisted upon two grounds: (1) That the judgment rendered in habeas corpus is not res judicata as to the issues involved. (2) That the petitioner in the former proceeding, and who now resists the application, was on the 25th day of April, 1894, duly registered under Act May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320], and now holds a certificate of residence and is entitled to remain in the United States by virtue of such registration and certificate, notwithstanding the prior judgment of deportation.

As to the first proposition, counsel have argued that the court had no jurisdiction to order the deportation of the petitioner upon his application for a writ of habeas corpus, and that the judgment rendered upon that application must be regarded as a denial of the petition, and, in so far as it directs deportation, as in excess of jurisdiction. If the rule for which they contend be admitted, namely, that the judgment rendered in 1890 is not conclusive upon the court now, it may be observed that it does not necessarily follow, regarding it purely as a denial of the application for a discharge, that it would not authorize the remanding of the defendant to the vessel, and to the custody of the person commanding such vessel, in this proceeding, which is in reliance upon it. To that extent, if the judgment still subsists, it would perhaps be incumbent upon the court to enforce it.

The effect of a certificate of residence upon the status of one securing it is vital here. It is not to be overlooked that Congress could have repealed the exclusion acts altogether; that the repeal of such laws would have entitled Chinamen here at the time to remain, and those not here to have entered the country; that it is only by virtue of the prohibitory acts that Chinese are excluded. It cannot be doubted that Congress could have expressly provided that all persons under judgment of deportation at the time of the adoption of the legislation under consideration should be entitled to register, and upon such

registration to remain in the country; and this by virtue of its plenary power to deal with the subject. A judgment of deportation could not stand as against a repeal of the laws which exclude Chinese. One against whom such a judgment had been rendered could, in case of repeal of the exclusion acts, insist that the judgment failed with the repeal of the law which authorized it. It is a familiar rule that the repeal of a statute providing for the punishment of criminal offenses precludes prosecution for those committed prior to its repeal, unless there is a saving clause in the repealing act. Full power is vested in Congress to legislate upon the subject, either by repeal of all exclusion acts or the modification of them, and this carries with it the incidental authority to relieve persons, conditionally or unconditionally, against whom those charged with the execution or enforcement of the laws may have proceeded in pursuance of existing provisions. We are to look for the legislative intent by an examination of the language used, indulging such necessary implications as the rules of construction justify. The collector of internal revenue was empowered to consider and pass upon applications for registration. Jurisdiction was conferred upon him. The courts were not invested with power in the first instance to issue certificates, nor with supervisory control on appeal. It was only where, in case of accident, sickness, or unavoidable cause, one had been unable to secure the certificate required by law, that they had any discretion in relation to the matter. With these exceptions, which could only incidentally arise in cases being prosecuted for deportation, the control of registration and the issuing of certificates was reserved for the executive branch. The right to decide presupposes the duty of hearing evidence or making other investigation. After the inquiry, of whatever nature the collector saw fit to make, he passed upon the qualifications of those seeking to register, and issued or refused his certificate accordingly. To give efficacy to the legislation, some force and effect must be given to the certificate which he was authorized to issue. The purpose of Congress in requiring registration being to supply a record from which the officers of the government could ascertain by reference to it those of our Chinese population who were rightfully here, and therefore entitled to remain, it is manifest that the tribunal created for that purpose had full power. This was made clear by the act of 1893, a quotation from section 6 of which reads:

"And it shall be the duty of all Chinese laborers within the limits of the United States who are entitled to remain in the United States before the passage of the act to which this is an amendment to apply to the collector of internal revenue of their respective districts within six months after the passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act and the act to which this is an amendment, or who, after the expiration of said six months, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested," etc. 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321].

Attention has been called to that portion of the section which reads, "who are entitled to remain in the United States," upon which the argument is based that, the defendant not being at the time entitled

to remain, the certificate was issued to one not within the provisions of the law. But, while it was not intended that any Chinese person not entitled to remain in the country should have a certificate, it was intended that the collector of internal revenue should pass upon all applications, and that his certificate, so long as in force, should be conclusive evidence of that right. The rule was prescribed for the government of the collector, and it was for him to find who were entitled. Congress made a new departure, and defined the method by which Chinese in the United States might obtain evidence of their right to be in the country, and this was apparently intended as a starting point, and the courts have no jurisdiction to collaterally assail a conclusion reached by the collector in this regard. This can only be done in a direct proceeding to cancel the certificate. The following from an opinion of Judge De Haven lucidly explains the soundness of this view:

"It is very clear that under this statute each collector of internal revenue was charged with the duty of ascertaining and determining whether the Chinese person applying to him for the certificate of residence provided for was entitled thereto, and I am entirely satisfied that, in any collateral inquiry concerning the right of its holder to remain in the United States, such certificate is conclusive evidence of the facts recited therein. The issuance of such certificate is the solemn act of the government, of which a permanent record is made, and is intended to furnish evidence of the right of the holder to remain in the United States. The right which the certificate confers is a valuable one, of which the holder can only be deprived by the judgment of a court of equity, in a direct action brought by the United States for the purpose of annulling it, or in a proceeding for deportation, by proof that since its issuance the holder has forfeited his right to remain in the United States by departing therefrom without procuring from the collector of customs of the district from which he departed a certificate entitling him to re-enter the United States, as provided in article 2 of the treaty of March 17, 1894, between the United States and China, and the regulations adopted by the Treasury Department for the purpose of carrying out the provisions of that article." In re See Ho How (D. C.) 101 Fed. 115.

This decision is abundantly sustained by the reasoning in United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, although the identical question was not before the court.

It has been suggested that, inasmuch as the judgment is valid upon its face, the defendant should under it be remanded to the vessel, and be left to his remedy by writ of habeas corpus, whereby, if his contention is correct, he could be immediately discharged. Whether he could be so discharged by that method, in the light of the Ju Toy Case, it may be confessed is open to doubt; but certainly, when a national court has jurisdiction over a Chinese person who claims to be a native-born citizen of the United States, who has been continuously in the country for the past 16 years, and who has lived here most of his life, it will not subject him to the hazard of summary banishment upon a judgment which has been annulled by congressional legislation, without at least giving him an opportunity to present proofs of his citizenship and to establish the right to live in his native land.

For the reason that in the present state of the record it appears that there is no subsisting judgment, the application will be denied. This ruling is strictly limited to the application before the court. The af-

fidavit attached to and made a part of the protest is not controverted. What may develop upon the hearing before the commissioner it would be improper at this time to anticipate.

THE CHARLES NELSON.

(District Court, W. D. Washington, N. D. December 28, 1906.)

No. 3,259.

1. SHIPPING—STEAMER CARRYING EXCESSIVE NUMBER OF PASSENGERS—LIABILITY TO PENALTY.

   A steamship which left San Francisco for Seattle a few days after the destruction of the former city by earthquake and fire *held* not subject to the penalty prescribed by Rev. St. § 4465 [U. S. Comp. St. 1901, p. 3046], for carrying more steerage passengers than the number allowed by her inspection certificate, nor liable to such passengers in damages for the inconvenience and privation resulting to them from the overcrowding and from a shortage of water, where the excess of passengers was due to the confusion caused by the destruction of the city and the company's office, and occurred notwithstanding its efforts to prevent it, and the shortage was due to the company's inability to procure water or sufficient coal for its condenser in San Francisco, and to bad weather which prolonged the voyage.

2. SAME—DISCRETION OF COURT.

   A court of admiralty may, in the exercise of a judicial discretion, refuse to impose on the owner of a steamship the penalty prescribed by Rev. St. § 4465 [U. S. Comp. St. 1901, p. 3046], for carrying more passengers than the number allowed by the vessel's inspection certificate, where, because of extraordinary conditions existing, such imposition would be inequitable.

In Admiralty. Suit in rem by passengers to recover damages for failure of the carrier to furnish suitable accommodations and food on a voyage at sea, and also to recover penalties under section 4465, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3046], for the carrying of an excessive number of passengers. Hearing on the merits. Libel dismissed.

James Kiefer, for libelant.
Kerr & McCord, for claimant.

HANFORD, District Judge. There are 10 libelants in this case, all of whom were steerage passengers on the steamship Charles Nelson, on a voyage from San Francisco to Seattle in the month of May, 1906. The libel charges that the steerage passengers suffered a great deal of discomfort on the voyage, caused by crowding the decks with freight, and inadequate room, and an insufficient number of berths for the steerage passengers, and lack of a sufficient supply of drinking water and food improperly cooked and not served nicely. For this cause the libelants claim damages and return of the amounts paid for their tickets. The libel also charges that there was received and carried on board the ship 14 steerage passengers in excess of the number limited by the ship's inspection certificate, and for this cause they claim the penalties prescribed by section 4465, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3046].

The evidence proves that the voyage was two or three days longer than the time usually required by steamships for making the run from San Francisco to Seattle, and that there was a great deal of discomfort among the steerage passengers. The voyage was prolonged by reason of stormy weather, and the discomforts complained of were partly incident to bad weather and partly to overcrowding of the steerage quarters. It is the opinion of the court, however, that the extraordinary conditions existing at San Francisco when the voyage was undertaken justify and require the exercise of judicial discretion and that according to principles of equity the libelants are not entitled to prevail. The evidence fully sustains the following statement, contained in the respondent's answers to interrogatories propounded by the libelants:

"For answer to interrogatory 1: Tickets were offered for sale at the office of the Charles Nelson Company in San Francisco, at the Stewart Street Dock, and at No. 918 Broadway, Oakland, Cal.

"For answer to interrogatory No. 2: There were sold in the manner hereinafter stated, and not otherwise, at least 27 steerage tickets for the voyage of the Charles Nelson begun May 2, 1906. Further answering said interrogatory, claimant states that a few days prior to the sailing of said vessel the city of San Francisco was practically destroyed by earthquake and fire; that the docks in said city were largely destroyed, and the place of business of the claimant was totally destroyed; that the usual ticket agencies in San Francisco where the claimant sold tickets for voyages to Puget Sound were destroyed by fire; that for the accommodation of parties desiring to leave San Francisco by steerage on the vessel Charles Nelson, and in the light of the great disaster in San Francisco, the claimant reduced the fare for steerage passengers on said trip, and to accommodate intending purchasers offered tickets for sale at Oakland, as well as at its office and at the dock in San Francisco; that the claimant, on account of the destruction of its place of business, was at that time unable to obtain offices in the city of San Francisco, and was maintaining an office in Oakland, Cal.; that up to a time subsequent to the time when said vessel sailed there was no telegraphic or telephonic communication between Oakland and San Francisco, and no means of communicating other than by special messengers, and on account of the confusion due to the fire and earthquake it was exceedingly difficult to communicate with the claimant's several agencies by private messenger; that a few hours before said steamer sailed there had been sold at its Oakland office for said voyage 15 steerage tickets, and the claimant learned that 7 tickets had been sold at the Stewart Street Dock in San Francisco; that as soon thereafter as it was able to get into communication with its agencies in San Francisco the claimant withdrew all tickets from sale, and directed the agents to refund to holders of tickets above 16 the purchase money.

"For answer to interrogatory No. 3: Claimant states that the said steamer Charles Nelson sailed from San Francisco on said voyage at 11 o'clock p. m. May 2, 1906; that the earthquake and fire in San Francisco had destroyed all of the electric light and gas plants in the city, and the pier from which said vessel sailed was unlighted, and there were no means or facilities for lighting same; that about 1 o'clock p. m. the claimant began taking passengers aboard said vessel; that the captain of the said vessel placed at the gang plank the steward, Mr. Elliott, and specifically directed him, in the light of the fact that more than 15 steerage tickets had been sold, to admit but 16 steerage passengers, and the said steward, after checking aboard 16 steerage passengers, refused to admit any other steerage passengers aboard said vessel, and directed all thereafter appearing with tickets to return to the agency where they had purchased the same and informed them that their money would be refunded; that some of the steerage passengers refused admission to said vessel left the dock, and others remained about the dock; that the claimant and its officers used all due diligence to prevent any more than 16 steerage

passengers to take passage on said vessel; that in the darkness of the night, by reason of the unlighted condition of the dock, it was ascertained on the morning of the 3d of May, when the tickets were collected on said vessel, that 11 steerage passengers in excess of the 16, and 3 stowaways, had come aboard said vessel without the knowledge or consent of its owners; that said vessel was then at sea, and a distance of more than 100 miles from the port of San Francisco and had until a short time prior thereto a small schooner in tow; that it was impracticable at that time for the said vessel to return to San Francisco.

"For answer to interrogatory No. 4: The claimant states that on the next morning after said vessel sailed it was discovered that there were 3 stowaways aboard said vessel, who were required by the master thereof to work their passage to Seattle, and they were berthed in the lazarette with the crew.

"For answer to interrogatory No. 5: Claimant states that said vessel was allowed to carry 16 steerage passengers.

"For answer to interrogatory No. 6: Claimant alleges that it had berths or bunks equipped with mattresses for 16 steerage passengers on said voyage.

"For answer to interrogatory No. 7: Claimant states that the said vessel at no time had furnished blankets for steerage passengers; that it never has furnished any other equipment than bunks, with mattresses, as aforesaid.

"For answer to interrogatory No. 8: Claimant states that the table and mess accommodations for steerage passengers aboard said vessel on said voyage and all other voyages was the messroom of the crew, where there were tables and accommodations to seat 8 persons at a meal, and in this connection further states that the steerage passengers on the said voyage preferred to have their meals served on the after hatch rather than wait their turn in the messroom, and that their meals were served on the after hatch, in accordance with their desires, and no one of said steerage passengers on said voyage ever made any complaint to any officer of said vessel by reason thereof."

The evidence also proves that the ship could not obtain fuel, nor fresh water, at San Francisco. Her condensing apparatus afforded the only means of furnishing fresh water, and by reason of the extra time consumed in making the voyage her supply of fuel was nearly exhausted when she arrived at Seattle, and the necessity for economizing fuel prevented the continuous working of her condenser, so that there was a scant supply of water. Her officers, however, did the best they could under the circumstances for the comfort of the passengers.

The appalling disaster which suddenly rendered a great multitude of people in San Francisco homeless and destitute is a matter of common and general knowledge, and due credit should be given to the generous impulses of officers and managers of railroads and steamship lines which prompted them to make extraordinary exertions to facilitate the emigration of the many who hastened to leave the ruins and desolation which surrounded them in that city. It is plainly apparent that the desire of the libelants to get away from San Francisco was too strong to admit of any questioning of the sufficiency of the accommodations afforded by the Charles Nelson before going aboard of her, and their demands are as ungracious as would be the case if they had been castaways, and were suing a rescuing ship which had brought them away from a desolate shore. The evidence proves that the officers of the Charles Nelson did not intend to oppress the libelants, nor to violate the law by receiving on board an excessive number of passengers, and that the overcrowding of the ship was occasioned by the intrusion of those who came on board in the darkness. After the

number of passengers which the ship was authorized to carry had been admitted, the captain had refused to receive an additional number.

For this reason, I direct that a decree be entered dismissing the suit, at the libelant's costs.

ELLIOT et al. v. ATLANTIC CITY.

(Circuit Court, D. New Jersey. January 11, 1907.)

1. QUIETING TITLE—EVIDENCE.

In a suit to quiet title to certain land, the fact that buildings which were formerly located on the land, and which were removed therefrom but two or three years prior to the beginning of the suit, and the construction and maintenance of jetties from the land in question into the ocean, was admissible as evidence of complainants' title.

2. SAME—JURISDICTION—REQUISITES—NATURE OF POSSESSION.

In a suit to quiet title to certain land, authorized by Laws N. J. 1870, p. 20, c. 153, possession in fact, as distinguished from constructive possession, arising merely by virtue of the legal title, is essential to confer jurisdiction on the court to try such action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 8.]

3. SAME.

In a suit to quiet title, as authorized by Laws N. J. 1870, p. 20, c. 153, actual possession of the principal tract is sufficient possession of adjoining uninclosed land in controversy, held under the same title and used in connection with such principal tract.

4. DEDICATION—STREETS—MAPS—CONSTRUCTION.

A map of a city as originally drawn showed M. avenue to be a street 100 feet wide, but before the map was filed a line had been drawn through the center of the street for a space of four blocks, broken at each intersecting street for a distance equal to the width thereof, and side lines were drawn from the ends of the center line thus broken to the corners of each block fronting an inlet of the ocean, so that within each of such four blocks one-half of the street had apparently been cut off and added to the adjacent block. *Held*, that the filing of the map in such condition operated as a dedication of only 50 feet for M. avenue along the blocks in question.

5. NAVIGABLE WATERS—ACCRETION—RELICTION.

Where land embraced within the lines of a street as dedicated was subsequently eaten away by tide water and thereafter replaced by accretion, the land so added was subject to the easement created by the dedication.

6. EMINENT DOMAIN—MUNICIPAL CORPORATIONS—STREETS—IMPROVEMENTS—ORDINANCES.

Where a street as originally dedicated was only 50 feet wide, the city could not acquire a right to more than the amount dedicated, either by an improvement ordinance or in any other manner except by condemnation proceedings.

7. DEDICATION—ACCEPTANCE.

After the dedication of a street the city passed an ordinance providing that all avenues, streets, and highways within the corporate limits of the city then laid, used, designated, or delineated on the maps and plans of the city, or dedicated to public use within the corporate limits of the city, were thereby accepted and declared to be streets, avenues, etc., within the control of the city. *Held*, that such ordinance took effect immediately, so that a street shown on the original plan of the city then became a public street to the full extent of its dedication.

8. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.

Complainants' predecessor in title commenced suit in a state court against defendant city to quiet title to certain land in controversy claimed by the city for street purposes, and a final decree was entered against

defendant. Before complainants purchased the land, they obtained information concerning such decree from the solicitor of complainants' grantors, who, however, failed to inform them that the decree had been opened, and that the city had been allowed to answer, and that there had been no final hearing. Complainants purchased without an examination of the records. *Held*, that they assumed the risk of the truth of the solicitor's statement, and that the decree did not operate as an estoppel against the city.

In Equity. On bill to quiet title.

Thompson & Cole, for complainants.

Harry Wooten and Godfrey & Godfrey, for defendant.

CROSS, District Judge. The bill of complaint herein is filed to quiet the title to certain real estate at Atlantic City under an act of the state of New Jersey entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," approved March 2, 1870 (Laws 1870, p. 20, c. 153, and the amendments thereto). The controversy is over the alleged existence across the premises described in the bill of complaint of an avenue designated as Maine avenue, between Atlantic and Baltic avenues, and, if such an avenue be found to exist, then as to its width. The complainants admittedly have an undisputed title to the lands described in their bill, and, indeed, all of the jurisdictional facts are admitted, except that the complainants are in peaceable possession of the lands in controversy. It appears that the lands are beach lands, and a portion of them, at least, is subject to the ebb and flow of tidal water from Absecon Inlet and the Atlantic Ocean. I think the complainants have shown all the possession that the lands are capable of in their natural condition, and that such possession is peaceable. They have shown that there was a large building upon the land but two or three years prior to the time they purchased it; that such building stood there for several years, until it was injured by a storm, when for that reason it was removed by its owners. The piles, however, upon which it was constructed, still remain. At the time the building was there, there was also adjacent to it a toboggan slide. Both of these structures were used, for a considerable period of time, for amusement purposes. Moreover, after the complainants acquired title, they built jetties upon the property at different places, with the intent of reclaiming the submerged portion of the land from the ocean. These jetties were in existence when this suit was commenced, and the right of the complainants to erect and maintain them does not appear to have been disputed. In 1901, after the complainants acquired title, the city constructed a temporary boardwalk over a portion of the lands, which, however, it subsequently removed upon notice from the complainants that such act constituted a trespass; and furthermore, the city subsequently accepted a grant from the complainants, the exact object and purport of which, however, does not appear. In Oberon Land Company v. Dunn et al., 56 N. J. Eq. 749, 40 Atl. 121, Vice Chancellor Gray, speaking of the possession required by the statute to confer jurisdiction upon the court, says:

"This peaceable possession must exist at the time of the filing of the bill; but the evidence of such a possession may be the action of the complainant, and

of those under whom it claims, at any reasonable time preceding the beginning of the action in this court. Any acts regarding the premises which would naturally convey to an onlooker the sense that the party doing or directing them was the owner are evidential of such a possession as the statute contemplates. These acts must necessarily vary greatly, according to the character of the property in question. A house would not be dealt with as would a tract of woodland, nor a sand beach property as would a farm."

The doctrine thus enunciated is reasonable, and applicable to the point under consideration. I think it entirely proper to consider the buildings which were formerly located upon the land, and which were removed therefrom but two or three years prior to the beginning of this suit, as well as the construction and maintenance of the jetties, as evidence of complainants' possession. The testimony also indicated other acts of possession of a less conspicuous character, which it seems unnecessary to set forth. Possession in fact, as distinguished from constructive possession, which arises simply by virtue of the legal title, is essential to confer jurisdiction upon the court; but actual possession of the principal tract is sufficient possession of adjoining uninclosed land, held under the same title and used in connection therewith. Sheppard v. Nixon, 43 N. J. Eq. 627, 13 Atl. 617; Yard v. Ocean Beach Association, 49 N. J. Eq. 306, 24 Atl. 729.

The defendant sets up a claim to an easement over a portion of the land in controversy for the purpose of a public street or highway. The portion thus claimed is alleged to be 100 feet in width, and to extend across the property from Baltic avenue to Artic avenue, and is known as Maine avenue. The city maintains the existence of such avenue by reason of a dedication made by predecessors in title of the complainants, who in 1852 filed a map, known in the case as "Plan of Atlantic City," on which Maine avenue was laid down, and also because by divers subsequent deeds, appearing in the chain of title to the plot of ground described in the bill of complaint, Maine avenue has been recognized. It is contended on behalf of the complainants, however, that the city is estopped from claiming such dedication of the avenue for reasons which will appear later; and further, that if not so estopped, such dedication exists only as to an avenue 50 feet in width, or, at the most, 75 feet in width, and not to an avenue 100 feet in width, as claimed by the city. The map above referred to embraces a very large tract of land, practically the entire site of Atlantic City. It is drawn to a scale, and counsel for both parties agreed that for some portion of its length Maine avenue, measured by such scale, is 100 feet in width, and as laid down on said map extends for a distance of eight blocks. The original map was not produced, but a copy was, and counsel agreed that the lines on the original map indicating Maine avenue are blue in color, and that, measuring from the north end thereof southward for four blocks, the street as indicated thereon is undoubtedly 100 feet wide. Beginning, however, with Baltic avenue, and for the remaining four blocks, including the block in question, a line has been drawn through the center of Maine avenue of the same color and size as the side lines; that this line is broken at each intersecting street for a distance equal to the width of such intersecting street, to allow for its uninterrupted passage, and that side lines

are drawn from the ends of the center line thus broken to the corners of each block fronting the inlet, the effect of which is that at each block apparently one-half of Maine avenue has been cut off, inclosed with, and added to, the adjacent block; or, stated in another way, each block from Baltic avenue southward on the side of Maine avenue toward the inlet, including the one in controversy, has been extended so as to include 50 feet of Maine avenue as originally laid down on the map. This is the situation as shown by the map when it was filed. There is no testimony offered to explain why the map was thus made. The deeds above referred to throw no light upon the question involved; they do, indeed, recognize Maine avenue as existing, but do not show its width, or not with any degree of certainty. The map must therefore speak for itself, and be interpreted by the court as any other writing would be, with the sole object of determining therefrom the intention of its makers. The question of dedication is always one of intention, to be derived from existing facts or circumstances. The rule as laid down in 9 Am. & Eng. Ency. of Law (2d Ed.) title "Dedication," p. 36, and which is abundantly supported by authority, is as follows:

"An intention on the part of the owner of the land to part with some right therein, and to vest an easement in the public, is the first essential of a valid dedication, for one cannot be deprived of his property without compensation against his will. Animus dedicandi is the vital principle, and if this is not present the dedication fails. * * * As the intent of the owner is essential, it must be clearly and positively shown."

Speaking in a general way, the distance between the easterly line of Maine avenue and Absecon Inlet, as shown on the map, is on an average about twice as great in front of the blocks where Maine avenue is admittedly 100 feet wide as it is in front of the blocks where it has been divided as above stated, and counsel for the complainant argues that this fact discloses the reason why Maine avenue was apparently narrowed to one-half its original width; his point being that, when the map was finished, but before it was filed, or any dedication of the street made, it was discovered that the block in controversy and the remaining blocks southward of it were of insufficient depth for building purposes unless 50 feet were taken off from Maine avenue as originally planned, and added to them. I can see no reason, and none has been suggested, why Maine avenue should have been treated as it was at this point and beyond to the ocean, unless the intention was to narrow Maine avenue. The suggestion of counsel, therefore, seems pertinent and forceful. It clearly was the original intention of the dedicators to have the street 100 feet in width throughout, but it is equally clear to my mind that before the map was filed its width for a certain distance was for some reason narrowed to 50 feet. The problem, with such light as exists, is somewhat perplexing, since it is difficult to say with absolute certainty what the intention of the owners of the land was when they made and filed this map, but I do not see my way clear to say that land which was with apparent deliberation carved off from the street of which it had clearly been intended to form a part, and then attached to and inclosed with an adjacent block, thereafter remained a part of the street. As a matter of fact,

it is not a part of the street; it is excluded therefrom. The case of Princeton v. Templeton et al., 71 Ill. 68, is worthy of consideration upon the question of the proper construction of the map. My conclusion is that the dedicators originally entertained the idea of laying out the street to the width of 100 feet throughout its entire length, but subsequently, and before the map was filed or deeds referring thereto were made, for some reason (and it is a matter of indifference what the reason was), changed their mind, and narrowed it to 50 feet. Upon the facts presented, Maine avenue was dedicated across the land described in the bill of complaint from Baltic to Artic avenues of a width of 50 feet and no more.

Plaintiffs' counsel, however, insist that the defendant has lost its right to set up this dedication, because the land embraced within the lines of Maine avenue as dedicated, whatever its width, was subsequently to the dedication encroached upon and eaten away by tidal water, and that the land subsequently formed by accretion over the site of Maine avenue is discharged from the easement. The rule as laid down in Am. & Eng. Ency. of Law (2d Ed.) vol. 1, p. 469, title "Accretion," is as follows:

"The general rule is that to the owner of the shore belong these imperceptible and insensible additions to his lands, which when once acquired become in all respects a part of the original tract; the title thereto being held subject to the same incumbrance and with the benefit of the same rights as is the land to which accretion is made."

The above quotation has to do with the question of property in lands formed by accretion, but later in the same volume, on page 474, in dealing with the title to land which has reappeared after submergence, the following statement is made:

"It seems that, although land be submerged by the sea, yet if it eventually reappears and remains capable of identification, the title thereto revests in the original owner."

I have not been referred to any cases which show or tend to show that land reappearing after submergence would thereupon be free from any lien, charge, or easement which existed at the time of its disappearance. I cannot conceive in principle why such should be the case. The same principle which would restore the land to the owner would likewise protect the rights of those having liens, incumbrances, or easements thereon. The owner would have his property restored cum onere. If the owner lost his land by submergence, an imcumbrancer would also lose his lien, but upon the restoration of the land to the owner, the right of the incumbrancer would also, and by the same act, be restored.

Three ordinances have been offered in evidence as affecting Maine avenue either directly or indirectly. Two of them, those of October 26, 1857, and March 5, 1862, provide for the opening, grading, and otherwise improving Maine avenue, and further recognize Maine avenue as 75 feet in width. It is claimed that these ordinances estop the city from claiming in any event a greater width than 75 feet for Maine avenue, but in the view I have taken of the dedication, these ordinances are immaterial, for if the street were only dedicated 50

feet wide, as I have found the fact to be, the city could not by ordinance open it to any greater width, except by condemnation proceedings and payment to the property owner for the additional land taken. Nothing further, however, was done under these ordinances, so far as appears, in front of the land in question. Another ordinance, that of July 24, 1877, was offered in evidence. It provides that all avenues, streets, and highways within the corporate limits of Atlantic City then laid, used, or designated or delineated on the maps and plans of Atlantic City, or dedicated to public use within the corporate limits of said city, were thereby accepted and declared to be streets, avenues, etc., within the jurisdiction of the city council, with full power to control and regulate the same. The last-mentioned ordinance took effect immediately, and from and after that date Maine avenue undoubtedly became a public street to the full extent of its dedication, but beyond this fact it has no bearing upon the question under consideration. My conclusion, therefore, is that, upon the case as presented, there exists an easement of a public street running over the lands described in the bill of complaint of a width of 50 feet, and that said street, thus dedicated and accepted, constitutes the westwardly half of Maine avenue as originally laid down on the above-mentioned map.

The complainants contend, however, that the defendant is estopped as to them from claiming or using said street for the reason that the Baltic Pier Pavilion Company, a former owner of complainants' title began a suit in the Court of Chancery of this state against the defendant herein to quiet the title to the lands in controversy, and that a final decree was entered by default in said suit, which declared that the defendant had no interest in the premises, and that subsequent thereto the complainants purchased said premises for a valuable consideration, relying upon the force and effect of said decree. The evidence shows, indeed, that such a suit was commenced and such a decree was entered, but it also shows that, some time before the complainants purchased the land in question, the decree was opened by the said court, and the defendant allowed to come in and file an answer, which it did, and that thereafter the suit was not brought to final hearing, but was subsequently discontinued, and the present suit instituted in this court. The only knowledge that the complainants appear to have had of the entry of the final decree above mentioned was obtained from the solicitor of the complainant in that suit. It is not pretended that they ever examined the record in the suit, and, if they had, they would necessarily have been apprised of the fact that the decree had been subsequently opened. They had no right to rely upon the representations of the solicitor of the complainant, and in doing so they assumed the risk. Such solicitor had no right or authority to speak for the defendant, and what he said or failed to say could in no wise estop the defendant; moreover, the record was at all times open to them, and was manifestly the only primary evidence of the status of the suit. A decree will be entered in accordance with the views above expressed.

THE LAKE SHORE.

(District Court, W. D. New York. January 8, 1907.)

1. COLLISION—STEAM VESSELS PASSING—DELAY IN ACTING ON AGREEMENT.
The large freight steamer Lake Shore was swinging out from her dock in Buffalo river to start on her trip up the Lakes as a steam barge was entering the river 1,000 feet distant. The barge, seeing that the steamer was moving, gave her a signal of one whistle to pass port and port, which, not being answered, was repeated. The Lake Shore about that time sounded two whistles, but the barge, which was going to starboard immediately, blew an alarm, and repeated her one blast, which was then acceded to by the steamer. At this time the barge was 100 feet distant, with her helm hard aport and her engine stopped. The steamer, however, continued her swing to port, and struck the barge on her port bow. *Held*, on the evidence, that the Lake Shore was solely in fault for failing to maintain an efficient lookout or to promptly stop her swing after assenting to the signal of the barge, as she might have done, and that the barge was not in fault, having stopped her engine and being as close to the south pier as she could safely go.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 203.]

2. SAME—VESSEL UNDER WAY.
Where a steamer had left her berth, her propeller was moving and she exchanged passing signals with another vessel, she cannot escape liability for alleged negligent navigation on the ground that she was not under way.

In Admiralty. Suit for collision.

Brown, Ely & Richards and Hoyt, Dustin & Kelley, for libelant.
Clinton & Clinton and George Clinton, for respondent.

HAZEL, District Judge. On the 15th day of September, 1903, the freight propeller Lake Shore and the steam barge Cormorant, while passing in Buffalo river at the entrance to the channel, came in contact; the former striking the Cormorant on her port bow, breaking the hawser pipe, parting the stem, and opening her decks. This action is brought to recover the damages sustained; the libel charging that the Lake Shore alone was in fault for the accident.

The material facts are these: On the morning of the collision, the weather being clear, the Lake Shore, heading out in the river, was moored on her starboard side to the Lackawanna Coal Dock; her bow being about 200 feet from the end thereof. She was ready to swing out into the river, which at that point was 215 feet wide, preparatory to starting on her trip up the Lakes. She was 376 feet over all, 50 feet beam, drawing 18 feet 7 inches of water, and was loaded with 6,800 tons of coal. The Cormorant was 218 feet long, 34 feet 6 inches beam, drawing 9 feet forward and 14 feet aft, and was partially loaded with lumber. In order to get into the channel at the mouth of the Buffalo river from the Erie Basin, it was necessary for the Cormorant in tow of a tug to go around the old basin breakwater. When she reached a point at the end of the breakwater, which was about 2,200 feet from where the Lake Shore was lying, the tug let go the lines and the Cormorant straightened in the channel and proceeded toward the river at the rate of about four miles an hour. Her master at once observed the Lake Shore, which was then still close to the

wharf. Soon afterwards he saw that she was getting underway; her bow having moved out into the stream about 10 feet. At this time the bow of the Cormorant was abreast of the south pier and distant from the bow of the Lake Shore something more than 1,000 feet. Her master, regarding the latter as a navigating vessel, blew one blast of the whistle to indicate his intention to pass on her port side, and immediately checked his speed. The Lake Shore, however, did not reply to the signal. It was explained at the trial by Capt. Hahn, master of the respondent vessel, that at this particular time he did not regard his vessel as underway, and supposed the one blast signal to have been blown to an outward-bound tug, which, according to respondent's witnesses, answered the signal. Several witnesses for the respondent testified to the presence of the tug and the blowing of the signals mentioned, and a like number of witnesses for libelant, including the master of the Cormorant, testified that they did not perceive a tug passing out of the river, and that the signal was blown to the Lake Shore, which was slowly leaving her berth. Assuming the presence of the tug, I am, nevertheless, of the opinion that it is proven that the signals were blown to the Lake Shore; she being concededly the nearest craft. The Cormorant, receiving no reply to her initial signal, sounded another one blast of her whistle, at the same time reducing her speed to about two miles per hour and putting her helm aport. In the meanwhile the Lake Shore, which was slowly swinging toward midchannel, sounded two blasts of her whistle, indicating her desire that the Cormorant should pass to starboard. The latter vessel, objecting, immediately blew an alarm and quickly sounded another single blast, which the Lake Shore answered with one blast, thereby receding from her previous request that the Cormorant pass to starboard and assenting to her passing on her port side. At this critical moment the Cormorant, with her helm properly hardaport and her engine stopped, was approximately 100 feet distant from the bow of the Lake Shore, and probably from 10 to 20 feet from the south pier, making headway at the rate of about one mile an hour. The Lake Shore continued to swing slowly to port, impinging the Cormorant. A careful examination and consideration of the evidence and argument of proctors has made it clear that the Lake Shore failed to seasonably stop her swing to port or alter her course after assenting to the signal of the injured vessel. I think the Cormorant had a right to presume, not only that the Lake Shore would stop swinging out beyond the middle of the river toward the south pier, but that she would seasonably provide sufficient space for passing port to port. The Frederick M. Wilson, Fed. Cas. No. 5,078.

Respondent contends that she was going astern at the time of the impact; that there was sufficient room for safe passing, about 45 feet; and, if the Cormorant had been properly navigated or controlled, the accident would not have happened. The testimony as to whether the Cormorant sheered toward the Lake Shore is in conflict; the witnesses for both sides being indefinite as to distances, and also regarding the precise manner in which the vessels impinged. Although the testimony for the libelant as to the exact position of the Lake

Shore at the time of the contact perhaps is not free from criticism, I am, nevertheless, reasonably satisfied that the primary responsibility for the collision is attributable to the Lake Shore, and that she alone must bear the consequences of her negligence. The Cormorant, with her helm hardaport and close to the south pier, was as skillfully navigated as the situation created by the negligence of the Lake Shore permitted. It is not improbable that the narrowness of the channel, together with the movements of the vessels, would cause a displacement of the water, resulting in the Cormorant sheering from the south pier and toward the bow of the Lake Shore; but I think a fair preponderance of the evidence indicates that the latter vessel did not seasonably stop swinging to port. True, the Lake Shore reversed her engine, and ordinarily the tendency would be to throw her stern to port and her bow to starboard, but this movement, in my judgment, was not executed with sufficient promptitude to avoid the accident. That Capt. Hahn suspected that he was greedy of the channel and probably could not promptly check the swing of his vessel may be inferred from his signaling the barge to turn out of her course on the south side of the river and pass starboard to starboard.

Charges of fault are also made against the steamer Lake Shore, in that she did not maintain an attentive lookout. Capt. Hahn, who was on the pilot house, swore that he did not see the approaching barge until he had directed his steamer to go ahead slow; the Cormorant then being at about the end of the south pier. He heard her signals, but assumed they were blown to a passing tug. When the bow of his steamer had swung 25 feet out in the river, he claims to have blown an initial signal of two blasts; the barge answering by an alarm quickly followed by a single blast. He answered, assenting to the barge passing port to port. He also testified that he reversed his steamer when she was approximately 50 feet from her berth, and later in his examination he swore that the accident happened in midstream. Thus it would seem to be shown that the Lake Shore continued to swing to port after the assenting signal was sounded. In my judgment the Cormorant cannot be held in fault for failing to assent to the starboard passing; for, in the exercise of proper precaution, the situation did not at the time of said signal warrant such a maneuver on her part. If an attentive lookout had been stationed forward at the instant the Lake Shore left her berth, the approaching steam barge doubtless would have been observed immediately as she turned in the channel, and, moreover, the different signals, indisputably sounded by her, would unquestionably have been understood. The presence on deck of the master of the Lake Shore did not render the service of a careful lookout indispensable, nor was she excused, even though just leaving her berth, from adopting such reasonable precaution to prevent collision as the situation required, specially as it may be presumed that at this time her master was variously occupied with the management of the vessel. Hence the failure of the Lake Shore to heed the signals of the Cormorant was a fault for which she must be held liable.

A further charge made against the Lake Shore is that rule 17 of

the statutory rules and rule 1 of the inspectors' rules were ignored, and therefore a dangerous situation was presented. The first-mentioned rule provides for signaling for vessels underway to pass each other on the port side, and the second rule relates to steamers approaching head and head. Respondent contends that these rules were inapplicable to the situation, as the Lake Shore was not strictly a vessel underway. This point is not maintainable, as it has been held that when signal lights for vessels under way are displayed by a vessel aground and such vessel answers signals, leading a navigating vessel to believe that she will keep out of the other's way, she will be held in fault and responsible for damages resulting from her action. The F. W. Wheeler, 78 Fed. 824, 24 C. C. A. 353; The Maling (D. C.) 110 Fed. 227; The Morris B. Grover, 92 Fed. 678, 34 C. C. A. 616. The Lake Shore had left her berth, her propeller was moving, her master was on the pilot house, signals were sounded by her to direct the movements of other vessels, and accordingly she cannot be heard to say in excuse of asserted negligence that she was not navigating. However, I am unable to see how fault in this respect can be imputed to the Lake Shore inasmuch as her invitation to pass to starboard was not accepted by the Cormorant. Undoubtedly the situation on account thereof became somewhat confused, but I do not think that the signals of the Lake Shore, even if they had been in violation of the statute, were a contributing cause of the mishap.

My conclusion is that the respondent was in fault, first, for not keeping a proper and sufficient lookout; second, that her master was not sufficiently attentive to the initial signals of the Cormorant; third, that he continued to swing to port after the signal assenting to the passing port to port was sounded; and, finally, that he managed his vessel in such a negligent manner as to cause her to impinge the Cormorant. The various allegations of fault on the part of the Cormorant as alleged in the answer are not sustained.

A decree will be entered accordingly in favor of the libelant against the Lake Shore, with costs, and an order of reference may be taken to the clerk to state the amount.

OGILVIE v. G. & C. MERRIAM CO.

G. & C. MERRIAM CO. v. OGILVIE.

(Circuit Court, D. Massachusetts. January 9, 1907.)

No. 155.

1. COPYRIGHTS—NAME OF BOOK—EXPIRATION OF COPYRIGHT—EFFECT.
   Where defendants procured a copyright on a dictionary in 1847, which was published under the name "Webster's Unabridged Dictionary," on the expiration of the copyright both the work and the generic name "Webster" became public property.

2. TRADE-MARKS AND TRADE-NAMES—COPYRIGHTED BOOKS—EXPIRATION OF COPYRIGHT—USE OF NAME.
   Where the name "Webster," as applied to dictionaries, referred to a publication copyrighted in 1847 under the name "Webster's Unabridged

Dictionary," and also acquired a secondary meaning, indicating to the public a particular book published and sold by defendant, who owned the copyright, on the expiration of the copyright complainant, though entitled to use the word "Webster" as applied to a reprint of the dictionary published by him, must so use it as to unmistakably inform the public that his book is not that published by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 86.]

3. SAME—EVIDENCE.

On the expiration of the copyright on Webster's Unabridged Dictionary, complainant started to publish a dictionary which was a reprint of and founded on the original, and which he called "Webster's Dictionary" or "Webster's Imperial Dictionary." On the back or cover of complainant's book was printed complainant's name "George W. Ogilvie," and upon the title page was printed "George W. Ogilvie, Publisher." *Held* that, as there was no trade-mark in the ordinary form and size of the book, complainant had done all that the law required to distinguish his book from dictionaries published by defendants under the name "Webster's International Dictionary."

4. SAME—UNLAWFUL COMPETITION—ADVERTISING.

Where, after the expiration of a copyright on Webster's Unabridged Dictionary, complainant published a dictionary called "Webster's Dictionary" or "Webster's Imperial Dictionary," which he advertised by misleading circulars, intending to convey the impression that complainant's book was a new edition of the dictionary published by defendant company, and was the successor of a later dictionary published by defendants known as "Webster's International Dictionary," complainant having taken portions of the printed matter in the circulars and advertisements of the International Dictionary and inserted them in his circulars and advertisements, he was guilty of unfair competition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 86.

Unfair competition, see Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity.

George F. Bean, for Ogilvie.
Judson & Hale, for G. & C. Merriam Co.

COLT, Circuit Judge. This bill and cross-bill present two general questions: Has the defendant, the G. & C. Merriam Company, the exclusive right to the use of the name "Webster" in the title of dictionaries of the English language? and, second, has the complainant, George W. Ogilvie, unmistakably informed the public that his dictionary is a Webster's dictionary published by George W Ogilvie, and not a Webster's dictionary published by the G. & C. Merriam Company?

The dictionary published by Ogilvie is entitled "Webster's Imperial Dictionary," and he seeks by his bill to enjoin the Merriam Company from sending out threatening letters and circulars to the trade, to the effect that the Merriam Company has the exclusive right to the use of the name "Webster" upon dictionaries. On the other hand, the Merriam Company, by its cross-bill, seeks to enjoin Ogilvie from the use of the name "Webster" upon his dictionary, and from sending out misleading circulars and advertisements respecting his dictionary. It is claimed by the Merriam Company that this use of the name

Webster and these circulars and advertisements are an infringement of Webster's International Dictionary, which is the latest edition of Webster's Dictionary published by the Merriam Company.

The evidence shows that the Ogilvie dictionary is an enlarged and revised edition of Webster's Dictionary, based upon Webster's Unabridged Dictionary, which was published and copyrighted by G. & C. Merriam in 1847, and upon which the copyright expired in 1889. The evidence also shows that the Merriam Company, and its predecessors in title, G. & C. Merriam & Co., and G. & C. Merriam, have been the publishers of Webster's Dictionaries for more than 50 years, having acquired all the rights in Webster's Dictionary from the heirs of Noah Webster previous to 1847, and that since that time they have published numerous editions of this work.

It further appears from the evidence that on the back or cover of every copy of each edition of this book published by Noah Webster and by the Merriams, beginning with the year 1806, have appeared the words "Webster's Dictionary," and that this is the generic name by which this book has always been known and described.

It further appears from the evidence that from 1847 to 1889 the Merriams were the sole publishers of Webster's Dictionaries, and that in 1889 the name "Webster," as applied to dictionaries, had acquired a secondary meaning, and indicated to the public the dictionaries published and sold by the Merriam Company. It further appears that, since the expiration of the Merriam copyright in Webster's Unabridged Dictionary in 1889, various editions of Webster's Dictionary have been published and sold by other publishers; but, notwithstanding this circumstance, it is shown by a preponderance of evidence that the name "Webster" still indicates to the public the dictionaries published and sold by the Merriam Company.

We have, then, to inquire what are the rights of Ogilvie with respect to the use of the name "Webster" upon dictionaries after the expiration of the Merriam copyright in 1889; it appearing that the name "Webster" has a two-fold signification, in that it is the generic name of the dictionary, and also indicates to the public the dictionaries published and sold by the Merriam Company.

A copyright, the same as a patent, is a monopoly created by statute. This monopoly is granted upon the implied condition that at the expiration of the copyright the book and the name by which it is designated are dedicated to the public; in other words, at the expiration of the copyright, both the book and its generic name become public property. To say that the public have the right to publish the book, and not the incidental right to use the name by which it is known, is in effect to destroy the public right, and to perpetuate the monopoly. For instance, to hold that the Merriam Company, after the expiration of its copyright in Webster's Unabridged Dictionary, still has the exclusive right to the use of the name "Webster" on some theory of trade-mark or trade-name, or unfair competition, would be to nullify the public dedication, and perpetuate the monopoly secured by the copyright. It follows, therefore, as a necessary result,

that at the expiration of the copyright any person has the right to publish the copyrighted book, and to call it by its generic name.

But it may so happen, as in the case at bar, that, at the expiration of the copyright, the name by which the book is known has also acquired a secondary meaning, and has come to indicate to the public the book published and sold by the publisher who took out the copyright. In such a case another person must so use the name as to protect individual property rights, and to prevent injury to the public. While no restrictions can be imposed upon the right to use the name, such person must, so far as is consistent with such use, protect the good will and business of the original publisher, and guard the public against deception. The duty, therefore, is imposed upon such person of accompanying his publication with such indications as to the source of publication as will unmistakably inform the public that the book is published by himself, and not by the original publisher. After having taken these precautions, if any injury results to the business of the original publisher, it is damnum absque injuria. Such injury is analogous to the incidental injury to the business of another which may result from the absolute right of every one to use his own name in his own business.

It follows in the case at bar that Ogilvie, upon the expiration of the Merriam copyright, has the right to publish the copyrighted book, or a revised edition thereof, and to call it "Webster's Dictionary," or "Webster's Imperial Dictionary," provided that he clearly indicates to the public that it is a Webster's Dictionary published by him, and not a Webster's Dictionary published by the Merriam Company.

In 1890, or soon after the expiration of the copyright in Webster's Unabridged Dictionary, the Merriams brought several suits in which they set up their exclusive right to the use of the name "Webster" in the title of dictionaries. In these cases the decisions were adverse to the Merriam Company upon this point, the courts holding that to give the Merriam Company this exclusive right would be to perpetuate the copyright monopoly.

In Merriam v. Holloway Publishing Company (C. C.) 43 Fed. 450, decided September 26, 1890, Mr. Justice Miller said:

"I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired may continue that monopoly indefinitely, under the pretense that it is protected by a trade-mark, or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright for any of his writings or works he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. * * * The grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book. * * *

"I will say this, however, that the contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired. What do they mean by the expression 'their book,' when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book."

In Merriam v. Famous Shoe & Clothing Company (C. C.) 47 Fed 411, decided September 10, 1891, Judge Thayer said:

"I have no doubt that defendant is entitled to use the words 'Webster's Dictionary' to describe the work that it is engaged in publishing and selling. Those words were used to describe Webster's Dictionary of the edition of 1847, and, as the copyright on that edition has expired, it has now become public property. Any one may reprint that edition of the work, and entitle the reprint 'Webster's Dictionary.' The latter words, which appeared on the title page and on the outer cover of books of the edition of 1847, have become public property, as well as other parts of the work. Defendant's right to call the 'Famous Reprint Edition' 'Webster's Dictionary' is as clear as the right of complainants to give that title to books of the edition of 1864."

In Merriam v. Texas Siftings Publishing Company (C. C.) 49 Fed. 944, decided March 15, 1892, Judge Shipman said:

"The plaintiffs are not entitled to an exclusive use of the name 'Webster's Dictionary' upon copies of editions the copyrights of which have expired, for the name is not a trade-mark. Mere copies of the edition of 1847 and 1859 can be reproduced by a publisher, over his own name, provided he makes no misrepresentations to induce the public to believe that it is another book, the right to publish which is the exclusive property of the plaintiff."

Merriam v. Holloway Publishing Company and Merriam v. Famous Shoe & Clothing Company were cited with approval by the Supreme Court in Singer Manufacturing Company v. June Manufacturing Company, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

Singer Manufacturing Company v. June Manufacturing Company was a patent case, and related to the exclusive right to the use of the name "Singer" upon sewing-machines after the expiration of the patent, which was claimed on the ground that the name "Singer" indicated to the public the machines manufactured by the Singer Manufacturing Company. In the opinion of the court in that case, Mr. Justice White said:

"It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. * * * It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly. * * * To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet, when the end was reached, disregard the public dedication and practically perpetuate indefinitely an exclusive right. The public having the right on the expiration of the patent to make the patented article and to use its generic name, to restrict this use, either by preventing its being placed upon the articles when manufactured or by using it in advertisements or circulars, would be to admit the right and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent. * * * But it does not follow as a consequence of a dedication that the general power, vested in the public, to make the machine and use the name, imports that there is no duty imposed on the one using it to adopt such precautions as will

protect the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. * * * It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a twofold significance, one generic and the other pointing to the origin of manufacture and the name is availed of by another without clearly indicating that the machine upon which the name is marked is made by him, then the right to use the name because of its generic signification, would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another. * * * On the other hand, to compel the one who uses the name after the expiration of the patent to indicate that the articles are made by himself in no way impairs the right of use, but simply regulates and prevents wrong to individuals and injury to the public. This fact is fully recognized by the well-settled doctrine which holds that 'every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is damnum absque injuria. * * *'

"The result, then, of the American, the English, and the French doctrine universally upheld is this: That where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and therefore that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact."

The Merriam Company contend that these cases are not applicable to the case at bar, because it is shown by the evidence that Webster's Dictionary now indicates to the public the latest edition of this book published by that company. This position is untenable. The fundamental ground on which these decisions rest is that at the expiration of the statutory term in a copyright or a patent the thing copyrighted or patented, together with its generic name, becomes public property. It follows that since 1889, or upon the expiration of the copyright in Webster's Unabridged Dictionary, Ogilvie had the same right as the Merriam Company to publish and sell that edition of Webster's Dictionary, or a revised and enlarged edition of that book, and to use the name "Webster" in the title. And this public right cannot be taken away or abridged on any theory of trade-mark or unfair competition, such as is now advanced by the Merriam Company. This is only another way of seeking to perpetuate the monopoly secured by the copyright. When the word "Webster," as applied to dictionaries, has once become dedicated to the public, it is not again subject to exclusive appropriation as a trade-mark or trade-name, nor can the public be deprived of its use on the ground of unfair competition.

It only remains to consider whether Ogilvie has clearly shown that his dictionary is published by himself, and not by the Merriam Com-

pany. Upon the back or cover of the Ogilvie book is printed "George W. Ogilvie," and upon the title page is printed "George W. Ogilvie, Publisher." The form of the book is the usual form which characterizes unabridged dictionaries. With respect to the book itself, I think Ogilvie has done all which the law requires to distinguish his book from the dictionaries published by the Merriams, including Webster's International Dictionary. As was said by Judge Shipman in Merriam v. Texas Siftings Publishing Company:

"The mere form or size of the volume in which Webster's Dictionary has ordinarily appeared does not in the mind of the public connect the plaintiff with the manufacture of the dictionary, and there is no characteristic of a trade-mark in such ordinary form or size." (C. C.) 49 Fed. 944.

With respect to the Ogilvie circulars and advertisements, the case is quite different. It is evident that these circulars and advertisements are misleading and deceptive. They convey the impression that the Ogilvie book is a new edition of Webster's Dictionary published by the Merriam Company, and that it is the successor of Webster's International Dictionary; and, further, Ogilvie has taken portions of the printed matter in the circulars and advertisements of the International Dictionary, and inserted them in his circulars and advertisements. All this goes to show the intention of Ogilvie to trespass upon the reputation of the Merriam Company, and to deceive purchasers into purchasing his dictionary for one of the series of Webster's dictionaries published by the Merriam Company. It is clear, therefore, that Ogilvie should be enjoined from sending out these circulars and advertisements in their present form. These circulars and advertisements should be so reformed as not in any manner to convey the impression that Ogilvie is the successor of the Merriam Company, or that his book is a new edition of any of the series of Webster's Dictionaries published by the Merriam Company.

The conclusions I have reached are that the Merriam Company should be enjoined from sending out circulars to the effect that they have the exclusive right to the use of the name "Webster" in the title of dictionaries, and that Ogilvie should be enjoined from sending out his circulars and advertisements in their present form; and a decree may be drawn accordingly.

In re JOHNSON.

(District Court, N. D. New York. January 7, 1907.)

BANKRUPTCY—PERSONS ENGAGED IN FARMING—MARRIED WOMEN.

Where a farm was conveyed to a married woman for the purpose of placing it beyond the reach of her husband's creditors, and she and her husband thereafter operated the farm, with an agreement that it was to be carried on as his, the wife performing only such services as were generally performed by a farmer's wife, the husband taking full charge of the farming operations, the wife was not "a person engaged chiefly in farming or tillage of the soil," within Bankr. Act July 1, 1898, c. 541,

§ 4, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that such persons may not be adjudged involuntary bankrupts.

[Ed. Note.—What persons are subject to bankruptcy law, see Mattoon Nat. Bank of Mattoon, Ill. v. First Nat. Bank of Mattoon, Ill., 42 C. C. A. 4.]

In Bankruptcy. Motion to confirm report of special master to whom this matter was referred and for an order thereon adjudging Mary E. Johnson a bankrupt.

John E. Smith, for petitioner.

W. E. Lounsberry (M. H. Kiley, of counsel), opposed.

RAY, District Judge. May 29, 1906, John E. Smith, a creditor of Mary E. Johnson, filed his petition asking to have her adjudicated a bankrupt, alleging as an act of bankruptcy that May 22, 1906, she had suffered and permitted, while insolvent, her son, one W. S. Johnson, to obtain a preference through legal proceedings, and not having at least five days before a sale of the property affected by such preference vacated or discharged such preference. The alleged preference consists in her having allowed and permitted her said son to obtain, secretly, a judgment against her in the sum of about $1,150.51, immediately issue execution thereon and levy upon all her property, except a farm mortgaged for more, it is alleged, than its value. The petition alleged that Mary E. Johnson is not a wage-earner, or a person engaged chiefly in farming or the tillage of the soil. The alleged bankrupt filed an answer, not demanding a jury trial, denying the act of bankruptcy, and also denying the allegation that she is not a person engaged chiefly in farming or the tillage of the soil, and alleging affirmatively that at the time of the filing of the petition and of the commission of the act alleged to be an act of bankruptcy she was "a person engaged chiefly in farming or the tillage of the soil."

On a full trial and hearing the special master found and reported, with the evidence, that the alleged bankrupt had committed the act of bankruptcy alleged, and was not a person engaged chiefly in farming or the tillage of the soil. This report was filed October 4, 1906, and subsequently exceptions to these findings and to the report were permitted to be filed nunc pro tunc. The evidence disclosed that the act of bankruptcy was committed as alleged. The petitioner urges that the judgment was obtained and the levy made clandestinely and are based upon a fraudulent and fictitious claim. While there is evidence to sustain this contention, to some extent at least, that question is immaterial here. However fraudulent the conduct of the parties to the judgment and execution may have been, the remedy is in the state courts if the alleged bankrupt was at the times mentioned not subject to proceedings in bankruptcy, being "a person engaged chiefly in farming or the tillage of the soil."

The facts upon which the determination of the case depend may be summarized as follows: Some years ago William J. Johnson, the husband of said Mary E. Johnson, held a contract for a farm in Fenner, Madison county. Because of sickness and financial difficulties he assigned this to his wife, Mary E. Johnson, the alleged bank-

rupt. Subsequently, and April 30, 1904, this farm was deeded to her. This deed was made to the wife, Mary E. Johnson, because of the involved financial condition of the husband, William J. Johnson, and with the general understanding it was to be run and managed in the same manner it had been while the husband held the contract; that is, by the husband and as his, except so far as it was necessary to do business in the name of the wife so as to prevent creditors of the husband from setting aside the conveyance and seizing the products of the farm as the property of the husband. John E. Smith, the petitioning creditor here, understood this, as he attended to the business in transferring the farm. The alleged bankrupt and her husband, until about the time of the commencement of these proceedings, have occupied the farm, and it has been run and managed in the manner indicated. The husband, with the assistance of hired help, has done the farm work and usually sold and disposed of the products, using the proceeds of sales as his own and as he pleased. He has not been employed by his wife as her agent, nor has he accounted to her. He was not employed by her as a servant, or hired man in the conduct and management of the farm or in doing the work thereon. The wife has occasionally sold products of the farm and purchased supplies, etc. But all this has been done in the usual and customary way incident to the relation of husband and wife where the husband holds the title to a farm and runs the business of farming thereon. At times and intervals she has assisted in doing the field farm work as was customary on all farms in the vicinity. She attended to the household work and to the manufacture of the milk from the cows kept on the farm into butter, and occasionally she sold it. Occasionally she gave directions to help on the farm as to the work to be done, but all this was done in the mode and manner customary on farms where the husband holds the title and runs the business. As a rule, when credit was obtained for money or property for farm business and farm purposes and obligations were given, the husband and wife joined in executing the obligation. As to store accounts for ordinary supplies credit was given the wife, as it was understood in the vicinity that she held the title to the real and personal property, and was the only one pecuniarily responsible. When the farm was deeded to the wife, the alleged bankrupt, the money to pay for it and to supply other needs for the farm was borrowed of Mr. Smith on bond and mortgage on the farm itself, and this mortgage was executed by both husband and wife. Out of this and subsequent credit to both for the purpose of running the farm grows a large part, if not all, of the indebtedness of the alleged bankrupt to the petitioner.

With this state of facts existing at the time of the filing of the petition herein, was this woman, Mary E. Johnson, within the meaning of section 4 of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended February 5, 1903, "a person engaged chiefly in farming or the tillage of the soil"? If she was, she was not and is not within the purview of the act, and cannot be adjudicated a bankrupt, for that section provides:

"Who may become bankrupts—(a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

"(b) Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act." Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423].

It is clear that she was not a person engaged chiefly in the tillage of the soil. Conceding that a person owning and living on a farm who does no work thereon, but who hires all the help and who directs all the work for his or her benefit and who thus causes the soil of the farm to be tilled for his or her benefit, and who conducts no other business, is engaged chiefly in the tillage of the soil, still the alleged bankrupt, Mary E. Johnson, is not such a person, for she was not thus engaged. Such was not her business. Was she engaged chiefly in farming? Her husband was a farmer and engaged in tilling the soil, and this was his main and chief business. She, as his wife, aided and assisted him, as is customary, in making the butter, in assisting about chores incidental to farming, in keeping the farmhouse in order, in preparing meals and sleeping apartments for the husband and the farm help.

In name the wife owned the business. The paper title to the farm was in her. In fact, she did not. The business was being run by the husband for his own benefit, and only incidentally and indirectly the benefit of the wife, and in the same manner all farmers' wives are aided and benefited by the proper management and running of the farms on which husbands and wives live and which the husbands own and control. It is unnecessary to say that a woman who is a wife may be a farmer. If she owns or hires a farm and is engaged in running it, she is a farmer within the meaning of the act. But the mere fact that she actually owns a farm does not make her a farmer. In re Matson (D. C.) 123 Fed. 743. Is the wife of a farmer who owns and runs a farm a farmer, or engaged in farming, because of the facts that she lives with him and keeps his house and cooks his meals and cares for his clothing, and manufactures the milk from the dairy into butter or cheese and occasionally assists in doing farm chores having no other business? The services of the wife belong to the husband. It is her duty to do all those things so far as circumstances demand and permit. She is not engaged in a separate and independent business. She demands and is entitled in return to a support from the husband. Is the wife of a blacksmith a blacksmith because she is the wife of a blacksmith and keeps his house, and occasionally sweeps the shop? Or is the wife of a merchant a merchant because of the facts that she is the wife of a merchant, and keeps his house and incidentally assists him by selling goods behind the counter? The word "farmer" is synonymous with agriculturist, husbandman, cultivator, or tiller of the soil. (Soule.) The Century Dictionary says a farmer is "one who cultivates a farm either as owner or lessee; in general one who tills the soil." This dictionary has the word "farmeress" defined

as "a woman who farms; a farmer's wife." In Johnson v. Guarantee & Accident Co., 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440, 69 Am. St. Rep. 549, it was held:

"One having regular clerical employment in a city, but whose home is upon a farm, where he spends his Sundays and one night in each week, the management of which is, in his absence, entirely in the hands of men hired by him for the purpose, is not a 'farmer,' within the terms of an accident insurance policy classing farming as a hazardous employment."

Plaintiff in that case testified as to his running the farm as follows:

"Two men were managing my farm at the time of the accident. It was their business to take care of the stock. Between them they had the entire charge of it. That included the bull. I left everything in charge of the two men. When I was there, I took charge of it as I saw fit."

The court said:

"We think there was no evidence tending to show that plaintiff was a farmer, within the terms of the policy, until his employers, Hull Bros., had ceased to do business. The fact that he lived upon his farm, and carried it on through others, does not make him a 'farmer,' within the meaning of that term as used in these accident policies. He was at home only from Saturday night to Monday morning, and on Wednesday night, of each week. There is no testimony to show that during that time he was engaged in the actual work of a farmer, so as to incur the more hazardous risks incident to that business."

In McCue v. Tunstead, 65 Cal. 506, 4 Pac. 510, it was held that:

"A farmer is one who resides on a farm with his family, cultivating such farm, and mainly deriving his support from it, though he is also the publisher of a weekly newspaper and the proprietor of patent medicines."

In re Slade's Estate, 122 Cal. 434, 55 Pac. 158, it was held that a farmer is one who is devoted to the tillage of the soil, and persons who follow this occupation may call themselves horticulturists, viticulturists, or gardeners, but they are farmers. In Wulbern v. Drake, 56 C. C. A. 643, 120 Fed. 493–495, it was held that the words in the bankruptcy act, "a person engaged chiefly in farming or the tillage of the soil," mean the business of cultivating land or employing it for the purpose of husbandry. In re Drake (D. C.) 114 Fed. 229–231, it was said, the meaning of these words being under consideration:

"Nor will it profit to trace historically the meaning of the word 'farming.' In its purely agricultural sense, its use is comparatively modern. Within the purview of this statute it is understood to mean the business of cultivating land, or employing it for the purposes of husbandry; and a farm is a tract devoted to cultivation under a single control, whether it be large or small, isolated, or made up of many parcels. For a long time after the words began to be used in an agricultural sense they were applied to lands held on lease, and 'demise, lease, and to farm let' are still the operative words of a lease, but they are, in modern use, applied without respect to nature of tenure. Robinson Crusoe says, 'I farmed upon my own land.' So it appears that the words have been used in their present sense for nearly 200 years. Under the proofs in this case the defendant had the direction and control of the farming operations upon all the land described, and was 'engaged in farming,' and I am of opinion that these words cannot be given the restricted meaning which would take out of the protection of the statute only those engaged in actual labor upon the farm."

In O'Neil v. Pleasant Prairie Mut. Fire Ins. Co., 71 Wis. 621, 38 N. W. 345, 346, it was held that the term "farmer" means a person

who cultivates a considerable tract of land in some one of the usual recognized ways of farming.

I find no case holding, and I have not been cited to any, that the wife of the farmer, who assists him in the usual and customary way by keeping the house and doing dairy work, is herself a farmer. Congress thought it wise to exclude farmers, those engaged chiefly in the tillage of the soil, from the classes who may be adjudicated involuntary bankrupts. It was thought that this would encourage farming or at least not discourage persons of small means from purchasing farms and farming implements on credit and engaging in that business. But it was not, I think, intended to exclude from the classes who may be adjudicated involuntary bankrupts the wives of farmers who live with their husbands and assist them in the ways mentioned. This case, however, presents a somewhat different aspect, in that the wife held the title to the farm and the work she did was indirectly and in some respects directly in aiding and assisting to do the work on the farm. She also rented in her own name a parcel of land, some 10 acres, which was worked as a part of the farm in question, but by the husband and in the same manner before described. It was all done as a cover and to keep the property from the creditors of the husband, who was the actual owner; the one actually doing the business and working the land for his own support and gain, and incidentally the support of the wife.

I cannot bring myself to the conclusion that where the title to the farm actually owned by the husband is put in the name of the wife to keep it from the husband's creditors, with an agreement and understanding that as between them it is to be run, managed, worked, and treated with its products as his, and is so run, managed, worked, and treated, as was the case here, the wife doing that which farmers' wives usually do, and merely signing her name when necessary to keep up the appearance of ownership in herself, the wife is "a person engaged chiefly in farming or the tillage of the soil" within the intent and meaning of the bankruptcy act.

The report of the special master is approved and confirmed, and the exceptions are overruled. There will be an order of adjudication accordingly.

UNITED STATES v. BRACE.

(District Court, N. D. California. January 16, 1907.)

(No. 4,353.)

1. PERJURY—PUBLIC LANDS—ENTRY—OATH—AUTHORITY TO ADMINISTER.

Act Cong. June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], providing for the sale of public lands, restricts the quantity to 160 acres to any one person, and section 2 requires the applicant to file with the register a written statement under oath that he does not apply to purchase the land on speculation, but in good faith to appropriate it to his exclusive use, and that he has not made any agreement or contract to convey the same. Section 3, 20 Stat. 90 [U. S. Comp. St. 1901, p. 1545], provides that if no adverse claim shall be filed after publication of notice of the application, the applicant, on furnishing the register of the land

office satisfactory evidence of the publication of the notice, that the land is unoccupied, and apparently contains no deposits of gold, etc., and on paying the purchase money and fees, shall be entitled to a patent. The act also authorizes the Commissioner of the General Land Office to make regulations for the carrying of its provisions into effect, and one of the regulations so made requires the register of the land office to examine the applicant under oath with reference to the good faith of his application. *Held*, that section 3 did not preclude the land officers from requiring proof of the good faith of the application as a part of the applicant's final proof, and that the register of the land office had express power to administer an oath to the applicant on such examination, as provided by Rev. St. § 2246 [U. S. Comp. St. 1901, p. 1371], the falsity of which could be the basis of a prosecution for perjury.

2. PUBLIC LANDS—TIMBER LANDS—SALE—APPLICATION—TRUTH OF FACTS.
Act Cong. June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], provides for the sale of public timber lands on an application under oath, stating, among other things, that the application is made for the sole benefit of the applicant, and not for the purposes of speculation or sale, and that on subsequent proof of the publication of notice and certain other facts, and payment of the purchase price and fees, a patent shall issue to the applicant. *Held*, that the facts stated in an application, including the fact that the application is not made for the purpose of sale, must not only be true when made, but must also be true when the land is paid for and the applicant receives his certificate of purchase or receiver's receipt.

3. PERJURY—SUBORNATION OF PERJURY—PUBLIC LAND—AFFIDAVIT.
Rev. St. §§ 5392, 5393 [U. S. Comp. St. 1901, pp. 3653, 3654], declares that every person who, having taken an oath before a competent officer, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, willfully and contrary to the oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and every person who procures another to commit any perjury is guilty of subornation of perjury. *Held* that, where an indictment charged that defendant induced C. to make application for the purchase of timber lands, as authorized by Act Cong. June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], and in the furtherance of such application to make a false oath at the time of final entry with reference to the good faith of the application, which the register of the land office was authorized to administer by Rev. St. § 2246 [U. S. Comp. St. 1901, p. 1371], and by the regulations of the land department, it sufficiently charged the offense of subornation of perjury.

A. P. Black, Asst. U. S. Atty.
J. H. G. Weaver, for defendant.

DE HAVEN, District Judge. Indictment for subornation of perjury. The indictment contains three counts, and the defendant has demurred thereto for uncertainty, and upon the broad ground that the matters alleged do not constitute a public offense, in this: "That the oath set out therein is extrajudicial, not authorized by law, and will not sustain an indictment for perjury or subornation of perjury." The first count, in addition to the usual technical averments required in an indictment for subornation of perjury, charges that defendant instigated and procured one Howard A. Cotrell to appear in person before the receiver of public moneys for the Eureka land district, upon the hearing of an application by said Cotrell then and there pending before the local land office of that district, to purchase a certain tract of land under the provisions of the act of June 3, 1878, entitled

"An act for the sale of timber lands in the states of California, Oregon and Nevada and in Washington Territory," and to "make and subscribe before the receiver an oath and affidavit" in which he knowingly, falsely, and corruptly deposed and swore, among other things, that he, "the said Howard A. Cotrell, had not directly or indirectly made any agreement or contract in any manner with any person by which the title to the said land, sought to be acquired from the government of the United States, * * * might inure, in whole or in part, to the benefit of any person except the said Howard A. Cotrell," and that such entry was made by him in good faith exclusively for his own use and benefit. Section 1 of the act of June 3, 1878 (chapter 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), provides that lands chiefly valuable for timber "may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons"; and by section 2 it is made necessary for the person desiring to avail himself of the provisions of the act, to file with the register of the proper district a "written statement" or application, setting forth certain facts showing the good faith of the applicant, and containing also a description of the land he desires to purchase. Section 3 of the act provides:

"That upon the filing of said statement as provided in the second section of this act, the register of the land office, shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver, * * * the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon. * * * Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

The indictment under consideration is sufficiently definite, and it, in effect, charges the defendant with having instigated and procured Cotrell to give willfully false testimony in relation to the bona fides of his application, upon the occasion of his making final proof in the local land office of his right to enter the land for which he had applied. It is insisted upon the part of the defendant that under the statute providing for the sale of timber lands, above referred to, the officers of the local land office were upon such final hearing without jurisdiction to inquire whether the entry was made in good faith for the exclusive use and benefit of the applicant, or whether he had directly or indirectly made any agreement to convey the land to another when he had acquired the title. In support of this contention it is said that,

by the terms of section 3 of this statute, if no adverse claim has been filed, the applicant is only required to furnish to the register of the land office satisfactory evidence, first, that the notice of his application has been duly published as required, and, second, that the land is of the character contemplated in the act, "unoccupied, and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal"; that the statute expressly declares that upon proof of these facts, "and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver, * * * the applicant may be permitted to enter such tract, and, upon the transmission to the General Land Office of the testimony and evidence in the case, a patent shall issue thereon"; and it is urged that, the statute having thus named the facts which are to be proven at the time of final entry, it was not competent for the local land officers to require proof of other facts, such as the good faith of the applicant in making the entry. The answer to this argument is found in the general intent or policy of the statute, and the particular provision therein making it the duty of the Commissioner of the General Land Office to prescribe regulations for the purpose of carrying the law into effect, and in the regulations made in pursuance of the authority thus conferred. The obvious intention of the statute is to restrict the right to purchase the lands to which it refers to persons who in good faith enter the same for their own use and benefit. The applicant must not be a "dummy" or a mere nominal purchaser, who in making application to purchase simply allows his name to be used for the purpose of acquiring from the government the legal title to the land applied for, with the intention of immediately transferring such title to some other person under a direct or indirect agreement or understanding that such is the purpose for which the entry is made; nor must he apply "to purchase the same on speculation." Olson v. United States, 133 Fed. 849, 67 C. C. A. 21. That such was the intention of Congress not only appears from the fact that the quantity of land which any one person or association of persons is allowed to purchase under the statute is limited to 160 acres, but from section 2, which requires the applicant to file with the register of the proper land district, as the first or initial step in the proceeding, a statement, verified by his oath, setting forth "that he does not apply to purchase the same on speculation, but in good faith to appropriate" it "to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself." The administration of this law is confided to officers of the Land Department, whose duty it is to see that its policy is not defeated and the government defrauded by a sale of the public lands to those who purchase on speculation or for the benefit of others; and to the end that this duty may be properly discharged, the statute expressly confers upon the commissioner of the General Land Office authority to make regulations for the pur-

pose of carrying its provisions into effect, and, under the authority thus given, that officer, on May 21, 1887, in a circular addressed to registers and receivers, prescribed the following among other regulations, to be observed in the entry of lands under this statute:

"The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the 3d section of the act, must be taken before the register or receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by you upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. You will test the accuracy of affiant's information and the bona fides of the entry, by close and sufficient oral examination. You will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use, and not for sale or speculation, and whether he has conveyed the land or his title thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure, in whole or in part, to the benefit of any person or persons except himself." 6 Land Dec. Dep. Int. 116.

The printed forms referred to in the foregoing regulation, and made a part of it, require the officers of the local land office to propound to the applicant at the time of entering the land applied for the following among other questions:

"Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which you may acquire from the government of the United States may inure, in whole or in part, to the benefit of any person except yourself?

"Ques. 14. Do you make this entry in good faith for the appropriation of the land to your own use and not for the use or benefit of any other person?"

That these regulations are in prefect harmony with the statute, and such as are reasonably necessary and proper to be observed in its administration, cannot admit of doubt. The officers of the Land Department are not required to accept the statements contained in the application to purchase as conclusively establishing the bona fides of the applicant, but, on the contrary, the statute contemplates that the Commissioner of the General Land Office shall make regulations giving to the register and receiver the authority to subject the applicant and his witnesses to an oral examination, for the purpose of satisfying themselves that the entry is made in good faith for the benefit of the applicant, and not in the interest of another, and the questions above set out are relevant to such an inquiry. Even if it should be conceded that his right to purchase from the United States would not be defeated by a sale, or by an agreement to sell, made after the filing of the application and before the date of the entry—that is, before the applicant is given his certificate of purchase or receiver's receipt showing that he has paid the government for the land and been allowed to enter it—still the fact of such intermediate sale or agreement to sell would be a material circumstance to be considered in an investigation relating to the truth of the statements contained in the original application. But the statute cannot receive this narrow interpretation. The facts stated in the application must not only be true

when made, but it must also be true that when the land is paid for, and the certificate of purchase or receiver's receipt issued, that the person entering the land is not then under agreement, express or implied to convey the title so acquired to another person. U. S. v. Bailey, 17 Land Dec. Dep. Int. 468. This seems to be in accordance with what was said by the Supreme Court in United States v. Budd, 144 U. S. 163, 12 Sup. Ct. 575, 36 L. Ed. 384. The court there said:

"The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement—the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied."

To hold that one may, after filing his application, make an agreement to convey the land applied for, and still have the right to enter the same for the benefit of the person with whom the agreement was made, would defeat the express policy of the statute, which limits the quantity which may be acquired thereunder by any one person or association of persons to 160 acres. Such an entry, if not opposed to the strict letter of the statute, would be clearly in violation of its spirit. Inasmuch as the regulations of the Commissioner of the General Land Office above referred to are valid, the receiver of the local land office was authorized to administer the oath mentioned in the indictment. Section 2246 of the Revised Statutes [U. S. Comp. St. 1901, p. 1371] provides:

"The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands. * * *"

It necessarily follows from the foregoing that the indictment sufficiently charges the defendant with the crime of subornation of perjury, under the rule declared in Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415, and as that offense is defined in sections 5392, 5393 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3653, 3654], which declare that:

"Every person who having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify * * * truly * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. * * * Every person who procures another to commit any perjury is guilty of subornation of perjury."

The demurrer to the indictment is overruled.

UNITED STATES v. BRACE et al.

(District Court, N. D. California. January 16, 1907.)

No. 4,352.

1. CONSPIRACY—INDICTMENT—CONSTRUCTION.

An indictment alleging that defendants during all the times between May 25, 1902, and the commission of the last overt act therein set forth continued to conspire together to defraud the United States of the title

to its public lands in the manner and by the means agreed on between them on May 25, 1902, was not equivalent to a charge that defendants subsequent to that date entered into a new conspiracy to accomplish their unlawful design, but was merely an allegation that the conspiracy formed on that day was never abandoned, but was in continuous operation thereafter until the date of the last overt act charged.

2. SAME—STATUTES—CONSTRUCTION.
Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], provides that, if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, and one or more of them do any act to effect the object of the conspiracy, all shall be liable to a penalty, etc. *Held,* that the offense defined by such section was a continuing one so long as it was in process of execution, as manifested by overt acts in pursuance thereof.

3. CRIMINAL LAW—LIMITATIONS.
The crime denounced by such section consists in putting a corrupt agreement into active operation, and hence limitations run from the date of the last overt act committed for the purpose of completing the object of the conspiracy.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 275.]

4. CONSPIRACY—SEVERAL PROSECUTIONS.
There can be but one prosecution for conspiracy in violation of Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], regardless of the number of overt acts committed in pursuance thereof.

See 143 Fed. 703.

J. H. G. Weaver and W. F. Clyborne, for defendant Brace.
J. F. Quinn, for defendant Young.
Robert T. Devlin, U. S. Atty., and A. P. Black, Asst. U. S. Atty.

DE HAVEN, District Judge. The indictment charges that the defendants, on May 25, 1902, entered into a conspiracy to defraud the United States by obtaining from it, in violation of the law providing for the sale thereof, title to divers tracts of land of great value, situated in this district and state; that for the purpose of effecting the object of said conspiracy, certain overt acts were committed by the parties thereto on June 10, 1902, by filing and causing to be filed certain false and fraudulent applications for the purchase of such lands in the local land office at Eureka, in this district, and state. The indictment alleges:

"That from the said twenty-fifth day of May, in the year of our Lord one thousand nine hundred and two, and until and including the times hereinafter alleged, the said conspiracy, combination, confederation, and agreement was continuously in process of execution, and the said George W. Brace and Albert B. Young continued, during and including said times, to knowingly, falsely, and unlawfully to conspire, combine, confederate, and agree together [and with divers other persons named] so to defraud the United States of the title to and possession of the said lands in the manner and by means aforesaid."

The indictment further charges that, for the purpose of effecting the object of said conspiracy, "and while the said George W. Brace and Albert B. Young so knowingly, falsely, and unlawfully conspired, * * * as aforesaid, so to defraud the United States of its title to and possession of said lands, in the manner and by the means aforesaid," the said defendant Brace committed other overt acts on the

11th, 12th, and 15th days of September, 1902, by causing divers persons to appear before the officers of the local land office at Eureka, Cal., and make false and fraudulent final proofs, for the purpose of establishing their right to purchase from the United States the lands for which they had applied. The indictment was found and returned on September 8, 1906. The defendant Brace has interposed a special plea, in which he alleges that the offense charged in the indictment is "barred by the provisions of section one thousand forty-four (1044) of the Revised Statutes of the United States of America [U. S. Comp. St. 1901, p. 725], in that more than three years had elapsed between the commission of said alleged crime and the finding of said indictment, to wit, three years and eighty-nine days. And in this behalf defendant alleges that, during all of said times between the commission of said alleged crime and the filing of said indictment, the said George W. Brace was subject to the process of said court, and at no time during said time was he a fugitive from justice, or was he 'fleeing from justice;'" and that he did not at any time between the date of the commission of the offense charged and the finding of the indictment "leave his home and known place of abode with intent to avoid detection or punishment for any public offense against the United States." The defendant Young has also filed a special plea, similar in form to that of the defendant Brace. The United States has demurred to each of these pleas, upon the ground that it does not state facts sufficient "to constitute a plea, or to authorize the court to stay the trial of this action," and upon the further ground that it does not appear therefrom "that an overt act in consequence of the conspiracy alleged in said indictment was not committed within three years before the filing thereof," and "because it appears upon the face of the indictment herein that an overt act in pursuance of the conspiracy alleged in said indictment was committed within three years before the filing thereof."

1. In my opinion the allegation in the indictment that the defendants during all the times between May 25, 1902, and the commission of the last overt act therein set forth continued to conspire together to defraud the United States of the title to its public lands, in the manner and by the means agreed on between them on May 25, 1902, is not equivalent to a charge that the defendants subsequently to that date entered into a new conspiracy for the purpose of accomplishing their unlawful design to defraud the United States of certain of its public lands. It is simply, in effect, an allegation that the conspiracy formed on May 25, 1902, was never abandoned, but was in continuous operation thereafter until the date of the last overt act set out. The indictment, therefore, is to be construed as charging but one conspiracy; that such conspiracy was formed by the defendants on May 25, 1902, and numerous overt acts were thereafter committed by them for the purpose of effecting its object, the first of these acts on June 10, 1902, and the last on September 15, 1902; that from the date of its formation until the commission of the last overt act in pursuance thereof, the conspiracy so formed on May 25, 1902, was, in the language of the indictment, "continuously in process of execution." Assuming that the conspiracy was formed and the overt acts committed

upon the particular dates named in the indictment, the precise question which is raised by the demurrers to the special pleas relates to the time when the right of the government to prosecute the defendants for the offense charged in the indictment began to run.

Section 1044 of the Revised Statutes [U. S. Comp. St. 1901, p. 725] provides that no person shall be prosecuted for an offense of the character described in this indictment unless the indictment is found "within three years next after such offense shall have been committed"; while the succeeding section declares that this limitation shall not extend to the case of any person fleeing from justice. The contention of the defendants is that the right of the government to prosecute them accrued upon June 10, 1902, the date of the first overt act, and, as this was more than three years prior to the finding of the indictment, the right to prosecute for such offense is barred; and support for this contention is undoubtedly found in the cases of United States v. Owen (D. C.) 32 Fed. 534, United States v. McCord, 72 Fed. 159, Ex parte Black (D. C.) 147 Fed. 832, Commonwealth v. Bartilson, 85 Pa. 482, and Insurance Co. v. State, 75 Miss. 24, 22 South. 99. The argument which is advanced to sustain this conclusion is very strongly stated by Deady, J., in United States v. Owen (D. C.) 32 Fed. 534, and proceeds upon the theory that a conspiracy is not to be deemed a continuous crime while in process of execution, but is a completed offense the moment the first overt act is committed in pursuance thereof, as much so and in the same sense as the crime of murder or of arson is complete and at an end when the deed is done. Of course, if this be so, the statute of limitations would commence to run at the date of the commission of such overt act; but it seems to me that the more reasonable view is that which was followed by the Supreme Court of Illinois in the case of Ochs v. People (Ill.) 16 N. E. 662, and United States v. Greene (D. C.) 146 Fed. 803–889, and that is to regard the conspiracy as a continuing offense so long as the parties thereto continue to perform acts to effect its object, and, thus considered, the prosecution thereof is not barred if any overt act has been committed within the statutory period. The crime, defined in section 5440 of the Revised Statutes, may be said to be a continuing offense so long as it is in process of execution, as manifested by overt acts in pursuance thereof. At common law the crime of conspiracy was complete when two or more persons combined for the purpose of committing an unlawful act, and it was not necessary to allege or to prove an overt act; but under section 5440 of the Revised Statutes there must not only be the unlawful combination, but one of the parties must do some act for the purpose of effecting its object. Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90; U. S. v. Nunnemacher, 7 Biss. 11, Fed. Cas. No. 15,902; U. S. v. Goldberg 7 Biss. 173, Fed. Cas. No. 15,223. The crime consists in putting the corrupt agreement into active operation, and so long as it is in operation the offense is a continuing one. This being so, my conclusion is that, whenever a person commits any act in pursuance of an existing conspiracy, no matter when such conspiracy was formed, or how many precedent acts have been committed for the purpose of

effecting its object, the offense defined in section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676] is then committed, and is subject to prosecution. In saying this I do not mean to be understood as holding that, when a number of acts have been committed in furtherance of one conspiracy, there may be as many prosecutions therefor as there were acts. There can be but one prosecution, based upon a single conspiracy, and this is not barred as to any overt act within the statutory period.

It follows from these views that the demurrers to the special pleas must be sustained.

HILLS v. LEEDS.

(District Court, D. Maine. January 21, 1907.)

No. 27.

1. SHIPPING—CHARTER PARTY—CONSTRUCTION.

Respondent chartered a yacht for a specified sum for a portion of the year 1905, the charter providing for a deduction from the consideration in case the yacht from any accident arising from any defect therein should be disabled for a period of more than 48 hours. The charter also provided that the owner agreed to let, and the hirer agreed to hire, the yacht for the time specified; that the owner should fit out the yacht, and hand her over to the hirer tight, staunch, strong, and in every way fitted for service, and provide an efficient crew, clothe them, and pay their wages; that the owner should assume the responsibility of fire and marine risks, and the hirer should be responsible for any injury amounting to less than $100, should pay the running expenses of the yacht other than the wages of the crew, and should have control of the captain and engineer, with authority to discharge them. *Held*, that such contract was a letting of the vessel, and not a mere contract of service, so that the charterer became the owner for the voyage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 149–155.]

2. SAME—EVIDENCE.

In an action to recover the balance due on a charter party, evidence *held* insufficient to show that an injury to the yacht was caused by a defect in her outfit, within a provision in the charter party that, in case she should become unfit for use for a period of more than 48 hours because of any defect in her outfit, there should be a pro rata return of the charter money to the hirer.

3. SAME—INJURIES TO VESSEL.

Where a charter party required the hirer to redeliver the yacht to her owner in the same condition in which he received her, and when she was delivered the blades of both her propellers were bent, her owner was entitled to recover the expense incident to the repair thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 219–221.]

Grosvenor Calkins, for libelant.
Henry M. Earle, for respondent.

HALE, District Judge. This is a suit upon a charter party. By this contract the libelant leased to the respondent the yacht Kasagi for a portion of the year 1905, ending September 30th, for the sum of $2,562.50, to be paid in five several installments. Libelant brings

this suit for the last installment and for certain disbursements, which he claims are due to him under the terms of the charter party. The main contention arises under article 3 of the charter party, which provides as follows:

"In the event of the yacht, from any accident to the yacht or machinery, arising by or from any defect in the yacht or her outfit, becoming unfit for use, said disability not having been brought about by any act or order of the hirer, whereby the hirer is deprived of the use of the yacht for a period longer than forty-eight (48) hours at any time or times, he will allow a pro rata return of the charter money to the hirer for such time as the yacht shall be unfit for use."

The respondent claims that on the 17th day of May, 1905, the yacht collided with a schooner and with the pier and marine railway at Jacob's Yard, City Island, New York, and was damaged and became unfit for use, and that said damage arose "from a defect in the yacht or her outfit"; that the disability arising from such damage continued for a period exceeding 48 hours, namely, from May 17, to June 18, 1905, a total of 31 days, during which time he was wholly deprived of the use of the yacht. He demands, therefore, a pro rata return of the charter money for such time. Respondent further claims that he made certain disbursements on account of repairs to the yacht, which disbursements should have been made by the owner, according to the terms of the charter party, and that the amount due from the libelant to the respondent for a pro rata return of the charter money and for the disbursements, completely offsets any claim which may be due to the libelant under the charter party.

Under the contention raised, it is necessary to examine specifically the provisions of the contract. In addition to the clause to which I have already referred, the charter provides that the owner agrees to let, and the hirer agrees to hire, the yacht for the time specified; that the owner agrees to fit out the yacht, and hand her over to the hirer tight, staunch, strong and in every way fitted for service; to provide an efficient crew to navigate her, consisting of captain and engineer; to clothe them and to pay their wages; that the vessel shall be delivered to the hirer in good condition as to her machinery and connections, and complete as to her regular outfit; that the owner shall assume all responsibility as to fire and marine risks; the hirer to be responsible for an injury to said yacht amounting to less than $100. The hirer agrees to take the yacht over in the city of Boston at the beginning of the contract, and to deliver her at the end of the term in the same condition as he received her, reasonable wear and tear only excepted; to pay the running expenses of the yacht and the food of the crew, but not the wages of the crew; also to pay the consumable stores used for the working of the yacht; to be responsible for breakages; to paint the yacht. The general provision is further made:

"That the hirer is to have the same authority as the owner of the boat so far as regards the management of the yacht and control of the captain and engineer, and that, in the event of either of them proving disobedient or incompetent, the hirer shall have the right to discharge him or them, and engage others in their place; but in such case the hirer shall, if necessary, provide new clothes for the man or men engaged in place of those so discharged."

This contract must be held to be a contract of letting and hiring, and not a mere contract of service. By it there was a demise of the vessel; her possession, command, and control passed from the owner to the hirer or charterer. The charterer became the owner for the voyage. The mere fact that the owner was to provide an efficient crew and to pay their wages is not inconsistent with the above conclusion. To arrive at the rights of the parties in this regard it is not necessary to examine section 4236 of the Revised Statutes [U. S. Comp. St. 1901, p. 2944], which provides that a charterer, in case he shall man, victual, and navigate a vessel, shall be deemed to be the owner of the vessel; for in this case the contract itself is explicit in this regard, and makes it clear that it is the intention of the parties that the charterer is to have the management and control of the yacht. The captain, engineer, and the crew then became the agents of the charterer during the term of the charter; and the general owner is not responsible for their acts or negligence, unless the charterer can establish by affirmative testimony that the owner did not "provide an efficient crew to navigate the yacht." The charterer has not met the burden of proving that the owner did not provide an efficient crew.

The courts have repeatedly passed upon the questions involved in this case. In Thompson v. Winslow (D. C.) 128 Fed. 73, this court had occasion to discuss the charterer's liability for the acts and defaults of the master and crew in the navigation of the vessel. In Reed v. United States, 11 Wall. (U. S.) 591, 20 L. Ed. 220, in speaking for the Supreme Court, Mr. Justice Clifford said:

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in the cases where they hire the ship, and have, by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage—as, for example, to carry a cargo from one port to another—the arrangement in contemplation of law is a mere affreightment, sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. Unless the ship herself is let to hire, and the owner parts with the possession, command, and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command, and navigation of the ship, is the agent of the general owners, and the mariners are regarded as in his employment, and he is responsible for their conduct."

In The Del Norte (D. C.) 111 Fed. 542, affirmed 119 Fed. 118, 55 C. C. A. 220, Judge Hanford said:

"And the charterer is owner pro hac vice where the master is subject to his orders and directions, though appointed to his position as master by the general owner. The India (D. C.) 14 Fed. 476; The Bombay (D. C.) 38 Fed. 512. In such a case the charterer is himself responsible for the torts of the master, because, having a legal right to control, he is legally presumed to actually control, the master's conduct. On the other hand, the general owner is not responsible, because he does not have the right to control the master in the performance of his duties. Wood, Mast. & S. § 281."

In Somes v. White, 65 Me. 542, 20 Am. Rep. 718, Mr. Chief Justice Peters discusses the rights and liabilities of general owners and of owners pro hac vice and says:

"It will be found upon an examination of still other authorities that in the cases where the responsibility of the owners has been sought to be maintained the inquiry has almost universally been whether, under the contract of letting, the master or the owners had the possession, command, and navigation of the ship. There can be no difference in this respect between a ship and any other species of personal property. The law of principal and agent cannot be applied where no agency exists. Owners are not answerable for a collision which in no sense is directly or indirectly caused by themselves."

See, also, U. S. v. Shea, 152 U. S. 178–189, 14 Sup. Ct. 519, 38 L. Ed. 403; McCormick v. Shippy (D. C.) 119 Fed. 226.

The Golcar S. S. Co. v. Tweedie Trading Co. (D. C.) 146 Fed. 563, to which my attention has been called, does not in principle differ from the cases which I have cited, nor do the other cases cited by the learned counsel for the respondent, when examined, present any different principles.

The principal question, then, is whether the damage occurred from a defect in the yacht or her outfit. Upon this question respondent offers testimony tending to show that the damage was occasioned by the improper action of the bells, and that such improper action was occasioned by a defect in the outfit of the yacht. Upon this point the testimony is somewhat contradictory. The burden is upon the respondent to show that the damage occurred within the provisions of article 3 of the charter party. Upon a careful analysis of the testimony, I do not find that the respondent has sustained this burden. Capt. Pippy in his deposition has testified that the accident happened from the improper working of the bells; but in his log it does not appear that he thought there was any improper working of the bells, but, rather, that at the time of the accident he was of the opinion that it happened through some misunderstanding in the engine room. The testimony of Savary, the engineer, has more probative value than any other testimony in the case; it is the evidence of the party who knew most about the transaction. I find nothing to discredit his testimony. From it, and from the whole evidence in the case, I find that there is not sufficient proof that the damage occurred from a defect in the yacht or her outfit. It is clear that the libelant may recover for the balance due upon the last payment to be made for the hire of the vessel under the charter party.

It will be seen by the second article of the agreement to hire that the respondent was under obligation to pay the running expenses of the yacht, the food of the crew during the term of the charter; he also having the right to discharge the captain and engineer in the event of their proving disobedient or incompetent. The libelant has proved that he has paid certain running expenses of the yacht and certain disbursements and advances which it was the duty of the charterer to pay. The libelant should recover for these sums.

Under the first clause of the agreement for hiring, the respondent has agreed to redeliver the yacht to her owner in the same condition in which he received her. Under an amendment to the libel, the testimony showed that when the yacht was redelivered to the libelant she was not in the condition in which the hirer had received her, but that the blades of both propellers were bent. Libelant may therefore recover the amount which he has paid, being less than $100, for his repairs to the propeller blades.

As I have found that the damage did not occur from a defect in the yacht or her outfit, it follows that I do not allow the respondent to recover for any counterclaim raised by his set-off. While, perhaps, very little question arises as to the payments made in the case, all such matters are for an assessor.

A decree may therefore be entered for libelant. Weld A. Rollins, Esq., is appointed assessor to assess damages consistent with this opinion.

BAKER v. PHILADELPHIA & R. RY. CO.

(Circuit Court, E. D. Pennsylvania. January 24, 1907.)

No. 48.

1. MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE—FELLOW SERVANTS—SERVANTS OF SEPARATE MASTERS.

The C. Railroad, by which decedent was employed as engineer, used the tracks of defendant company for a certain distance entering Philadelphia, and decedent, on approaching the junction with a fast freight, found the tower signal turned against him. He waited six minutes, when a white light was displayed from the tower, signaling his train to proceed, which signal indicated that decedent had the right of way, and that the track to the south was unobstructed. When decedent's train arrived at a point somewhat south of the signal station, it struck the engine and tender of a local freight train belonging to defendant company, which was crossing from the south to the north-bound track, and the engineer of such freight testified that, in violation of the rules, he had been on the south-bound track after cars, without having a man out either ahead or behind his train to guard against accidents. *Held*, that neither the operatives of defendant's train nor the signalman in the tower, all of whom were employed and paid by defendant company, could be regarded as decedent's fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 484.]

2. RAILROADS—INJURY TO OPERATIVES—ACCIDENT TO TRAINS—STATE STATUTES—APPLICATION.

Pub. Laws Pa. 1868, p. 58, provides that when any person shall sustain personal injury or loss of life while engaged or employed on or about the roads, works, depots, and premises of a railroad company, or on or about any train or car therein or thereupon, of which company such person is an employé, the right of action and recovery in all such cases against the company shall be only such as would exist if such person were an employé, etc. *Held*, that such act had no application to an action for the death of an employé of one railroad company while rightfully using the tracks of another, caused by the negligence of the employés of the latter.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Decedent, a railroad engineer, on approaching a junction with the tracks of another company which decedent was entitled to use, found the signals turned against him, and thereupon waited until he was signaled by the towerman of the company owning the tracks to proceed, which he did, and immediately collided with a train belonging to the latter company negligently on the track. *Held*, that decedent was not negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 941.]

4. DEATH—BURDEN OF PROOF.

In an action for death of a railroad engineer, the burden is on the defendant to show that deceased was negligent, and that his negligence contributed to the injury resulting in his death; it being presumed, in

the absence of evidence to the contrary, that decedent exercised proper care in order to protect his own life.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 75, 76]

5. SAME—DAMAGES—EXCESSIVENESS.

Decedent, a railroad engineer, 25 years of age, in good health, industrious, and of good habits, was killed through defendant's negligence. Decedent was earning from $100 to $130 a month, most of which he gave to plaintiff, his mother, who was about 54 years of age. There was also evidence that decedent was thrifty and careful in matters of expenditure. *Held*, that a verdict awarding plaintiff $7,500 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 125.]

Charles H. Edmunds, for plaintiff.
Gavin W. Hart, for defendant.

HOLLAND, District Judge. The Central Railroad of New Jersey was using the tracks of the Philadelphia & Reading Railway Company from Bound Brook to Berks streets, in the city of Phildelphia, by an arrangement, the exact terms of which did not appear. On the morning of September 9, 1905, the plaintiff, Henry K. Baker, an engineer, was in charge of a fast freight of the Central Railroad Company approaching Philadelphia. Upon arriving at Tabor Junction at about 2:34 o'clock on the morning of that day, the train was stopped by the display of a red danger signal in the tower, manned by an employé of the Reading Railway Company. Six minutes later a white light was displayed from the tower, signaling the train to proceed, and, under the rules, the engineer had a right to assume the south-bound track was unobstructed, and he was authorized, and in fact required, to proceed. When his train arrived at a point somewhat south of the signal station, he struck the engine and tender of a local freight belonging to the Reading Railway Company, which was crossing over from the south-bound to the north-bound track as Baker's train was passing. The Reading Railway's freight engine had no right to be at that point. The engineer (King) of this engine testified that, in violation of the rules, he had been on the south-bound track after cars without having a man out either ahead or behind his train to guard against accident. The rules governing the running of trains on both roads were uniform, and issued in accordance with the rules adopted by the American Railway Association. Rules 99 and 100 were the same for both companies. The employé in the tower who gave the signal and the train crew of the Reading Railway Company were employés of the Philadelphia & Reading Railway Company; the train crew of the Jersey Central were employés of the latter company. The jury was, in substance, instructed that the man in the tower and the Reading Railway Company's crew were not fellow servants of the crew in charge of the Central Railroad Company's train, and that if the former, or either of them, were negligent, as a result of which the death of the plaintiff's son was caused, she would have a right to recover, and the court refused to instruct the jury, at the request of the defendant, that the case was governed by the statute of the state of Pennsylvania passed April 4, 1868, and further refused to instruct the jury that—

"Even though the decedent was technically upon the road of his employers, to wit, the Central Railroad of New Jersey, it was their duty to supply him

with safeguards as the occasion demanded; and, having supplied him with Reading Railroad employés, they must be considered as Central Railroad employés, and that the defendant would not be liable in this suit; and further, that the towerman was a part of the means by which the train was enabled to run, and he must be considered as one of the employés necessary to move the train, and, no matter by whom employed, he was in law a co-employé of decedent."

Under the common law, the master is not responsible for injuries received by his servant as a result of the negligence of a fellow servant engaged in the same common employment; but all the authorities are to the effect that, in order that this rule may apply, the servant whose negligence caused the injury must be an employé of the same master of the employé injured. Servants of different masters are not deemed to be fellow servants, within the meaning of this rule, although they are working together in the same common employment; they must all be under the control and direction of a common master. Coates v. Chapman, 195 Pa. St. 109, 45 Atl. 676; Crawford v. Wells City (D. C.) 38 Fed. 47; Central Railroad Co.. v. Stoermer, 51 Fed. 518, 2 C. C. A. 360; The Wm. F. Babcock (D. C.) 31 Fed. 418; Thompson's Commentaries on Law of Evidence, §§ 4846, 4996. This seems to be the law as laid down by most courts of last resort in the United States, as the collation of cases on this question found in Thompson's Commentaries, supra, will show. Servants of different railway companies, using the same tracks, are not fellow servants, so as to relieve the employer from injuries negligently inflicted by its employés upon the employés of the other company. Numerous cases cited in Thompson's Commentaries, §§ 4998, 5000, illustrate this principle.

It is contended by the defendant that the case is covered by the statute of the state of Pennsylvania passed April 4, 1868 (P. L. 58), as follows:

"Section 1. When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or on or about any train or car therein or thereupon, of which company such person is an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee. Provided, that this section shall not apply to passengers."

The application of this act of 1868 to cases such as the one at bar has been, in our judgment, finally settled by the decision of the Supreme Court of Pennsylvania in the case of Keck v. Philadelphia & Reading Ry. Co., 206 Pa. St. 501, 56 Atl. 47. The facts of that case and the one here are entirely similar, with the sole exception that there was in the Keck Case no towerman to signal Keck that his track was clear for him to proceed. The Keck Case arose out of the death of the plaintiff's husband, who was an engineer on the Central Railroad of New Jersey, using the tracks of the Reading Railway Company, and was killed by running into one of the latter's trains negligently upon the track, which the Central Railroad train had a right to use at the time. Judge Mitchell, in deciding the Keck Case, reviewed all the previous decisions of the Supreme Court of Pennsylvania in which this act of assembly was considered, and held that the rules to be deduced from these cases are as follows:

"First. Where the same track is used by two railroad companies, it must be considered for the application of the act of 1868 as the property of each while using it. Secondly. Whether the use be by virtue of joint or several ownership, charter right, lease, license, or traffic agreement, is immaterial. Thirdly. To bring the case within the second class distinguished in Spisak v. B. & O. R. R. Co., 152 Pa. St. 281, 25 Atl. 497 (namely those where the employment is ordinarily the duty of railroad employés), the plaintiff must not only be engaged in such work, but also be so engaged for or upon the property of the railroad by whose negligence he is injured. Thus in the present case (Keck Case) the plaintiff's husband was engaged in railroad work as locomotive engineer, but not for the defendant, nor upon premises which were to be treated as defendant's at that time. He was therefore not within the act. [The exact situation in the case at bar.] Fourthly. In such cases the employés of each road accept the risks of their employment in regard to their own road, but not those incident to the operation of the other road, unless at the time engaged in some work for the other or for both roads jointly."

The defendant, however, urged that the towerman in displaying the red signal to stop the New Jersey Central train and the white light to go ahead was performing labor as an employé of the Jersey Central, because at the time the southbound was the track of the Jersey Central, and the signaling of the towerman for the Jersey Central train to use it was the work of a Jersey Central employé for the time, notwithstanding the fact he was paid and was an employé of the Reading Company. This position we regard as untenable. As we have shown, the act of 1868 does not apply, and there is no decision of any court, either in Pennsylvania, this district, or in any other state, that has been called to our attention, where the rule that employés of different masters are not fellow servants in cases of injury to one or the other has been modified to the extent claimed by the defendant, nor can we see why such modification should be permitted in this case. There is no more reason for holding that the signaling of a towerman to a Jersey Central train should transfer him from that of an employé of the Reading to that of an employé of the Jersey Central than that the signaling of a member of a Reading crew to a train crew of the Jersey Central should transfer the former from a Reading employé to a fellow servant of the latter; and if it be held that in either case the person signaling the Jersey Central train is for the time thus transferred, then it would seem to me that the rule in negligence cases, where there are different employers, would be practically inapplicable to most cases where the same tracks are being used by different railroads, because the running of trains in accordance with the rules, and with a view of the safety of the employés and the general public, constantly involves a reciprocal dependence of the employés of one road upon the employés of the other for signals and other information; and there can be few cases of this kind (of the negligent injury of the employés of one company by the employés of the other) without being able to show it was the duty of the negligent party to have performed some act of signaling or warning to the injured employé. If it could be said that in the cases where the duty of the employés of one company in furnishing any signal or information to the employés of the other that the performance of this duty transfers the performer into the employment of the other company, then it must be held the rule no longer applies to different railway companies using the same tracks. This view would be in direct conflict with the authorities.

The court, in effect, expressed the opinion to the jury that there was no evidence in the case from which they could infer that Baker had contributed toward the accident by any negligence on his part. The language used with reference to this point in the charges is as follows:

"There is no evidence that he did not proceed carefully; but, at any rate, he proceeded, and when he got some distance beyond the signal tower toward Philadelphia, he struck a shifting engine, and his engine was overturned, and he was killed."

Also, at another part of the charge the court said:

"There is no evidence here to show that there was any negligence on the part of Henry K. Baker in running that train, but there is evidence that he was going at the rate of fifteen miles an hour. One of the witnesses said that six miles an hour was about the speed they could go at that place. Another witness said they had a right under the circumstances, if they felt like it, to run a hundred miles an hour; that they had been given the white light, and had a right to go ahead. Is there any evidence from which the inference could be drawn that Henry K. Baker was negligent in the way and at the speed he ran his train?"

We are of the opinion that the court was entirely right in its instruction to the jury that there was no evidence of contributory negligence on the part of Baker. It is undisputed that Baker had the right of way as against the local freight of the Reading Railway, which was unlawfully on his track; that he had been signaled from the tower to proceed, and it was his duty to do so. It is further proven by uncontradicted evidence of King, the engineer of the Reading Railway engine, that he was unlawfully on the south-bound track, without a flagman out to warn approaching trains, so that Baker was entitled to proceed with his train upon the assumption that the south-bound track was unobstructed, and that he was privileged to proceed at a rate of speed usual at that point. There was some evidence as to the rate of speed he was going, but it was very indefinite. Thatcher, the brakeman on the Central Railroad train, said he judged the speed to be about 15 miles an hour. King, the engineer of the Reading Railway train, testified the accident occurred in the yard limits, and that 6 miles an hour was the speed permitted there, and the rules required trains to be kept under control. The defendant has not pointed to any regulation in the book of rules prescribing the speed at which a train can run in yard limits, and 15 miles an hour is not such a speed as to raise any presumption of negligent running. It is true King further stated that there was some regulation about running trains 6 miles an hour, under control, in yard limits. He, however, said it was simply a regulation, and was vague as to who authorized it, or by what authority it was required to be observed. He did not say it was in the book of rules, nor did he claim it was a regulation that had been brought to the notice of any of the train crew of the Central Railroad of New Jersey. If there was any negligence on the part of the plaintiff, it could easily have been shown, but the defendant elected to stand upon the evidence of the plaintiff, and in that there is nothing from which the inference could be drawn that Baker was at all negligent at the time this accident occurred.

The burden of proof is on the defendant to show that the deceased

was negligent, and that his negligence contributed to the injury which resulted in his death. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Hough v. Railroad Co., 100 U. S. 213, 25 L. Ed. 612. This rule governs in the United States courts irrespective of the decisions in courts of the state where federal courts are held. 2 Foster's Federal Practice (2d Ed.) p. 880, § 375. In the absence of all evidence on the subject, it would be presumed that the deceased exercised proper care, for he had the greatest incentive to caution, in order that he might protect his own life. Improvement Co. v. Stead, 95 U. S. 165, 24 L. Ed. 403. On all the evidence, the rule of the federal courts is that the burden of proof is on the defendant to sustain, by a preponderance of evidence, its defensive plea of contributory negligence. Railroad Co. v. Mares, 123 U. S. 717, 8 Sup. Ct. 321, 31 L. Ed. 296.

There is a further objection that the amount awarded is excessive. Henry K. Baker was not more than 25 years of age, in good health, good habits, industrious, and an esteemed and valuable employé. He was earning from $100 to $130 per month, most of which he gave to his mother, as he was thrifty and careful in matters of expenditure. Her income, therefore, was very close to $1,000 per year. She was about 54 years of age, and while it could not be affirmed that her income from this source would continue for the remainder of her life, yet this was her only source of maintenance, and from the disposition and habits of the young man the jury had a right to assess an amount equal to the value of his life to her in the way of income, based upon what he was giving her at this time, as modified by what he would continue to contribute during the entire period of her probable existence. There is no rule by which we can arrive with any certainty at a sum to exactly compensate one damaged in the loss of a son, as the plaintiff in this case is, and there is no doubt a wide difference of opinion as to what is and what is not excessive. This verdict of $7,500, in my judgment, is not so obviously excessive as to require the court either to grant a new trial or to interfere with the amount awarded.

Reasons for a new trial and in arrest of judgment are overruled.

PLUMMER v. TWO HUNDRED TONS OF RAILS et al.

(District Court, W. D. Washington, N. D. December 14, 1906.)

No. 3,290.

SHIPPING—CONTRACT GIVING LIEN ON CARGO FOR DEMURRAGE—VALIDITY.

Certain railroad materials were shipped on a chartered vessel from Seattle to Nome, Alaska, consigned to the charterer. Owing to his inability to obtain lighters to discharge such cargo, the ship remained at Nome until a claim for demurrage accrued under the charter, and was finally compelled by the close of the season to bring such cargo back to Seattle. By agreement between the master and the charterer it was there discharged to remain subject to the vessel's lien for demurrage. In a suit brought to enforce such lien, a corporation, of which the charterer was president and general manager, appeared as claimant and set up title to the property, and that it had paid the freight in advance to the charterer, but the bill of lading on which the shipment was made did not disclose such

ownership, nor was it known to the owners or master of the vessel; claimant's vendors being named as the consignors. *Held*, that the lien was valid, having been given by the owner of the legal title, and also valid if he be regarded as the general agent of claimant, and claimant as the owner, since it was through his default as such agent that the demurrage arose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 597.]

In Admiralty. Suit in rem against part of a cargo, by the owner of a chartered ship, to collect demurrage and recompense for necessary disbursements. Heard on general and special exceptions to the libel. Exceptions overruled, and the demurrage claim allowed.

William H. Brinker, for libelant.
Leroy V. Newcomb, for claimant.

HANFORD, District Judge. This is a suit by the managing owner of the ship Occidental in rem against part of a consignment of railroad materials, to collect demurrage claimed for detention of the ship at the port of discharge, and for reimbursement for expenditures alleged to have been made by the libelant for and on account of the charterer, who was also the consignee of the cargo. The ship made a voyage from Seattle to Nome, pursuant to a charter party containing a time limitation for duration of the voyage to Nome and return to Seattle, and these railroad materials were carried to Nome as part of a general cargo, and were brought back to Seattle because the consignee failed to obtain lighters at Nome for transportation of this part of the cargo from the ship's side to a landing place on the beach. After waiting until there was danger of being shut in for the winter, if he delayed departure for a longer time, the captain of the ship informed the consignee of his intention to return to Seattle with that part of the cargo which had not been discharged, and demanded payment of demurrage for overtime provided for in a clause of the charter party. Being unable to meet the demand for demurrage, the consignee made an agreement with the captain, whereby, in effect, he pledged the cargo remaining in the ship for payment of any balance which should be due on account of demurrage after applying the net proceeds expected from the sale of a quantity of coal which had been discharged from the ship. After the arrival of the ship at Seattle, an additional agreement was made between the captain and the consignee to the effect that the railroad materials should be unladen and stored without prejudice to any right of the shipowner to hold the same for the unpaid demurrage, and it was unladen and stored pursuant to that agreement.

The claimant is a corporation, and by general exceptions to the libel it questions the sufficiency of that pleading, and disputes the jurisdiction of the court, and by special exceptions, styled a "plea," asserts ownership of the property, and that it prepaid all freight charges for transportation thereof, and delivery at Nome, and that freight was not earned because of nondelivery at the port of destination; and it disputes the right of the libelant to claim a lien on its property for any sum which the charterer may personally owe, and denies that he had lawful authority to subject the property to a lien for his personal debt by pledging it. The claimant's title, as set forth in the special exceptions, is deraigned by purchase from W. D. Hofius & Co. A bill of lading,

signed by the captain, however, is attached to the exceptions as an exhibit, and by reference to it and allegations in the exceptions it is identified as the bill of lading issued when the consignment was received by the ship for transportation to Nome. This document shows that W. D. Hofius & Co. were the consignors, and the carrier was to deliver the property at Nome to the charterer or his assigns. Payment of the freight money is alleged to have been made to the charterer, and it is also alleged that the charterer was, at the time of the shipment, president and manager of the corporation, which is now attempting to repudiate his authority to bind it by the contracts which he made in his own name as the ostensible owner of the property. The exceptions also allege that the board of trustees of the corporation made an agreement with the charterer for the transportation of the property to Nome, pursuant to which it was delivered to him for shipment, and the freight money paid to him, and that he wrongfully caused the bill of lading to be issued to himself as consignee, and that the claimant did not know that he had done so, at the time when it was done, and remained in ignorance of that fact until after the ship had sailed away on her voyage to the north. It is not alleged nor contended that either the captain or any owner of the ship was cognizant of any interest in, or title or claim to, the property which the claimant may have had, at the time of the shipment, or at any time previous or subsequent until its claim was filed in this suit.

The case has been argued and submitted on these exceptions, with the understanding that the merits of the whole controversy, with respect to the claim for demurrage, are set forth with sufficient fullness to enable the court to finally adjudicate that part of the case.

The argument made in behalf of the claimant does not indicate any ground for doubting the jurisdiction of the court, and I have not discovered any in my independent researches. The only supposed defect in the averments of the libel is failure to itemize the expenditures for which reimbursement is claimed. These general exceptions appear to me to be without merit, and they are overruled.

The claimant's argument on the merits ignores entirely the most important facts in the case, although they are set forth candidly in the special exceptions, and ignores the elementary principles of law upon which the decision must rest. It is but a zealous effort to prevail upon certain propositions which are not applicable. The decision of the court is grounded upon the following propositions:

1. The claimant did not acquire the legal title to the property, because, instead of making delivery to it, the vendors delivered the property to the carrier, and they are named as the consignors in the bill of lading, which is the documentary evidence of the transfer of title, and the charterer of the ship is named as the consignee. Therefore by this document the legal title was transferred to and became vested in the charterer.

2. As a consequence of the payment of the purchase price, and the freight money by the claimant, there was a resulting trust, and it became the equitable owner of the property.

3. The shipowners, and their agent, the captain, having no knowledge of the claimant's equitable rights, and being innocent of knowing-

ly aiding the consignee in the perpetration of a fraud, had a right to make the contracts which were made with him; he being the legal owner, and ostensibly the real owner, and having possession of the bill of lading.

4. The contracts are binding upon the claimant for an additional reason, viz.: The consignee, being at the time of the transactions the president and manager of the corporation, was clothed with the authority of a general agent of said corporation, that is, the claimant, and with respect to its superior equitable rights the acts of the agent in contracting for the shipment of the property, and in the efforts which he made to avert a loss to the claimant of the amount of the demurrage claimed, and his omission to provide for the landing of the property at Nome, were the acts and omissions of the principal.

5. By treating the consignee as the agent and bailee of the claimant, instead of owner of the property, the claimant cannot strengthen its position, for, in that view of the case, a lien attached to the undelivered part of the cargo for demurrage, because the detention of the ship was occasioned by the default of the claimant through its agent, the consignee, in his failure to secure lighters for the transportation of the property from the ship to a landing place.

6. The claimant cannot justly disclaim knowledge of any of the transactions. This is so because its agent was at all times well informed as to all the details of his own doings, and the law imputes his knowledge to his principal.

By the final decree to be entered, the amount of demurrage sued for will be allowed, with interest at 6 per cent. from the 20th day of December, 1905. The libelant's demand for alleged disbursements cannot be finally adjudicated now, for the reason that sufficient facts have not been set forth in, nor admitted by, the exceptions. As to this part of the case, the claimant may take leave to file an answer.

HIGHT et al. v. HIRSCH et al.

(Circuit Court, D. Oregon. December 17, 1906.)

No. 3,044.

JUDGMENT—CONCLUSIVENESS—RES JUDICATA.

Where plaintiffs had been made defendants in two principal causes previously tried—one for partition of the land in controversy, and the other to quiet title thereto, and having answered, decrees were passed against them, such decrees constituted a complete estoppel precluding the maintenance of a subsequent suit by plaintiffs to quiet title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1092-1099.]

Action to Quiet Title.

The plaintiffs bring this suit to quiet the title to 54½ acres of land situate in Multnomah county, Or., being a portion of the south half of the William Blackistone Donation Land Claim. The complaint alleges, in brief, that on June 8, 1860, James A. Odell conveyed the south half of the William Blackistone claim to Laura Ann Blackistone, the wife of William, "for and during the term of her natural life, and from and after her decease to the children of the

said Laura Ann and William Blackistone who should survive the said Laura Ann, or if any of the said children should die leaving issue, then to the survivor of said issue, share and share alike, the issue of each child deceased taking the same share that its parents would have taken if living at the death of the said Laura Ann;" that William and Laura Ann Blackistone had born to them four children, to wit, Francis Garrett, Augustus, Charles, Clara E., and Tobias Myers; that Francis Garrett and Tobias Myers died in infancy; that Augustus Charles is now deceased, but left children surviving him, namely, the complainant Jessie Blackistone and defendant Arthur M. Blackistone; that Laura Ann Blackistone died in December, 1905; and that Augustus Charles died prior to that time. The bill of complaint further alleges that plaintiff Clara E. Hight (nee Blackistone) is the owner of an undivided one-half interest in said premises; that complainant Jessie Blackistone is the owner of an undivided one-fourth, and the defendant Arthur M. Blackistone is the owner of the remaining undivided one-fourth; and that the other defendants claim some interest therein adverse to plaintiffs, which constitutes a cloud upon their title. The defendants Josephine Hirsch and Jacob Mayer, the only two served, pleading separately, make answer in effect that the donation land claim of Blackistone was entered prior to his marriage with Laura Ann; that on June 8, 1860, Blackistone, desiring to make provision for his wife and their children, executed to James A. Odell, for a nominal consideration, a deed of conveyance for the said south half of his claim, and that Odell executed the deed mentioned in the bill of complaint to Blackistone's wife and children; that thereafter, to wit, on January 2, 1862, William Blackistone instituted a suit against his wife, in the circuit court of the state of Oregon for Multnomah county, for a divorce, wherein such proceedings were had that a decree was rendered annulling the marriage, and divesting the wife of all right to the premises conveyed, as aforesaid, and vesting the title thereto in their four children named, as set out in the bill of complaint, in equal proportions in fee simple; that subsequently Kallmes obtained judgment against one John Doscher and William Blackistone, and by virtue thereof, through execution duly issued, sold all the interest of defendants in and to the entire donation land claim of William Blackistone, and that Thomas Thoburn became the owner, through purchase and deed from the sheriff; that thereafter, on October 31, 1865, Thoburn instituted a suit against Doscher and wife, Blackistone and wife, Charles A. Blackistone (being the Augustus Charles mentioned in the bill of complaint), Clara E. Blackistone, Charles M. Carter, and Sherry Ross, for the purpose of partitioning between the parties plaintiff and defendant the said south half of said claim; that the defendants Augustus Charles and Clara E. Blackistone appeared and answered by their guardian; that Blackistone and wife and Doscher and wife also answered, and that it was finally decreed that Thoburn was the owner of the fee of the undivided half of the premises; that the defendants Charles A. and Clara E. Blackistone were the owners in equal parts of the remaining undivided one-half, and that the other defendants had no interest whatever therein; and, upon partition being had, the land described in the bill of complaint was set off to the plaintiff Thomas Thoburn, and the eastern portion of said south one-half of the claim, excepting 28 acres previously sold to A. P. Ankeny, to defendants Charles A. and Clara E. Blackistone; that subsequently A. P. Ankeny, Andrew J. Watson, Solomon Hirsch, Thomas A. Davis, Louis Fleischner, and Alexander Schlussel became the owners of the property described in the bill of complaint, and thereafter, and while such owners, and as owners thereof, on September 15, 1877, filed a complaint in the circuit court of the state of Oregon for Multnomah county, against Charles A. and Clara E. Blackistone, and others, to quiet their title to such property; that each of defendants duly entered an appearance, and that on November 20, 1877, it was adjudged and decreed that plaintiffs therein were the owners of the larger portion of said premises (describing the same), and that defendants had no interest whatever therein; that said cause was subsequently appealed to the Supreme Court of the state of Oregon, and affirmed: All of which is shown by way of estoppel in bar of the complainants' cause of suit. The present defendants appearing are connected up with the title thus decreed to be in the plaintiffs in that cause. Further than this, the statute of limitations is pleaded. These

answers are challenged by demurrers as insufficient by way of estoppel or other defense to plaintiffs' cause of action.

James Kiefer, for complainants.
Teal & Minor, for defendant Josephine Hirsch.
Otto J. Kraemer, for defendant Jacob Mayer.

WOLVERTON, District Judge (after stating the facts). The defendants' answers are evidently drafted upon the theory that the decree in the divorce case alluded to therein became effectual as a merger of the life estate of Laura Ann Blackistone with the remainder in the children of the marriage, and that, from and after the date of such decree, the estate in fee was vested in such children, and that the father inherited the shares of the two that died in infancy. Subsequent proceedings set out are all in pursuance of this theory, and are grounded thereon. The plaintiffs, by their demurrers to the answers, combat the theory as not well grounded either in fact or in law; and this is the pivotal question about which the entire controversy turns.

There was an early statute of the state of Oregon which provided that:

"The court, in granting a divorce, shall make such disposition of and provision for the children as shall appear most expedient under all the circumstances, and most for the present comfort and future well-being of such children."

And, further, that:

"The court shall make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of children."

This statute seems to have received construction in an early case, decided in 1864 (Jacob Cline v. John Hurly), which does not appear to have been reported, wherein it was held that the court had power by reason thereof to bestow on the children of divorced parties the real estate of the party in fault. This case is referred to in Doscher v. Blackiston, 7 Or. 403, 407, and it is there held that the construction thus given the statute had become a rule of property, and for that reason it should be adhered to. Coming directly to the present controversy, it was held in the latter case that the decree rendered in the case instituted by Blackistone against his wife for divorce vested the life estate of the wife in realty involved in the children, who held the estate in remainder, and that the whole estate became thereby vested in them when they received by this decree the particular estate held by their mother before the divorce. This was an adjudication concerning the very matter in question here, and it has been acted upon ever since; and, whether right or wrong in principle or law, it cannot now be disturbed or questioned. So that the theory of defendants has in its support this adjudication; and all the subsequent proceedings are, as formerly observed, based upon it. The subsequent case of Ankeny et al. v. Blackiston et al., 7 Or. 407, is in further confirmation of the title thus established. It was instituted for the purpose of quiet-

ing the title, and this perhaps because the doctrine of Doscher v. Blackiston was questioned. This case was tried out in the circuit court, and thereafter appealed to the Supreme Court and affirmed; and thus, by the highest judicatory of the state, the title to the property was decreed to be quieted in the plaintiffs in that suit. It is shown that the defendants who have answered herein derived their interest from the plaintiffs in that cause, and now rely implicitly upon such adjudication as confirming their title against the claim of the plaintiffs here. It seems beyond question that, the plaintiffs having been made defendants in the two principal causes alluded to, the first for partition and the second for quieting the title to the premises, and having answered therein, and decrees having gone against them, the records thus made up constitute a complete estoppel to their present suit, and the answers are therefore sufficient.

It is unnecessary to treat of the plea of the statute of limitations.

These considerations lead to an overruling of the demurrer, and it is so ordered.

THE SAN RAFAEL et al.

(District Court, N. D. California. June 18, 1906.)

No. 13,580.

JUDGMENTS—MATTERS CONCLUDED—PROCEEDING IN ADMIRALTY FOR LIMITATION OF LIABILITY.

A decree dismissing a proceeding for limitation of liability for damages for a collision after hearing, on the ground that petitioner was the owner of both vessels concerned in the collision and both of which were in fault, and had surrendered but one, is one on the merits, and is a bar to a second proceeding for limitation of the same liability in which both vessels are surrendered as between petitioner and damage claimants, who were parties to and contested the first.

In Admiralty. Proceeding for limitation of liability.

Van Ness and Denman, for petitioner.

H. V. Morehouse, for claimants.

DE HAVEN, District Judge. This is a proceeding for limitation of liability for the damages resulting from a collision between the steamers San Rafael and Sausalito in the Bay of San Francisco, on the night of November 30, 1901. The petition alleges that the petitioner was the owner of both steamers; that the collision was without the privity, knowledge, or consent of the petitioner, or any of its officers or directors, and was the result of fault or error of judgment on the part of the master of the steamer San Rafael in believing that the fog signal of the steamer Sausalito indicated that that steamer was approaching from a point off the starboard bow of the San Rafael, when, in fact, she was approaching from the port bow of the San Rafael. The petition further alleges that:

"Petitioner is now ready and able and willing, and hereby offers, to give and file herein its stipulation and undertaking, with sufficient sureties, for the payment into court by your petitioner, as required by law and the orders of

this court in the premises, of the full sum and value of the said steamship San Rafael and her freight then pending, and all other said property required to be surrendered by said statute and said rules, as a condition whereon petitioner's liability for any and all loss or damage caused or resulting from said collision shall be limited as by said laws and statutes it is provided that it may be."

The petitioner then sets forth that J. S. McCue and Patrick Cassidy, as guardian ad litem for the widow and minor children of one Alexander Hall, have recovered judgments in this court against petitioner for damages resulting from such collision. The prayer of the petition is that the court cause due appraisement to be made of the value of the interest of the petitioner in the San Rafael and her freight pending—

"And of all property then owned by your petitioner that should be lawfully so appraised, and that a stipulation or undertaking, with proper sureties thereto, may be thereupon given by your petitioner and filed herein, conditioned for the payment into court of the full sum of such appraised value, with lawful interest thereon, whenever the same shall be ordered by this court, and that on filing such stipulation or undertaking herein that a monition issue to said J. S. McCue and to said Patrick Cassidy, guardian ad litem as aforesaid, citing them and each of them to appear before this court at a time therein stated * * * to then and there show cause, if any such they have, why the prayer of your petitioner should not be granted, and to there present their several claims for the consideration of this court; * * * and that in the meantime, and until final judgment herein, that said McCue and said guardian ad litem be * * * restrained from proceeding by execution on their said several judgments."

J. S. McCue and Patrick Cassidy, as guardian ad litem, appeared without service of process and filed an answer to the petition, in which they pleaded in bar of the proceeding a decree of this court, dated April 17, 1906, dismissing a former petition by the present petitioner, for limitation of its liability for the damages occasioned by the collision above referred to between the steamers San Rafael and Sausalito.

It appears from the record that in the former proceeding there was no mention in the petition of the fact that petitioner was also the owner of the steamer Sausalito, and the stipulation given therein was only for the appraised value of the San Rafael, and for her freight pending. McCue and Cassidy, as guardian ad litem, appeared in that proceeding, and in answer to the petition filed therein alleged that the collision between the San Rafael and Sausalito was the result of the negligence of the officers and crew of both steamers, and prayed for an order that the Sausalito be brought into the proceeding, "and duly appraised and turned over to a trustee and sold, and that the proceeds thereof, together with the freight pending," be a fund out of which to satisfy their respective claims. The judgment dismissing the former proceeding was entered after a hearing upon the merits, and was given in obedience to a mandate from the Circuit Court of Appeals; that court holding that upon the facts the petitioner was not entitled to limit its liability for the damages resulting from the collision because it had not surrendered the Sausalito. The San Rafael, 141 Fed. 270, 72 C. C. A. 388.

In the present action the petitioner seeks to avoid the objection which was held fatal to its right to limit liability in the former proceeding, and now offers to give a stipulation for the appraised value of the

San Rafael and her freight pending at the time of the collision, and all other property then owned by it, and required by law to be surrendered, as a condition whereon its liability for damages may be limited. This broader offer constitutes the only substantial difference between the present petition and that filed in the proceeding which was dismissed.

The conclusion which I have reached upon consideration of the foregoing facts may be briefly stated as follows: The court had jurisdiction of the former proceeding instituted by the petitioner for the limitation of its liability on account of the collision referred to in the petition now before the court, and I am also of the opinion that the final judgment in that proceeding rendered after a full hearing, although in form one for the dismissal of the petition therein, is to be regarded as a judgment upon the merits, as the decree did not provide that the dismissal should be without prejudice. Treating this judgment as one upon the merits, did it finally determine as between the parties thereto that the petitioner is not entitled to limit its liability for the loss and damage resulting from the collision referred to in the present petition? The rule in reference to the conclusive effect of judgments is well stated in Shinkle v. Vickery (C. C.) 117 Fed. 916. It is there said:

"It is unquestionably the general rule that both at law and in equity a judgment or decree is conclusive between the parties on the matters determined. It is also equally well settled that an adjudication is final and conclusive, not only as to the matters actually determined, but as to all matters which the parties might have litigated and have had decided as essentially connected with the subject-matter of the litigation, and coming within the legitimate purview of the original action. It is not meant by this that it is conclusive against the plaintiff as to another matter constituting another cause of action which he might, but was not required, to have joined with the claim asserted in his action. The rule does mean, however, that when a suit is brought for a specific purpose—as, for example, a bill in equity to redeem a pledge, or to enforce the delivery of property held under a claim of trust to which the party has more than one claim of title—the plaintiff must assert in his bill all his claims of title, and all the grounds upon which he bottoms his right to a decree. He cannot be permitted to file a bill asserting only one of the claims held by him to the property sought to be recovered, and, when defeated, institute another suit or suits counting on other sources of title. He must present his whole case. He will not be permitted to experiment with the court by setting up successively the different titles by which he claims the subject-matter in litigation. He will not be permitted to withhold a part of his right or title, and, if he does, he will be concluded from asserting it in another suit. Failing to assert his entire right or title, the decree is as conclusive as to every right and title which he might and ought to have asserted and relied upon. It is enough to bar the second suit that the same grounds of recovery might have been set up and relied on in the first suit."

This reasoning is quite applicable to this case. The right of the petitioner to a limitation of its liability was contested in the former proceeding and decided adversely to the petitioner, and it cannot be permitted to litigate the same general question with the parties who appeared therein by filing a new petition alleging that it is now willing to surrender other property for the purpose of availing itself of the benefits of the statute giving to owners of vessels the right to limit their liability. The judgment of the Circuit Court of Appeals directing this court to dismiss the former petition was intended as a final determination as between the parties thereto of petitioner's right

to limit its liability for damages arising from the collision referred to; otherwise the petitioner would have been permitted by that court to amend its petition and make surrender of the property now tendered, or the direction would have been to dismiss such proceeding without prejudice to the right of the petitioner to commence a new action for the limitation of its liability.

An order will be made directing that an appraisement be made of the steamers San Rafael and Sausalito and their freight pending, and that upon giving a stipulation for such value an injunction as prayed for issue against all persons, except J. S. McCue and Patrick Cassidy, as guardian ad litem of Catherine Hall et al.; and that as to J. S. McCue and Patrick Cassidy, as guardian ad litem of Catherine Hall et al., the petition be dismissed.

THE RYGJA.

(District Court, S. D. New York. December 26, 1906.)

1. SHIPPING—TIME CHARTER PARTY—CONSTRUCTION.
   The effect of using the word "about" in stating the term of a time charter is to allow an underlap or surrender of the vessel a brief time before the expiration of the time mentioned, while with respect to an overlap it merely embodies in the contract the rule which permits the charterer to retain the vessel until the completion of such reasonable voyage as she is on when the charter term expires.
2. SAME—OVERLAP.
   The rule that the term of a time charter does not expire until the completion of the voyage the vessel is on when the time stated ends is one of commercial necessity, and should not be extended beyond its requirements.
3. SAME—EXPIRATION OF TERM—USE OF WORD "ABOUT."
   Where a time charter was for "about" six months, with privilege of renewal by the charterer by giving notice for a further period of about six months more, upon such renewal it became a charter for "about" one year from the beginning, and the owner was entitled to a redelivery of the vessel on completion of the voyage she was on at the expiration of one year. The charterer cannot extend the term by claiming such overlap at the end of both six-month periods.

In Admiralty. Action for breach of charter party.

Wheeler, Cortis & Haight and Mr. Bullowa, for libelant.

Convers & Kirlin and Mr. Woolsey, for claimant and respondent.

HOUGH, District Judge. The libelant chartered the Rygja "for a period of about six calendar months" from her "time of delivery." He also obtained by the charter party the right to hire her "for a further period of about six calendar months more," provided he gave notice of his intention to continue with the vessel "one month previous to the expiration of the first-named term." The steamer was delivered under the charter party July 13, 1905, and on the following December 12th the charterer gave notice of his intention to keep the vessel for the additional period of "about six months." The Rygja was continually engaged in voyages contemplated by the charter party, and when exactly six months from July 13, 1905, expired was upon a law-

ful and uncompleted voyage, which did not terminate until March 4, 1906. Under Straits of Dover S. S. Co. v. Munson (D. C.) 95 Fed. 690, affirmed 100 Fed. 1005, 41 C. C. A. 156, Anderson v. Munson (D. C.) 104 Fed. 913, Dene S. S. Co. v. Bucknall Bros., 5 Comm. Cases, 372, the charterer claims that the first period of "about six months" expired only with that voyage, i. e., on March 4, 1906, and that from that date must be calculated a second similarly elastic period, so that the term of the charter party would not expire until September 4, 1906, at the earliest, and might extend over possibly two months more. It is said to logically follow that the date of notification of extension was similarly movable, and, although given as if the charter party had been for exactly six months, it might have been effectively served as late as February 4, 1906, i. e., one month prior to the termination of the voyage upon which the steamer was engaged when the sixth months from delivery was complete.

It is true, as urged, that each word intentionally inserted in a contract must be given, if possible, its fair significance; but I think this commercial document can be interpreted with due regard to all its words without expending two periods of "about six months" into either one year or nearly a year and a half, according to the preference of the charterer. The extended period of a charter for an exact time, recognized by the decisions of this court, supra, or created by force of the word "about" in a charter party so worded, is known in the trade as an "overlap." It has been testified without contradiction that under an "about" time charter the charterer may relinquish the vessel some brief time before the expiration of the number of months inserted in the charter party, and modified by the word "about," and such time is known as an "underlap." Without such modification of the specified time of charter, while "overlap," has been held under the cases cited to be lawful, no "underlap" is permissible. Full significance is given to the language of the contract by recognizing the word "about" as creating the underlap, and in respect of overlap, embodying in the charter party the rule obligatory in this court since the Straits of Dover, supra. The rule referred to rests upon a commercial necessity, arising from the impossibility of having a time chartered vessel in a port of redelivery exactly at the expiration of a definite period for which hire may have been agreed upon. Beyond the requirements of this commercial urgency, it should not be extended, and I regard The Laureldene (Dene S. S. Co. v. Bucknall Bros., supra) as a very extreme instance of its application.

Whether the "underlap" right may be availed of by both charterer and owner need not be here discussed or decided, but it follows from the above view of this extraordinary charter party that the word "about" does not serve to enlarge or diminish the charter term, except as demanded by reasonable business requirements, and has no relation to its normal expiration or the time of giving notice of renewal. Therefore, when this charterer gave notice a month and a day before the expiration of exactly six months of hire, he signified his intention of continuing with the ship for "about six months more" from January 13, 1906, and the whole period of engagement became equivalent to

a charter for "about twelve months." The charter party in question provided for a redelivery of the steamer at "a United States Gulf or Atlantic port or a port in Europe at charterer's option." On June 12, 1906, the Rygja was on a voyage from South American ports via Cuba to New York, there to discharge cargo, and on that date the charterer gave notice of his intent to make redelivery at a European port. The then voyage of the steamer ended at New York August 4, 1906, and upon its completion the shipowner refused to permit her to sail for Europe, declared the charter ended, and resumed control of the ship. The charterer, asserting that the ship's engagement for the second "about six months" period had not terminated, brings this action for a breach of charter party.

Regarding the agreement as in effect for "about twelve months," this case is that of Bucknall Bros. v. Murray, 5 Comm. Cases, 312, and with that decision I entirely concur. See, also, The Istoc, 7 Comm. Cases, 190. The charterer finally urges that since June 12, 1906, was within the strict 12-month period, his designation of a port of redelivery in Europe operated as a fixing of the date of termination of hire, lawful if such termination would normally occur within "about six months," or say eight months, of January 13, 1906. The difficulty with this claim is that the Rygja on June 12th was really bound to New York, there to complete her voyage and discharge cargo in a port of redelivery. The act of the charterer in saying that he would send her on a new voyage to Europe could not change that fact, nor enlarge the actual voyage. What would have been required by law and justice had the charterer when near the end of his definite term availed himself of the word "about" to send the ship on the longest voyage possible need not be now considered, further than to note that in my opinion The Laureldene, supra, should on this point require serious consideration before receiving the adherence of American courts.

Let the libel be dismissed, with costs.

MASON v. ST. ALBANS FURNITURE CO.

(District Court, D. Vermont. December 6, 1906.)

1. ESTOPPEL—ACTS IN PAIS.
   A party is not estopped by acts in pais done under a misapprehension of facts induced by the party seeking to avail himself of the estoppel.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 128–135.]

2. BANKRUPTCY—CLAIMS—BURDEN OF PROOF.
   The burden rests upon one making claim against the estate of a bankrupt for salary under a contract to prove the contract, and that the services contracted for were fairly rendered, and if he fails to do so his claim cannot be allowed for the contract price, but only on a quantum meruit as to which the burden of proof also rests upon him.

In Bankruptcy. On report of referee.

V. A. Bullard, for petitioner.

A. A. Hall and Lee S. Tillotson, for petitionee.

MARTIN, District Judge. This case has been heard by the referee, who allowed the claim subject to the approval of the court. The trustee in bankruptcy filed exceptions to the report and appealed; also filed a petition, setting forth the grounds upon which he claimed error relating to the allowance of the claimant's account for services as business manager for the bankrupt covering a period of over a year and four months. It appeared on hearing that the claimant's services were rendered under a contract as follows:

"That the said O. R. Mason for the consideration hereinafter mentioned covenants and agrees to assume the management of the factory owned by the party of the second part, and devote at least two days a week to said business, and to furnish the services of L. C. Whipple as superintendent, or another person of equal ability, for the term of one year from date; and that in consideration thereto the said St. Albans Furniture Company shall pay to the said O. R. Mason for the services above mentioned during the term aforesaid the sum of four thousand dollars ($4,000), payable monthly; that the St. Albans Furniture Company will provide the said O. R. Mason without cost to him railroad transportation."

At the hearing before the referee, the trustee contended that the claimant failed to perform his contract with said furniture company according to its intent and meaning as understood by the parties. Upon this contention, the referee reports that he finds from the evidence "various sufficient causes for criticism of the claimant's management, but he finds no evidence that the claimant's services were worth less than the amount charged under the contract, and there is no evidence to show how much less, if any, the services were worth, and the referee cannot undertake to decide the value of the services rendered under the rule of quantum meruit without substantial evidence upon which to base such decision. Furthermore, Mr. Mason's management and services were indorsed by the bankrupt company in the re-engagement August 1, 1904, only a little over four months before the bankruptcy. The referee cannot well hold that there was a nonfulfillment of contract when the bankrupt almost up to the very date of bankruptcy approved the manner of the fulfillment of the contract."

He also reports as follows:

"It was insisted by the trustee that the evidence showed the re-employment was made upon misrepresentations by said Mason as to the inventory, and that, as regards the trustee, Mr. Mason, as an officer, became managing agent, and was to be treated, regarded, and held accountable as such. The trustee also insists that under the facts shown Mr. Mason should only be allowed upon the basis of quantum meruit, but the referee did not measure or make any deduction on this basis, for the reason that the trustee did not show what the services of the said Mason were actually worth. If the referee was in error in either of these positions taken, and the contention of the trustee should prevail on either point; that is, if the trustee was not estopped from claiming the reduction, and if, from the evidence, the referee is at liberty to find what deductions, if any, should be made, on account of the alleged shortages of duty, then the report should be recommitted for further consideration as to the amount of damages."

The holding by the referee that the defendant was estopped in this defense because of the rehiring of the claimant, as above stated, without reporting the facts disclosed by the evidence before him on the question of the claimant's performance of his duties under the contract,

and whether the officers of the company, at the time of said rehiring, were or were not deceived by the claimant, was error, as estoppel proceeds upon the ground that he who has been silent as to his alleged rights when he ought, in good faith, to have spoken, shall not be heard to speak when he ought to be silent. If at the time of the rehiring of the claimant, the defendant company was misled as to the character and efficiency of the claimant's services during the preceding year, that is no reason why they may not be heard to speak whenever such shortage of duty is discovered.

This cause was referred by my predecessor to the referee to find and report the facts, and, as to this point, the referee has reported his conclusions of law without stating the facts under which the parties acted. The referee also holds that it is incumbent upon the defendant to show damages suffered by the claimant's failure to perform, whereas, in the opinion of the court, it is incumbent upon the claimant to prove his contract, and that he fairly performed the services called for by it, and upon this, the burden of proof is with the claimant. If he failed to make out this issue by a fair balance of evidence, he cannot recover the contract price. His only recovery then is that of quantum meruit, and as to this, the burden of proof still remains upon the claimant. If the referee is satisfied, from all the evidence before him, that there was a substantial shortage on the part of the claimant in the performance of his duties under the contract, he should only allow him what his services were fairly worth from the evidence submitted, bearing in mind that the burden of proof is on the claimant. If, however, the referee finds that the claimant fairly performed his duties, the question as to whether the claimant's services were worth the contract price or not does not arise, for the parties fixed the price. It was suggested on hearing by counsel on both sides that the court review the evidence and pass upon all the questions raised, but as the referee saw the witnesses and heard them testify, he can more readily adjust the matter than the court.

Cause recommitted for further consideration by the referee and further hearing, if he deems it necessary.

THE LYNDHURST.

(District Court, E. D. New York. December 31, 1906.)

1. SEAMEN—PERSONAL INJURIES—LIABILITY OF VESSEL.
   Where a seaman was injured by the breaking of a runner passing through the eye of the rope by which the mizzen topgallant yard was hauled up, the fact that a storm had subjected the runner to a very unusual strain did not constitute a defense to the ship's liability for the seaman's injuries, in the absence of a showing that there had been an adequate inspection to determine the sufficiency of the runner thereafter.
   [Ed. Note.—For cases in point see Cent. Dig. vol. 43, Seamen, § 188; vol. 34, Master and Servant, § 211.]

2. SAME—CONTRIBUTORY NEGLIGENCE.
   Where a sailor was injured by the breaking of a runner, while or immediately after he had ridden down the halyards, which was forbidden be-

cause it tended to put unnecessary strain on the runner, the seaman was guilty of negligence which contributed to his injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 189; vol. 34, Master and Servant, § 775.]

Abbott & Coyne, for libelant.
Convers & Kirlin, for claimant.

THOMAS, District Judge. The libelant was a sailor on the Lyndhurst. She had been inspected and overhauled at Wilmington and Philadelphia, and received A1 Lloyds approval before sailing; but when 50 days out, on a voyage to China, the runner passing through the eye of the rope, whereby the mizzen topgallant yard is hauled up, broke while the sail was being raised, and the block fell, hitting the libelant on the femur, just above the knee, breaking his leg. For this the libel is filed. The captain did not think libelant's leg was broken, and did not treat him for it, but did the best he could for him, and treated him with all consideration. The bone united; but, the fracture being oblique, the ends overrode each other somewhat, so that his leg is shortened an inch and a half or two inches. He undoubtedly suffered much pain.

The examination at the instance of the Lloyds related to exterior observation of the rigging, and did not otherwise tend to test the breaking strength of the runner. The evidence does not show how such ascertainment could have been made. After the voyage began, the runner, in connection with other similar parts, was under observation by the chief officer. He testified that it was apparently in good condition, that he examined the place where the runner broke after the accident, that it was a clean break, and that the ends were bright and free from rust. Reynolds, boatswain's mate of the Lyndhurst, states that he often had to do with the runner; that it was rusted before the accident, and was in unfit condition on account of appearance of rust; that he reported it before the accident to the chief officer. The chief officer denies such statement. The ship had been in service since 1886, and there is no evidence that there had been renewal of the runner during that time, or that its breaking strength had been tested. However, the runner was of the best make, and the fact of such long service is not inconsistent with its proper usefulness and strength. The claimant ascribes the weakening to such an extent that it broke to the unusual strain put upon it by bad weather shortly before the accident, but asserts that, in the absence of bad condition appearing outwardly, the fact of such strain could not be determined.

Did the runner exteriorly show conditions that should have prompted the claimant to closer examination? Neither the chief officer nor Reynolds were produced in court, and the question is, why should Reynolds and the libelant be believed, rather than the chief officer and others who had the runner under observation? The libelant is an interested witness, and Reynolds states that he was disposed to bring action for an injury received by himself on the ship before his discharge. On the whole, it would seem that, so far as the controversy between Reynolds and the chief officer is concerned, there is no suffi-

cient reason to prefer the statement of Reynolds. Therefore it is found that the latter did not give actual notice.

But the claimant's defense in part is that the storm had subjected the runner to very unusual strain. This very fact should have put the claimant to unusual investigation, and it is considered that adequate inspection was not had. But would such sufficient inspection have revealed the condition of the runner? The court cannot state what the inspection would have revealed. It may be that it would have disclosed evidence of breakage at the point of rupture. Is it a defense that there was no use of inspecting properly, because after the event the court cannot say from the evidence that it would have disclosed signs of weakness? There was no flaw in the runner at the place of the break. There may have been exterior indications that would have escaped cursory examination, and when a cable breaks in ordinary use, and it appears that there has been no adequate inspection after it has been subjected to extraordinary strain, the two facts raise a presumption of negligence that has not in this case been overcome.

But it appears that the libelant, at the time of the accident, was either riding down the halyards, or that he had just reached the deck and was standing on the boat skid, after doing so, while the yard was being hauled up by himself and several others. Riding down the halyards was forbidden, for it tends to put unnccessary strain on the runner, and certainly it would tend to overburden it. Hence the libelant contributed to the injury.

It is found that the ship was not negligent in failing to put into Cape Town.

The damages are fixed at $1,500, which, with the costs, will be divided.

THACHER et al. v. UNITED STATES.

(Circuit Court, D. Massachusetts. December 29, 1906.)

No. 158.

INTERNAL REVENUE—ACTION TO RECOVER LEGACY TAXES PAID—STATUTE REQUIRING REFUNDMENT.

Rev. St. § 3228 [U. S. Comp. St. 1901, p. 2089], limiting the time for presenting claims for the refunding of internal revenue taxes illegally collected, has no application to a claim for the refunding of legacy taxes paid on contingent interests, which did not become vested prior to July 1, 1902, which are required to be refunded by Act June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 449], irrespective of their legality or whether they were voluntarily paid or not; and a failure to present the claim within the time limited by such section will not bar an action thereon.

On Demurrer to Petition.

Weston-Smith, Walcott, Peabody & Brown, for petitioners.

Asa P. French, U. S. Atty., and Wm. H. Garland, Asst. U. S. Atty.

LOWELL, Circuit Judge. On June 7, 1901, the petitioners in this case, being the executors of Henry C. Thacher, paid to the collector

of internal revenue, without protest, an inheritance tax on account of contingent beneficial interests. This tax they seek to recover under the provisions of Act June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 449]. On March 15, 1904, their claim was filed with the collector in due form. The contingent estates were not vested in possession or enjoyment before July 1, 1902.

The United States has demurred to the petition. It contends that the tax thus paid was illegally collected (Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563); that, in order to recover back the tax thus collected, the claim must be filed with the collector within two years after payment of the tax (Rev. St. § 3228 [U. S. Comp. St. 1901, p. 2089]); and that, inasmuch as the claim in this case was filed more than two years after payment of the tax, the petitioners cannot recover.

The answer to the contention of the United States is simple. The petition before the court is not based upon the illegality of the tax, which it nowhere asserts. It seeks only the free bounty of the government, given by the act of 1902, which reads 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 interests which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two." Act June 27, 1902, p. 1160, § 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 450].

The petitioners could not at any time have maintained suit to recover the tax as having been illegally collected. They had paid it voluntarily, not under protest. Their claim to a refund, if they had any, was moral only, and not legal. It appealed only to the government's sense of fairness, and could be satisfied only by the bounty of the United States, given upon such terms as Congress saw fit to impose. That a free gift of Congress, like that here in question, may be sued upon after it has been voted by Congress, was decided in U. S. v. Jordan, 96 U. S. 418, 28 L. Ed. 1013, and U. S. v. Louisville, 169 U. S. 249, 18 Sup. Ct. 358, 42 L. Ed. 735. The act of 1902 fixes no time within which the claim for a refund must be filed with the collector, and no departmental regulation has been called to the attention of the court. Even if the limit fixed by Rev. St. § 3228 [U. S. Comp. St. 1901, p. 2089], be applicable here by analogy, yet the two years therein mentioned must run, if they run at all, not from the payment of the tax, which was ineffective to create the claim here in suit, but from the passage of the act providing the bounty which the petitioners seek to

obtain. That the tax paid by the petitioners in 1901 was illegally collected is irrelevant to the issues raised by this petition.

Demurrer overruled.

THE JOHN FLEMING. THE SUIR. THE SHANNON. THE BESSIE WHITING.

(District Court, E. D. New York. December 31, 1906.)

COLLISION—SCHOONER AND MEETING TOW.

A tug with two loaded mud scows in tow *held* solely in fault for a collision between the scows and a meeting schooner in the Swash Channel at night; it appearing by a preponderance of the evidence that she crossed the bow of the schooner immediately before the collision.

In Admiralty. Cross-suits for collision.

Wing, Putnam & Burlingham, for Dayton and others, owners of the Bessie Whiting.

Peter S. Carter, for Brown & Fleming Contracting Co.

James J. Macklin, for the John Fleming.

THOMAS, District Judge. The schooner Bessie Whiting, loaded, at about 2 a. m. on December 27th, collided with two loaded mud scows, tandem, in tow of the tug Fleming. The tug's hawser, from 60 to 70 fathoms in length, extended to the scow Shannon, from which a hawser, some 6 to 7 feet in length, extended to the scow Suir. The schooner and Shannon were sunk. The Suir capsized. The libel and cross-libel are filed to recover damages for the injuries sustained by the respective parties. The collision was in the Swash Channel, which runs from southeast to northwest. The wind was southwest or west southwest and moderate, and the tide strong ebb. The schooner passed to the port of the tug Lawrence, with a tow of mud scows, and ported slightly for this purpose, but her wheel was shortly steadied to pass a tug and tow, which were passed to starboard. Behind these tows was the Fleming. The schooner's evidence is that the Fleming's green light was first seen, then both her lights, and then her red light, which, if true, indicates that the Fleming crossed the schooner's bow, although the schooner's helm was put hard-up to avoid collision. If this contention is true, the Fleming crossed the schooner's bow, and her liability is obvious. But the Fleming's contention is, and evidence is given to support it, that the Fleming and her scows were at all times on the port hand of the schooner, and that the Fleming was lapping the Lawrence's tow; that the schooner luffed twice, and finally brought herself into collision; that, in fact, the schooner was unmanageable, as she was carrying no jibtopsail, nor flying jib, and that the spanker, with one reef, was not properly balanced by proper foresails. The schooner carried a jib, fore staysail, mainsail, main topsail, and reefed spanker. The other foresails were omitted on account of an injury to them off the coast of Virginia. But she had sailed into Delaware Breakwater, whence after repairing certain of her sails, undergoing inspection by an underwriter's surveyor, and receiving a

certificate to proceed, she had come without injury and, so far as appears, without difficulty, to the place of collision. Nevins, the master and pilot of the Lawrence, stated that the schooner passed the Lawrence, "acting all right," and then aberrated in her navigation in very much the way claimed by the Fleming. Did the schooner luff? That is the vital question. It is unimportant on which side of the schooner the Fleming was, if the schooner did not luff, for the schooner was privileged, and it was the duty of the Fleming to keep out of her way. It will be noticed that the evidence of Nevins is not necessarily inconsistent with that of the schooner. If the Fleming crossed the schooner's bow, and held her course towards, and probably to some extent along the Lawrence's tow, the schooner might seem to Nevins to be going towards the Fleming, and the steadying of the wheel of the schooner, and the subsequent paying off under her hard-up helm, would fairly account for the phenomena presented to Nevins.

It is unnecessary to notice and discuss all the evidence given to support the differing claims of the parties. Every phase of the subject has been presented by Mr. Carter in the brief for the Fleming. But after considering the evidence, and the inferences that may be drawn from it, the fact remains that the privileged vessel was struck by a tow, whose tug was primarily bound to keep the tow off, and the court is not satisfied that the alleged exculpatory event—that is, the luffing of the schooner—happened. She approached and sailed in a fair wind, in orderly course, past the Lawrence, and, as is claimed, suddenly began to behave badly, so as to throw herself in the way of the scows. This seems very improbable, and when resort is had to the evidence the Fleming certainly has not a preponderance.

It is urged that it is not probable that the Fleming would cross the schooner's bow. Probably her pilot considered that he had time to get on the port side of the schooner with his tug, and that was the case, but this necessitated carrying his scows across the tide, whose easterly set may have delayed his maneuver, whereby the scows did not clear. In any case, it seems that it is more reasonable to believe that the Fleming tried to get over on the westerly side of the channel, in the presence of the schooner, than that the schooner changed her course so suddenly and to such a degree as to bring about the collision.

The libelants should have a decree against the Fleming, and the cross-libel should be dismissed.

GOPSILL et al. v. C. E. HOWE CO.

(Circuit Court, E. D. Pennsylvania. January 10, 1907.)

No. 32.

COPYRIGHT—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The showing on a motion for a preliminary injunction to restrain alleged infringement of complainant's copyrighted directory *held* not to warrant the granting of such injunction, but sufficient to make it proper to require defendant to give a bond for the payment of any damages complainant might recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Copyrights, § 78.]

In Equity. On motion for preliminary injunction.

H. C. Kennedy, George R. Van Dusen, and Horace Pettit, for complainants.

Joseph P. Rogers and John O. Bowman, for respondent.

HOLLAND, District Judge. The affidavits admitted in this case leave the question very much in doubt. There are a number of errors in the complainants' directory, which it is alleged have been copied by the defendant. It is true there are a number of names with the same residence and occupation in complainants' directory, which are errors as compared with the real facts as they now exist; in other words, these people by this name do not reside at these places at this time. The complainants allege an unfair use has been made of their directory by defendant, and that in copying from it the errors were also copied. This is denied, and defendant, in its affidavits, explains the entire system employed in the work of preparing its book.

The allegation is that the names were originally copied from the voters' list of the town, and the affidavits are to the effect that these names appearing in defendant's directory, which are supposed to be errors, were found upon the voters' list and kept for use in the work of the canvassers. They further state that all these names were written upon slips, and canvassers covered the entire city. The documentary evidence produced to show that this was done was very voluminous and of a kind to indicate that the defendant did the work claimed to have been done by it in the affidavits. At any rate, it has made out such a case that a preliminary injunction should not be issued. There has not been a complete explanation as to the alleged errors appearing in defendant's directory, but enough has been shown to indicate that their source of original information was the voters' list, and that these errors appeard there. If, upon final hearing, they can conclusively establish this by the production of the voters' list, or other evidence to show that this is the fact, it would, of course, go far to explain their existence in their book, and how they came there without being copied from the complainants' directory.

But, in order that the complainants may be fully protected pending a final determination, the following order will be made: That the defendant be required to give a bond in the sum of $20,000, conditioned for the payment of any damages which the complainants may recover against it in this suit, and, upon filing the same with the clerk of the Circuit Court, the restraining order is revoked, and the petition for a preliminary injunction is dismissed; and in case this bond is not filed on or before Saturday morning, January 12, 1907, at 10 o'clock, a preliminary injunction will issue.

STRELLOW v. SCHLOSS.

(District Court, M. D. Pennsylvania. December 21, 1906.)

No. 83.

BANKRUPTCY—INSOLVENCY—LIABILITY OF BANKRUPT FOR DEBTS OF BUSINESS CONDUCTED IN HIS NAME.

One Schloss, an alleged bankrupt, was the manager and apparent head of a store conducted under the name of the "Schloss Department Store," and goods were ordered for and came shipped to it in that name. He had printed and used billheads with that name upon them, kept the bank account of the business in his own name, and on one occasion made a statement showing his financial condition when ordering goods for the store. *Held*, that he could not avoid liability for the debts contracted in the business on the ground that another was the real party in interest, and he was merely an employé, where such fact was not stated to nor known by the creditors, nor defeat bankruptcy proceedings on the claim of solvency where the concern was insolvent.

In Bankruptcy. On rule for new trial.

R. L. Grambs and R. W. Rymer, for the rule.
Edward W. Thayer, opposed.

ARCHBALD, District Judge. The respondent contests the proceedings, and asserts his solvency, and this was the issue tried. It depends upon whether he is personally liable for the merchandise which went into the store at Clarks Summit, Pa., of which he was the apparent head. He claims not to be, because he was merely a manager of the store, without any interest beyond his salary, and that, so far as it is made to seem otherwise, he was the dupe of Okell, who imposed upon his inexperience and used him for his own ends. The jury apparently believed this and found in his favor, but unfortunately it is not sustained by the evidence, or there are at least other things which control. Upon his own admission he knew that the store was run as the "Schloss Department Store," and that goods were ordered for and came shipped to it in that name. This could refer to no one but himself, and he thus gave it the sanction of his name. It is undisputed, also, that he used letter and billheads in the business of the store with this designation on them, the bill for printing which he acknowledged as his own; that a bank account was opened and carried on in his own individual name, in which the money received from the sale of goods was deposited, and on which he drew checks to pay for things that went into the store. It was also clearly shown that in one instance at least, when in New York ordering goods, he made a detailed statement with regard to his financial standing, the only possible occasion for which was that he was the owner of the store.

It is of no avail against this that, as he says, he protested to Okell when goods came charged to him individually. He did not send them back, neither did he take pains to repudiate the other use of his name. And even if it be accepted as evidence that Okell was the real party in interest, that goods which were shipped to the store were diverted unopened and in bulk to the place which Okell had opened at Carbondale, it was not only with the knowledge and connivance of Schloss, but by

his active assistance, that this was done. And the same is true with regard to the goods that were carted down to Scranton. Combining and conspiring with Okell, in this way, to cheat and defraud the creditors of the Clarks Summit store, as he confessedly did, instead of relieving him from liability, it all the more fastens it upon him, and he is fortunate to escape simply with civil responsibilty.

Taking this view of the case, as I am compelled to do, it would be a travesty on justice to let the verdict stand, and the rule for a new trial is made absolute.

In re COHEN et al.

(District Court, W. D. New York. January 10, 1907.)

No. 2,537.

1. BANKRUPTCY—DISCHARGE—EVASIVENESS—FALSE TESTIMONY.
   That the testimony of a bankrupt was probably subject to criticism for evasiveness, and may have been false in some particulars, was insufficient to justify the denial of a discharge.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 732.]

2. SAME—COMPOSITION—FALSE OATH—WILLFULLNESS.
   Where acceptance of a bankrupt's offer of composition was recommended by the trustees, the fact that the referee reported that the bankrupt had made a false oath in the proceeding in which he denied making a financial statement in August, 1906, was insufficient to justify the court in rejecting the compromise on the objection of an unsecured creditor, the proof being insufficient to show that the offense was committed "fraudulently" or "knowingly."

In Bankruptcy. On motion to confirm composition offered by bankrupts.

Eugene Warner, for trustees.
Henry H. Seymour, for objecting creditor.

HAZEL, District Judge. No question is raised in relation to the regularity of the offer of composition. The single point urged by an objecting unsecured creditor is that Cohen, one of the firm of bankrupts, at the examination before the referee, testified falsely and with fraudulent intent and accordingly, the offer of compromise should be rejected by the court. The trustees herein are in favor of the acceptance of the offer, and the referee in bankruptcy has reported to this court that although the bankrupt Cohen made a false oath in the proceeding, in that he denied making a statement of the financial condition of the bankrupt firm to the witness Bissell in the month of August, 1906; yet, upon the whole record, he is of opinion that the proofs are insufficient to warrant holding that the offense was committed fraudulently and knowingly. It is urged that the false oath relied upon was material; the effect of the testimony being that when the false statement was made the bankrupts were solvent, and, as they were adjudicated bankrupts several months afterward the inference is warranted, that they have concealed a portion of their property. The bankrupt, who is accused of making a false oath, after denying at

an earlier examination that he made a written statement to Mr. Bissell, testified that he had no recollection of so doing. According to the witness Bissell there was no formal statement made to him in August, 1906, by the bankrupt Cohen in relation to the financial condition of the firm. He says it was merely a memorandum, and that a formal statement in writing was made to him by the bankrupt Sinai, in July, 1905. The memorandum of August, 1906, upon which the false oath is predicated is not produced, and any details upon which the financial condition of the bankupts at that time was based are not before me. The testimony of the bankrupt Cohen is probably subject to criticism for evasiveness, and it may have been false, but a discharge in bankruptcy cannot be denied on that ground. This application is governed by the same rule. The Circuit Court of Appeals in Re Gaylord, 112 Fed. 668, 50 C. C. A. 415, say:

"It is incumbent upon the opposing creditor to establish satisfactorily that the particular statements of which perjury is predicated were false. They cannot be found to be false upon mere conjecture."

And Judge Coxe held, in Re Gaylord (D. C.) 106 Fed. 833, that the burden is upon the creditors to prove the false oath by clear and positive proof.

I am not convinced that the proofs are sufficiently strong to warrant the conclusion by this court that the false oath in question was corruptly made. Moreover, the opinion of the referee that upon the whole record the opposing creditor has not satisfactorily established the offense charged is entitled to weight.

The specifications are overruled, and the composition offered by the bankrupts is confirmed.

McGUIRK v. O'HALLORAN et al.

(Circuit Court, D. Massachusetts. January 23, 1907.)

No. 182.

1. MALICIOUS PROSECUTION—ACTION—ELEMENTS.
   In order to establish a cause of action for malicious prosecution, plaintiff must allege and prove that the prosecution was without probable cause, and also that it ended in plaintiff's favor.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 18, 21, 70, 72.]

2. SAME—ACQUITTAL.
   Defendant's want of probable cause in an action for malicious prosecution does not excuse plaintiff from showing that his prosecution ended in his acquittal or its equivalent.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 72, 116.]

Jesse C. Ivy, for plaintiff.
Winfield S. Slocum, for defendants.

LOWELL, Circuit Judge. The plaintiff's declaration is in two counts. The first alleges false imprisonment; the second malicious

prosecution. The defendant demurred to both counts, but at the argument he did not press his demurrer to the first. The second alleges malicious prosecution in the common form, except that it substitutes for the usual allegation of the plaintiff's acquittal the following:

"At said police court the plaintiff was, solely through and by means of perjury and subornation of perjury by said defendant, convicted of the crime of keeping and maintaining a common, noisy, ill-governed, and disorderly house, and ordered by said court to pay a fine of forty dollars, which fine she thereupon paid."

To establish malicious prosecution the plaintiff must allege and prove, among other things, both (1) that the prosecution was without probable cause, and (2) that it ended in favor of the plaintiff. These are separate requirements, not to be confounded with each other. The defendant may prove probable cause by showing a conviction of the plaintiff in a lower court, although this conviction has been subsequently reversed, and the plaintiff has been acquitted. But the presumption of probable cause arising from the plaintiff's conviction in a lower court may be overcome by evidence that this conviction, as alleged in the case at bar, was procured solely by the defendant's perjury.

The defendant's want of probable cause, however shown, does not excuse the plaintiff from proving that his prosecution ended in his acquittal, or in its equivalent. This requirement has no exception material to consider here. Hence, the second count of the declaration, which alleges final judgment against the defendant, is fatally defective (Pollock on Torts [Webb's Am. Ed.] 392, 394), and for a recent illustration, Davis v. Johnson, 101 Fed. 952, 955, 42 C. C. A. 111.

Demurrer to the first count overruled. Demurrer to the second count sustained.

THE DREAMLAND.

(District Court, E. D. New York. December 31, 1906.)

COLLISION—FAULT—EVIDENCE.

In a libel for collision between a tug and a steamship, evidence *held* to require a finding that both vessels were at fault; the tug for navigating too near to the shore, and the steamer for throwing her stern into the stream without a lookout astern to determine whether the lateral motion of the stern to port would interfere with the navigation of another vessel.

John F. Foley, for libelant.
Morris & Whitehouse, for claimant.

THOMAS, District Judge. The tug Magnet, with a barge alongside, was approaching the Battery, while the tide was flood, when the excursion steamer Dreamland crossed well ahead of her bow, for the purpose of making a landing at her station at the Battery. She took her position with her bow pointing westerly, but was unable to make her landing immediately, because another excursion boat, the Rosedale, was lying at the dock. The Rosedale was heading easterly, and after some minutes went out under the stern of the Dreamland, and, upon the exchange of suitable signals, crossed the bow of the

Magnet, who had reduced her speed and ported her helm, for the purpose of allowing this maneuver. Thereafter the Magnet steadied her helm and started ahead, but her starboard bow came in collision with the stern of the steamer Dreamland.

The contention of the captain of the Magnet is that the Dreamland was lying several hundred feet off in the river, with her bow pointed to the dock, and that she was backing without a stern lookout, and without signals, at the time the collision occurred, although the Magnet blew her alarm whistles. The evidence of the Dreamland is that she had been lying about parallel with her dock, and holding herself against the tide, to allow the Rosedale to go out, and that the tide carried her astern, whereupon she went forward; that this was repeated once or twice, but that at the time of the collision she was not backing, but ported her helm to throw her bow in, under the influence of the tide.

This is one of the cases where the vessels were so closely related in distance that it is difficult to determine the exact fact. But upon the whole testimony it is concluded that the Dreamland was not pointing to her dock in the manner described by the libelant, but was lying much closer to the dock; that the Magnet herself was navigating much closer to the dock than she was privileged to do, and that porting her helm carried her still further toward the Dreamland; that, when the Rosedale had passed the bow of the Magnet, the latter went ahead, so as to present her starboard side to the stern of the Dreamland; and that the Dreamland, in attempting to throw her bow toward the dock, necessarily carried her stern farther into the stream, whereby the accident happened.

This finding brings both vessels in fault; the Magnet for navigating so near to the shore, and the Dreamland for throwing her stern into the stream without a lookout at the stern to determine whether such lateral motion of the stern to port would interfere with the navigation of another vessel. There had been a lookout on the stern of the Dreamland; but after the Rosedale passed he went forward before the Magnet came up, leaving no lookout at the stern of the vessel. This explanation of the accident is the most probable that can be gathered from the evidence, and seems to reconcile the conflicting statements of the witnesses.

The damages and costs will be divided.

DE GALINDEZ et al. v. ENNIS.

(Circuit Court, E. D. Pennsylvania. December 26, 1906)

No. 44.

PLEADING—STATEMENT OF CLAIM.

Mere imperfections in a plaintiff's statement of claim, which can be cured by requiring a more specific statement or a bill of particulars, do not render it demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 409, 410.]

On Demurrer to Statement.

Richard A. Irving, and Biddle & Ward, for plaintiffs.
R. W. Archbald, Jr., and Simpson & Brown, for defendant.

J. B. McPHERSON, District Judge. I have no doubt that the statement would have been more satisfactory if it had been drawn by a member of the Pennsylvania bar. As it stands, it certainly leaves something to be desired; but, making due allowance for the evident unfamiliarity of the draftsman with the requirements of our practice, I am inclined to think it contains a fairly intelligible account of the claim to which the defendant is called upon to reply. There are some items, however, of which he may be entitled to ask for more precise details, by demanding either a more specific statement, or a bill of particulars.

So far as the defense of the statute of limitations is concerned, it is obvious that no harm can be done by postponing decision until the proofs have been put in.

The demurrer is overruled, and the defendant is directed to file an affidavit of defense within 20 days.

CLAY et al. v. KLINE.

(Circuit Court, S. D. New York. October 8, 1906.)

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—SIMULATION OF CIGAR BANDS.

A preliminary injunction granted restraining defendant from using upon individual cigars of panatella shape bands simulating those of complainant in shape and colors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 108.]

In Equity. On motion for preliminary injunction.

Wise & Lichtenstein, for the motion.
Mandelbaum Bros., opposed.

LACOMBE, Circuit Judge. The complainant may take a preliminary injunction against defendant using upon individual cigars having substantially the size and shape of what are known as "panatelas" any red and gold band lettered in white, substantially as are the two bands presented on the argument, when such band has an elongated oval escutcheon such as defendant now uses, or one in shape, size, and proportions relative to the band substantially similar to the complainant's.

SPAULDING et al. v. EVENSON et al.

(Circuit Court, E. D. Washington. August 6, 1906.)

1. INJUNCTION—MOTION FOR PRELIMINARY INJUNCTION—AMENDMENT OF BILL.
An amendment to a bill offered by a complainant on the hearing of a motion for a preliminary injunction, where no answer has been filed and complainant has the right to amend as of course, will be accepted and considered as a part of the application for injunction; especially where it relates to a formal matter not affecting the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 316.]

2. COURTS—JURISDICTION OF FEDERAL COURT—AMOUNT IN DISPUTE.
A bill in a federal court for an injunction to restrain defendants from interfering with complainant's business, which alleges that the value of the matter in dispute exceeds, exclusive of interest and costs, the sum of $25,000, and that complainant has been damaged by the acts of defendants in more than such sum, is sufficient, in the absence of any denial of such averments, to sustain the jurisdiction of the court.

3. PARTIES—VOLUNTARY ASSOCIATIONS—PARTIES BY REPRESENTATION.
Where a voluntary association, with many members, is represented by a committee or regularly constituted officers, a suit may be maintained against such officers or members of the committee in their representative capacity, and in such case the association will be deemed before the court without bringing in all of the members.

4. ASSOCIATIONS—LIABILITY OF MEMBERS—ACTS OF SUBSIDIARY ASSOCIATION.
Where a voluntary association creates a subsidiary or branch association as an instrumentality through which to accomplish certain purposes, it is liable for the acts of such subsidiary association to the same extent as though such acts had been done by the entire membership.

5. INJUNCTION—GROUNDS—UNLAWFUL INTERFERENCE WITH COMPLAINANT'S BUSINESS.
Defendant, which was a voluntary association, composed of numerous firms and corporations doing business throughout eastern Washington, some of whom were dealers in crockery, some in vehicles, some in stoves and ranges, and others in hardware, organized a subsidiary association, known as the "Peddlers' Association," and contributed funds to be used for the purpose of "competing with the peddlers." It was made the duty of every resident agent, upon learning of a peddler of ranges or vehicles offering to sell in his community, to immediately "offer him competition" by taking goods of like kind and quality, or catalogues of such goods, "together with teams and sufficient men to do so successfully, and accompany the peddlers on their rounds," and to explain to farmers and others who might buy that they could do better with local dealers; giving them the privilege of buying from any dealer in the community. Complainant was a manufacturer of wagons and buggies in another state, some of which were shipped to Washington, and there sold by agents, who took a number of vehicles, and drove through the country, selling them to farmers, and had thus built up a profitable business. Defendant, in pursuance of its said scheme, through its officers and committee, employed two men to follow each of complainant's agents. They stopped at the same hotels and stables, started out when he started, followed him to every prospective customer, and interfered with the conversation. Some carried guns and revolvers. *Held*, that such acts were not competition, nor intended as such, but to suppress competition by destroying complainant's lawful business; that they were done pursuant to an unlawful conspiracy between persons, some of whom were not even competitors, to interfere with com-

plainant's lawful right to carry on its business, and their continuance would be enjoined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 108, 170, 172.]

In Equity. On motion for preliminary injunction.

H. H. Stipp and Post, Avery & Higgins, for complainants.
Merritt, Oswold & Merritt, for defendants.

WHITSON, District Judge. In this case a temporary restraining order was issued without notice, upon the bill of complaint and the affidavits of several of the employés of complainants, and the defendants were cited to show cause why an injunction pendente lite should not be granted. The allegations of the bill are in substance as follows: Complainants are residents and citizens of the state of Iowa. They are and have been engaged in that state in the manufacture of buggies and wagons of various kinds for many years, which they have been selling, not only in the state of Iowa, but in various other states, including the state of Washington. Their method of making sales in this state is by means of salesmen traveling through the country, selling to farmers and others residing in the rural districts; that their vehicles, known as the "Spaulding buggies and wagons," are strong, and specially adapted to the needs of the farmers, and they have acquired a reputation in the state of Washington, and especially in eastern Washington, as buggies and wagons of high grade, purchasable at reasonable prices, and that the standing of complainants in said community and their said business is of very great value. It is alleged that the defendant the Inland Empire Implement & Hardware Dealers' Association is an association composed of local dealers, some of whom are dealers in hardware, and not engaged in the business of selling buggies and wagons or farm implements, while other members of the association are so engaged; that the membership of the association is composed of numerous firms and corporations of various counties in eastern Washington; that said association has raised a fund of $10,000, and placed it in the hands of defendant Evenson, to be used for the purpose of preventing complainants selling buggies and wagons in eastern Washington, and for several weeks last past complainants have had about 20 employés so engaged; that the method adopted by complainants is to drive through the rural districts, hauling from two to four vehicles, and stopping at farmhouses where customers may probably be found, and offering the same for sale; that all of the vehicles so offered are manufactured in the state of Iowa, and shipped to this state in car-load lots, and that before any of said buggies and wagons are offered for sale complainants pay the taxes thereon, and comply in all respects with the laws of the state of Washington; that the defendant the Inland Empire Implement & Hardware Dealers' Association, through the defendants Lucas, Evenson, and Hay, has, in pursuance of the policy of the association, and in accordance with the instructions of the membership thereof, unlawfully and maliciously interfered with the complainants' business, and have threatened, intimidated, harassed, and annoyed complainants' employés and the persons with whom complainants were transacting business, and inter-

fered with their liberty and the rights of complainants to make a livelihood, and to contract and to do business, in the following particulars: That they have various of the employés of complainants followed by employés of the defendants day and night, so that wherever one of the complainants' employés goes he is "dogged," sometimes by one, but generally by two, of the employés of the association; that some of said followers are armed with guns and rifles, some being unarmed; that whenever employés of the complainants undertake to converse with a farmer or other purchaser, such conversation will be interrupted by such followers, who undertake to persuade the probable purchaser from purchasing from agents of complainants, suggesting that they ought to purchase of resident dealers, who reside in the community; that such persons following are not undertaking to sell any buggies themselves, nor do they name or represent any competitor or dealer in buggies or wagons, their sole object being to prevent complainants from making sales, to the end that they may be driven out of business in the state of Washington; that after contracts of sale have been made between an agent of the complainants and purchasers, the agents of the defendants persuade such purchasers to violate such contracts and to refuse to consummate such sales; that several of such followers, at the instance of defendants, have been appointed deputy sheriffs, and that one of the agents of complainants has been arrested under the false and malicious charge of peddling goods without a license by a person so appointed at the instance of the defendants, and in furtherance of such conspiracy; that such conduct has been carried on for several weeks, and numerous sales have been lost; that employés of complainants have become alarmed and discouraged, and will, if such acts continue, quit the employ of complainants, and they will be unable to carry on their business; that in one instance a fist fight occurred between the salesmen of the complainants and persons so following them, and that further breaches will result; that in pursuance of their scheme the defendants have circulated false and slanderous matter regarding complainants' buggies, by newspaper articles and otherwise, and have circulated stories that complainants are perpetrating a fraud upon their customers—all of which, it is alleged, is done for the purpose of running the complainants out of business in the state of Washington.

The allegations of the bill are not wholly sustained. As to how far the affidavits presented at the hearing do sustain the bill will appear in another part of this opinion, where the facts are discussed. The restraining order did not enjoin the defendants from publication of false reports in newspapers, as prayed, for the reason that complainants have an adequate remedy at law for that grievance, and because such conduct, if truly alleged, would not have the direct effect of preventing them from carrying on their business.

1. The first point made by defendants is that, in the absence of any threatened continuance of the acts complained of, only a cause of action at law has been stated. This contention is well made. During the argument, complainants offered an amendment, thereby supplying the allegations, the absence of which was suggested, but defendants, by their counsel, object to the filing of the same, upon the ground that the injunction must stand or fall by the original bill of complaint.

This would be a somewhat technical view. A refusal to consider the amendment, which, under the rules, complainants may file as of course, and to regard it as a part of the application for an injunction, would be an idle proceeding, for, if complainants are entitled to the relief which they seek at this time, the only result would be that of delay. Another application could immediately be made under the bill as amended, and if complainants are entitled to an injunction at all, they could have the aid of the court by an ex parte order, or by an application on notice. Inasmuch as the parties are before the court with full showing made both for and against the injunction, it will be inexpedient to send them out of court, only to be recalled for a new hearing upon the merits. To sustain the objection would be a fruitless victory for the defendants, of temporary and transient character. Particularly should the right to amend be recognized when the proposed amendment relates to a formal matter not affecting the merits of the controversy, and concerning which counsel have not been misled. The amendment, therefore, will be permitted, and considered as a part of the application.

2. The next point raised is that the jurisdictional amount does not affirmatively appear. It is alleged:

"That the value of the matter in dispute exceeds, exclusive of interest and costs, the sum of more than twenty-five thousand dollars, and that your orators have been damaged by the said acts and conduct of said defendants in excess of the sum of twenty-five thousand dollars."

No answer has been interposed, nor has any affidavit been filed or presented tending in any way to dispute or contradict these averments. Taking the bill as a whole, it must be concluded that the matter in dispute is complainants' right to do business and its damages for being deprived of that right. The complainants have made a prima facie case sufficient to sustain the jurisdiction, in the absence of any denial or showing to the contrary. Pennsylvania Co. v. Bay (C. C.) 138 Fed. 203; Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; Maffet v. Quine (C. C.) 95 Fed. 199; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729.

3. Defendants' counsel have argued that a voluntary association, as the Inland Empire Implement & Hardware Dealers' Association is shown to be, cannot be made to respond by a suit against its officers, but that its members must be before the court. This is the general rule. It is subject to at least one exception. Where an association with many members is represented by a committee or regularly appointed officers, if such representatives be brought in, it will be deemed that the association, as such, is before the court. The rule applicable to this case is laid down by Foster's Fed. Prac. § 48, as follows:

"Similarly, where persons who are jointly liable are very numerous, some may be sued instead of all, provided that the manner in which they are sued and the fact that they are numerous are stated in the bill. Ordinarily, the complainant selects such of the class as he chooses to represent the rest. The persons thus selected may be a committee chosen by the rest of the class to act for them in the matters complained of, such as a reorganization committee of stockholders and bondholders, or the managing committee of a clearing house association."

It is alleged, and not denied, that defendant Lucas is president of the association, that defendant Evenson is the secretary and active manager, and that defendants Cook and Heath are employés and superintendents, of the work referred to in the bill. While the defendants have attempted to appear specially, they have, under rule 22, appeared generally. Mahr v. Union Pacific Ry. Co., 140 Fed. 921. We then have the case of the president of the association, the secretary, treasurer, and manager of it, who is confessedly directing the work, two superintendents in the field before the court, supplemented by a general appearance of the association itself, composed of about 166 firms in eastern Washington and northern Idaho, upon a general showing resisting the application for an injunction, and in effect justifying the acts complained of. Equity rule 48 provides:

"When the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."

It would seem that this rule is only declaratory of a well-established principle of equitable procedure which is generally recognized. McArthur v. Scott, 113 U. S. 391, 5 Sup. Ct. 652, 28 L. Ed. 1015; United States v. Coal Dealers' Ass'n (C. C.) 85 Fed. 252; Van Houten v. Pine, 36 N. J. Eq. 133; Pearson v. Anderberg (Utah) 80 Pac. 308; Fitzpatrick v. Ruter (Ill.) 43 N. E. 392; West v. Randall et al., Fed. Cas. No. 17,424, Vol. 29, 718.

The court has jurisdiction over the association as such, and over all parties who have appeared to resist the application for an injunction. In this connection it is proper to consider the contention that the defendant the Inland Empire Implement & Hardware Dealers' Association has not committed the acts complained of, but that the acts were committed by an association known as the "Peddlers' Association." It is disclosed by the affidavit of Edward W. Evenson, secretary of the Hardware Dealers' Association, that at a meeting thereof held at the city of Spokane on the 6th and 7th days of June, 1906, certain proceedings were had with reference to competition with peddlers, "who would, might, or should peddle goods and merchandise handled and sold by the members of said association, and in competition with the dealers in said goods and merchandise in the territory where the members of said association were doing business." The matter was fully discussed, and a committee was appointed to "formulate some plan of competing with the peddlers," which reported, recommending:

"First. The formation of an association, to be called the 'Peddlers' Association.' Second. That each and every resident dealer in either ranges or vehicles holding membership in the Inland Empire Implement & Hardware Dealers' Association be asked to pay into the treasury of such association the sum of twenty dollars ($20), or such other sum as said resident dealers may see fit; said payment being the only requirement as to membership. Third. That all manufacturers and jobbers in steel ranges and vehicles in the territory, or who solicit trade in the territory, be asked to contribute the

sum of one hundred dollars ($100), or such sum as they may see fit. Fourth. That all sums so collected be used to pay expenses incurred in offering to peddlers such competition as will enable resident dealers to hold their trade in such lines as may be peddled in their respective communities. Fifth. That whenever a resident agent shall know of a peddler of ranges or vehicles offering to sell goods in his community, he shall immediately offer him competition by taking goods of like kind and quality, or catalogues of such goods, together with teams and sufficient men to do so successfully, and accompany the peddlers on their rounds with the farmers and others who might buy, and explain to the farmers and others that they can buy goods of like kind and quality from them for less money, or better goods for the same money. In case such farmers should prefer not to buy from any particular dealer in the community, he can have the privilege of buying from any dealer in the community nearest and most agreeable to the farmer. Sixth. That the proceeds or profits of all sales so made shall revert to the Peddlers' Association, and that all expenses so incurred shall be borne by the Peddlers' Association. Seventh. That all funds on hand and all profits accruing shall ultimately be returned to the members pro rata. Eighth. That a committee of three be appointed, to be called a 'Peddlers' Committee,' whose duty it shall be to devise ways and means and to administer the funds collected for the above purpose, and also that the funds belonging to the Peddlers' Association be deposited in the Spokane & Eastern Trust Company in the name of A. Urbahn, chairman, and E. W. Evenson, who shall alone have power to draw the said funds for the purpose referred to. Ninth. All accounts to be accompanied by vouchers, and passed upon by the committee."

This report was adopted.

If anything more were needed to designate this proceeding of the so-called "Peddlers' Association" as the creation of and instrumentality used by the defendant association, it may be found in the affidavit of Evenson in reference to the Peddlers' Association, where he says:

"That for such reasons the branch of the defendant association known as the 'Peddlers' Association' was organized as hereinabove shown, and that, as shown by the objects and purposes as hereinbefore stated, the only reason, object, or purpose for the organization of said branch of said association was to enter into honorable, lawful, legal, and fair competition with said peddlers, to the end that the business of the members of said association might and would be protected from the invasion of the temporary peddlers, who might invade the territory of the members of the said association."

4. Saving the question of jurisdiction, the matters of practice thus far noticed are of comparatively minor importance. The vital question is whether an unlawful combination has been entered into, and through that combination the complainants are being wrongfully deprived of their right to carry on business within this state. The defendants do not claim that they are regularly engaged in the business of peddling. On the contrary, they lay stress on the fact that they have established places of business, residences, and local habitations, that they are citizens of the state, that they pay taxes, and submit to the burdens imposed by our laws, and that they thereby contribute to the upbuilding of the communities in which they respectively live, while the complainants are residents of another state, who, without bearing the burdens of citizenship, reap the benefits of a trade to which the defendants are justly entitled. However just, in the abstract, this contention may be, the rights of the parties are to be measured by the laws of the country. A nonresident of the state has the same right to do business within the state as a resident, and it is the duty of the courts to uphold that right wherever it is invaded by unlawful means. The

purpose of the association is disclosed in the fifth paragraph, which has been quoted in full. It is said: "That whenever a resident agent shall know of a peddler of ranges or vehicles offering to sell goods in the community," he shall immediately take goods of like character, and go in pursuit, etc. It will be noted that the dealer, whose expenses are paid by the association, does not confine himself to competition with his own goods. It is provided:

"In case such farmers should prefer not to buy from any particular dealer in the community, he can have the privilege of buying from any dealer in the community nearest and most agreeable to the farmer."

The effect of this is to conspire against the carrying on of a legitimate business. In the competition which the particular agent carries on, if he cannot sell his own goods, the inference is that he is to try to sell the goods of some other dealer; anybody's goods rather than to allow the peddler to sell. That this is the construction given by members of the association is shown by the affidavit of defendant Hay. In referring to the instructions given men sent out to follow peddlers by M. E. & E. T. Hay, a corporation, of which he is president, he says:

"That said employés were further instructed that, in case they found a prospective purchaser who for any reason did not wish to deal with the above-mentioned corporation, they should try to induce him to purchase from the local dealer to whom he was most favorably inclined and to whom he preferred to give his trade."

The association is not the owner of any vehicles, ranges, or other property. It is not engaged in mercantile pursuits. It cannot, therefore, become a competitor with those who are so engaged. It is not seeking to compete with those engaged in business, for it is not so engaged itself. It is a combination to interfere with, obstruct, and hinder the carrying on of business by persons engaged therein, without having any direct interest in like business, or any business whatever. This is not competition. Again, it is shown that the association is composed of numerous partnership firms and corporations, some of whom are engaged in the hardware business, others in the crockery business, some in the selling of stoves and ranges, but all of whom undertake to stand together, and contribute to the maintenance of a fund for the putting of peddlers out of business, whether such peddlers are engaged in competition with the line of goods which they handle or not. For instance, what justification can a dealer in crockery find for contributing to a fund with which to compete with the complainants, who are only dealers in vehicles? And what justification can one who does not deal in vehicles at all find for competing with the complainants, who confine themselves to that line alone? Can it be said that these firms or corporations, as the case may be, are competing with the complainants when they are not engaged in the sale of like commodities? Under our competitive system, one dealer may, if he can, put his competitor out of business, but he must do it through well-recognized methods of competition, namely, by offering better goods or better facilities, or selling at lower prices. But this rule applies to a competitor—one engaged in the same line of business. Whenever one not so engaged commits such acts as would be competi-

tion were the person engaged in like business, then it becomes an unwarranted interference, and the law will imply malice. According to the confessed purposes of the organization, the defendant association is organized for an unlawful purpose. Its members are committed by agreement, actually being carried out, to interfere with the sale of goods by what they term competition when not engaged in the same line, and the sale of which could not affect their interests, directly or indirectly.

5. The defendants contend that they have a right to follow complainants' agents, and to offer for sale goods in competition with them, and that they may interfere with any conversation and disturb any sale being made so long as they do not resort to violence, but admit that if the evidence shows that they are doing it for the purpose of putting complainants out of business, that it is a violation of the law, and the writ should go. The argument is this: One person has the same right to travel the public highways as another. If the farmer does not object, one has as much right as another to enter upon his premises and solicit his trade; that while it may be a breach of good manners to interfere with a conversation being carried on between the salesmen of complainants and salesmen of defendants, it is not an invasion of any legal right. In the abstract, if applied to a single instance, this contention is sound. If the canvassers of the defendants had occasionally fallen in with complainants' canvassers, and interfered with sales by competition in good faith, there could be no prevention of such conduct by an injunction. The real purpose of the organization, both as professed in its proceedings and as shown by the manner of carrying out that purpose, is not to promote or engage in competition, but to destroy it. A brief review of the history of this subject will throw light upon the present inquiry. In 1903 an act was passed by the Legislature of this state (Sess. Laws 1903, p. 38, c. 34), which undertook to prohibit the sale of vehicles, stoves, ranges, pianos, or other merchandise without a license, and the license fee was fixed at $10 per day, but with the proviso that the act should not apply to any person selling any of said articles from his regularly maintained stock or established place of business, when such stock had been maintained in the county for a period of six months. This act was several times held discriminative and void by superior judges of the state of well-recognized ability, but did not, apparently, reach the Supreme Court; those decisions being generally acquiesced in. While it has been suggested by affidavit that complainants are carrying on business in violation of this law, it was not referred to in argument, and it may be assumed that counsel do not rely upon that point. In 1905 an act was passed to meet the objections to that of 1903 (Sess. Laws 1905, p. 372, c. 177). It provides that every person, firm, or corporation who peddles out after shipment to the state, canvasses, or sells by sample, etc., shall pay in advance an annual license tax of $200. This act was recently declared void by the state Supreme Court. Bacon v. Locke, Constable (Wash.) 83 Pac. 721. It is a matter of common notoriety that this legislation was enacted at the suggestion and for the benefit of local dealers. The amount fixed for license by the Legislature was intended to be prohibitive of competition by peddlers. Shortly after

the decision holding the act of 1905 unconstitutional, we find the dealers who had attempted to put the peddlers out of business by legislation resorting to the very ingenious scheme which has been here disclosed. It is proposed now to accomplish by subterfuge that which the courts of the state have repeatedly held cannot be done directly. While complainants were engaged in selling vehicles in various counties of this district in the manner of their choice, parties were organized, consisting of two persons in each, to follow their salesmen, which they did with remarkable persistence and pertinacity. "Whither thou goest I will go; and where thou lodgest, I will lodge," was the rule to which they steadfastly adhered. In one instance a deputy sheriff was appointed and sent out as one of the alleged salesmen of the defendants. The appointment of a deputy sheriff to follow complainants' salesmen and cause arrests under a void act is suggestive of more than competition. In two other instances rifles were carried by the agents of the defendants. It is said that these were carried for the purpose of shooting squirrels and coyotes. In the light of the showing made, this theory must be taken with a grain of allowance. Such conduct suggests force. Two persons in a party is not in keeping with ordinary business purposes. One of these followers carried a revolver. Clearly this was intended to intimidate. Complainants' agents could not escape from these men, who shadowed them continually, who stopped where they stopped, traveled when they traveled, sought the same customer at the same time, interrupted conversations where sales were being attempted, either with offers of other goods, or dissuading probable purchasers. They stopped at the same hotels, put up at the same stables, went early or late, as the salesmen of complainants went, following in close proximity; all this, it is said, for the purpose of selling goods in competition. It is a well-known fact that business men do not ordinarily court the presence of a competitor. Business methods, discounts from catalogue prices, and the like, the merchant does not, as a rule, lay bare to his adversary. The affidavits filed by defendants to sustain their objection to the granting of an injunction do not meet by frank disclosure the grievances complained of. They are evasive by their silence on vital points, and their failure to definitely meet the charges confirms the view already suggested concerning their objects and purposes.

In the light of what has been disclosed, and of the legislative and judicial history of this subject, it would be doing violence to the intelligence of the defendants not to conclude that every member of the association in his heart knows that the object and purpose in view in this particular transaction is to run complainants out of the state.

Undoubtedly the defendants have a right to peddle. They have a right to peddle in the same territory where the complainants peddle. They have a right to show the superior quality of their own goods and the inferior quality of the complainants' goods. They have a right to canvass by catalogue or otherwise. Their grievance, so frankly disclosed, that since they are located within the state, and contribute to its governmental expenses, they ought not to be brought into competition with those who, if they contribute anything in the way of taxes, it must be of the most transient character and limited amount, has led

them into a misconception of their remedy. While the law guaranties to them the right to peddle and solicit orders in every lawful way, it guaranties the same right to the complainants, and they are entitled, as the defendants are, to pursue their business in their own way, without being harassed, intimidated, or followed. There is ample scope for business enterprise, when the complainants' agents appear in the community, by canvassing the territory generally. It is idle to say that where the agents of the association follow the agents of the complainants, dog their footsteps, go to the same place, solicit the same man at the same time, stop at the same hotel, follow the next morning, whether it be late or early, are following for business rivalry only. The purpose of this harassment is to prevent the complainants from doing business; that it will accomplish it if it be permitted to proceed, cannot be doubted. If men cannot be protected under the law, they are apt to resort to violence, regardless of the law. Refusal of the courts to afford protection to legal rights leads to anarchy. A man's right to carry on his business is his property, and he can only lawfully be deprived of it by lagging behind his competitors, or by failure to keep abreast of them in the quality of his goods and the price he sells them for. He cannot be denied the right to do business upon equal terms with others. If, having equal opportunity, he fail, well and good. The fittest will survive. But every citizen is entitled to a chance equal to that of his fellow citizens. If an injunction be refused, the complainants are relegated to one of two courses. They must either give up their business altogether, which will accomplish the purpose the defendants have in view, or meet interference with violence. It is shocking to suppose that a citizen engaged in a lawful undertaking can be compelled to accept either alternative.

Counsel for defendants have suggested that there is no law which is violated when the defendants' agents follow the complainants' salesmen. The interference with the complainants' rights consists in depriving them of the privilege of conducting their own business in their own way. One who violates no law in so doing is entitled to carry on a business according to his own ideas of propriety and expediency. Every man may follow his own occupation without hindrance. The principle which defendants would establish could, in this age of combinations and trusts, and in all probability would, come back to plague them. It is sufficient that the defendants have the legal right to engage in the occupation which the complainants engage in, and in the same way. They can fully protect themselves by canvassing the same territory. Locally it must be assumed that they would have the advantage in this regard. To follow the footsteps of complainants' salesmen, to interfere at every turn, is beyond endurance. To permit this to be done would be destructive of individual liberty, and it would strike at a sacred right, namely, that of allowing every citizen to pursue his own calling unobstructed and unhindered, except in so far as better goods, lower prices, better facilities, or the like, would have a tendency to hinder or obstruct.

Viewed according to the ordinary conception of right and wrong, one instinctively recoils from the contention of the defendants. There is no substantial conflict in the authorities applicable to facts such

as are here presented. A case of striking similarity in many respects to the one at bar is that of Standard Oil Co. v. Doyle, decided by the Supreme Court of Kentucky, and reported in 82 S. W. 271. Doyle had been in the employ of the Standard Oil Company at Lexington, but resigned his connection with that company, and entered into business as an independent dealer. He was quite successful, on account of his large acquaintance, and soon made great inroads on the business of his former employer. Thereupon the oil company sent one Bonnycastle, ostensibly "to look after the business interests of the Standard Oil Company in Kentucky by increasing its sales of oil, by making for it new customers, and, if possible, to regain the customers lost by reason of Doyle's connection with the Standard Oil Company having been severed." The company started wagons in opposition to Doyle's wagons, and followed such wagons, sometimes getting in front of them, and stopping at every place where Doyle's wagons stopped, sometimes going into a house where Doyle's men were, and there offering to sell oil at a cheaper rate, and in one or two instances cursing and abusing Doyle's drivers. Sometimes the company's drivers would stand for hours awaiting the movement of Doyle's drivers. The language of the court in its finding that there was a conspiracy is peculiarly applicable:

"It was most assuredly unlawful to obstruct, harass, and annoy appellee's employés when engaged in the discharge of their duties in selling and distributing oils to appellee's customers; to threaten customers of appellee to shut them up in their business if they continued to deal in appellee's oils; to cause and procure false and injurious reports concerning appellee and his business to be circulated in Lexington and vicinity; and to procure appellee's arrest and prosecution on false charges in connection with the business in the sale of oils, for the purpose of estranging and alienating the acquaintances, customers, and patrons of appellee."

In sustaining a judgment for damages obtained in the lower court, it was said:

"While the evidence was conflicting upon all the questions at issue, and especially upon the issue of conspiracy, yet we were of the opinion that there was sufficient evidence upon that point to authorize a submission to the jury. A conspiracy is a combination between two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. It is shown by the evidence that a purpose was accomplished by unlawful means, and when we consider the relation of the parties, their manifest motives of self-interest, the manner in which the purpose was carried out, and the declarations of the parties, it is reasonable to infer that this purpose was accomplished by concert of action and agreement of appellants."

In Drake Hardware Co. v. Wrought Iron Range Co. (Sup.) 78 N. Y. Supp. 1114, an order in the following language was approved:

"It is hereby ordered that said defendant, * * * its agents, etc., * * * be, and they are hereby, restrained, prohibited, and enjoined * * * from preceding or following in close range any employés, team, or teams of plaintiff with employé's team or teams in such manner as to hinder, obstruct, harass, or intimidate plaintiff and its employés in the free use of the highway, and from in any other way occupying said highway in such manner as to hinder, obstruct, harass, or intimidate plaintiff and its employés in the free use thereof; * * * from resorting to any species of threats, intimidation, force, or fraud, or any conduct which would imply threats, intimidation, coercion, or force, for the purpose of preventing plaintiff from selling

its stoves and ranges and carrying on its business * * * of selling from wagons."

The foregoing cases are directly in point on the facts, but the following sustain the principle for which complainants contend: Bohn Mfg. Co. v. N. W. Lumbermen's Ass'n (Minn.) 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; State ex rel. Durner v. Huegin (Wis.) 85 N. W. 1047; Loewe et al. v. Cal. St. Federation (C. C.) 139 Fed. 71; Jensen v. Cooks' & Waiters' Union (Wash.) 81 Pac. 1069; Seattle Brewing & Malting Co. v. Hanson (C. C.) 144 Fed. 1012; W. Va. Transportation Co. v. Standard Oil Co. (W. Va.) 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; Van Horn v. Van Horn (N. J. Err. & App.) 28 Atl. 670; Bar v. Essex Trades Council (N. J. Ch.) 30 Atl. 881; Eddy on Combinations, § 262.

An injunction will be granted prohibiting the defendant association as such, and all defendants who have appeared in the action, from following, harassing, intimidating, or interfering with the business of complainants, from approaching persons solicited by complainants at the same time complainants' agents are soliciting them. This will not be construed as prohibiting defendants from canvassing and soliciting customers or peddling in the same territory and at the same time that complainants' agents are canvassing, soliciting, or peddling. The injunction to go into effect upon the filing of a good and sufficient bond, to be approved by the clerk of the court, in the sum of $8,000, with appropriate conditions, indemnifying the defendants against loss, damages, and costs.

THE CEREA.

IL PIEMONTE.

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

1. ADMIRALTY—SUBSTITUTION OF NEW OWNER AS CLAIMANT OF LIBELED VESSEL.

   The substitution of a new owner as claimant of a libeled vessel which has been released on stipulation is not the bringing in of a new party, and may be allowed without notice to the surety on the stipulation.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, §§ 414–429.]

2. SAME—BRINGING IN NEW PARTIES.

   In a suit in admiralty by a banker who advanced money on bills of lading of a cargo to recover from the vessel for an alleged wrongful or unauthorized delivery of the cargo to persons who sold the same and retained the proceeds, where it appears from the pleadings that, if improper delivery was made, claimant may have a claim over against such persons, he is entitled by analogy to admiralty rule 59 to have them brought in, notwithstanding the fact that an action at law has been brought against them by libelant which is pending.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, §§ 414–429.]

In Admiralty. On motion to substitute claimants and for leave to bring in new parties.

F. W. & A. E. Hinrichs, for libelants.
W. J. Underwood, for Brown & Seccomb.
Convers & Kirlin, for claimants.

ADAMS, District Judge. This is a motion on the part of the steamships Cerea and Il Piemonte for a substitution of the Navigazione Alta-Italia, as owner of the said steamers, in place of Henry Feltman, deceased, in these actions, which were brought to recover the value of certain consignments of lemons alleged to have been the libellants' property and wrongfully delivered by the various defendants to W. H. Westervelt & Company, a firm of fruit importers, who, it is claimed, had pledged the lemons to the libellants, who are bankers, to cover various advances made by them. It appears that actions were brought against the steamers by the libellants and thereupon claims were duly made by the said Feltman and stipulations for value given by him. Subsequently he died and it is now sought to substitute the said corporation, which, it is alleged, on information and belief, has become the sole owner of the steamships.

It is urged by the libellants in opposing the motions, that (1) if the motions are granted unconditionally, the surety given upon the stipulations when the vessels were released will be discharged principally because the surety has not been served with notice of these motions, (2) there is no definite moving party before the court, (3) that there is no authority for the granting of the motion under analogy to the 59th Rule or otherwise, and (4) that these motions should be denied on the ground of laches.

The claimant contends that the substitution should be allowed because the effect of it is only to bring in the real owner and one who is entitled to appear and to be actually represented in a proceeding which involves its own property, and cites The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993. There a question as to the liability of the sureties where a new libellant was substituted arose and it was held that in admiralty, and perhaps at common law, such an act would not change the original liability and the surety would remain bound. No real distinction in principle can be drawn between the substitution of one claimant for another instead of one libellant for another, and The Beaconsfield is apparently in point here and an authority for the granting of the motion. The libellants urge that the case is covered by The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, where it was held that the obligors in a stipulation given for the release of a vessel libelled for collision are not, in the absence of an express agreement to that effect, responsible to persons in the suit, intervening after the vessel's release. The inapplicability of that case is shown by the fact that there the intervening parties appeared after the stipulation was given and the vessel released. In The Beaconsfield, there was merely the substitution of a new owner, not a new party in the sense of The Oregon situation, where the stipulation was given to secure the original libellants and afterwards new libellants appeared who, upon recovering judgments, would seek to avail themselves of a stipulation given to answer the original libel claims. The court there said,

after quoting the language of the stipulation (page 206 of 158 U. S., page 812 of 15 Sup. Ct. [39 L. Ed. 943]):

"Here is a simple agreement to become responsible for the final decree rendered in the cause in which the stipulation is given, and the words 'for the benefit of whom it may concern' refer undoubtedly to the owners of the Clan Mackenzie, in whose behalf Simpson, the master, had filed the libel. We know of no authority which permits the liability of sureties upon such a stipulation to be enlarged by the inclusion of claims other than the ones which the stipulators agree to pay. To such a claim the surety may well reply non in hæc fœdera veni. The stipulators may be so well satisfied that the claimant has a defence to the original libel as to be willing to take upon themselves the contingency of a decree requiring its payment, but they may neither know, nor be able to conjecture, what other demands may be made against the property."

The court said in The Beaconsfield, 158 U. S. 310–312, 15 Sup. Ct. 860, 863, 39 L. Ed. 993.

"It is insisted, however, that the sureties on the stipulation were released by the amendments to the libel, first, continuing it in the name of Cotton alone after the death of Clough, instead of in the name of Cotton and Clough, as administratrix; and again, in substituting Sanbern as owner of the cargo instead of the original libellants. Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety, and so long as the cause of action remains practically the same, a mere change in the name of the libellant, as by substituting the real party in interest for a nominal party, will not avoid the stipulation as against the sureties; or, as it is stated in some cases, stipulations are to be interpreted as to the extent and limitation of responsibility created by them by the intention of the court which required them, and not by the intention of the parties who are bound by them. It was said by Judge Ware in Lane v. Townsend, 1 Ware, 286, 293, Fed. Cas. No. 8,054: 'If, therefore, there is an ambiguity in the terms of the stipulation, or the construction of them is doubtful, it is not the intention of the party for which we are to inquire, for the will of the party had nothing to do in determining its conditions; the doubt must be removed by consulting the intention of the court, or the law which required the stipulation and dictated its terms.' The introduction, however, of a new cause of action is something which the sureties are not bound to contemplate, and it necessarily follows that they cannot be held. This was the ruling of this court in the recent case of The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, in which, after a libel had been filed for a collision, and the usual stipulation to answer judgment given, other libels for damages arising from the same collision were filed without a rearrest of the vessel, and it was held that this was a new cause of action, and the court acquired no jurisdiction to render a judgment against the sureties. See, also, The North Carolina, 15 Pet. 40, 10 L. Ed. 653.

The law upon this subject is nowhere better stated than in The Nied Elwin, 1 Dodson, 50, cited and abstracted in The Oregon, in which Sir William Scott held that, in a case of prize, the substitution of the Crown for the captors did not release the sureties, but that they could not be held for a new cause of action, viz., the intervention of hostilities between Great Britain and Denmark, after the stipulation was given. In respect to the first question he says: 'I cannot entirely accede to the position which has been laid down on behalf of the claimant, that these bonds are mere personal securities given to the individual captors; because, I think, they are given to the court as securities to abide the adjudication of all events at the time impending before it. This court is not in the habit of considering the effect of bonds precisely in the same limited way as they are viewed by the courts of common law. In those courts they are very properly construed as mere personal securities for the benefit of those parties to whom they are given. In this place they are subject to more enlarged considerations; they are here regarded as pledges or substitutes for the thing itself, in all points fairly in the adjudication before the court.'

Even if this action had been at common law, it is not altogether certain that the amendment, substituting the name of the real party in interest for a nominal party, would not be good. Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800. The obligation of the sureties to respond for the damage done by the Beaconsfield to her cargo was neither increased nor diminished by a mere change in name of the party libellant."

In the one case, The Oregon, it was adding new demands; in the other, The Beaconsfield, it was merely substituting a new name for a party already interested.

Another part of the motion asks for leave to bring in by petition other parties, which it is contended were necessary in this litigation to enable the court to render justice in the matter.

It appears that these actions are but two of several similar cases which are before the court. They are all brought by certain bankers to recover advances alleged to have been made against various bills of lading covering shipments of lemons and oranges on the various vessels specified in the several actions. The credit is alleged to have been given to Westervelt & Company, a firm engaged in the importation of fruit from Italy. The libellants claim that two bills of lading were issued in Italy for these shipments, which were sent to London and thence to New York and advances obtained on them. It is alleged that Westervelt & Company by means of additional or duplicate bills of lading made entry of the consignments in the custom house, received permits therefrom, obtained possession of the goods from the vessels and had the goods sold by the firm of Brown & Seccomb, fruit auctioneers. It is further alleged that the delivery by the steamships of the fruit was in accordance with the usual procedure and long established custom of the trade in New York and that the goods in fact were delivered to Westervelt & Company and to Brown & Seccomb and were sold by the latter firm; that the proceeds of the sale were retained in part by Brown & Seccomb and transferred in part to Westervelt & Company.

It would seem that if the libellants are entitled to recovery against the vessels on the theory of improper delivery, that the claimant may have a right of recovery against the parties sought to be brought in who, it is alleged, obtained possession of the goods or their proceeds. It would be consistent with the practice of the court, under analogy to the 59th Rule, to have all the parties before it so that complete justice can be rendered in one action. It does not appear how the libellants can be prejudiced by such a course, unless it would follow therefrom that they would be deprived of a right of a trial by jury in the actions which, they allege, they have brought against the persons sought by the claimant to be made parties here. The libellants have invoked the jurisdiction of this court and subjected themselves to the equitable principles which prevail here. It appears that if the claimant can in any way be protected by the presence of the other parties, whom in the event of an adverse decision here, it would have to sue to indemnify itself, it should have the right of such indemnity in the one action.

The answers to the libellants' objections seem to be:

(1) It does not apparently affect the matter because no notice of

the motion has been given to the surety; (2) There is a definite moving party before the court. If it should turn out upon the trial that the claimant now seeking a substitution is not entitled thereto as a matter of fact the matter can then be properly adjusted; (3) There is ample authority for the granting of the motion. The contract is maritime and the court is justified in looking into all its breaches and to afford adequate relief. See Gow v. William W. Brauer S. S. Co. (D. C.) 113 Fed. 672, 675, and authorities cited on the latter page; (4) There have been no laches here sufficient to defeat the motion. Some delay has occurred through the substitution of the new proctors and owing to the summer season but it is of no real importance.

The motions are granted.

WILHELMSEN v. TWEEDIE TRADING CO.

TWEEDIE TRADING CO. v. WILHELMSEN.

(District Court, S. D. New York. December 8, 1906.)

SHIPPING—TIME CHARTER—RIGHTS OF PARTIES WITH RESPECT TO DOCKING VESSEL.

A steamer was under a time charter for a year providing that she should be docked and cleaned at least once in six months, payment of the hire to be suspended until she was again in condition for service. After the discharge of her cargo at Hankow, China, 600 miles up the river from Woosung, on the coast, the charterer, which desired her to proceed next to a port of Japan, delivered her to the owner for docking; the six months having expired. There were no docking facilities at Hankow, but when she reached Woosung she was ordered by the owners to Shanghai, a few miles distant, for docking. When again ready for service, the charterer demanded that she be redelivered at Hankow, which the owners refused, but delivered her at Woosung, where she was accepted without waiver of the charterer's contentions, and ordered to Japan. The charterer refused to make further payments of hire due under the charter until the docking dispute should be settled, and the owners subsequently withdrew her from the charter as authorized on default in the payment of hire. *Held*, that the delivery of the vessel for docking at Hankow, where she could not be docked, and the demand for her redelivery there, where she was not wanted by the charterer, while perhaps technically within its rights, was unreasonable, and that as reasonably and fairly construed the owners fully complied with the charter and were entitled to recover the charter hire and damages for its breach.

In Admiralty. Suit to recover charter hire, and cross-libel for breach of charter.

Convers & Kirlin, for Wilhelmsen.

Wheeler, Cortis & Haight, for Tweedie Company.

ADAMS, District Judge. The first of the above entitled actions, Wilhelm Wilhelmsen against the Tweedie Trading Company, was brought to recover certain due hire of the steamship Tiger, said to be due under a charter dated September 2, 1904, at New York, providing for the hiring of said steamer for a period of one year from her delivery to the charterer, which was the 26th day of October. The steamer was withdrawn from the charterer's service on the 4th day of August because of the non-payment of hire after June 10th, 1904,

and it is alleged that there remains due hire from that day, excepting for a period from June 16th at 6 P. M. to June 25th at noon, when she was off hire through docketing, which, at the charter rate of £750 a month, amounts to $1218.12 and allowing for an address commission of $133.06, leaves due the libellant $5189.29. It is alleged that to this sum should be added the sum of £8, representing the outward expenses at Shanghai; also £9.10 an improper deduction from the hire paid for rat screens and life guards; also the sum of £20, the cost of cables necessitated through the respondent's refusal to pay hire in accordance with the contract; also the estimated sum of £2084.13.4 damages proximately resulting from the respondent's refusal to carry out its terms of the contract. It is alleged that the total amount due by the respondent for damages and disbursements was £2122.11.4 or in currency of the United States $10,329.46. Adding this sum to the hire, the total claim is $15,518.75.

The answer denies that this claim is due and alleges that the withdrawal of the steamer from the charterer's service was wrongful and improper and constituted a breach of the terms of the charter party and a cause of large damages to the respondent, estimated at $20,000, which it is entitled to set off against any claim the libellant may have. It then alleges:

"Ninth. Further answering the libel and as a defense thereto the respondent alleges that the charter party set forth in the Second Article of the libel contained among other things the following clause:

'That as the steamer may be from time to time employed in tropical waters during the term of this charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, but at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service.'

On or about the 10th day of June, 1905, the Steamship 'Tiger' was at Hankow, and at that time more than six months had elapsed since the steamer had been docked, bottom cleaned and painted, and the respondent thereupon duly notified the libellant that the steamer required to be docked, bottom cleaned and painted, and duly redelivered the said steamship to the libellant for such purpose on or about the 10th day of June, 1905, aforesaid, and the libellant accepted the said Steamship 'Tiger' for such purpose, and thereupon the hire of said steamer ceased until such time as she should be again redelivered to the respondent. On or about the first day of August, 1905, the respondent was notified by libellant that the steamer was ready for respondent's use and redelivered the said steamship to the respondent and thereafter the respondent ordered her to proceed to Victoria, B. C. And in accordance with the terms of the charter-party paid to the libellant's agents a half monthly instalment of hire in advance. The libellant refused to allow her so to proceed and refused to carry out the terms of the charter-party. By reason of the aforesaid refusal of the libellant to carry out the terms of the charter-party the respondent sustained damages which as nearly as they can be now estimated amount to about the sum of Twenty thousand Dollars ($20,000). The respondent is entitled under the terms of said charter-party to recover said sum from the libellant and asks that it may be set off against any claim to which the libellant may be adjudged entitled herein.

Tenth. Further answering the libel and as a further defense thereto, the respondent alleges that at the time the said steamship 'Tiger' was re-delivered to the libellant at Hankow she had on board 132-16/20 tons of bunker coal, which was of the reasonable and market value of $1538.14, and that thereafter the master of said steamship caused to be laden aboard said steamship 750 tons of coal at Shimonoski and 80 tons of coal at Shanghai for which the respondent was forced to pay $2847.54, which was the reasonable and market

value of said coal. The respondent is entitled under the terms of said charter-party to recover said sums from the libellant, and asks that they may be set off against any claims to which the libellant may be adjudged entitled herein.

Eleventh. Further answering the libel and as a separate defense thereto the respondent alleges that it advanced and disbursed for the owners of said steamship at her master's request the following sums, to wit;

Disbursements at Shimonoski	$177.70
" " Hankow	997.36

The respondent is entitled under the terms of said charter-party to recover said sum from the libellant and asks that it may be set off against any recovery to which the libellant may be adjudged entitled herein."

The respondent also filed a cross libel alleging:

"Second. On or about the 2nd day of September, 1904, at New York a charter-party was entered into between the libellant and respondent, through his duly authorized agents, Bennett, Walsh & Company, whereby the libellant agreed to hire and the respondent agreed to let the Steamship 'Tiger' from the time of delivery for a period of time from October 21st, 1904 up to October 1st or 31st, 1905. Among other provisions the charter-party contained the following:

'19. That the owners shall have a lien upon all cargoes and all sub-freights, for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned.'

'21. (Quoted supra from the answer). Said charter-party is hereby referred to and made party of this libel.

Third. Thereafter the steamship 'Tiger' was delivered to the libellant and entered upon the charter aforesaid. On or about the 10th day of June, 1905, the Steamship 'Tiger' was at Hankow, and at that time more than six months had elapsed since the steamer had been docked, bottom cleaned and painted, and the libellant thereupon duly notified the respondent that the steamer required to be docked, bottom cleaned and painted, and duly redelivered the said steamship to the respondent for such purpose on or about the 10th day of June, 1905 aforesaid, and the respondent accepted the said Steamship 'Tiger' for such purpose, and thereupon the hire of said steamer ceased until such time as she should be again redelivered to the libellant. On or about the 1st day of August, 1905, the libellant was notified by respondent that the steamer was ready for libellant's use and thereafter the libellant ordered her to proceed to Victoria, B. C. The respondent refused to allow her so to proceed and refused to carry out the terms of the charter-party and thereafter notified the libellant that he had withdrawn the steamer from libellant's use. Said withdrawal was wrongful and improper and in violation of the provisions of the charter-party aforesaid. By reason of the aforesaid withdrawal and refusal of the respondent to carry out the terms of the charter-party the libellant has sustained damages which as nearly as they can be now estimated amount to about the sum of Twenty thousand Dollars ($20,000).

Fourth. At the time the said Steamship 'Tiger' was redelivered to the respondent at Hankow she had on board 132-16/20 tons of bunker coal, which was of the reasonable and market value of $1538.14, and thereafter the master of said steamship caused to be laden aboard said steamship 750 tons of coal at Shimonoski and 80 tons of coal at Shanghai for which the libellant was forced to pay $3376.87, which was the reasonable and market value of said coal. The libellant is entitled under the terms of said charter-party to recover said sums from the respondent.

Fifth. The libellant advanced and disbursed for the respondent at the request of the master of the Steamship 'Tiger,' the following sums, to wit:

Disbursements at Shimonoski	$177.70
" " Hankow	997.36

The libellant is entitled under the terms of said charter-party to recover said sums from the respondent.

Sixth. By reason of the premises payment of the aforesaid sums of $20,000, $1538.14, $2847.54, $177.70 and $997.36 amounting in all to $25,560.74 has become due and payable from the respondent to the libellant. Payment of the

said sums have been demanded of the respondent by the libellant, but the respondent has refused and still refuses to pay the same, or any part thereof and the same remains wholly due and unpaid.

The libellant has performed all the obligation and stipulations of the said charter-party on its part to be performed."

The libellant's answer to the cross libel was practically a denial thereof.

It appears that the Tiger was delivered to the respondent on the 25th day of October, 1904, and thereafter was docked at Marseilles on November 29, 1904. After making a voyage to the East, she came to New York. In the meantime, the charterer had closed her for another voyage to the East with a cargo of case oil and when in New York, the secretary notified the master that though the charterer was not then entitled to have her docked, it would be when she reached Hankow, China, and as the docking would be much more expensive there, suggested that it be done at the time in New York. This the libellant declined and she proceeded on the voyage. She arrived at Hankow on the 29th of May, 1905. On June 6th, while the cargo was being discharged there, the charterer notified the owner's agents in New York that upon the completion of the discharge, the steamer would be delivered to the owner for docking in accordance with the provision of the charter. The discharge was completed on June 10th. The owner was notified that the charterer wished the steamer to dock and paint at once, to which the owner replied that she would dock and paint on arrival at first place where facilities existed. Thereupon the charterer caused a cable to be sent to the owner that it insisted upon an immediate docking and had ordered the steamer to proceed to Moji, Japan, for such purpose.

There being no dock at Hankow, it was necessary that she should go to some place where one could be had. Some selection had to be made and the charterer chose Moji in the absence of the selection of a port by the owner, where the work could be done. The vessel was on the voyage to Moji when she was intercepted by the owner at Woosung, at the mouth of the Yangtze-Kiang River and ordered to Shanghai, where she was docked. Here the docking was done at a large expense, incidental to Chinese tonnage dues, a considerable portion of which might have been avoided by sending her to a Japanese port.

When the docking was finished at Shanghai, it is alleged that notice was given to the charterer that the steamer was in readiness for service again and the dispute turns principally upon the parties' obligation with respect to the hire due. Section 21 provides for docking as hereinbefore quoted.

It will be observed that no provision is made with respect to notice to the charterer of a completion of the drydocking but it has been shown, that general custom provides in such a case that the owner is required to give notice to the charterer of the steamer's readiness to resume service after docking, at the same port where she went off hire. It seems that a burden is placed upon the owner of giving notice of such readiness but the owner here offered only to resume the service at Woosung, while the charterer claimed that it was entitled to have the vessel returned to Hankow, some 600 miles distant and difficult to reach because of a strong current in the river. Perhaps the charterer was technically

right but practically the owner was giving the charterer all it was entitled to. Woosung was en route to a place where the charterer wished the steamer to go, which was Moji, and where it subsequently ordered her. It really did not want her at Hankow. It started her from that place to Moji, of its own volition, and took her there after the docking at Shanghai.

The charterer sought to deliver her at Hankow in the evident expectation that the owner, in view of the expense he would necessarily be subjected to for docking in that vicinity, would yield to the former's desire for a renewal of the contract upon the existing terms, which were apparently for the charterer's benefit. The owner, however, replied that the docking could be done at Shanghai or Nagasaki, as the master might determine and so ordered the master, who thereupon selected Shanghai. When the docking and some repairs made there were finished, June 25th, she proceeded to Moji in pursuance of orders received from the charterer, given without prejudice to the charterer's contentions in the matter.

The selection of Shanghai might have been a violation of the charterer's rights, as stated above, if it had wished to send the steamer further up the river in the pursuit of its business, and in that case there might be some merit in the claim that the charterer was entitled to have her docked elsewhere, but the charterer did not so desire. It wanted the steamer at Moji, as a convenient place in its own interests. It does not seem that under the circumstances there was any merit in the claim that the steamer should go off hire at Hankow. Shanghai, in view of its proximity to Woosung, where the owner offered to have her resume service, was on the route to Moji, and a proper place for docking. It was expensive for the owner but convenient for the charterer, therefore a suitable selection by the owner and I fail to see any just ground of complaint on the charterer's part. Sending her back to Hankow if the charterer were entitled to have her resume service there, would have been an evident waste of time in all respects.

The hire was not paid after June 10th. The contract provided:

"6. Payment of the said hire to be made in cash half monthly in advance in New York, at the current rate of Bankers short sight bills on London in U. S. Gold or its equivalent, and in default of such payment or payments as herein specified, the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim, they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter."

After failure to make several due payments in excuse of which the charterer alleged that it was awaiting settlement of the docking dispute, the owner availed himself of his right of withdrawal, which, it seems to me, he was entitled to exercise.

The libellant Wilhelmsen is allowed a decree for the hire, excepting for the time occupied in docking, which will be computed as though it were done at Woosung, with order of reference to compute also the amount of his damages for the breach of contract. The cross libel will be dismissed. The dismissal, however, does not preclude the charterer from showing before the commissioner any disbursements made on the owner's account and for which it should be allowed credit in his action.

THOMSON et al. v. UNION CASTLE MAIL S. S. CO., Limited, et al.

(Circuit Court, S. D. New York. January 16, 1907.)

1. MONOPOLIES—COMBINATION AMONG SHIPOWNERS—REASONABLE RESTRAINT.
Where a combination of foreign shipowners engaged in South African trade allowed certain rebates to New York shippers who patronized the ships belonging to the combined owners exclusively, such arrangement constituted only a partial and reasonable restraint on foreign commerce, and was therefore not unlawful at common law.

2. SAME—SHERMAN ANTI-TRUST LAW—RECOVERY OF TREBLE DAMAGES.
Foreign shipowners formed a combination abroad to organize and control steamship business between New York and South African ports, after which plaintiffs, who had never before been engaged in South African trade, began to ship goods to such ports, and in common with other patrons of defendant's vessels, became entitled to rebates under a circular issued by defendants in case plaintiffs did not patronize competing vessels, which they afterwards did, whereupon defendants refused to pay further rebates. *Held*, that plaintiff's right to such rebates, if any, was not an item of damage that proximately grew out of the combination of shipowners, and hence plaintiffs were not entitled to recover the same under Sherman anti-trust act (Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), authorizing a recovery of treble damages accruing through an unlawful combination in restraint of interstate and foreign commerce.

At Law.

This action for treble damages, under section 7 of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), came on for trial before Hough, District Judge, and a jury. The defendants named in the complaint consisted of several British shipowners, one German shipowner, and their several American agents. It was alleged that the defendants had formed a combination and a monopoly in restraint of foreign commerce of the United States between the port of New York and the divers ports of South Africa, and that such combination and monopoly had injured the plaintiffs, especially in the sum of £1,112. There was also a prayer for general damages. During the trial the action was discontinued as against the German shipowner and continued without amendment of the pleadings against the British shipowners. It appeared that steamship trade between New York and South Africa began in the year 1893. It was originated by one of the defendants. Within a month or so of the dispatching of the first steamer another of the defendants put a steamship on berth in New York for the same ports. There was some evidence that for the space of from one to three months there had possibly been competition between these two defendants; but certainly from that time, and possibly from the beginning, the defendants thereafter operated their steamships in union, pursuant to arrangements made in England and authoritatively communicated to their New York agents. They charged uniform rates of freight, and arranged the dispatch of their steamers so as not to interfere with each other. In 1898 all the British defendants by a joint circular announced to the trade that those shippers who sent all their South African goods by defendants' steamers, and who shipped said goods to South African consignees, who during certain periods had received no goods from the United States by vessels other than those of the defendants, would be entitled to receive a commission, rebate, or return of a certain percentage of the freight moneys demanded by the announced or tariff rates of the defendants between the United States and South African ports. At the time of the issuance of this circular the plaintiffs had never been engaged in South African business. They made their first shipment to that region in 1899 by the line of one of the defendants, and thereafter until their quarrel with the defendants pursued that practice. During the year 1900 difficulties arose between plaintiffs and defendants or some of them in respect of the payment of these rebates. Defend-

ants claimed that either the plaintiffs or their consignees had patronized other lines than those of defendants, and that, therefore, they were not entitled to the rebates demanded. The amount of the rebates so withheld by the defendants or some of them is the £1,112 above specified. As a result of these differences of opinion and withholding of rebates, the plaintiffs were put to certain other expenses in their endeavors to collect said £1,112. This action was brought in June, 1903, and declares that the combination and monopoly existed and plaintiffs' damages were received during 1899, 1900–02, and so on to June, 1903. During that time other steamers from time to time endeavored to get South African business in New York. When such steamer appeared, the defendants or one of them put on berth what they called a "fighting steamer"—i. e., a vessel for which freight would be accepted at rates as low or lower than those offered by the competing vessel—and the capacity of the fighting steamer was as far as possible allotted to and between those shippers who had in the past confined their South African patronage to defendants. The plaintiffs complained that they were not given upon these fighting steamers opportunity of sending all, or, indeed, any large part, of the goods which at the time they had in hand to send, but it appeared that they were given as large a fraction of the fighting steamer's capacity at cut rates as were other shippers similarly situated. These facts having been made to appear upon the examination and cross-examination of the plaintiffs' witnesses, defendants moved to dismiss the complaint.

Dr. Lorenzo Ullo, for plaintiffs.

Convers & Kirlin and Wing, Putnam & Burlingham (Mr. Thacher, of counsel), for defendants.

HOUGH, District Judge (orally). I feel that the court must decide this case. It is unfortunate that the first legal proceeding to test the applicability of the Sherman anti-trust law to foreign commerce should have been brought under the seventh section of the act, because it perhaps prevents laying a foundation for a really illuminating discussion on that aspect of the statute. If this case had been promoted by the United States, or even by a shipowner who, by the combined action of the defendants, had been prevented from freely engaging in commerce between New York and South Africa, I think very different questions would have been presented for consideration; but these plaintiffs can only recover if able to show that they have been injured in their business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the Sherman act. By the common law it is my opinion that restraint of trade or commerce, if partial and reasonable, is lawful; and that doctrine, as applied to the peculiarities and requirements of the steamship trade, I have always thought was fully, ably, and correctly stated in the case of the Mogul Steamship Company. Viewing it as matter of common law, it is my opinion that the trade regulations shown in this case are reasonable in theory or principle, though, perhaps, unwisely interpreted in practice; but I do not think that the general question as to whether reasonable regulations of foreign or interstate commerce are obnoxious to the Sherman act requires consideration in this litigation.

The action as against the Hansa Line and its agents having been discontinued, it appears to me that all the defendants who are left in the case engaged in the steamship business between the United States and South Africa in substantial union. All the defendants are foreign shipowners, except the resident agents of those foreigners, who

are merely mouthpieces of their principals, and themselves made no combination whatever except in respect of their own commisions —something obviously not within the purview of the act. Since the foreign steamship lines here concerned agreed upon their concerted action in their home country, and engaged in substantial union in the business of transportation by steam between New York and South Africa from the very beginning, then all the defendants' American and South African steamship trade has been done, as it appears to me to have been done, subject to these foreign made regulations. Under such circumstances I find it impossible to believe that a statute designed to prevent a restraint of existing trade can apply to the conditions under which the trade was born. In the original formation of the defendants' union, therefore, I find no infraction of any federal law; and it remains to consider only whether the action of the defendants in putting on what have been called "fighting steamers" constituted something that converted a lawful union into an unlawful one. It seems to me that the fighting steamers, so far from restraining commerce and stifling competition, in and of themselves constituted a very violent competition. The well-known fact that competition carried to its uttermost destroys itself seems to me nothing to the point so far as the Sherman act is concerned, the supreme test of the application of which act has frequently been held to be the stifling of competition to the detriment of the particular commerce concerned.

Now, these plaintiffs began to ship their goods and to ship other people's goods to South Africa long after the only combination shown was made, and I believe made abroad. What South African business the plaintiffs had was created in conjunction with the defendants' combination. The combination injured neither the business nor the property of the plaintiffs, except by possibly depriving them of greater profits than they might have made had the defendants chosen to enter upon American business under other conditions. They were not obliged to enter upon American business at all.

What the plaintiffs are really seeking to recover are the rebates due to those persons who gave their whole business to the defendants. This right to rebate rested on contract, a contract embodied in the fact of shipment evidenced by the usual documents. That contract was not in itself unlawful. If the union of the defendants was not of itself unlawful, each defendant could have made the same contract individually which they made unitedly, could have announced the same contractual purposes, and carried them out. It may be that the action of the steamship companies in withholding the rebates claimed by the plaintiffs was unjustifiable; but the plaintiffs must in this case, and under this pleading, prove that their loss was proximately caused by a violation of the Sherman act. Even if the organization of a new line of foreign commerce, arranged in London to connect the United States with a foreign country, be obnoxious to the Sherman act, though the commerce alleged to be restrained existed prior to the alleged restraint only in posse, it must remain true that whatever may be the rights of the federal government as against such obnoxious combination no private person can recover damages against the members of the

combination except such as naturally flow from and are proximately caused by the action of the combination.

These plaintiffs have admitted that they have but one substantial claim of injury from which all their other damages flow, namely, that after they agreed, perhaps unwillingly, to the trade terms of the combination, and by so agreeing obtained and developed trade which they never had before, that then the defendants so interpreted the bargain which they had obtained from the plaintiffs as to deprive the latter of an advantage which the plaintiffs supposed they got by practically going into the combination themselves. Now, this may give plaintiffs a good cause of action upon the contract, or for deceit in not having communicated to them the singular fact that disloyalty of a consignee over whom they could have no control would deprive them of the reward of their own fidelity; but it is not an item of damage that proximately grows out of the combination, even if such combination was in restraint of foreign commerce.

The motion to dismiss the complaint is therefore granted.

In re BANNER.

(District Court, S. D. New York. January 18, 1907.)

1. LANDLORD AND TENANT—CONSTRUCTION OF LEASE—DEPOSIT TO SECURE RENT.

To secure performance of the conditions of a lease by the lessee, it deposited $5,000 with the lessor, to be held by him and, in case the lessee performed the full covenants of the lease through the term, to be applied on the rent for the last six months. On this deposit the lessor agreed to pay interest. *Held*, that such agreement created the relation of debtor and creditor only between the parties with respect to the $5,000, and that the bankruptcy of the lessor and the threatened foreclosure of a mortgage on the property antedating the lease did not entitle the lessee to cease paying rent so long as it continued to occupy the property.

2. MORTGAGES—RIGHT OF MORTGAGEE TO RENTS—EFFECT OF ASSIGNMENT IN MORTGAGE.

A provision in a mortgage, following the usual one giving the mortgagee a right to a receiver of rents and profits in case of default, that "the said rents and profits are hereby, in the event of any default or defaults in the payment of said principal or interest, assigned to the holder of this mortgage," operates merely as a pledge of the rents, to which the pledgee does not become entitled until he asserts his right in some legal form, as by an application for a receiver and a demand by such receiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 515, 516.]

In Bankruptcy. On motions to direct preferential payments out of funds in the hands of the trustee.

Leo Levy, for trustee.

Ira L. Bamberger, for mortgagee.

Henry S. Dottenheim (Mr. Matthews, of counsel), for Riggs Restaurant Company.

HOUGH, District Judge. The bankrupt was the owner of No. 468 Broadway, New York City. Some time prior to his bankruptcy he executed a second mortgage to the Broadway Trust Company, which, after the usual proviso giving to the holder of the mortgage a right to a receiver of the rents and profits of the premises without regard to the adequacy of the security, continues:

"And the said rents and profits are hereby, in the event of any default or defaults in the payment of said principal or interest, assigned to the holder of this mortgage."

After the execution and recording of the mortgage containing these words, the bankrupt leased a portion of the building to the Riggs Restaurant Company, which lease was duly recorded, and provides that the tenant (the Riggs Company) "does deposit and pay over to the landlord (the bankrupt) $5,000, to be held by the landlord for the punctual payment and performance of the covenants and agreements" of the lease. It further declares that, should the tenant "fully pay the rent" and perform the agreements of the lease "up to and during the full term and period of this lease," the deposit of $5,000 shall be applicable to "the last six months' rent" of the premises. Upon this deposit the bankrupt agreed to pay the Riggs Company interest. The option, however, was given to the Riggs Company to demand that the bankrupt "repay" the Riggs Company the said $5,000, provided that "other suitable and sufficient security" be deposited in lieu thereof. There are other provisions of the lease regarding this deposit of money, which, however, only emphasize the fact that it was a deposit with Banner, as to which it was "agreed that no action or proceedings of any kind shall be instituted, begun or carried on by the tenant * * * until after the expiration of the full term of this lease as originally made."

Some months later, and on April 24, 1906, a petition in bankruptcy was filed against Banner. Adjudication followed on the 4th of June, 1906, and, under the bankruptcy proceedings, first a receiver and then a trustee took possession of No. 468 Broadway and collected the rents thereof, including rent from the Riggs Company. Shortly after the appointment of the receiver in bankruptcy, it being obvious that the failure was a bad one, the Riggs Company objected to continuing to pay rent to the receiver, but were compelled so to do by the receiver's refusing to treat the deposit with the bankrupt as anything that entitled the Riggs Company to cease the payment of rent while still enjoying the possession of the premises. Thereafter rent was paid regularly, but under protest. On August 17, 1906, an action to foreclose the mortgage in question was begun, and on August 27th, upon application being made to the Supreme Court of the state, a receiver of the rents and profits of the building was appointed. It being then uncertain whether the sale of the premises in foreclosure would produce a fund sufficient to discharge the mortgage indebtedness, this court refused (for the time) an application promptly made by the state court receiver to turn over to him, on behalf of the Broadway Trust Company, the moneys in the hands of the trustee in bankruptcy derived from the premises in question. On November 23d the sale in foreclosure was

had, a deficiency judgment resulted, and the property passed out of the hands of the trustee in bankruptcy, who now has in hand a fund derived from the rentals of the building, out of which the Riggs Restaurant Company demands to be preferentially paid so much as results from payments made under protest by it, and all of which the Broadway Trust Company demands as being the result of collections of rents assigned to them by the mortgage first above alluded to and now foreclosed with a deficiency.

The rights of the Riggs Restaurant Company can best be tested by considering its claim as pressed against the general creditors, rather than against the mortgagee. Without regard to the mortgagee's rights, if any, I am unable to perceive that the agreement between Banner and the Riggs Company created anything more than the relation of debtor and creditor. To make the agreement in the lease more than this, the contention must go to the length that, whenever Banner's title was threatened by a right superior in law or prior in time to the lease in question, such threat operated to permit the tenant, not to instantly recover $5,000 from Banner, but to stop paying rent until the threat of ejectment or dispossession was passed. That this meaning can be found in the words above quoted does not, I think, bear argument.

Concluding, therefore, that the Riggs Restaurant Company is but a general creditor, it remains to consider the rights acquired by the Broadway Trust Company under its mortgage. The general rule in this state has been summed up in Frank v. New York, etc., Railroad Co., 122 N. Y., at page 221, 25 N. E., at page 338:

"A mortgagee out of possession has no lien upon rents. Until he elects to take possession or moves for a receiver, the rents belong to the lessor"—i. e., mortgagor (citing earlier cases).

In this matter it is urged that the assignment clause, following in the mortgage the proviso for a receiver, operated to vest in the mortgagee title to the rents eo instanti a default occurred in the payment of interest. Such default did occur almost cotemporaneously with the appointment of the receiver in bankruptcy, with the alleged result that all the moneys in the trustee's hands derived from the premises in question have from the moment of default been the property of the mortgagee. This view is thought to find support in Harris v. Taylor, 35 App. Div. 462, 54 N. Y. Supp. 864, and a decision of the Appellate Term, following and relying upon that decision, in Thompson v. Erskine (Sup.) 73 N. Y. Supp. 166. In the first of these cases there was an independent assignment of the rents, operating in præsenti, entirely distinct from any mortgage at all, and such assignment made by the mortgagor was held superior to the claim of a mortgagee whose receiver had obtained possession of the rents so assigned. In the latter case the assignment was contained in the bond which accompanied the mortgage, and, relying upon Harris v. Taylor, supra, it was held that such an assignment enabled the assignee, who was also the mortgagee, to directly sue, after notice and demand, a tenant of the mortgagor, although the mortgagee was out of possession and the mortgagor still owned the premises.

I cannot reconcile this last doctrine with the well-known practice of the Supreme Court of this state in holding that even a specific proviso for a receiver does not control the court when a receiver is asked for (Thomas v. Davis [Sup.] 85 N. Y. Supp. 661); nor with Butler v. Frazer (Sup.) 57 N. Y. Supp. 900, where an assignment of rents contained in the mortgage was treated merely as a pledge, and a good reason for the appointment of a receiver to collect the same. I am not aware that the difficulty created by the addition of an assignment clause to a receivership clause in a New York mortgage has received the attention of the New York Court of Appeals, and I therefore follow Freedman's Saving Co. v. Shepherd, 127 U. S., at page 502, 8 Sup. Ct., at page 1254, 32 L. Ed. 163, holding that it is "competent for the parties to provide in the mortgage for the payment of rents and profits to the mortgagee while the mortgagor remains in possession. But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver, or until in proper form he demands and is refused possession." This I believe is the true view. That a mortgagee out of possession can, upon the instant of a default in mortgage interest, become to all intents a landlord of the mortgaged building, seems to me something not to be encouraged. The form of words used in this mortgage operated merely as a pledge of the rents, to which the pledgee does not become entitled until he asserts his right and in some legal form endeavors to reduce the pledge to possession. An application for a receivership, followed by due demand, is such an appropriate form; and this form was followed within a few days after the appointment of the state court receiver, to wit, on or about September 1, 1906.

The petition of the Riggs Restaurant Company is denied, and that of the Broadway Trust Company granted, so far as to direct the trustee herein, upon final settlement of his accounts, to pay over to the Broadway Trust Company all rents accruing from 468 Broadway from and after September 1, 1906, subject, however, to such equitable charges for the fees of the trustee and his attorney as may be allowed upon final settlement of his accounts, to which settlement the Broadway Trust Company is hereby allowed to become a party, entitled to except thereto and to be heard thereon.

MULLER v. CHICAGO, I. & L. R. CO. et al.

(Circuit Court, E. D. New York. December 31, 1906.)

1. REMOVAL OF CAUSES—AMENDMENT OF PETITION.

Where a cause has been removed on the ground of diversity of citizenship on a motion to remand on the ground that plaintiff sues as assignee of a chose in action, and that the petition for removal does not show the citizenship of the assignors, the court has power to permit its amendment

to show, according to the fact, that their citizenship was such as to give jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 178.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT BY ASSIGNEE.

In an action against two railroad companies, the complaint alleged the delivery of goods to one which it accepted as a common carrier, and agreed and undertook to carry and safely deliver to the second; that it failed to take proper care of such goods, whereby they became damaged and injured in transit; that it delivered the same to the second company, which accepted them as a common carrier, and agreed and undertook to carry them and safely deliver them to a third company, but, in violation of its agreement and duty, diverted and unreasonably delayed the shipment; and that the goods were finally sold by both defendants without notice to plaintiff. *Held*, that the action was one for breach of duty as a carrier, arising by operation of law or by express contract, and in either case was in tort, and not to recover on a chose in action within the meaning of section 1 of the federal judiciary act of March 3, 1875 (18 Stat. 470, c. 137 [U. S. Comp. St. 1901, p. 508]), and might, therefore, be brought in a federal court by an assignee without reference to the citizenship of his assignor.

At Law.

Latson & Bonynge (Paul Bonynge, of counsel), for plaintiff.

Davies, Stone & Auerbach (Julien T. Davies, Jr., and Charles H. Tuttle, of counsel), for defendant Chicago Great Western Railway.

THOMAS, District Judge. It appears that this action was commenced against the defendants on or about November 24, 1905, by the service of a summons and complaint, and that the venue was laid in the Supreme Court of the state of New York for the county of Kings. On or about December 13, 1905, the defendants joined in a petition to the Supreme Court of the state of New York for the removal of the case into the Circuit Court of the United States for the Eastern District of New York, on the ground that the controversy was one wholly between citizens of different states, and for this purpose duly filed in said court a bond for removal. Thereafter there were several stipulations between the parties extending the defendants' time to plead or move in the action, and on February 26, 1906, each defendant answered. On or about August 28, 1906, the attorney for the plaintiff served upon the defendants' attorneys a notice of trial of the action for a term of this court beginning November 7, 1906, and on August 29, 1906, a cross-notice of trial was served by the defendants. Thereafter, at the instance of the defendants, evidence was taken by deposition, and the attorneys for the plaintiff appeared and examined the witnesses produced. On November 19, 1906, the depositions of 17 other witnesses were taken in this action in Louisville, Ky., by stipulation and agreement between the attorneys for all the parties, and thereupon the attorneys for the plaintiff appeared and participated in the examination of such witnesses. It further appears that on or about December 8, 1906, the attorneys for the plaintiff moved this court to remand the action, on the ground that this court had no jurisdiction of the action, or of the parties thereto.

It appears upon the hearing that the ground of such motion is that

the plaintiff is an assignee of the cause of action, and that the record does not show that the assignors could have removed the action. The assignors of the plaintiff at the time the action was commenced were citizens and residents of the commonwealth of Massachusetts, and the plaintiff was a resident of the state of New York, while the Chicago, Indianapolis & Louisville Railroad Company was formed and existed under and by virtue of the laws of the state of Indiana, of which state it was a resident, and the Chicago Great Western Railway Company was created under the laws of the state of Illinois, of which state it was a resident. The petition for removal states "that there is a controversy in this suit which is wholly between citizens of different states, which can be fully determined between them"; and the residence of the parties is stated as above.

At the time of the hearing of the motion to remand, a motion was also heard for an order amending the petition for removal by inserting the following allegation:

"That at the time of the commencement of the said suit Jeremiah Williams, Joseph S. Williams, Edward P. May, Charles M. Boyd, and Gardiner B. Williams, being the individuals referred to in paragraph 'Third' of the complaint herein, were and still are citizens and residents of the commonwealth of Massachusetts, and none of them was a citizen or resident of the state of Indiana, the state of Illinois, or the state of New York."

And changing the venue of said petition to read as follows: "Supreme Court of the state of New York, county of Kings."

The plaintiff objects to such amendment of the petition upon the ground that, if the same were necessary to give this court jurisdiction, the action is still pending in the court of the state, that this court has no power to allow the amendment, and that, if it were made, it would be ineffective for any purpose. There is one purpose for which in good conscience as well as in law it should be effective, and that is to estop forever the defendants from asserting hereafter that this court has not power to allow the amendment. It may be that the plaintiff would not be estopped, as he would not be if the court is without power to allow the amendment, but it is inconceivable that any tribunal would permit a party to place upon the record evidence that the court had jurisdiction for the purpose of assuring jurisdiction, and thereafter dispute such jurisdiction, or that the evidence offered for the purpose of proving it had no such effect.

It is not disputed that there was such diversity of citizenship between the plaintiff's assignors and the defendants as would give the Circuit Court of the United States jurisdiction, and the only defect, if any, was in the failure to make proof of the fact at the time the petition for removal was filed. Inasmuch as it is considered that the court has upon other grounds jurisdiction of the action, it is concluded that the defendants may amend the petition, so that, at least, they cannot be heard hereafter to dispute the jurisdiction of the court. The plaintiff upon the motion to remand relies upon section 1 of the removal act (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), which provides:

"Nor shall any circuit or district court have cognizance of any suit * * * to recover the contents of any promissory note or other chose in action in favor

of any assignee * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The complaint shows that in the month of May, 1903, the plaintiff's assignors delivered to the defendant Chicago Great Western Railway Company, at Kansas City, Mo., certain property belonging to the plaintiff, and that the defendant "then and there accepted the same as common carrier, and undertook and agreed as such common carrier, in consideration of a reasonable compensation to be paid to it therefor, safely to carry the said goods to Chicago in the state of Illinois, and there deliver the same to the defendant Chicago, Indianapolis & Louisville Railroad Company for transportation and delivery to said Jeremiah Williams & Co., at Boston, in the state of Massachusetts"; that such defendant "did not safely carry said goods to Chicago and there deliver the same in accordance with its said undertaking, but, on the contrary, and in violation thereof, and of its duties and agreement in the premises, permitted said goods to become wet and dirty, in which condition said goods were liable to and prone to deteriorate, and become heated and otherwise injured and impaired"; that on or about June 29, 1903, such defendant, "without taking any care or precaution for the drying, preservation, or protection of said goods, and without any notice whatsoever to the said Jeremiah Williams & Co. of the then condition of said goods, delivered the same to the defendant Chicago, Indianapolis & Louisville Railroad Company, at Chicago, in the state of Illinois"; that such last-named defendant "then and there accepted said goods, and undertook and agreed as common carrier as aforesaid, in consideration of a reasonable compensation to be paid to it therefor, safely to carry the said goods to Louisville, in the state of Kentucky, and there deliver the same to a connecting carrier for transportation and delivery to said Jeremiah Williams & Co., at Boston, in the state of Massachusetts"; "that by reason of the premises, and of its failure to take due and adequate precautions for the care, protection, and preservation of said goods, and of its delivery of said goods in the hereinbefore described condition to the defendant Chicago, Indianapolis & Louisville Railroad Company, without any notice thereof to the said Jeremiah Williams & Co., the defendant Chicago Great Western Railway became and was bound to the said Jeremiah Williams & Co. as an insurer of said goods and of the safe carriage thereof from Chicago, in the state of Illinois, to Boston, in the state of Massachusetts, and of the safe delivery of the said goods to said Jeremiah Williams & Co. at said last-named place, and more particularly became and was bound jointly and severally with the defendant Chicago, Indianapolis & Louisville Railroad Company to answer to said Jeremiah Williams & Co. for all defaults of said defendant Chicago, Indianapolis, & Louisville Railroad Company in the premises, and to pay to said Jeremiah Williams & Co., and to save said Jeremiah Williams & Co. harmless from, any and all loss of or injury or damage to said goods while in the possession, custody, or upon the lines of said defendant Chicago, Indianapolis & Louisville Railroad Company"; "that the defendant Chicago, Indianapolis & Louisville Railroad Company did not safely

carry said goods to Louisville, in the state of Kentucky, and there deliver the same to the connecting carrier, pursuant to its said undertaking, but, on the contrary, and in violation thereof, and of its duties and agreement in the premises, diverted the said goods and carried the same to New Albany in the state of Indiana, and unreasonably delayed the carriage and transportation thereof by permitting said goods to remain at said place for a period of upwards of two weeks, and in further violation of its aforesaid duties and agreement wholly failed and omitted to take any precautions or measures for the care, preservation, and protection of said goods, and wholly failed to give to said Jeremiah Williams & Co. any notice of the delay in the transportation of said goods and of the then condition thereof"; that thereafter, "and on or about the 15th day of July, 1903, the defendant Chicago, Indianapolis & Louisville Railroad Company, acting jointly and in conjunction with the defendant Chicago Great Western Railway, sold said goods without the knowledge or consent of the said Jeremiah Williams & Co., and without any notice thereof to said Jeremiah Williams & Co., all in violation of the duties and obligations of said defendants and each of them in the premises." It was the legal duty of the Chicago Great Western Railway Company as a common carrier to accept the goods for carriage, and thereupon there attached to it the liability imposed by law upon a common carrier. The complaint does not show that there was any contractual modification of this liability, nor is there any allegation of any express or specific contract between the shipper and the carrier. The complaint states that the defendant "then and there accepted the same as common carrier, and undertook and agreed as such common carrier * * * to carry to Chicago, * * * and there deliver to the Chicago, Indianapolis & Louisville Railway Company."

The gravamen of the action is the breach of duty imposed by law upon the carrier to carry safely; and the nature of the action is not necessarily changed by the allegation that the defendants agreed to perform the duty that the law imposed upon them. Such an agreement is implied, but is not the foundation of the carrier's duty nor the source of his liability, unless it is evident that the pleader intended to base his right to recover solely upon an express stipulation between the shipper and the carrier. Now, it appears from the complaint that the Chicago Great Western Railway Company "permitted said goods to become wet and dirty," so that they were "prone to deteriorate and become heated and otherwise injured." This is an allegation that is pertinent to an action on the case, and to recover therefor resort is not had to the "contents" of any agreement.

The actual charge against the first carrier is that it allowed the goods to come into the condition named, and, without any effort to diminish the injurious effect thereof, delivered the goods to the second carrier. It is true that the complaint does charge that the second carrier accepted the goods and "undertook and agreed as common carrier as aforesaid * * * safely to carry" the same to Louisville, and there deliver to a second connecting carrier. And the charge against the second carrier is that it "diverted the said goods and carried the same to New Albany in the state of Indiana," and "unreasonably delayed

the carriage and transportation thereof by permitting said goods to remain at said place for a period of upwards of two weeks, and, in further violation of its aforesaid duties and agreement, wholly failed and omitted to take any precautions or measures for the care, preservation, and protection of said goods, and wholly failed to give to said Jeremiah Williams & Co. any notice of the delay in the transportation of said goods and of the then condition thereof." Then follows the final act of wrong on the part of both companies in the sale of the said goods.

The complainant charges that the second carrier undertook to carry as a common carrier. If it undertook to carry the goods, as the fact appears to be, it was bound to the duties resting upon a common carrier. If it diverted the goods, it is liable as a common carrier. If it omitted to take proper care for the preservation and protection of the goods that it had to carry, it is liable as a common carrier. If it alone, or in conjunction with the first carrier, sold the goods without jurisdiction, it was guilty of conversion.

The cause of action against the second carrier for delay, if it exists at all, is based upon negligence, although the delay might in a given case be such as to amount to conversion. Scovill v. Griffith, 12 N. Y. 509. If the second carrier "wholly failed and omitted to take any precautions or measures for the care, preservation and protection of said goods," and to give the shipper notice of the delay in transportation and of the condition thereof, the cause of action is based upon negligence. And, if the second carrier sold the goods without justifiable excuse, it was obviously conversion.

It is considered that the cause of action against the defendants or either of them, whether it arose from a breach of duty imposed by law, or whether the duty to carry arose out of a contract, is an action in tort. The complaint charges the first carrier with a wrong, and it is of no consequence whether he became a common carrier by force of an express contract, or by virtue of the legal duty imposed upon him. So the second carrier is charged with neglect and conversion while it was acting in the capacity of a common carrier. The cause of action is not based upon the contents of a contract, but it is based upon the actual wrong done by the carrier when acting as such.

It does not follow from the foregoing that upon the trial the plaintiff may not show from bills of lading or similar instruments, or stipulations, that the carrier accepted the goods for carriage on its own line or beyond its own line. Nor would the plaintiff be precluded from showing that the second carrier undertook to act as a common carrier through some traffic arrangement with the first carrier. Such contracts merely show the status of the defendants, and are evidence that it had undertaken the duty imposed upon it by law, or one which it assumed. But, when it appears that it is actually acting as a common carrier of goods, and it commits a wrong with reference to them, the gravamen of the action is the wrong.

The construction of the complaint at this time should not preclude the plaintiff on the trial, and, if he desires to amend, it should be allowed without costs.

CURRAN et al. v. SMITH et al.

(Circuit Court of Appeals, Third Circuit. May 28, 1906.)

No. 44.

1. CONTRACTS—ACTION FOR BREACH—DEFENSES.

Defendants, who were contracting engineers, entered into a provisional agreement with plaintiffs to investigate a project for the construction of a pipe line in California to supply water to a city and for irrigating purposes as set forth in a prospectus furnished by plaintiffs, and if found satisfactory to enter into a contract to construct the line and reservoir for a certain sum and a share of the stock of a corporation to be organized and to which the property was to be conveyed. One of defendants spent a month in personally investigating the proposed line, water supply, etc., with full opportunity to learn all of the facts as fully as they were known to plaintiffs. Afterward they entered into a final contract, the property and rights of way which had been secured by plaintiffs were conveyed to them, and they entered upon the preliminary work, but soon abandoned it and refused to proceed further. *Held*, that they could not defend against liability on the contract on the ground that it was induced by fraudulent representations.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 424–427.]

2. DAMAGES—BREACH OF CONTRACT—ANTICIPATED PROFITS.

Plaintiffs and defendants entered into a contract which contemplated the construction of a pipe line to supply water to a city and for irrigating purposes. Defendants were to construct the line and reservoir and were to receive in payment $110,000 from plaintiffs and one-half the stock of a corporation to be formed, and to which the property was to be conveyed: plaintiffs to retain the remainder. Preliminary surveys and measurements developed the fact that the cost of the line would be largely in excess of the estimates, and that the water supply was far less, and defendants abandoned the contract, and the project was never carried out. *Held* that, in an action for the breach, plaintiffs were not entitled to recover for anticipated profits which under the evidence were too uncertain, speculative, and doubtful, nor for expenditures made by them in connection with the project prior to the contract; but that the measure of damages was the amount expended by them in reliance upon the contract after it was made and before its final abandonment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 74–76.]

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

J. Rodgers McCreery, for appellants.
E. W. Smith, for appellees.

PER CURIAM. This case was heard without a jury, and no objection is made in this court, if any objection were now available, to the findings of fact by the learned circuit judge. Upon these findings, it seems clear to us that his conclusions of law inevitably follow, and we think it superfluous to restate in other language a course of reasoning with which we are in full accord.

The findings of fact, as originally found, are as follows:

"This is an action for damages for breach of a contract, brought by Henry B. Smith and William L. Benham, of Bay City, Mich., against Orville P. Curran, Jr., and Curtis G. Hussey, of Pittsburg, Pa.; the parties so named being

citizens of the respective states in which they reside. The defendants deny their liability, on the ground that the contract was procured by misrepresentation, and they also dispute the damages which the plaintiffs claim. The case is submitted to the court without a jury, on the evidence introduced at a previous trial, at which the jury disagreed and were discharged, from which the facts are found to be as follows:

"(1) In 1894 one J. A. Jones conceived the idea of obtaining a water supply at the head waters of the San Luis Rey river, at the foothills of the San Jacinto Range, Cal., some 20 odd miles back from the ocean, and furnishing water for purposes of irrigation in the San Luis Rey Valley, and to the city of Oceanside at the coast. The stream referred to is not a large one, and not only was the water which flowed upon the surface to be utilized, but underground percolations, which exist and are available in that region by reason of the character of the soil, were to be developed and brought to the surface by means of driven wells. The supply so obtained was to be conducted by means of a gravity pipe line, from the proposed head above Pala, to a distributing reservoir at Oceanside, a distance of 22 or 23 miles; water for irrigating purposes being taken off for farms and ranches at various intermediate points. In the development of the scheme, and in order to give it a substantial basis, a contract was secured with the city of Oceanside by which, in consideration of the delivery of 100 miner's inches of water, the city was to pay $25,000 in cash when the pipe line was completed, and an annual rental thereafter of $2,500. A contract with a large ranch owner named McWhirter was also secured, who was to pay $37,500 cash and $3,750 annual rental, in return for 150 inches of water; and there was an understanding with another ranch owner named Utt that he would pay $28.500 and $2,850 rent, for 114 inches. Some 82 different farmers along the line further agreed to pay an aggregate of $26,625 cash, on completion of the work, and an annual rent of $5,700, in return for 228 inches of water, and were in addition to contribute 1,242 acres of land, which it was estimated would be worth when irrigated about $100 per acre. A tract of 120 acres was also purchased by Jones, at the point where the stream breaks through the foothills, for the beginning of the pipe line; and, the prospective course of the line having been staked out, a right of way over public highways was secured from the commissioners of San Diego county in which the San Luis Rey Valley is situated, and arrangements for it were made over private lands which would be crossed for a large portion of the distance. Some landowners at the upper end, however, did not give their assent.

"(2) In the latter part of the same year (1894) Jones brought the project to the attention of the plaintiffs, Smith and Benham, one of whom was a manufacturer of wooden pipe and lumber, and the other assistant general freight agent of the Michigan Central Railroad. They in turn consulted R. P. Lamont, an engineer of Chicago, who became interested in the scheme, and, after having gone out to Oceanside to look it over, gave it as his opinion that a line could be built for about $100,000, of which $60,000 would be required in the first six months; the money from the sale of water rights taking care of the enterprise after that. Later on, through Lamont, the plaintiffs were introduced to the defendants, Curran and Hussey, who were contracting engineers; Lamont and Curran having been previously associated together in business. And on October 31. 1895, the parties met together at Pittsburg, where the project was fully discussed; the following prospectus being submitted by the plaintiffs in that connection: 'Capacity of pipe line, over 3,000 inches (miners') daily. Water sells from $250 to $500 per inch. Annual rental $25 to $50 per inch, making over $100.000 per annum for life of pipe line, over the following property secured: 120 acres at head of pipe line, with flowing stream at all times of the year; also flowing wells—good pure water. Filing of 5,000 miners' inches from river first right. Natural reservoir, capacity ten billions gallons of water. Right of way from county commissioners. Right of way from property owners full length of line. Contracts already signed, giving first mtgs. on real estate for water for over $100,000. Pipe line about 22 miles in length—gradual descent—760 feet fall. Large amount of land covered as plan of construction, viz., inclosed pipe 36 inches laid on skids, natural flow, reach all land not higher than head and can

follow lay of land. This allows of land being irrigated entire length of line instead of at end of pipe line, as when water is carried in ditches. Location San Luis Rey Valley, Oceanside, San Diego County, Cal. End of line, have contract with city for $25,000, 100 inches.' Attached to this prospectus was a list of those who were said to have contracted for water, with the number of inches to be taken by each, and the quantity of land they were respectively willing to contribute, the written contracts for which, it was understood, were held in escrow by E. S. Payne, a banker at Oceanside, pending the carrying out of the project. The result of this interview was a preliminary or provisional agreement, a copy of which is set forth in the plaintiffs' statement, and made part of these findings, by which the defendant, in substance, undertook to investigate the proposed pipe line, and if it appeared that the cost would not exceed $100,000, and that the contracts, water rights, and privileges, including that with the city of Oceanside, had the value represented by the plaintiffs, to enter into a contract to build the line for the sum named, as soon as a charter for an irrigating company had been procured by the plaintiffs under the laws of California; the plaintiffs on their part agreeing to turn over to such company all their rights, privileges, deeds, and contracts, receiving the whole of the capital stock in return, and transferring two-fifths to the defendants, retaining two-fifths for themselves, and holding the other one-fifth for Jones and Lamont.

"(3) Immediately following the execution of this agreement, Curran went out to Oceanside to make investigations, reaching there November 11th, and within the next few days he went twice over the ground with Jones, who pointed out the proposed line cut through the brush and staked, representing it as suitable and as having been the subject of a survey. He was also taken to the head of the line, and shown the stream that was to be utilized, observing and making an estimate of its flow, which he figured at about 300 miners' inches; and the place where the underground waters were to be developed was pointed out, and, in a general way, the lands intended to be irrigated. He was further taken to the Payne bank where the water contracts held in escrow were produced, and the list which he had of them checked off and verified. He was not informed, however, of the fact that a number of these contracts had been canceled at that time, on account of the failure to complete the pipe line by the time set; advantage having been taken by the parties of a provision in each allowing them to do so. In all he remained about a month at Oceanside and vicinity, looking into other water systems, getting estimates on the cost of the work, and busying himself with general matters connected with the scheme. During this time, under the stress of a counter proposition made by other parties—Grant and Puterbaugh—the city councils of Oceanside were also threatening to cancel their contract on the ground that the time fixed for the completion of the work, February 1, 1895, was long since past. Curran at once interested himself to prevent this and try and get an extension, and, for the purpose of doing so, at the instance of Benham, who had also in the meantime come out to Oceanside, a letter was written November 30th, in the name of the defendants, addressed to the plaintiffs, to be used before the councils, wherein it was, in substance, declared that the defendants had investigated the proposed pipe line, and were prepared to enter into a contract for its construction, according to the existing (provisional) agreement between the parties, with a reservation as to the price, which is not important. On the strength of this, on December 10th, a new contract was entered into with the city of Oceanside, in the name of Smith (to whom Jones on December 2d had formerly assigned and transferred all his rights and interests); this contract being to substantially the same effect as before, except that the work was to be completed by July 31, 1896. A bond which was exacted by the councils was further given by Smith, with Benham and Lamont as sureties, in the sum of $15,000 to secure the fulfillment of the undertaking by the time named.

"(4) Having got the measure into this shape Curran returned East, and on December 17th, 1895, the parties met again—this time at Chicago—and entered into the agreement on which suit is brought, a copy of which is set forth in the plaintiff's statement and made part of these findings. It was there, in substance, agreed by the defendants, confirming what had gone before, that,

in accordance with plans and specifications to be by them furnished, and by the plaintiffs approved, they would construct a 36-inch wooden pipe line, from a point on the San Luis Rey river, about three miles above Pala Mission, to the site selected for the reservoir at Oceanside, estimated to be 23 miles; such pipe line to be commenced as soon as convenient and completed by July 31, 1896, and the right of way to be furnished by the plaintiffs as fast as needed. In consideration of this undertaking, the plaintiffs agreed to pay the defendants $105,000 within four months after the completion of the work; this sum being based on an estimated length of line of 23 miles, with provision for a proportionate increase or deduction in case it varied one way or the other therefrom, and with a further provision that the defendants should be paid the actual cost if it exceeded the sum named, up to $110,000 as a limit. The plaintiffs also agreed to organize a corporation under the laws of Illinois, which was the state finally selected, with a capital of $600,000, to which they were to transfer all contracts, rights, and privileges, receiving in return the whole capital stock, and assigning one-half of it fully paid to the defendants as an additional consideration for the pipe line, which later was to become the property of the corporation when completed. There were other elaborate provisions with regard to the financing of the scheme, which do not need to be noted, except that the defendants were to furnish an indemnifying bond of $15,000 to the city of Oceanside to take the place of the one outstanding, on which the plaintiffs were obligated. While nothing is said in the agreement as to Jones and Lamont, it was understood that they were to be taken care of by the plaintiffs out of their one-half of the stock. Following this, on December 2d, Jones, as above noted, transferred to Smith all his rights and contracts, and on December 10th further conveyed to him the 120 acres of land which he had purchased at the head of the line. The former were in turn assigned by Smith to Curran and Hussey, December 26th, and on February 28, 1896, the land was also deeded to them, in trust, however, for the corporation which was to be formed. An order was also given December 18th by Smith on Jones, to turn over to the defendants all construction material and property which he had on hand, which was done.

"(5) After the execution of the final agreement, and some following correspondence between the parties with regard to the formation of the proposed corporation, the organization of which by common consent was deferred for the time, the defendants about the middle of January, 1896, went out to Oceanside to carry out the project. The first thing to be done was to make a survey, in order to definitely locate the line on which the pipe was to be laid, to accomplish which the defendants got together a corps of engineers and put them in the field. It was then for the first time discovered that the only approach to a survey which had been previously made was one by Jones, with an ordinary carpenter's level to determine the grade, and without definite plans or profiles. The defendants' engineers were engaged in their work about six weeks, completing it the middle of March, and making careful and extended surveys and estimates, from which it was ascertained that the cost of constructing the line would far exceed the amount for which the defendants had undertaken it, and that the results to be derived would be very much less than had been represented. It was found, for instance, that the flow of the stream at the proposed intake was 275 miners' inches, and in the opinion of Mr. Miller, the defendants' engineer, nothing beyond that could be developed. I am not prepared to adopt this view, but I do find that enough could not be so obtained to make up the 3,000 miners' inches spoken of in the prospectus, and it is doubtful whether even the 592 inches could be secured which were necessary to meet the outstanding irrigation and other contracts. By going three miles up the stream, however, and developing other branches, a somewhat better showing could be made. There was a serious discrepancy also in the elevations. Instead of there being a gradual fall of 760 feet to work with, the proposed intake was only 475 feet above tide, and the site selected for a reservoir at Oceanside was 280 feet, leaving but 191 feet between the two, although it was possible that the reservoir could be effectively put 100 feet lower. Nor was the fall a gradual one. For some 21 or 22 miles to Gonzales corner (a controlling point if the project of extending the system into Vesta Valley, which seems to have been contemplated, was adhered to) the fall was

approximately but three feet to the mile, which would only be sufficient to deliver 1,100 miners' inches, as a maximum, in a 36-inch pipe. Abandoning, however, the idea of getting over into Vesta, and lowering the Oceanside reservoir as suggested, an average fall of about 10 feet per mile could be secured, which would increase the delivery to about 1,900 inches. Adhering also to the line staked out by Jones, about half way down the course, just south of Gopher Canon, the ground was 40 feet higher than at the starting point, and 75 or 80 feet above a hydraulic grade line of three feet to the mile, necessitating either a tunnel or a heavy cut over a mile long at a great expense. A practical line could be secured, however, which would avoid this difficulty, but would vary about a mile from the one originally proposed, and increase the length of it, a survey and location of which was made. It was further found that the pipe at certain points, instead of being laid at grade, would have to be carried over deep gullies, on high trestles, materially increasing the expense. All things considered, the cost of the line as estimated by Mr. Miller, on the best practical location, was $437,000. As to the farms to be irrigated, with the owners of which contracts had been secured, pledging certain contributions of land and money when the work was completed, it was developed by the survey that about half were higher than the line, and not able therefore to derive any benefit from it, in addition to which, as already stated, a large number of the parties had given notice of forfeiture for failure to complete within the time limited. Difficulties were further experienced with regard to the right of way, particularly at the upper end of the line, where several landowners expressly refused it, at first even forbidding a survey across them. Water rights, for irrigating purposes, were also claimed in the stream, by certain riparian owners below the intake, which if substantiated and insisted upon would seriously cripple the enterprise.

"(6) After expending about $5,000 or $6,000 in these surveys and investigations—or if the value of their own time and services were included, some $7,000 or $8,000—and being convinced as the result that the scheme was impracticable, the defendants so notified the plaintiffs, at an interview in Chicago, April 27, 1896, at which the subject was discussed at length, although no definite conclusion was reached. Afterwards, on May 2d, in order to bring the matter to a head, Mr. Gillett, the plaintiffs' attorney wrote to the defendants, stating that his clients were ready to perform their part of the contract, and insisted that it should be carried out by the defendants, to which the defendants, by Mr. Lord, made reply a few days later that they had not yet fully decided what they would do, and proposed to look into it further. On June 6th, however, they notified the plaintiffs that they did not intend to go on, and on June 24th they offered to return all contracts, rights of way, etc., which had been transferred, but the plaintiffs refused to accept them. Suit was begun in September, 1899, without anything further having passed between the parties. The project which was the basis of the agreement between them has never been proceeded with or developed by the plaintiffs, nor so far as appears, by any other parties, and remains to-day in substantially the same condition as when it was dropped by the defendants."

After these findings were made the defendants moved to add the following:

"(1) That C. P. Curran, Jr., on his trip to Oceanside in November, 1895, was directed by plaintiff to meet J. A. Jones, who was plaintiff's representative on the ground. (2) The plaintiffs, through Benham and Jones, their representative, had knowledge, at and before the time the contract in suit was executed, of the character and extent of the investigations which had been made by Curran, of and in connection with the pipe line. (3) That all of the contracts with landowners for water contained the following provisions, inter alia: '[Landowner] do hereby covenant, contract and agree to and with the said Jones, his associates, successors or assigns, that upon said Jones, his associates, successors or assigns, delivering ——— miners' inches of water ——— through one of the conduits of the said system of water works at the property line of the above-described lands within twelve months of the first day of June, 1894, then in such case ——— do hereby promise, contract, covenant

and agree ——— to pay to said Jones, his associates, successors and assigns the sum of ——— dollars. Provided, however, and this agreement is made upon the express stipulation, ——— that water shall be furnished by June 1st, 1895, unless the said Jones, his associates, successors or assigns shall be prevented by labor strikes, labor organizations, acts of God, order of court, or other acts or things beyond the control of said Jones, his associates, successors or assigns, and provided further, that on or before June 1st, 1895, said Jones, his associates, successors or assigns shall deliver a contract duly executed according to law, wherein and whereby said Jones, his associates, successors or assigns shall grant to ——— or ——— assigns ——— upon the conditions herein contained, the perpetual right to take,' etc. (4) That defendants were informed by plaintiffs that the underground waters at the point of divertion above Pala had been investigated and that these investigations had disclosed an ample supply of water. (5) Letter from H. M. Gillett to Curran and Hussey, dated May 2, 1896 [testimony, p. 341], and letter of Hamline, Scott and Lord, to H. M. Gillett, dated May 8, 1896 [testimony, p. 344]."

The letters referred to in the fifth request do not appear in the record. The first, third, and fifth requests were granted, and the second and fourth were refused. The learned judge's argument upon the law as it is applicable to these facts, and his conclusions therefrom, appear from the following further quotation from his opinion:

"Taking up first the question of the defendant's liability upon the facts so found, before discussing the subject of damages, it is idle to argue that the agreement is invalid because it was induced by fraudulent misrepresentations on the part of the plaintiffs. However widely divergent the conditions, on which the success of the enterprise depended, are found to be from what was represented in the discussion between the parties leading up to the agreement, the defendants, through Curran who went upon the ground and was given all the information asked for, undertook an independent investigation, after the preliminary or provisional agreement, and before entering into the final one, and by that they are bound. It does not matter that this was not thorough, although a month was given to it, or that it failed to develop the discouraging features which subsequently appeared. Every opportunity was afforded to make it as full as necessary, and there were many things, such as the flow and fall of the stream, the character of the country to be traversed, the distance (which is now complained of as some three miles more than was stated), and the elevation and lay of the land, which were apparent to the observation of any one, and presumptively much better understood and appreciated by the defendants, with their technical engineering training, than by the plaintiffs. There is no pretense, and certainly there is no evidence, that the plaintiffs did not honestly believe and rely upon the representations made in the prospectus, by which they were apparently as much misled as the defendants; their confidence and good faith being shown by the large amount of money which they were prepared to advance. The most that can be said is that they ought to have known with exactness the truth of what was asserted in the prospectus before allowing it to be made the basis of negotiations. But, whatever might have been the result had the matter rested there, the defendants, very properly, before going into a project of this character and magnitude, took time to look into it, and if they failed to inform themselves as fully as they might and ought, not having protected themselves by a warranty, they cannot now be heard to say that the agreement was entered into in reliance upon the representations of the plaintiffs, and that, these having failed, they are relieved.

"The law upon this subject is well settled, as will appear by the reference to a few of the authorities. Thus, in Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627, it is said: 'Where the means of knowledge are equally available to both parties, and the subject of purchase is alike open to inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. * * * And the same rule obtains when the complaining party does

not rely upon the misrepresentations, but seeks from other parties means of verification of the statements made, and acts upon the information thus obtained.' So in Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, which was a bill to rescind a contract to purchase a mine, it was said: 'Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he choses to make it, the purchaser cannot afterward allege that the vendor made misrepresentations.' In Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246, a bill was filed to restrain the enforcement of purchase money due on land, and for a recoupment of damages by reason of false representations with regard to it. The land was a plantation lying along the Mississippi river, and the sale was effected through a real estate agent who delivered to the prospective buyer a written memorandum with regard to the property, wherein it was, among other things, stated that 1,060 acres were under cultivation, and that 800 acres according to the owner, or 500, according to the levee engineer, were 'above overflow,' thereby meaning, above any overflow from the river previously experienced; both of which representations failed. In a letter accepting the property, the purchaser expressly declared that he did so on the statements made as to the amount, character, etc., of the land; but it appeared that prior to this he visited the plantation, with a view to inspecting it before purchasing, and was taken over it from one end to the other by the party in charge, and it was held that he was bound. 'The general principles applicable to cases of fraudulent representations,' says Fuller, C. J., 'are well settled. * * * The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were approximate, immediate, and material. If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he choses, he cannot say that he relied on the vendor's representation.' To the same effect are Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931, and Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, in the latter of which it is reiterated, that: 'When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor.' Cases announcing the same doctrine could be almost indefinitely multiplied, but it will be sufficient to refer to Attwood v. Small, 6 Clark & Fin. 232; Jennings v. Broughton, 5 De G. M. & Cord. 126; Haywood v. Cope, 25 Beav. 140; Mahaffey v. Ferguson, 156 Pa. 156, 27 Atl. 21; Tuck v. Downing, 76 Ill. 71; Ludington v. Renick, 7 W. Va. 273; Hall v. Thompson, 1 Smedes & M. (Miss.) 443; Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Long v. Warren, 68 N. Y. 426. They all with one accord imposed upon a party, who is given opportunity to investigate and undertakes to do so, the responsibility for the result, unless he protects himself by a warranty, or by such subsequent assurances at the time of entering into the contract as amounts to it.

"In the present instance, much that appears in the prospectus consists, not so much in a statement of existing facts, as a representation with regard to things to be brought into existence, as to which, as is said in Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105, the law gives a very different effect; and, as a mere suggestion of possibilities, it is a question how far the defendants in any event had the right to rely upon them. East v. Worthington, 88 Ala. 537, 7 South. 189; Bandurant v. Crawford, 22 Iowa, 40; Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105. But passing that by, even as to those statements which were given a more definite and positive form, the defendants, not only having taken it upon themselves to make an investigation, but expressly agreed to do so, cannot now say, according to the doctrine announced in the cases cited, that they put faith in the representations made by the plaintiffs with regard to the project, however extravagant they have been proved, so as to entitle them to avoid the agreement on the ground of deceit or fraud.

"The defendants therefore being undoubtedly liable on the agreement, the only question is as to the damages which have been sustained by its breach. The principal claim made by the plaintiffs is to the profits which it is said they have lost, which it is contended were large and assured. With regard to this, however, there is considerable to be observed. The scheme which the parties had in contemplation, into which the agreement entered, while not necessarily impracticable, could not, in my judgment, have been realized to the extent anticipated. As is shown above, the supply of water required for any great success was not there, being apparently limited to the possibility of some 500 miners' inches, the elevation of the proposed intake was much less than was calculated, making it difficult to secure a suitable hydraulic grade line, and the cost of construction was likely to far exceed the estimate of $100,000 which had been relied on—all of which correspondingly reduced the probability of remunerative results. As their part of the agreement the plaintiffs were to advance, for the construction of the pipe line, the sum of $105,000, which might be increased to $110,000 in case it cost that much, for which they were to receive one-half of the capital stock of the corporation to be formed, of the par value of $300,000 (their share), less such portion as was to be given to Lamont and Jones, which is not shown. Assuming that the defendants are chargeable with the failure of the enterprise, because of the refusal to carry out their part of it—although the scheme is still open, and others can possibly be interested in it on equally favorable terms, if it has merit—the stock which the plaintiffs were to get represents their ultimate interest, and the value of it, less its cost, stands therefore as the measure of their loss, because of the enterprise not having been carried through. This value, however, it is manifest, cannot be determined with any certainty. It is dependent upon the success of the project, which was necessarily problematical, if not doubtful. The most that can be said is that, if the difficulties spoken of above and others which existed were overcome, the corporation, upon the completion of its line, might have expected to receive from the city of Oceanside, and the different ranch owners and farmers with whom contracts had been made, the amounts which they had respectively pledged, including the land that was to be contributed, from which, no doubt, considerable would have been realized. All this was contingent, however, on the ability of the corporation to meet its part of the undertaking, and this was dependent upon its developing a water supply of at least 592 inches, which was apparently only in part to be had. It was also dependent—outside of the contract with the city of Oceanside—on how far the lands of those who had been drawn into the scheme could be irrigated, a large part of which undoubtedly could not be, because of their being above the grade of the line. A number of these landowners, moreover, long prior to the breach of the defendants' agreement, had terminated their contracts, availing themselves of their right to do so; the time limited for the completion of the work having expired. And even those who had given no notice had the right to do so for the same reason, at any time. No doubt many, if not all, of these parties could be got back, if the water was ready to deliver; but as the matter stood there was nothing to be relied upon in this direction with any certainty. It is useless to ask for damages therefore, as though the money which was to be paid and the bonus land which was to be contributed was so much cash in hand which the plaintiffs have lost. All that can be said is that these were possible resources which might be realized, and when they were would aid in giving value to the plaintiffs' share in the enterprise, but, until they were, could not be counted on.

"It will be seen from these considerations that the success of the scheme and the results to the plaintiffs in return for the one hundred and odd thousand dollars which they were required to put into it were most uncertain. It is indeed a grave question whether the plaintiffs are not by just so much the better off than if the project had been carried out to the end, having their money instead of having sunk it. But at the most they would have had nothing but their $300,000 of stock, the intrinsic value of which it is altogether impossible to estimate, even approximately. It might have proved valuable. It might have been worthless. No one can say which. Nor, if of value, how much. While it is true that the law does not array itself against the recovery of anticipated profits, by way of damages. 8 Am. & Eng. Encycl.

Law (2d Ed.) 618, 620; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Lazier Gas Engine Co. v. Du Bois, 130 Fed. 834, 65 C. C. A. 172. It does against those which are speculative and doubtful. Iron City Tool Works v. Welisch, 128 Fed. 693, 63 C. C. A. 245; Howard v. Stillman Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147. And that is the character of those which we have here.

"I therefore find as a matter of fact, as well as of law, that the profits claimed to have been lost by the plaintiffs by the failure of the defendants to perform the agreement in suit were uncertain, speculative, and doubtful, and cannot be allowed.

"The plaintiffs further claim the value of the time and money which they have expended on this project. Directing our attention first to that which preceded the final agreement, I find the facts to be as follows:

"Facts as to Expenditures Preceding Final Agreement. Up to December 17, 1895, the date of the final agreement between the parties, the plaintiffs had expended in endeavoring to promote and develop the project in question, including the value of their own time and services, the sum of $15,238.01, the items of which appear in the exhibit attached to the plaintiffs' statement which is hereby made a part of these findings, as though incorporated therein. On this they were paid by the defendants for supplies and other property turned over to them the sum of $1,985.86, leaving a balance of $13,252.15. This amount included $750 paid for 120 acres of land bought by Jones at the head of the line, which the plaintiffs still own. It also covers $1,860, charged for their own time and services, including meetings with the defendants at Chicago and Pittsburg in negotiating for an agreement. It does not appear that any of it was incurred at the instance or request of the defendants; by far the larger part being before the parties had ever met, and the material which they got out of it having been paid for. Upon what principle these expenditures are claimed it is difficult to see. It is true that the plaintiffs may have invested this much in the project which they will not get back, unless it is revived. But this is not to be laid at the defendants' door. Even if the project had gone on, the plaintiffs would still have been out this money, except as it was made up to them by the profits derived from the venture, if successful, which it would, however, by so much have reduced. There are also particular objections to individual items, such as the $750 paid for the Jones land of which they still have the benefit, and the $1,860 charged for their own time and services, with which the defendants had nothing to do. But, without stopping upon this, taking the expenditures as a whole, upon no consideration do any of them enter into the damages for which the defendants are responsible, and they are therefore disallowed.

"The plaintiffs also claim for expenditures made and obligations incurred after the execution of the agreement, with regard to which the case is different, and as to which I further find:

"Facts as to Expenditures After Execution of Agreement. Since December 17, 1895, when the agreement was executed, the plaintiffs in furtherance of their part of it, and in some instances at the direct suggestion of the defendants, paid out money and became obligated to the extent of $3,630.82, which they would not have done except for the agreement, and of which they have now lost the entire benefit by the failure of the defendants to keep it. The items which make up this sum are set forth in the margin, those which bear date after the breach of the agreement being really incurred before it [table omitted], and they now with interest amount to $5,525.

"Two matters claimed by the plaintiff in this connection, however, do not come within this category—$51.12 attorney fees paid J. L. Stoddard, and $1,966.55, balance claimed by Jones, and one $500 counsel fees in negotiating with defendants, only partly. The Jones claim has not been paid or assumed by the plaintiff, and there is nothing to show how it is made up or that they are obligated for it; much less that it is a matter with which the defendants are chargeable. The same also is substantially true of the attorney and counsel fees, with this exception: There is evidence that Mr. Gillett did some work looking to the organization of a corporation under the Illinois law, which would be the legitimate subject of a charge against the defendants; that duty having been imposed on the plaintiffs by the agreement, and therefore proper-

ly undertaken by them. The value of these services does not appear, but I venture to estimate them at $100, which I allow. The rest of the attorney and counsel fees, covering the negotiating and settling of the provisional and final agreements, as well as legal advice when a breach was imminent, are not a legitimate subject of claim, and are therefore refused.

"As to the indemnifying bond of $15,000, which was given to the city of Oceanside by Smith, with Benham and Lamont as sureties, on account of which damages are also claimed, it will be sufficient to discuss the question of liability when the plaintiffs are shown to have suffered by reason of it. While suit has been threatened, it has gone no further, and, the obligation not being absolute, the mere fact that it is outstanding amounts to nothing until they have been compelled to pay something on account of it. As the result of these conclusions the plaintiffs are entitled to judgment, which is hereby directed to be entered in their favor, in the sum of $5,525, with costs; and the counterclaim of the defendants is denied."

It is therefore ordered that the judgment be affirmed, upon the foregoing opinion.

LYNCHBURG COTTON MILL CO. v. TRAVELERS' INS. CO. OF HARTFORD, CONN.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1906.)

No. 654.

1. INSURANCE—ACTION ON POLICY—CONTRACT LIMITATION—WAIVER.

Where an employer's liability policy provided that an action thereon should be barred unless commenced within 30 days after the right of action accrued, but the insurer participated in negotiations for a settlement for a period of more than 90 days after the 30-day limitation had expired, the contract limitation was absolutely waived, so that on the termination of the negotiations for settlement the insured was only required to proceed within the statutory period to enforce its claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1543, 1551, 1553.]

2. SAME—EVIDENCE.

Where, in an action on an employer's liability policy, it was claimed that the suit was barred by a 30-day limitation clause, certain correspondence between insured and the local and state agents of the defendant company and between such agents themselves regarding the adjustment of the claim, which was a mere continuance of the same adjustment which the company admitted to have been conducting for 90 days after the 30-day limitation had expired, was admissible as bearing on the issue of waiver of such contract limitation.

In Error to the Circuit Court of the United States, for the Western District of Virginia, at Lynchburg.

For opinion below, see 140 Fed. 718.

On the 18th day of April, 1902, Fitzhugh Stanley, an employé of the Lynchburg Cotton Mill Company, was injured in the course of his employment; and on the 21st of April, 1903, he recovered a judgment for damages on account thereof, in the circuit court of Campbell county, against the cotton mill company for $5,000 and costs, which judgment was subsequently affirmed by the Supreme Court of Appeals of Virginia in March, 1904. At the time of the accident to Stanley, the plaintiff in error had an employer's liability policy issued by the defendant in error for an amount not to exceed $2,500 for injury to any one person; and in said policy the insurance company undertook to defend at its own expense, and in the name and on behalf of the assured, any suits for damages covered by its policy. The present

suit was instituted by the plaintiff in error herein, in the corporation court of the city of Lynchburg, to recover from the defendant in error herein the sum of $2,732.93, being the amount claimed under the accident policy aforesaid as their liability on the judgment recovered by said Stanley. The case was by appropriate proceedings removed from the corporation court of Lynchburg to the United States Circuit Court for the Western District of Virginia. Upon the docketing of the same in the latter court the defendant pleaded nonassumpsit, and issue was joined thereon, and subsequently filed its special plea in writing setting up in bar of the plaintiff's right of recovery the 30 days' limitation within which suit should be brought, as prescribed by clause 14 of the policy sued on. To this special plea the plaintiff replied, setting forth certain correspondence had by and between it and the defendant company and its representatives, looking to an adjustment of the controversy, and whereby, as claimed by the plaintiff, the benefits of clause 14 of the policy were waived, and that in any event such compromise was not abandoned by the defendant until the 16th day of September, 1904, a period of less than 30 days before the institution of this suit. To this replication the defendant filed its rejoinder, likewise setting forth a letter from defendant's counsel to the plaintiff, dated the 16th of August, 1904, whereby the defendant insisted that the negotiations looking to a compromise ended on the date of said letter of the 16th of August, and that the failure of the plaintiff to institute its action within 30 days from that date, said suit not having been commenced until the 10th day of October, 1904, barred a recovery, and the said defendant, on account thereof, craved judgment against the plaintiff. Upon the issues thus joined a jury was impaneled, and after the conclusion of all the evidence the court, on motion of the defendant, instructed a verdict in its favor, to which action of the court, as well as to sundry rulings made pending the trial, upon the admission and exclusion of evidence, exceptions were duly taken by the plaintiff, and this writ of error sued out to this court. A preliminary motion was submitted to this court involving the technical question of the sufficiency of the bill of exceptions certifying the evidence in the case, and that motion at a previous term of the court was in an oral opinion decided in favor of the defendant, the two circuit judges concurring therein, and the writer dissenting. The evidence, therefore, so far as contained in said bill of exceptions, is eliminated, and the case is now before the court solely upon the propriety of the rulings of the lower court upon the questions raised by the pleadings, and upon the admission and rejection of evidence pending the trial, and the entry of judgment for the defendant.

Randolph Harrison and A. R. Long, for plaintiff in error.

Robert H. Talley and J. T. Coleman (Cabell, Talley & Cabell and Caskie & Coleman, on the brief), for defendant in error.

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

WADDILL, District Judge (after stating facts as above). Ten bills of exceptions were taken to the action of the lower court respecting the admission and exclusion of evidence, and one, the eleventh, to the direction by the court of a verdict for the defendant. The 10 bills of exception and assignments of error based thereon relate to the efforts on the part of the plaintiff to introduce certain correspondence between the plaintiff and certain of the representatives of the defendant company, or between agents and representatives of the respective companies, regarding the claim in suit, after the 16th of August, 1904, the day on which the defendant in its rejoinder to the special plea claims to have terminated the efforts at adjustment. The court in its rulings as set forth in bills of exception from 1 to 8, inclusive, as shown by the able and elaborate opinion of the learned judge of the court

below (140 Fed. 718), was controlled largely by its view of the effect of the effort at compromise upon the fourteenth clause of the policy sued on; the court's view being that what had been done operated only to suspend the clause in question during the period of such efforts at adjustment, which, as averred by the defendant, terminated on the 16th day of August, 1904, and that suit should have been instituted on the policy within 30 days from that time, and that inasmuch as the correspondence and evidence sought to be introduced, as shown by said eight bills of exception, related to efforts at adjustment after the 16th day of August, such correspondence could not be introduced; it not appearing that those claiming to act for the company had authority to waive any of the conditions or provisions of the policy as shown by the sixteenth clause thereof. It is as to the first ruling of the court, and as a consequence of which its subsequent rulings were made, that we shall first pass. Section 14 of the policy of insurance is as follows:

"14. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy."

The plaintiff in error satisfied the judgment against it on the 15th day of April, 1904, and under the strict terms of clause 14 suit should have been instituted thereon within 30 days from that time, but by reason of the correspondence of the parties this period was confessedly extended from the 15th of May, 1904, until the 16th day of August, 1904; and the effect of the decision of the lower court is that what occurred operated to suspend said clause to the 16th day of August, 1904, when it was again revived and became operative for a period of 30 days, thereby requiring suit to be instituted within 30 days from the 16th of August, 1904. In this view we are unable to concur, believing that the same is neither supported by reason or authority. Clause 14 was a limitation prescribed by the contracting parties in the interest of the insurer, and which should be construed most favorably for the insured. Holladay's Adm'r v. Phœnix Ins. Co., 7 U. S. App. 325, 51 Fed. 715, 2 C. C. A. 463; Cotten v. Fidelity & Casualty Co. (C. C.) 41 Fed. 506; 2 May on Insurance (3d Ed.) § 478; 2 Wood on Fire Insurance (2d Ed.) 120.

The insurer had the right to insist on the enforcement of this special limitation, but upon departing therefrom, certainly in the absence of express stipulation to the contrary, what was done operated, not as a suspension of the clause, but a waiver thereof, and after such waiver the general statute of limitations of the state, and not the special time named in the contract, governed the parties in the enforcement of the same. The reason for this is apparent, and this case is a striking illustration of what would be the ill effect of a contrary doctrine. No one would ever know when, as to such contracts, the statute of limitations

began or ceased to run. It would not be determinable from an examination of the contract, nor from the state statute, but would depend upon an uncertain and indefinite state of facts, as to which persons might think differently, and bring about a chaotic condition, which would be exceedingly undesirable. The requirement to sue within 30 days is a stringent clause at best in contravention of the general law on the subject, and only enforcible because of the special agreement of the parties; and it is one that cannot and should not be revived by implication, if once lost; and, besides, the equities of the case would be unfavorable to the adoption of such a policy. The insurer knowing his rights under the general law could afford to waive the clause in question, in order to effect an adjustment, and the assured likewise to make or entertain such a proposition, realizing that by so doing he would forfeit nothing, and upon failure proceed by suit within the statutory period to enforce his claim. The contrary view would result in making practically impossible any effort at compromise between the parties, certainly so far as the assured is concerned. If it be suggested that the benefit of the clause, so far as securing speedy adjustment, would be lost, the answer is that at least a specific contract for revivor of the special limitation contemplated after the failure of the settlement should be had, if it is proposed to avoid the statutory limitation. This question would seem to be precluded, so far as this court is concerned, by the decisions of the Supreme Court of the United States; and certainly the decisions of two of the states of this circuit, namely, Maryland and West Virginia, are to the same effect. In Semmes v. Hartford Insurance Co., 13 Wall. 158, 20 L. Ed. 490, a 12 months' limitation in an insurance policy having expired, when it was impossible by reason of the war for the insurer to sue, the Supreme Court held that such limitation was avoided, and not merely suspended: and in an able and elaborate opinion Mr. Justice Miller distinguished between the effect of such clauses in contracts and the ordinary limitation prescribed by statute. He said:

"We are of opinion that the period of 12 months which the contract allowed the plaintiff for bringing his suit does not open and expand itself so as to receive within it three or four years of legal disability created by the war, and then close together at each end of that period, so as to complete itself, as though the war had never occurred. It is true that in regard to the limitation imposed by statute this court has held that the time may be so computed, but there the law imposes the limitation, and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. * * * Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. * * * Now, this contract relates to the 12 months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to 12 months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So, also, if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within 12 months, is by the contract made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully nothing but a presumption of law, or presumption of fact, will again revive it. There is nothing in the contract which does it, and we know of no such presumption of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract, that would from removing absolutely the bar of the statute; for, when the bar of the contract

is removed, there still remains the bar of the statute, and, though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority; that is, by the statute of limitations."

In Thompson v. Phœnix Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, 298, Mr. Justice Harlan speaking for the court, in considering a provision of a character similar to the one under consideration said:

"While the validity of such a stipulation cannot be disputed (Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 389, 19 L. Ed. 257), we do not doubt that it may be waived by the company, and such waiver need not be in writing. It may arise from such a course of conduct on its part as will equitably estop it from pleading the prescribed limitation in bar of the suit by the insured."

In the same case, on page 299 of 7 Wall. (19 L. Ed. 257), the learned justice further said (citing from Mickey v. Insurance Co., 35 Iowa, 174, 180, 14 Am. Rep. 494):

"It would be contrary to justice for an insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought."

In Hartford Insurance Co. v. Unsell, 144 U. S. 439, 448, 12 Sup. Ct. 671, 36 L. Ed. 496, the Supreme Court of the United States considered the effect of a waiver of the provisions of a contract of the kind, and what constituted such waiver, and the forfeitures thereof, and quoting from the opinion of Mr. Justice Bradley, in Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689, said:

"We have recently in the case of Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689, shown that forfeitures are not favored in the law; and the courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture."

And in the further progress of the opinion, on page 450 of 144 U. S. page 674 of 12 Sup. Ct. (36 L. Ed. 496), the court said:

"It is always open for the insured to show a waiver of the condition or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the insured has a right to rely."

The case of Semmes v. Insurance Co., supra, was followed by the Court of Appeals of Maryland in Earnshaw v. Sun Mutual Aid Society, 68 Md. 465, 475, 12 Atl. 884, 6 Am. St. Rep. 460, and by the Supreme Court of Appeals of West Virginia, in Galloway v. Standard Fire Ins. Co. (W. Va.) 31 S. E. 969, 971. To the same effect is Insurance Co. v. Baker, 153 Ill. 240, 38 N. E. 627; Eliot Nat. Bank v. Beale, 141 Mass. 566, 570, 6 N. E. 742; Jackson v. Fidelity &

Casualty Co. of N. Y., 41 U. S. App. 552, 562, 75 Fed. 365, 21 C. C. A. 394.

A further citation of authority is not deemed necessary, as we feel not only bound by those given, but are convinced of the soundness of the rule adopted, as well as the justice of the conclusions that flow therefrom. Many of the authorities upon each side of the question will be found in the interesting discussion of the subject in the lower court's opinion, to which we refer (140 Fed. 718, supra).

The rulings of the court as set forth in the bills of exception Nos. 1 to 8, inclusive, may doubtless have been correct under the court's view of the suspension, as distinguished from the waiver of clause 14 of the policy, as the parties to the correspondence on behalf of the defendant in error may not have had authority to waive any of the provisions of the policy, including the extension of the time under which suit might be instituted; but if the suspension was not a practical question, the clause having been previously waived by the course of conduct of the defendant company respecting the same, then manifestly the letters sought to be introduced should have been admitted as a part of and along with the other correspondence between the parties, or their agents, as to the adjustment of the claim. The rejected letters consisted of certain correspondence between the plaintiff and the local and state agents of the defendant, and between said agents themselves, regarding the adjustment of the claim in suit and which was a mere continuation of the same adjustment admitted to have been under consideration for 90 days, after the 30-day limitation under which suit might be brought had expired. These letters, together with the explanation of the circumstances under which and why they were written, should have gone to the jury along with the other communications had between the parties upon the issues joined, and it cannot be said that the plaintiff may not have been prejudiced because of such failure. Boston & Albany R. R. Co. v. O'Rielly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006, and cases cited; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 64 C. C. A. 180, 189, 129 Fed. 668.

The objections to the rulings of the trial court, as shown by bills of exception 9 and 10, appear not to be well taken, and certainly in a subsequent trial the questions therein raised will become immaterial.

It follows from what has been said that the action of the lower court should be reversed, with costs, and the case remanded thereto, with directions to award a new trial, the same to be had in accordance with the views herein expressed.

Reversed.

LINSTROTH WAGON CO. v. BALLEW.*

(Circuit Court of Appeals, Fifth Circuit. January 9, 1907.)

No. 1,572.

BANKRUPTCY—ACTION PENDING IN STATE COURT—JUDGMENT—CONCLUSIVENESS.

Before the filing of an involuntary petition, claimant instituted suit in a state court to recover specific personal property alleged to have been purchased by the bankrupt by fraudulent representations, and obtained a writ of sequestration under which the property was seized. Bankruptcy proceedings were then instituted, and the trustee, by leave of the state court, intervened and unsuccessfully defended the suit, in which claimant recovered judgment for the return of the property. *Held*, that the state court's jurisdiction was not lost or in any way affected by the filing of the bankruptcy petition, or by the subsequent adjudication that the buyer was a bankrupt, and that, so far as the property or its proceeds were concerned, the judgment was conclusive on the trustee as a person acquiring an interest pendente lite, though he was not a necessary party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 319, 322.]

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

On July 12, 1904, one W. M. Morgan, who resides and does business in Corsicana, Navarro county, Tex., made his application to the Linstroth Wagon Company, the appellant, at its place of business, in St. Louis, Mo., to buy a lot of its wagons on a credit of four, six, and eight months. Before accepting Morgan's orders, the appellant investigated his commercial standing, and ascertained, from his report and statement made to R. G. Dun & Co.'s Commercial Agency, that he claimed to have assets amounting to $62,604.33, with liabilities amounting to only $23,432.74, and showing that his assets included cash value of stock on hand of $27,980.15, cash value of stock in transit, $6,000; accounts and bills receivable considered good, $26,732, and real estate of the value of $4,000, over and above exemptions. His liabilities consisted of amounts due upon open accounts, $200.38; for merchandise closed by notes, $22,632.36; loans from bank, $600. Thereupon, and relying on the said statement so made by Morgan, his orders for 50 wagons on the terms proposed were accepted and the goods were shipped to him to Corsicana, Tex., and to Ennis, Tex. On August 10, 1904, he executed and delivered to appellant his notes for the specified payments. On or about October 27, 1904, the appellant received an invitation from Morgan to attend a creditors' meeting at Corsicana on the 8th of November, following. Appellant then began investigations, which satisfied it that the statements made by Morgan to R. G. Dun's Commercial Agency were false, and fraudulently made for the purpose, and with the intention of establishing a false basis of credit, and were made with the fraudulent intent to deceive the commercial world generally, and the appellant in particular, and that Morgan, at the time said statements were made, was insolvent and his liabilities largely exceeded his assets. As soon as appellant discovered the fraud perpetrated upon it, it elected to rescind the contract of sale, and on November 7, 1904, brought suit in the proper state court against Morgan, and obtained writs of sequestration for the seizure of the goods to be held subject to the order of the court, and prayed judgment for the wagons, for costs and for general relief. One of these writs of sequestration was executed immediately by seizing the wagons found in Navarro county. Two days after the bringing of the suit by the appellant in the state court, as just recited, certain creditors of Morgan presented an involuntary petition in bankruptcy against him in the bankruptcy court for the district which embraced Morgan's residence, and on the following day, to wit, November 10th, made an application

* Rehearing denied February 19, 1907.

to the referee for the appointment of a receiver to take possession of the property belonging to the bankrupt's estate until a trustee could be appointed and had qualified. Such receiver was immediately appointed, and took possession of the bankrupt's estate, including the goods claimed in the appellant's suit and on some of which the writ of sequestration to the sheriff of Navarro county had been levied. On December 13th the receiver returned an inventory of all the property belonging to the bankrupt estate, as far as the same had then come to his knowledge, including therein the goods claimed by the appellant, and on January 4, 1905, the receiver applied for an order to sell all of the property free from incumbrances, of which application notice was duly given to all the known creditors and parties in interest to show cause, if any there be, why the sale should not be made. On December 31, 1904, W. M. Morgan & Bro. were duly adjudicated bankrupts. Pending the giving of the notice of the application for sale, the first creditors' meeting was held on January 23, 1905, at which meeting the appellee, who resided in Corsicana, Tex., was appointed trustee, and on the same day was, as such trustee, ordered to sell all of the property which had been so inventoried by the receiver. On February 11, 1905, the appellant, on leave, amended its petition in the state court, by showing to the court what had been done under the sequestration writs and adding the following averment: "Plaintiff is informed and believes and here charges that subsequent to the levy and seizure of the wagons by the sheriff of this county (Navarro) and subsequent to the time when the writ to Ellis county should have been levied, certain of the creditors of defendant W. M. Morgan filed a petition in the United States District Court at Dallas, Tex., to have him adjudged a bankrupt, and that thereafter said Morgan was adjudged a bankrupt by said court, and the defendant, Ballew, has been appointed trustee for his estate, and is now as such trustee in the possession of all of said wagons here sued for, claiming same as a part of the said Morgan's estate. Plaintiff now aks that said Ballew, trustee in bankruptcy, be made a party hereto, and that on trial it have judgment for its said wagons against both Morgan and Ballew. It further prays for costs and general relief." On this amended petition there is indorsed: "I hereby accept service of the above petition, waive issuance of citation and enter my appearance at March term, February 11, 1905. [Signed] W. W. Ballew, Trustee of W. M. Morgan."

The trustee presented a plea in abatement to the jurisdiction of the state court, in which he set up, in substance: "That the suit of the Linstroth Wagon Company was instituted against W. M. Morgan within less than four months prior to the bankrupt proceedings instituted against W. M. Morgan by Jos. W. Moon Buggy Company et al., in the United States District Court for the Northern District of Texas; that at the time of the filing of this suit against W. M. Morgan by plaintiff herein, the said Morgan was in possession of the goods sued for, under valid contract and purchase, and that the title to said goods had passed to Morgan long prior to the filing of the suit herein, and that when Morgan was adjudicated a bankrupt the title to said goods vested in said W. W. Ballew, immediately upon his election as trustee, and that no action in this court can defeat the jurisdiction of the bankruptcy court in the administration of all the assets that were in the possession of Morgan at the time of the filing of the petition in bankruptcy, and for four months prior thereto; that this suit was instituted only a few days before bankrupt proceedings were filed, and that the right of the bankruptcy court over the property is not only superior to that of the state court, but is exclusive, regardless of any action taken in the state court whose jurisdiction in such cases is divested by the bankruptcy proceedings, and this court has no right to further proceed herein." The same matter substantially was presented in exceptions to the plaintiff's petition, and not waiving the plea to the jurisdiction or the exceptions to the petition, the trustee answered with a general denial, and plead specially that the appellant had not relied upon the report made by Morgan to Dun's Mercantile Agency, but was specifically notified that the agency did not accept that report as correct, and had informed the plaintiff that the property statement of Morgan in his report to that agency was greatly exaggerated and that as a matter of fact he was, in all probability, insolvent, and that thus,

with full and timely notice of the insolvency of Morgan, the plaintiff made an absolute sale of the goods to Morgan and accepted his notes therefor without making further inquiry. He plead further that if it should be held that the plaintiff is entitled to recover the goods by reason of the avowed false and fraudulent statements, the goods have in fact been in the possession of Morgan and the trustee for more than six months under claim of title and the goods have been stored in the warehouse of Morgan, and he and the trustee have been compelled to pay rent upon the warehouse and insurance upon the goods, and that plaintiff is liable for the storage of the goods and for the freight paid from St. Louis to Corsicana and Ennis, and for insurance upon the goods; that the freight, storage, and insurance are reasonably worth $1,200, which is a lien upon the property which the trustee is entitled to have foreclosed and the property sold to satisfy the same, concluding with appropriate prayers.

On April 25, 1905, the case in the state court came on for trial. Plaintiff appeared by its attorney, Morgan made default, W. W. Ballew, trustee, appeared in person, and both the parties present announced ready for trial. A jury was waived, and all questions of fact, as well as of law, were submitted to the court, which, having heard the pleadings read, and the evidence adduced, and the argument of counsel, was of the opinion that the property sued for, to wit, 50 complete Linstroth wagons, were obtained from the plaintiff by W. M. Morgan through false representations, and that therefore plaintiff is entitled to recover the same, and entered judgment accordingly. The decree further recites that it appeared to the court that on the 7th of November a writ of sequestration was issued in the cause at the instance of the plaintiff, and went into the hands of the sheriff of Navarro county, by virtue of which he seized and took into his possession certain wagons situated in Navarro county, Tex., described as follows (giving particular description), which wagons were afterwards delivered by the sheriff to L. Carpenter, the receiver appointed by the referee, and that the sheriff took the receiver's receipt for the same, and that the defendant, Ballew, trustee, as such trustee, is in the possession of, and claiming certain of the foregoing described wagons, including those delivered by the sheriff to the receiver as belonging to the bankrupt estate, described and valued as follows (giving a minute description with value), and announcing that it was the finding of the court that plaintiff is entitled to judgment against said Ballew as trustee for the said wagons in his possession as such trustee, gave and caused to be entered the appropriate judgment. Thereafter, on June 28, 1905, the appellant filed its application before the referee, claiming title to the property which had been adjudged to it against W. M. Morgan and against the trustee by the said court, which application the referee set down to be heard on the 12th day of July, 1905, and issued a rule requiring the trustee to show cause on that day why the property should not be delivered by him to the appellant. On the day named the trustee filed his answer to the application, in which he set up substantially the same matters he had urged by his plea, exceptions, and answer in the state court. To this answer of the trustee the appellant replied by exceptions that the matters stated were not responsive to the issue presented by the plaintiff, are evasive and show no cause of defense against the cause of action asserted by Linstroth Wagon Comapny; that so much of the answer as sets up that the sale to W. M. Morgan had passed to him the title to the wagons, presents an issue that had theretofore been adjudicated by the district court of Navarro county, Tex., a court of competent jurisdiction with all parties here interested before it. It also denies the allegation in the trustee's answer that it appeared in open court and refused to claim the property in controversy, but says it had no notice of any order of sale being issued; that it has never been a party to any proceeding in this court, and does not now and never has occupied the position of a creditor of the bankrupt, but shows to the court that, prior to any bankruptcy proceedings against Morgan, its status as against him had been fixed by the suit begun in the district court of Navarro county, Tex., in which the title to the property in controversy was claimed by it, and in which suit the question of whether or not the title to the goods in controversy passed to the bankrupt was adjudicated and decided adversely to the

bankrupt and to the trustee. It denies that any judgment by the District Court of the United States has ever been made, enjoining it from asserting title to the goods in controversy, or enjoining the judgment obtained by it in the district court of Navarro county, Tex.; that by the order of that court, the plaintiff was directed to present its application to this court for the delivery to it of said goods.

In support of the application, and of the trustee's answer thereto, respectively, the record of the proceedings in the state court and in the bankruptcy court were submitted, and on the same day the referee made his order, dismissing the application for the possession of the property, providing in the order that "nothing herein shall be construed as preventing claimant from prosecuting any remedy which he may have against the fund produced by the sale of said property in this proceeding." To which action and judgment of the referee the appellant excepted, and duly filed its petition, asking to have the same reviewed by the judge of the court, stating the grounds of its exception and objection to the order, and of its claim for the relief asked, which need not be recited here. The claim of the appellant on certificate from the referee came on to be heard before the district judge on February 26, 1906, when the trustee stated in open court that the property applied for had been sold since the order of the referee, dismissing the application, and the petition for review thereof on certificate had been filed. Thereupon, the court made the order from which this appeal is taken. The order is as follows:

"It being made to appear to the court that the property in the hands of the trustee of the bankruptcy estate, which the claimant Linstroth Wagon Company claimed, and by its application to the referee sought to recover, has been sold in the due course of the administration of the bankruptcy estate, and that the proceeds of said sale are in the hands of the trustee of said estate, it is ordered that the certificate herein be returned to the referee for the purpose of incorporating these acts therein. It is further ordered that the claimant be, and it is, hereby permitted to present its claim before the referee in bankruptcy for the funds arising from the sale of the said property. It further appearing to the court that the issue raised by claimant in the certificate of the referee has been settled by the sale of the property, it is ordered that the certificate of the referee upon coming in with the additions made thereto, as above provided, stand dismissed, with costs against the Linstroth Wagon Company. To which action of the court the Linstroth Wagon Company excepts in open court, and gives notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit. Upon the announcement by the court of its decisions on the certificate of the referee, the Linstroth Wagon Company presented in open court, and asked leave to file what it termed "an amended petition of complaint," which paper had to do with its claim for the value of the wagons sold by the referee as such value was fixed in a judgment of the district court of Navarro county, Tex. The court denied leave to file said amended petition of complaint, and directed that whatever papers the Linstroth Wagon Company desired to file in connection with such claim be filed before the referee in bankruptcy for his action thereon. To which refusal and action of the court the Linstroth Wagon Company excepted, and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit."

H. L. Stone, for appellant.

J. E. Cockrell, Edward Gray, and W. W. Ballew, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

The features of this case call to mind the opinion which seems to have been quite prevalent in many quarters at one time while the bankrupt act of 1867 was in force, that the moment a man is declared bankrupt, the District Court, which has so adjudged, draws to itself, by that

act, not only all control of the bankrupt's property and credits, but that no one can litigate with the trustee contested rights in any other court except in so far as the Circuit Courts had concurrent jurisdiction, and that other courts could proceed no further in suits of which they had, at that time, full cognizance; as the result of which opinion the practice became prevalent to bring any person who contested with the trustee any matter growing out of disputed rights of property or contracts, into the bankruptcy court by service of the rule to show cause, and dispose of their rights in a summary way. Against this view of the matter and practice which for a time sweepingly prevailed, the Supreme Court steadily set its face. Eyster v. Gaff et al., 91 U. S. 525, 23 L. Ed. 403. On the going into effect of the present act, some of the referees in bankruptcy and of the judges of those courts, unmindful of the teaching of the Supreme Court under the act of 1867, or disregarding its lesson, began to follow the practice which had prevailed under that act against which the Supreme Court had steadily set its face. With the usual tendency toward the growing weight of precedents, that practice had extended and become widely prevalent before the case of Bardes v. Hawarden Bank (U. S.) 20 Sup. Ct. 1000, 44 L. Ed. 1175, distinctly presented for the decision of the Supreme Court the question as to whether under the act of 1898 a District Court of the United States, in which proceedings in bankruptcy had been commenced and are pending under the act, has jurisdiction to entertain a suit by a trustee in bankruptcy against a person holding and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors. It was considered that the determination of this question depends mainly upon the true construction of section 2 and section 23 of the present act (Act July 1, 1898, c. 541, 30 Stat. 545, 546, 552, 553 [U. S. Comp. St. 1901, pp. 3420, 3431]), which sections are embodied, in hæc verba, in the opinion of the court, and the question of their effect, considering the language of each and their relations to one another, was approached by referring to the terms, and to the judicial construction of the bankrupt act of 1867, and comparing its provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity with the provisions of the present act; and after a full review and discussion of previous decisions and provisions of the act under which they were made, and of the analogous provisions of the present act, it was held that the provisions of section 23b control and limit the jurisdiction of all courts over suits brought by trustees to recover property from third parties, or to set aside transfers of property to third parties alleged to have been fraudulently made as against creditors, and that the District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over such suits.

On the same day, and through the same justice as its organ, the Supreme Court announced its decision in White v. Schloerb (U. S.) 20 Sup. Ct. 1007, 44 L. Ed. 1183. That case, therefore, can hardly be considered or read so as to qualify the opinion in Bardes v. Bank. In entire consistency with all the reasoning in the opinion in the Bardes Case, the White Case held that, after an adjudication in bankruptcy,

an action of replevin in a state court cannot be commenced and maintained against the trustee for property in the possession of and claimed by the bankrupt at the time of the adjudication, and in the possession of the trustee in bankruptcy at the time the action of replevin is begun, and that the District Court sitting in bankruptcy has jurisdiction by summary proceedings to compel the return of property so seized. This decision rests on principles that are elementary.

A year later the Supreme Court, speaking through the same distinguished justice, who announced the decisions in the cases just cited, announced its decision in Bryan v. Bernheimer, 181 U. S. 197, 21 Sup. Ct. 557, 45 L. Ed. 814, reciting that the property involved in that controversy was not held by Davidson (private assignee of the bankrupt) under any claim of right in himself, but under a general assignment, which was itself an act of bankruptcy; that no trustee had been appointed; that the sale by Davidson to Bernheimer was made after and with knowledge of the petition in bankruptcy; that Bernheimer consented to the form of proceeding, and that therefore the District Court, as a court of bankruptcy, was authorized to decide the matter in a summary way; which, in effect, means that Bernheimer was not an adverse claimant, and that he had expressly submitted his claim to the court in that proceeding.

In the case of Mueller v. Nugent, the claimant held the money in controversy as the agent of his father, the bankrupt, and without any claim of adverse interest in himself; and though he had not, like Bernheimer, submitted himself to the jurisdiction of the bankruptcy court, he was held to be amenable to the control of that court by summary proceedings. 184 U. S. pp. 17, 18, 22 Sup. Ct. 269, 46 L. Ed. 405. In the course of the opinion in this case, the remark was made that the filing of the petition is a caveat to all the world and in effect an attachment and injunction. In reference to which remark, the Supreme Court afterwards said that it was made in regard to the particular facts in the case in which it was used. York Manufacturing Co. v. Cassell, 201 U. S. 353, 26 Sup. Ct. 481, 50 L. Ed. 782. It was also said in the Bernheimer Case that the remark made in the Bardes Case, that the powers conferred on courts of bankruptcy by clause 3 of section 2, and by section 69 (30 Stat. 545, 565 [U. S. Comp. St. 1901, pp. 3421, 3450]), after the filing of the petition in bankruptcy, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, was an inadvertence, and upon a question not arising in the case then before the court which related exclusively to the jurisdiction of the suit by the trustee after his appointment. The Supreme Court has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties.

Mr. Chief Justice Marshall said, in Cohens v. Virginia, 6 Wheat. 399, 5 L. Ed. 257:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court

is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And, in Carroll v. Lessee of Carroll et al., 16 How. 287, 14 L. Ed. 936, Mr. Justice Curtis referred to Ex parte Christy, 3 How. 292, 11 L. Ed. 603, and Peck v. Jenness et al., 7 How. 612, 12 L. Ed. 841, as illustrations of the rule that:

"Any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains."

The trustee takes the property of the bankrupt in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property, which is void as against the trustee by some positive provision of the statute. Thompson v. Fairbanks, 196 U. S. 526, 25 Sup. Ct. 306, 49 L. Ed. 577. The District Court has power to ascertain in a particular case presented whether the claim asserted is an adverse claim, within the meaning of the provisions of the bankruptcy law, existing at the time the petition was filed, and in accordance to the conclusion reached, that court will retain jurisdiction or decline to adjudicate the merits. In many cases the jurisdiction may depend upon the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it will find it cannot go further. And in a case where the court erroneously retains jurisdiction to ascertain the merits, its action can be corrected on review. Louisville Trust Co. v. Comingor, 184 U. S. 26, 22 Sup. Ct. 293, 46 L. Ed. 413; Mueller v. Nugent, 184 U. S. 15, 22 Sup. Ct. 269, 46 L. Ed. 405.

The numerous reported cases decided by the Supreme Court, beginning with Bardes v. Bank, and including Manufacturing Co. v. Cassell, supra, illustrate the application to particular cases of the sound construction placed upon the provisions of section 23, in Bardes v. Bank, and aid in the inquiry as to whether a given claimant is, in truth, an adverse claimant within the meaning of the provisions of that section, but did not, and do not, qualify the construction put upon those provisions in that case. The amendatory act of 1903 gave concurrent jurisdiction to the courts of bankruptcy and any state court which would have had jurisdiction if bankruptcy had not intervened, of suits by a trustee for the purpose of such recoveries as are authorized by section 60, subd. b, and section 67, subd. e (30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]), in addition to those which could be entertained by the consent of the proposed defendant. These amendments do not touch the case of the appellant. It does not claim the property here in controversy under any transfer from the bankrupt; it expressly disclaims being a creditor of the bankrupt at the time of the institution of this suit. The suit is not founded upon a claim from which a discharge in bankruptcy would be a release, and therefore is not

subject to the provisions of section 11a (30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]). Before the filing of the involuntary petition, which imparted life to the jurisdiction of the court of bankruptcy as to Morgan and his estate, the appellant asserted its title to the specific personal property, clearly marked, branded, and distinctly pointed out, which it sought to recover against the bankrupt, then in possession of it, and obtained appropriate preliminary process for placing the property in safe custody pending the trial of appellant's title thereto. It did not seek to acquire or fix a lien by the levy of its writs of sequestration, or by the recovery of a judgment, but to establish its rights to the specific property and recover, lawfully, the possession of it. The appellant could not have sued in the Circuit Court, because the value of the property was less than $2,000; it could not sue in the United States District Court, because that court had no jurisdiction in civil cases, apart from its jurisdiction as a court of bankruptcy, and its jurisdiction as a court of bankruptcy had then not yet been vitalized by the filing of the involuntary petition. Therefore, it could invoke the jurisdiction of the proper state court only, which it did, and by its petition and the suing out of the writs for which it prayed, that court obtained jurisdiction of the cause, and the jurisdiction was not lost, or in any way affected by the subsequent filing of the involuntary petition against Morgan, or by the subsequent adjudication that he was a bankrupt. The trustee might have obtained leave of the court of bankruptcy to appear and defend the suit, and have so appeared by leave of the state court; but he was not a necessary party, and whether he did so appear or not the suit could proceed to final judgment which would be binding on the trustee equally with any other party acquiring an interest pendente lite. Therefore, so far as the property itself or the admitted proceeds of that property are concerned, it is immaterial whether we consider that the trustee became or not, legally, a party to the litigation in the state court. It is conceded that he did personally appear and plead, and that the issue as to the title was not only directly involved as against the bankrupt who made default, but was ably contested by the trustee by demurrer, plea, and answer. The physical facts appear to have been undisputed. The conclusions of law and fact deducible therefrom were directly and fully considered, and the appellant's ownership of the property adjudged.

It follows that the District Court erred in retaining possession of the appellant's property and proceeding to dispose of the same; and that it also erred in dismissing the appellant's application to review and correct the erroneous proceedings had before and by the referee, which were duly brought to the attention of the court by the proper certificate; that, in the condition things were at the time the certificate came on to be heard before the District Court, it should have ordered that the proceeds of the sale of the property in the custody of the court should be surrendered to the appellant, and without any costs against it or any deduction from the amount of the proceeds to meet the expenses and charges which were claimed by the trustee, or by any of the officers of the court of bankruptcy or the parties to the proceedings in that court as a lien against that fund. In support of

this conclusion, and without further present argument, we refer to the opinion of this court in Beach et al. v. Macon Grocery Co. et al., 125 Fed. 513, 60 C. C. A. 557.

The action of the District Court sought to be reviewed on this appeal is wholly reversed, and the cause is remanded to that court, with directions to take order therein in accordance with the conclusions above expressed.

ASHBURN v. GRAVES et al.

GRAVES et al. v. CRAWFORD et al.

(Circuit Court of Appeals, Fifth Circuit. January 22, 1907. On Rehearing, February 26, 1907.)

Nos. 1,506, 1,525.

1. QUIETING TITLE—RIGHT OF ACTION—POSSESSION.
   In the absence of any local statute affecting the question, a suit in equity to remove a cloud upon the title to real estate cannot be maintained in a federal court by a complainant out of possession.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 8–11, 44, 45.]

2. SAME—CLOUD ON TITLE—DEED VOID ON ITS FACE.
   A deed executed by a stranger to the title, or which for other reasons is void on its face, to convey title creates no such cloud upon the title as confers jurisdiction on a court of equity of a suit for its cancellation.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 20.]

3. INJUNCTION—TRESPASS—PLEADING.
   A bill to enjoin trespass by the cutting of trees does not state a case within the jurisdiction of equity, where it shows that the trees are forest trees, valuable only for lumber, and there is no allegation that the defendant is insolvent; and a mere allegation that complainant will suffer irreparable injury, without stating facts to support it, is not sufficient.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 232, 236.]

Appeal and Cross-Appeal from the Circuit Court of the United States for the Southern District of Georgia.

This is a suit in equity by Jennie L. Graves, Minnie C. Graves, and Ida Graves, citizens of New York, against H. T. Crawford, William McMullin, John McMullin, W. W. Ashburn, and John W. Hightower, citizens of Georgia. The property involved in the suit is real estate situated in the Eighth district of Colquitt county, Ga., described as lots numbered 353, 354, 383, and 384, containing 1,960 acres, worth $10,000.

The bill shows that Eli Graves acquired the title from the state of Georgia; that he conveyed it to Joel S. Graves March 22, 1848; that on June 8, 1855, Joel S. Graves conveyed the lands to Cyrus S. Graves, who died in 1863; and that the title passed by operation of law to the complainants, two of whom are the children, and one the widow, of Cyrus S. Graves. The complainants claim to have inherited title to the lands from Cyrus S. Graves. The lands are alleged to be valuable on account of the heavy growth of pine timber thereon.

The following is a condensed statement of the material averments of the bill on which the complainants based their right to relief: Complainants in the year 1889 consulted A. T. McIntyre, Sr., of the firm of McIntyre & McIntyre, attorneys at law, as to the protection of the lands from trespassers. McIntyre, Sr., advised complainants to obtain the services of William Mc-

Mullin to protect the lands from trespassers. Complainants visited and examined the lands, and engaged William McMullin "to look after the lands." He promised to perform this service without charge on account of the past kindness of one of the complainants to his brother. The complainant Jennie L. Graves about April 2, 1899, conveyed all of her interest in the lands to the other two complainants. McIntyre, Sr., was retained to look after complainants' interest in the land, and to pay the taxes, and funds were left with him for that purpose. Complainants left with McIntyre, Sr., such "title deeds as they had." Complainants then returned to New York. McIntyre, Sr., prosecuted a suit against one Norman, who was a trespasser on part of the lands, and was paid a fee for his services. The complainants paid the taxes on the lands to the date of the filing of the bill.

The only part of the bill which connects W. W. Ashburn with the case is section 16, which is as follows: "Your orators further aver and charge that while the said A. T. McIntyre so represented your orators as attorney, as aforesaid, and was in possession of your orator's title deeds, as aforesaid, to wit, on November 5, 1890, the said McIntyre, as a member of the firm of McIntyre & Watson, undertook to convey by deed, and in behalf of said firm of McIntyre & Watson, to said W. W. Ashburn, the title to the north half of the lot No. 353, which deed is recorded on the records of the clerk of the superior court of Colquitt county, Ga., February 1, 1890. The said W. W. Ashburn accepted said conveyance with full notice that the title to said lot of land was in your orators, and that the said McIntyre & Watson had no title thereto. And your orators further aver and charge that the said deed constitutes a cloud upon the title of your orators' said lands. And the said north half of said lot being still covered with a heavy growth of marketable pine timber, and being chiefly valuable by reason of the opportunity to sell said timber, the said cloud upon your orators' title prevents your orators from selling the said timber, to the great wrong and injury and loss of your orators; and your orators further aver and charge on information that the said W. W. Ashburn has leased the timber privileges on the said north half of said lot No. 353 to the said John W. Hightower, who is about to proceed, under the said W. W. Ashburn, to cut and convey away said timber, to the great wrong and injury of your orators, and through other persons acting under him has boxed the trees and taken the turpentine from other portions of said lot No. 353."

It is alleged that by fraud or mistake lot No. 383 was sold at a receiver's sale; that McIntyre, Jr., of the firm of McIntyre & McIntyre, who at the time were complainants' attorneys, in possession of their deeds, bought the lot for $5, saying that he bought for orators, but took deed in his own name. The lot was worth $2,500. The facts were concealed from the complainants. Afterwards McIntyre, Jr., died, and Hayes was appointed his administrator. By a fraudulent agreement—Hayes being ignorant of the fraud—Hayes, as administrator, conveyed lot No. 383 to John McMullin, son of William McMullin, and John McMullin conveyed it to H. T. Crawford. The order of sale was obtained by McIntyre, Sr., who wrote the conveyances. The bill then makes averments charging H. T. Crawford with trespassing on lot No. 383 in December, 1898; that he commenced "to box trees on said lot for turpentine purposes." It also charged that Crawford entered upon the "south halves of lots 353 and 354, and cut timber on parts of the same, and used the same for turpentine purposes, and is continuing his trespasses thereon, and, unless restrained by the orders and decrees of this court, will destroy the entire timber and turpentine values of said lots."

As to the injury the complainants will suffer, the following averment is made: "Your orators further aver and charge on information that said trespassers, knowing the fact that your orators were defenseless females residing in a distant state, have taken advantage of your orators' absence, and have advanced from one step to another in the wrongs and injuries upon your orators in and about said lands, and that they have combined and confederated in said wrongs with the attorneys and agents aforesaid left by your orators in that locality to look after your orators' interests there, and that, unless the trespassers aforesaid are restrained and enjoined by the orders and decrees of this court, your orators will suffer irreparable loss and injury."

The bill contains elaborate allegations as to William McMullin bringing a suit against complainants in a court of law by attachment and obtaining judgment for a large sum; and making levy and threatening a sale of complainants' property; but, as the court below canceled this judgment, and McMullin has not appealed, there is no question before this court as to that part of the bill.

The bill concludes with a prayer for an injunction against all the defendants to restrain them from boxing trees on any of the lands; that the fraudulent deeds and leases under which defendants hold be canceled, and for an accounting and decrees against defendants for the value of turpentine and timber used by them, respectively.

The defendants filed demurrers to the bill. The court overruled the demurrers. The defendants then filed answers. Evidence was taken, and the case was tried on its merits.

The court entered a final decree substantially as follows: That the bill as to H. T. Crawford be dismissed for want of equitable cognizance as shown by the proof, without prejudice to the right of the complainant to sue at law, the title to lot 383 and south half of lot 353 not being passed on; that complainants have a perfect legal title to lots 354, 384, and north half of 353, and are entitled to the relief prayed against all the other defendants; that the fraudulent judgment obtained by William McMullin be canceled; that a perpetual injunction be granted as to W. W. Ashburn and John W. Hightower and the Union Lumber Company, and all persons claiming under them, as to lots 354, 384, and north half of 353; that judgment is given complainants against W. W. Ashburn for $379.75 for the turpentine taken from the north half of lot 353 prior to the filing of the bill; that judgment is given complainants against W. W. Ashburn, and his lessees, Hightower and Union Lumber Company, for $1,076, for the value of timber cut from the north half of lot 353 pending the suit (and in violation of the injunction of the court); that the lease made by Ashburn to Hightower and the Union Lumber Company be canceled.

Ashburn appealed from this decree, and assigns that the court erred in overruling his demurrer to the bill, and in decreeing against him on the merits. None of the other defendants appeal. The complainants have sued out a cross-appeal. They assign that the court erred in dismissing the bill as to H. T. Crawford, and in failing to grant relief against Crawford.

Robt. L. Shipp, for appellant.

Marion Erwin, for appellees.

Marion Erwin and M. P. Callaway, for cross-appellants.

Robt. L. Shipp and Saml. B. Adams, for cross-appellees.

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

SHELBY, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

Under rule 25 of this court the appeal and cross-appeal have been argued together as one case. Bucki v. Atlantic Lumber Company, 93 Fed. 765, 35 C. C. A. 590.

The appellant, Ashburn, assigns that the court below erred in overruling his demurrer. One of the grounds of demurrer was that there was no equity in the bill; that the complainants' remedy at law was ample and complete.

The only mention of Ashburn in the bill is in the sixteenth paragraph, which we have copied in full in the statement of the case. The averments, in brief, are that McIntyre, one of the complainants' attorneys, conveyed to Ashburn the north half of lot No. 353, which was owned in fee by the complainants, and that Ashburn accepted the deed and had it recorded; that Ashburn had

leased to John W. Hightower the timber privileges on the north half of the lot; and that the lessee, under the lessor, is about to proceed to cut and convey away said timber, and through other persons has boxed the trees, and taken turpentine from trees on other portions of the lot. The contention is that these averments give the court jurisdiction in equity to remove a cloud on the complainants' title by canceling the deed that McIntyre made to Ashburn, and that these averments confer jurisdiction to enjoin the threatened trespass.

The jurisdiction of courts of equity to remove clouds from title is exercised for the reason that the deed, or other instrument constituting the cloud, may be used to injuriously or vexatiously embarrass the complainant's title. There are well-established limitations upon the exercise of the jurisdiction. A plaintiff having the legal title, and not in possession, will ordinarily be left to his action of ejectment. This is the familiar doctrine of the federal courts. United States v. Wilson, 118 U. S. 86, 89, 6 Sup. Ct. 991, 30 L. Ed. 110; McGuire v. Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670. When a local statute gives the remedy by bill in equity to remove a cloud on the legal title, without requiring the complainant to first obtain possession, the remedy may be administered in appropriate cases by the federal courts. Southern Pine Co. v. Hall, 105 Fed. 84, 88, 44 C. C. A. 363. But we know of no such local statute affecting this case. What does the bill show as to the possession of lot No. 353? The appellee quotes authority to the effect that, if complainants allege that they are "seised in fee simple," that is a sufficient allegation of possession. Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406, 33 L. Ed. 725. That is true, but we find no such allegation in the bill. The extent of the averment is that the complainants inherited the property from Cyrus S. Graves. So far from alleging possession by the complainants, the bill tends to show that Ashburn, by his lessee, is in possession. It is alleged that Ashburn accepted a deed to the property from McIntyre; that he "has leased the timber privileges" on it to Hightower, who is about to proceed to cut the timber and to carry it away, and through other persons acting under him has boxed the trees, and has taken the turpentine from trees on other portions of the lot. These averments certainly do not show that the complainants are in possession of the property, and we think that they are intended to show that Ashburn and his lessee are in the wrongful possession of it. For that reason the bill cannot be maintained as one to remove cloud from title.

If this difficulty were out of the way, do the averments of the bill show such apparent title in Ashburn as to constitute a cloud on complainants' title? The conveyance was made to Ashburn by McIntyre and one Watson. There are no allegations to show that either one of them had any apparent title to convey. They are strangers to the title set up by the complainants. If the complainants were in possession of the lot, and Ashburn sued for it, this deed to him, on the averments of the bill, would not enable him to recover. It would not make a prima facie case for him. No facts are alleged that, taken with the deed, would affect the title of the complainants, or interfere with their possession, if they were in possession. Ashburn's title, as shown by the bill, would fall of its own weight, and the complainants

would never be troubled to offer any evidence. Such a deed, under the facts averred in the bill, is not a cloud on title. Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S. E. 663; Pixley v. Huggins, 15 Cal. 127; Rea v. Longstreet, 54 Ala. 291. It is true that Mr. Pomeroy, while admitting that the weight of authority sustained it, objected to this doctrine, and expressed the opinion that equity should go so far as to cancel a deed void on its face (4 Pomeroy's Eq. Jur. [3d Ed.] § 1399), but the Supreme Court indorses the view that a void deed creates no such cloud as confers equity jurisdiction. Hannewinkle v. Georgetown, 82 U. S. 547, 21 L. Ed. 231; Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

The only other alleged ground of equity jurisdiction in the case as against Ashburn is to enjoin him from cutting the timber on the land. The bill shows that the trees are not shade trees in a yard, or on a lawn, or trees of any special value to ornament grounds. They are merely forest trees, the value of which may be easily estimated. There is no averment in the bill that Ashburn is insolvent. There is nothing in the bill to show that the remedy at law is not ample and complete. The bill, therefore, contains no equity as one to enjoin the cutting of the timber. West v. Walker, 3 N. J. Eq. 279, and notes; Cowles v. Shaw, 2 Iowa, 496; Paddock v. Davenport (N. C.) 12 S. E. 464; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 314; 1 High on Injunctions (4th Ed.) §§ 676, 699.

In reference to trespasses by Crawford, it is alleged that, unless said trespasses "are restrained and enjoined by the orders and decrees of this court, your orators will suffer irreparable loss and injury." If this language be construed as applicable to Ashburn, it is immaterial. It is the mere conclusion or opinion of the pleader. Such facts must be stated as show the injury to be irreparable. This averment is not sufficient. Cruickshank v. Bidwell, 176 U. S. 75, 81, 20 Sup. Ct. 280, 44 L. Ed. 377.

The bill showed no grounds of equitable jurisdiction as a suit against Ashburn, and his demurrer should have been sustained, and the bill dismissed as to him without prejudice to the rights of the complainants to sue at law if they were so advised.

We are of opinion that the learned Circuit Court decided correctly in dismissing the bill as to Crawford, and that the cross-appellants are entitled to no relief by their appeal.

On the appeal of Ashburn, the decree against him is reversed, and the cause remanded, with instructions to sustain his demurrer and to dismiss the bill as to him. The costs of the appeal will be taxed against the appellees, and the costs of the cross-appeal against the cross-appellants.

PER CURIAM. The application for a rehearing is denied. See Southern Pine Company v. Hall, 105 Fed. 84, 44 C. C. A. 363, and cases there cited.

KNUDSEN-FERGUSON FRUIT CO. v. CHICAGO, ST. P., M. & O. RY. CO.

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

No. 1,237.

PAYMENT—RIGHT TO RECOVER—DEMAND PAID WITHOUT DURESS OR OBJECTION.

A consignee of a shipment of fruit, which, after the same was delivered to it and with full knowledge of the facts, paid without objection the charges of the carrier, including a charge for icing in transit, in addition to the published tariff rate for carriage, cannot thereafter maintain an action to recover back the amount of such icing charge, on the ground that it was illegally exacted.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 254-261, 287.]

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

To review the judgment of the Circuit Court in an action brought by plaintiff in error to recover $45, claimed to have been illegally exacted by defendant in error as a charge for icing service rendered in connection with the transportation of a car load of peaches, this writ was prosecuted. The Michigan Central, Chicago & Northwestern, and Chicago, St. Paul, Minneapolis & Omaha Railway Companies operate a continuous line from South Haven, Mich., to Duluth, Minn., the points of origin and destination, respectively, of the shipment in question. As required by the interstate commerce law, these three companies had filed tariff schedules exhibiting their charges for the transportation of fruits between the points mentioned. These schedules also stated that the published charges for transportation did not include the cost of icing in transit, but that the carrier would impose an additional charge for such service. When the peaches were turned over to the initial carrier, that company received from the consignor, Gill & Crary Fruit Company, a shipping order, as follows:

"Shipping Order Michigan Central Railroad Co.

"Sept. 7, 1903.

"Gill & Crary Fruit Co., Ltd.

"The Michigan Central Railroad Company will receive and carry the property marked, consigned and destined as indicated below to the said destination, if on its road, otherwise will deliver to another carrier on the route of said destination.

"It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, both on the face and on the back hereof, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

"Marks, Consignees and Destination.	Description of Articles.	Weight Subject to Correction.
"Knudsen-Ferguson Fruit Co. "Duluth, Minn.	400 bushels peaches in baskets with wood taps. S. L. & C. Gtd. Icing $45.00.	20000 lb.
"F. G. E. 16274 "Via C. & N. W.	Re-ice at Chgo and St. Paul. Gill & Crary Fruit Co., Ltd. Consignor."	

The shipment reached Duluth and was delivered by defendant to plaintiff on September 12, 1903. On the 22d of September the defendant presented to plaintiff a freight bill, including the item of $138.44, which amount was made up of $93.44, the charge for transporting the peaches calculated at the

published rate for that service, and $45 icing charge. The plaintiff paid this bill on the day it was presented. In October of the following year the plaintiff instituted suit for the recovery of the $45 and attorney's fees. The complaint alleges that when the peaches reached Duluth, and while they were yet in the possession of the carrier, the defendant demanded that plaintiff pay the amount of the icing charge, and refused to deliver the shipment until such payment was made; that the charge was unlawful, and that plaintiff was obliged to pay the money to get the shipment released; in other words, that it was a case of duress of goods.

Roger S. Powell, for plaintiff in error.

C. D. Severance, for defendant in error.

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

LANDIS, District Judge, having stated the case as above, delivered the opinion of the court.

The plaintiff's theory of defendant's liability is that peaches, being of a perishable nature, cannot be transported in safety the distance between South Haven and Duluth (some 800 miles) without refrigeration in transit; that the law imposes upon the carrier the duty to carry safely; that therefore, when the carrier publishes a rate for the transportation of such perishable commodity, the obligation to refrigerate rests upon the carrier as an inherent essential to safe transportation, the performance of which obligation, as contended by plaintiff, gives the carrier no right to impose an additional charge therefor. This would be an interesting question, were it before us for examination; but in our view of the case, the plaintiff having paid the money with full knowledge of all the facts and after the goods had been turned over to it by the defendant company, we are precluded from a consideration of whether or not the carrier has a right to impose a charge for icing service in addition to the published rate for transportation.

The rule is that a party may not recover back the amount of an unlawful demand, when he has voluntarily paid the same with full knowledge of all the facts, unless the payment was made "to emancipate the person or property from an actual and existing duress imposed by the party to whom the money is paid." Brumagin v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Baltimore v. Lefferman, 4 Gill (Md.) 425, 45 Am. Dec. 145; Lamborn v. Commissioners, 97 U. S. 181, 24 L. Ed. 926. On the other hand, the action to recover back may be maintained "if the payment is caused, on the one part, by an illegal demand, and made, on the other, reluctantly and * * * without being able to regain possession of the property except by submitting to the payment." Maxwell v. Griswold, 10 How. (U. S.) 242, 13 L. Ed. 405.

In the pending cause, as seen above, the carrier's published tariff schedules notified the shipper that for furnishing ice in transit a charge in addition to the published freight rate would be made, and the shipping order of the consignor (who, for this purpose, was the agent of the plaintiff, consignee) specifically included the item for refrigeration by name and amount. The shipment was delivered to the plaintiff September 12th, and 10 days thereafter the defendant presented its bill, which, without even an expression of dissatisfaction, the plaintiff paid. Obviously, there was no duress of goods.

The payment having been deliberately made with full knowledge of all the facts, and after the shipment came into the possession of the consignee, the legality of the icing charge is not before us for determination, and the judgment is affirmed.

EUCLID NAT. BANK et al. v. UNION TRUST & DEPOSIT CO.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1906.)

No. 664.

1. BANKRUPTCY—ORDERS—REVIEW—MODE.

Where an order was entered in bankruptcy, merely denying petitioner's right to participate in the individual assets of the bankrupt until the individual creditors had been first paid, and no order was entered either by the referee or District Court rejecting petitioner's claim, such order was reviewable on a petition for review, and not solely by appeal, under Bankr. Act July 1, 1898, c. 541, §§ 24, 25a, 30 Stat. 553 [U. S. Comp. St. 1901, pp. 3431, 3432].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 915.]

2. SAME—PARTNERSHIP—INDIVIDUAL ASSETS—APPLICATION.

Where a member of an insolvent firm was adjudged a bankrupt, and the firm had no assets, firm creditors were not entitled to share in the individual assets of the bankrupt partner, which were insufficient to pay his individual debts, under Bankr. Act July 1, 1898, c. 541, § 5, subsecs. "f," "g," "h," 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], providing that the net proceeds of the individual estate of each partner shall be applied to the payment of his individual debts, and that the surplus only shall be applied to pay partnership debts, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 563.]

Petition to Review, in Matter of Law, a Decision of the District Court of the United States for the Northern District of West Virginia, at Clarksburg.

For opinion below, see 142 Fed. 588.

C. D. Merrick, for appellants.

B. M. Ambler, for appellee.

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

WADDILL, District Judge. This is a petition to review, in matter of law, the action of the United States District Court for the Northern District of West Virginia, rendered on the 15th day of January, 1906, whereby said court adjudged and determined that the petitioners, creditors of the firm of Henderson, Barrett & Co., of which the bankrupt, H. C. Henderson, was a partner, were not entitled to share in the individual assets of the said H. C. Henderson, who had been adjudged a bankrupt, until his individual creditors had been first paid. The facts in the case are briefly these: H. C. Henderson was duly adjudged a bankrupt, and the Union Trust & Deposit Company was chosen as trustee of his estate in bankruptcy. Pending the bankruptcy proceedings, the petitioners for review here, creditors for a large amount of the firm of Henderson, Barrett & Co., in which the bankrupt was a partner, sought to prove their claims in Henderson's bankruptcy pro-

ceeding; their contention being that, inasmuch as there were no assets of the firm, they had the right so to do. It was conceded that the individual assets of the bankrupt were not sufficient to pay his individual creditors in full; that the firm was insolvent; that there was no solvent partner thereof, and the firm as such, had not been adjudicated bankrupt. The referee denied the right of the partnership creditors to participate in the dividend arising from the estate of the bankrupt, H. C. Henderson, until his individual creditors had been fully paid. From this action of the referee, an appeal was duly taken to the District Court, and that court, taking the same view of the law, approved and confirmed his finding, and this petition for review of the District Court's action was applied for.

The question presented for our consideration is the correct interpretation of the provisions of Bankr. Act July 1, 1898, c. 541, § 5, subsecs. "f," "g," "h," 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], respecting the distribution of the estates of bankrupts between individual and social creditors. A preliminary question is raised which it is necessary first to dispose of, namely, the appellees moved to dismiss the petition on the ground that the relief sought could only be secured by appeal pursuant to sections 24 and 25a of the bankrupt law, and not by a petition for review. It is true that the last-named section, paragraph 3, contemplates that appeals shall be taken in case of the allowance or rejection of a debt or claim in excess of $500, and that that is the appropriate remedy, and not a petition for review; but we think upon a careful perusal of the two sections in question it will be apparent that the action complained of was not such a rejection of the debt claimed as is contemplated in the act regarding appeals. Neither the referee nor the lower court rejected the debt of the petitioners, but denied to the holders of the debts the right of participation in the individual assets of the bankrupt until the individual creditors had been first paid. The petitioners would share to the full extent of their debts, in any distribution of the individual estate, after the extinguishment of the individual debts, had there been sufficient assets. The motion to dismiss should therefore be denied.

Coming to the merits of the case, clauses "f," "g," and "h" of section 5 of the bankrupt law are as follows:

"f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"g. The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

"h. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the parnership propery shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the

partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

The language of subsection "f" would seem to be too clear to admit of serious doubt as to its meaning, namely, that the estate of the individual bankrupt should be first applied to individual debts, and those of the firm to the firm debts, and that only the surplus of the estate over and above what was necessary to pay the individual debts on the one hand, or the social creditors on the other, could be used and applied alike to the payment and adjustment of the individual and partnership debts, as the case may be. Indeed, the act plainly limits this latter application of the assets to the surplus thereof, as distinguished from the estate generally. The contention, however, is earnestly made that notwithstanding the clear and unambiguous provisions of the act, and the apparent justice thereof, a different rule should be adopted, and an exception made in cases where there is no partnership estate, and that in such a contingency the social creditors have a right to share along pari passu with the individual creditors, in the distribution of the latter estate. The question thus raised is not a new one, either under this or the former bankruptcy acts, and has given rise to much discussion in this country and in England, resulting in many conflicting decisions, and an apparently hopeless confusion of the subject. We are disinclined to enter into a general discussion of the various and irreconcilable opinions found in the reported cases. The decision of Judge Lowell in Re Wilcox (D. C.) 94 Fed. 84, contains an extended review of the entire subject, and especially a history of the law, to which we take the liberty of referring. The Circuit Court of Appeals of two of the circuits have taken antagonistic views of the present bankruptcy act. In Conrader v. Cohen, 121 Fed. 801, 58 C. C. A. 249, a decision of the Circuit Court of Appeals for the Third Circuit, the petitioners' right to share as partnership creditors in the individual assets of the bankrupt is fully recognized; and in Re Janes, 133 Fed. 912, 67 C. C. A. 216, a decision of the Circuit Court of Appeals for the Second Circuit, the contrary view is taken. A careful consideration of the entire subject and review of the authorities convinces this court that, whatever may have been the correct rule under former bankruptcy acts, the latter case, a decision of Judge Lacombe, of the Second circuit, concurred in by Judges Wallace and Townsend, presents the correct construction of the law under the present act; and, however much force there may have been in the contention made by petitioners under the former bankruptcy acts, or what may be the correct general doctrine applicable to the settlement and distribution of partnership estates, that it was clearly within the power of Congress to adopt a method for marshaling such assets, to be applied to the respective classes of creditors, which it has done, and in terms too clear and comprehensive to admit of the necessity for interpretation further than to adopt and follow its plain mandates. To ingraft upon this act the exception sought to be maintained by the petitioners would be manifestly improper on the part of the court, and in the language of Judge Lacombe in Re Janes, supra, would be judicial legislation. An able discussion on the subject will be found in the opinion of the

lower court (128 Fed. 527), to which we refer, as also to In re Mills (D. C.) 95 Fed. 269, and In re Corcoran, 12 Am. Bankr. Rep. 283.

For the reasons given herein, the action of the lower court is in all respects approved, and the petition for review denied.

EVANS v. JOHNSON.

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

No. 2,243.

CORPORATIONS—ULTRA VIRES ACT—GUARANTY—ESTOPPEL.

H., being indebted to claimant on certain notes and desiring to form a corporation to take over his merchandise business, informed claimant of his intention. Claimant demanded that, if H. did so, the corporation should guaranty the paper. H. formed the corporation and sold the business to it, taking in return full paid capital stock, after which H., as president of the corporation, indorsed a guaranty on the notes to claimant on behalf of the corporation, after which H. acquired all of the corporation's stock. *Held*, that the corporation, never having received any benefit from its ultra vires act in guarantying such notes, was not estopped to deny the power to execute such guaranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1554–1558.]

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

Appeal by the trustee in bankruptcy of the Hansen Mercantile Company from an order allowing the claim of Johnson. In February, 1901, Johnson sold to Hansen his interest in a mercantile business previously owned in partnership, and in part payment took Hansen's personal notes for $9,000. Hansen continued the business in his own name for nearly two years. He removed the goods to another town and reduced the principal of the notes to $7,500. In January, 1903, he caused the mercantile company to be incorporated under the laws of Minnesota with power as expressed in its charter to transact a mercantile business. He sold to the company his stock of merchandise then on hand for $20,000 of the capital stock of the company, fully paid. The merchandise was fairly worth the par value of the stock. About eight months afterwards, August, 1903, he executed to Johnson renewal notes for the balance of his indebtedness. These notes were dated back to February, 1903, and upon each thereof was a form of guaranty which Hansen as president executed in the name of his company. It is upon the guaranty of these notes that Johnson bases his claim. At the time Hansen did this there were outstanding in the hands of individual holders the following amounts of the capital stock of the company: $17,000 held by Hansen, $1,500 by his wife, $1,500 by clerks in the service of the company who purchased from Hansen for valuable considerations, and $5,000 by another party who bought direct from the company at full par value. When Hansen executed the renewal notes, he delivered his $17,000 of stock to Johnson as collateral, and the latter continued to hold it until the hearing before the referee. Hansen never obtained from the directors or stockholders of the company authority to obligate it for the payment of his personal debts nor was his action ever confirmed by them. No entry of the liability so attempted to be created appeared upon the books of the company, and no consideration for the guaranty moved to it. To establish a consideration and the elements of an estoppel Johnson testified that in November, 1902, about two months before the incorporation of the company, Hansen mentioned to him his purpose in that connection, and that he (Johnson) said that in such case Hansen would have to either pay or secure him; that he would not allow him to put his personal assets into a corporation

while owing him $7,500 past due, but that, if he gave Hansen more time on the indebtedness, the latter would "have to guaranty the paper by the corporation soon after he got incorporated." Johnson testified that Hansen agreed to this, and we will consider the case according to his version, though there was a conflict in the evidence. In a legal and obligatory sense Johnson did not extend the time upon Hansen's indebtedness. The renewal notes were payable upon demand, and Johnson was at liberty to proceed upon them at any time after their execution. Four payments of interest upon these notes were made by the checks of the company. The first, for $600, was charged to Hansen's personal account upon the books of the company, and the other three, aggregating $600, were entered as expense items with nothing to indicate to whom they went. The company became bankrupt in July, 1904. The referee allowed the claim and the allowance was approved by the District Court.

W. A. Sperry (Lewis L. Wheelock, on the brief), for appellant.

Lafayette French and Henry A. Morgan (John F. D. Meighan, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The bankrupt corporation had no power under its charter to guarantee the obligations of others. Therefore to sustain his claim Johnson invokes the Minnesota doctrine of estoppel in connection with a contention that the company received a consideration for the guaranty of the notes. Willis v. Sanitation Co., 53 Minn. 370, 55 N. W. 550; Kraniger v. Building Society, 60 Minn. 94, 61 N. W. 904; Rosemond v. Autograph Register Co., 62 Minn. 374, 64 N. W. 925; Africa v. News Tribune Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. Rep. 424, Hunt v. Malting Co., 90 Minn. 282, 96 N. W. 85.

But the decisions of the Supreme Court of Minnesota which are relied on proceed upon the theory that a corporation is estopped from availing itself of the defense ultra vires when otherwise it would be permitted to do an injustice, as, for instance, when the corporation has received the benefit or advantage from its act, and still retains the same. The case before us is not of that character. The notes which Johnson held evidenced the personal indebtedness of Hansen, not the indebtedness of the company. The original consideration for them passed nearly two years before the company was incorporated and two years and eight months before Hansen as its president assumed to bind it as guarantor. When Hansen sold his goods to the company the latter paid in full by issuing to him fully paid capital stock; and thereafter upon the faith and credit of the condition so established Hansen sold portions of the capital stock to others, and, on the other hand, the company went into the markets, did business, and incurred obligations. Johnson retained no lien upon the goods sold to the company, and was in no position to dictate or control the disposition of them by the owner. That he would not permit Hansen to sell them to a corporation was a threat he had no right to make in the absence of a purpose on the part of Hansen to defraud. There was no contract or promise that the corporation should buy the goods by paying the consideration or any part thereof to Johnson. The entire consideration was paid direct to Hansen, and Johnson knew it when he took Hansen's stock as collateral to the notes. There was no undertaking on the part of the

company either to pay Johnson's claim or to guarantee it as part of the consideration it was to give for what it got. In this respect the case differs from National Bank of Commerce v. Allen, 33 C. C. A. 169, 90 Fed. 545.

The state by whose authority a corporation is organized, the stockholders who compose it, and its creditors whose demands have arisen in the course of its legitimate business are all interested in having it confined to the lawful exercise of its corporate powers. In this case the creditors especially would suffer by adding to the liabilities of the bankrupt company the personal debt of its president. The company was organized to transact a mercantile business. It had no power under its charter to guarantee the debts of others, and in this case it received and retained no consideration for doing so. That it was a small corporation, the stock of which was largely owned by one man who controlled its operations, cannot alter the principles of law which are applicable. It is urged that after the transactions in question occurred Hansen purchased the stock of the other stockholders; also that certain payments of interest upon the notes were charged to the expense account of the company. But these features of the case do not furnish the elements of an estoppel.

The order is reversed, with direction to disallow the claim.

NEEL et al. v. IRON CITY SAND CO.

(Circuit Court of Appeals, Third Circuit. January 25, 1907.)

No. 65.

1. SALVAGE—VOLUNTARY SERVICE.

The Return, having broken her shaft, was floating helplessly on the Ohio river, when she made signals of distress to libelants' steamboat, in response to which the latter made fast its tow to a telegraph pole on the river bank and went to the Return's assistance. The Return was without means to get out a line, and was in grave peril of drifting against the wall of a dam, or another obstruction below, when libelants' vessel took her to a landing. *Held*, that the service rendered by libelants' vessel was voluntary, and constituted a salvage service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 14, 28.]

2. SAME—AWARD—AMOUNT.

A decree awarding libelants $25, and directing each party to pay their own costs, was inadequate; libelants being entitled to at least $100, with costs in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 70, 71.

Salvage awards, see note to The Lamington, 30 C. C. A. 280.]

3. SAME—COURT OF ADMIRALTY—SALVAGE SERVICE—JURISDICTION.

Where a charge for landing a steamer in distress was really a claim for salvage, it was rightfully cognizable by a court of admiralty in a proceeding wherein the members of the salving vessel's crew could participate; and hence such claim was properly withdrawn from an action by the owner of the salving vessel in a state court against the owner of the vessel saved to recover on an account for services rendered, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 117.]

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

L. C. Barton, for appellants.
Wm. A. Stone, for appellee.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty in a suit which was instituted by the appellants to recover for salvage services claimed to have been rendered to the steam vessel Return. The District Court awarded the libellants the sum of $25, and ordered each party to pay its own costs. We have considered the case de novo, upon the only questions it involves. They are: (1) Was the aid which was rendered to the Return a salvage service, or one of towage merely? (2) If in fact and in law it was a salvage service, was the libelant precluded from asserting it to be so?

1. On March 11, 1902, the Return, having in tow a flat laden with sand, had broken her shaft and was floating helplessly upon the Ohio river. The steamboat George W. Moredock, by whose master and crew the service in question was rendered, was bound down the river, and to her the Return made signals of distress. The Moredock, in response, detached the coal-laden flat which she was towing, and, having made it fast to a telegraph pole on the river bank, went to the assistance of the Return. The small boat of the latter had been sent ashore "to telephone," and as this left her without means of getting out a line, she was likely to drift against the wall of the Davis Island dam, or the Bear Trap, below. The Moredock took her to a landing. She had been in grave peril, and her attainment of a place of safety was unquestionably due to the help which she asked for and received. The service, then, was rendered in saving a vessel which was in danger from a maritime misadventure, and, as it was rendered by persons who were under no obligation to render it, it is impossible to regard it otherwise than as a service of salvage. The case of The C. D. Bryant (D. C.) 19 Fed. 603, referred to by the learned proctors of the appellee, is plainly distinguishable. That case involved the consideration of the Oregon pilot act of 1882 (Sess. Laws 1882, p. 15), under which a pilot was bound to render aid to a vessel "in stress of weather, or in case of disaster"; and it was held to be the duty of the pilots subject to that act to give whatever assistance might be required of a pilot as such, without other compensation than that prescribed by the law, unless he thereby incurred "extraordinary danger and risk." But in this case the rendition of the service was voluntary, and no statutory duty or requirement is in question.

2. The owner of the George W. Moredock brought an action in a Pennsylvania court against the owner of the Return to recover upon an account for services rendered, in which was included a charge of $25 for "landing steamer Return," etc. But this charge was subsequently withdrawn from that suit, and properly so, because, as the claim was really for salvage, it was rightly cognizable by a court of admiralty, and in a proceeding wherein the members of the Moredock's former crew could participate.

Having reached the conclusion that the service rendered was one of salvage, and that the libellants were entitled to have it so considered, we think it obvious that, while the award ought not to be a large one, the sum fixed by the decree appealed from is too small, and that the order as to costs was not as favorable to the libellants as it should have been. Therefore the decree is reversed, with costs to the appellants in this court, and the cause will be remanded to the District Court, with direction to enter a decree awarding to the libellants the sum of $100, with costs in that court.

MARTIN et al. v. HULEN & CO. et al.

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

No. 2,345.

BANKRUPTCY—ACTS OF BANKRUPTCY—MORTGAGES.

Within four months preceding the filing of a bankruptcy petition H. & Co. purchased a stock of goods for $3,000, paying $100 in cash and giving notes for the remainder. At the same time they gave a chattel mortgage on the goods so purchased to secure the payment of the notes, which mortgage covered all additions to the stock and all stocks that might thereafter be consolidated with it. Immediately after the purchase and execution of the mortgage H. & Co. consolidated such stock, which was worth the price agreed to be paid for it, with that which they had previously owned, acting in good faith and in accordance with the previous intention to unite the two stocks, so that the mortgage should cover both. *Held*, that the execution of such mortgage did not constitute an act of bankruptcy.

Appeal from the District Court of the United States for the Southwestern Division Judicial District of Missouri.

Oscar T. Hamlin, for appellants.

John L. McNatt (H. H. Bloss, on the brief), for appellees.

John S. Farrington, for Abe Lemaster.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The question presented by this appeal is whether Hulen & Co., a copartnership, committed an act of bankruptcy in mortgaging, whilst insolvent, a stock of goods owned by them. Within the four months preceding the filing of the petition against them they purchased of one Lemaster another stock of goods for the sum of $3,000, paying $100 in cash and giving their notes for the remainder. At the same time they gave a chattel mortgage upon the goods so purchased to secure the payment of the notes. By its terms the mortgage extended to and covered all additions to the stock of goods and all stocks that might thereafter be consolidated with it.

Immediately after the purchase and the execution of the mortgage Hulen & Co. consolidated the Lemaster stock with that which they previously owned, and it is claimed by appellant that, as they were then insolvent, they committed an act of bankruptcy. The goods purchased from Lemaster were worth the purchase price, and the master found that Hulen & Co. acted in good faith, and that there was in fact no intention to give a preference. While transactions of that

character by an insolvent should be closely scrutinized we are of the opinion that no act of bankruptcy was committed. The fact that the goods purchased were worth the price to be paid for them, and the good faith of the parties, repel all inference of intent to prefer. The reasonable presumption from the findings of the master is that both Hulen & Co. and Lemaster contemplated the union of the two stocks of goods, and that the mortgage should cover all of them. Therefore it cannot well be said that the latter was a creditor who after the creation of his claim secured a mortgage upon his debtor's property. What they did should be fairly regarded as a single transaction, and when it was consummated the estate of Hulen & Co. was in no worse plight so far as unsecured creditors were concerned than it was before.

The order of the District Court is affirmed.

BOWERS v. LAKE SUPERIOR CONTRACTING & DREDGING CO.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1906.)

No. 2,322.

1. PATENTS—LICENSES—ASSIGNABILITY.

A license to use a patented invention that does not contain words importing assignability is a grant of a mere personal right to the licensee, which does not pass to the licensee's heirs or representatives, and which cannot be transferred to another without the express consent of the licensor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 316.

Sublicensees and assignment of licenses for use or sale of patents, see National Phonograph Co. v. Schlegel, 64 C. C. A. 596.]

2. SAME—UNASSIGNABLE LICENSE—CONDUCT OF PARTIES.

A continuing assignable quality may be given to a license to use a patented invention originally unassignable, by facts and circumstances and the conduct of the parties during the continuance of the license.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 320.]

3. SAME—ASSIGNMENT.

Plaintiff executed a license authorizing B. to use certain patented inventions in connection with a hydraulic dredge, on payment of certain royalties. This license was not assignable, and after certain royalties had become due and were unpaid B. requested certain changes in the contract, including the insertion of words authorizing an assignment, which plaintiff agreed to make on B. sending a draft for the royalties then due, with accrued interest. B. did not pay such interest, however, and was never notified that it had been waived, but on B.'s death his executrix continued to operate the dredge and another dredge purchased, which, also, contained certain of the patented inventions, and paid royalties thereon, after which she transferred the dredges to defendant corporation under a bill of sale passing the entire dredging plant, business, and contracts, and all licenses to practice or enjoy patented inventions, together with the license papers. Defendant, with knowledge that executrix had been operating under the license and that she asserted a right to transfer and had made manual delivery thereof, continued to operate the dredge and patented appliances without disavowal of responsibility, or repudiating responsibility for royalties, which plaintiff thereafter demanded. *Held*, that defendant should be regarded as a licensee and as such was liable for royalties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 320.]

4. SAME—ROYALTIES—AMOUNT.

Plaintiff executed an unassignable license, authorizing B. to use certain patents on dredging machines which had been installed on a hydraulic dredge known as the "West Superior"; B. agreeing to pay specified royalties therefor. B. thereafter applied to have the license made assignable, and for reduction of the royalty rate, which plaintiff refused to do unless B. paid certain interest on past-due royalties and equipped another dredge of a specified capacity. B. performed neither of these conditions, but later purchased a dredge containing certain of the patented inventions which had been emancipated from further payment of royalties, but which was scarcely half the capacity required by plaintiff in his offer to reduce, after which both B. and his executrix paid royalties at the reduced rate until the executrix transferred all the dredges, licenses, etc., to defendant corporation with plaintiff's consent. *Held*, that there was no valid contract for the reduction of the royalty rate, and that defendant was therefore liable only for royalties on the work done by the original dredge at the price originally fixed in the license.

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

This was an action by Alphonzo Benjamin Bowers against the Lake Superior Contracting & Dredging Company to recover royalties alleged to be due under a license for the use of certain patented inventions connected with hydraulic dredges. At the conclusion of the evidence the trial court directed a verdict for the defendant, and the plaintiff prosecutes this proceeding in error.

Bowers was the owner of a number of patents on dredging machines, and one Barker was the owner of a hydraulic dredge known as the "West Superior," which contained some of the patented features and which he had been operating without the consent of Bowers in the performance of a contract with the United States to do certain dredging work in the harbors of Duluth and Superior at the western end of Lake Superior. In May, 1899, Bowers and Barker entered into a contract embracing a settlement for past violations, and granting to Barker a license to use the patented inventions on Lake Superior and tributary waters for the remainder of the terms of the patents. The license ran to Barker alone, and not to his heirs and assigns. It was therefore not assignable. The agreed royalty was one cent per cubic yard of material excavated under the government contract, and 2½ cents per cubic yard of material excavated under other contracts. Barker operated under the license during the season of 1899. In the autumn of that year he requested by letter certain changes in the contract of license, and on November 9, 1899, Bowers replied, granting his request only in part, and authorizing the interpolation in the written contract of certain words, among which were "heirs, representatives and assigns," for the purpose of making the license assignable. Bowers' consent to this, however, was conditional. After saying that he expected interest at the rate of 7 per cent. upon the several amounts of royalty then past due and unpaid, he concluded his letters as follows: "Please send me drafts for these sums with said interest. The aforesaid changes in the license are to be made and become effective only on receipt of said draft by me." One of the important questions in the case is whether this modification ever became effectual.

June 18, 1900, Bowers made a written proposition which was accepted by Barker, the licensee, that after that month he would allow a rebate of a half cent per yard on the government work provided the latter promptly made his monthly payments of royalty, and also had at the commencement of the season of 1901 a second dredge of specified capacity ready for work, the reduced rate to apply to the government work done by both dredges. During the remainder of the season of 1900 Barker operated the West Superior dredge and paid royalty at the half-cent rate. Before the next season opened Barker bought a dredge known as the "Northwestern," which had been built some years before under license from Bowers and emancipated from further payment of royalty by the payment of a lump sum. Barker then died, leaving a will wherein his wife was named executrix. Mrs. Barker, having qualified, operated both dredges during the entire season of 1901, the West Superior on

government work and the Northwestern on private contracts. She made monthly reports to Bowers of the work done by the former, and made payments of royalty down to November at the reduced rate, but made no reports or payments in respect of the work of the Northwestern.

In the latter part of November, 1901, a controversy arose between Bowers and Mrs. Barker as to whether the dredge Northwestern came under the supplemental contract of June 18, 1900, and its operation, therefore, became the subject of royalty, and, if not, then whether the estate should pay royalty of one cent per yard of the work done by the Superior, which was the rate prior to the reduction agreed upon in view of the employment of a second dredge. This controversy was settled by the payment of a lump sum materially in excess of the royalty due for the work of the West Superior on the half-cent basis, but the settlement receipt did not show which theory was adopted.

In April, 1902, Mrs. Barker sold to the defendant dredging company the entire dredging business and property, including the dredges West Superior and Northwestern. The bill of sale contained this clause: "This instrument is intended to include and convey all patent rights and all licenses to practice or enjoy patents and patented inventions appertaining to the dredging business owned or controlled by first party." The first party in this bill of sale was Mrs. Barker, the executrix. At the consummation of the sale there were turned over to the defendant dredging company the original Bowers license covering the Northwestern and also the license to Barker covering the West Superior. Thereafter the defendant operated the latter on the government contract and on private work, and also operated the Northwestern exclusively on private work, but it made no reports of work done and no payments of royalty. Bowers' action was brought to recover royalty claimed to be due on account of the work done by both dredges.

John H. Miller (H. G. Gearhart, on the brief), for plaintiff in error.

Thomas J. Davis (Theodore Hollister, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The assignment of error relied on is that the trial court erred in directing a verdict for the defendant. The action of Bowers for royalty is founded upon the assertion of the existence between him and the defendant dredging company of the relation of licensor and licensee of his patented inventions. It is claimed that such relation is deducible from the original nonassignable license to Barker, the amendment thereof by the insertion of the words "heirs, representatives and assigns," the supplemental contract authorizing the use of a second dredge and the reduction of the agreed royalty rate, the death of Barker, the passing of the license to his wife as executrix, her sale of the dredges and all appertaining licenses to the defendant, and its acceptance thereof and continued use of the dredging machines.

It is also claimed that, even though there was no amendment of the license to Barker during his lifetime, it was in fact treated as assignable by both Bowers and Mrs. Barker, the executrix, and that if the nonassignable character of a license is once waived as to one assignee it is by force thereof waived as to all succeeding ones, and the license thereupon takes its place among those that may be transferred by the act of the holder or by operation of law at his death. It is further claimed that, aside from the foregoing, when the defendant accepted from Mrs. Barker as executrix the bill of sale of the dredges

and licenses pertaining thereto and received into its possession the Barker license, and without repudiating it continued the operation of the dredges, it cannot be heard to say that it was acting adversely to the plaintiff or that its position was antagonistic to the validity of his patent rights.

First as to the original license and the question whether it was amended in respect of its nonassignability during Barker's lifetime. A license to use a patented invention that does not contain words importing assignability is a grant of a mere personal right to the licensee which does not pass to his heirs or representatives and which cannot be transferred to another without the expressed consent of the licensor. Hapgood v. Hewitt, 119 U. S. 227, 234, 7 Sup. Ct. 193, 30 L. Ed. 369; Oliver v. Rumford Chemical Works, 109 U. S. 75, 82, 3 Sup. Ct. 61, 27 L. Ed. 862; Troy Iron & Nail Factory v. Corning, 14 How. (U. S.) 193, 216, 14 L. Ed. 383.

Both parties to this controversy agree that, tested by this well-established rule, the license from Bowers to Barker was not assignable while in its original form, unchanged by agreement. But Bowers claims that there was evidence sufficient to require submission to the jury of an agreement between him and Barker that words importing assignability should be inserted at the appropriate place in the contract. The evidence upon the subject was substantially as follows: Shortly after the execution of the license Barker, who was in Wisconsin, wrote to Bowers, who lived in California, requesting that four specified changes be made, and that a new contract of license be drawn embodying them, and be also signed by another party who was supposed to have an interest in the patents. Bowers replied, denying that any one else had any substantial interest, declining to make two of the changes, consenting to one in a modified form, and agreeing to the remaining one making the license assignable by the insertion of the words "heirs, representatives and assigns." He did not adopt Barker's suggestion that a new contract be prepared. He called Barker's attention to the fact that some installments of royalty were past due and unpaid, and said that he should expect interest thereon at the rate of 7 per cent. per annum. He concluded his letter as follows:

"Please send me drafts for these sums with said interest. The aforesaid changes in the license are to be made and become effective only on receipt of said draft by me."

The evidence leaves it uncertain whether Barker paid the past-due royalty by draft as requested or by promissory note. If it were important whether he paid by draft instead of by note, it should be said that there was a sufficient conflict in the evidence to require a submission to the jury. But, whatever the fact in this particular may have been, it was admitted by Bowers that Barker did not pay either by draft or by note the accrued interest upon the past-due installments of royalty. Bowers testified that he waived the interest, but there is no evidence in the record that such waiver was ever communicated to Barker. A waiver of the condition in whole or in part should have been brought to the attention of Barker. So far as the record shows, Barker's conduct was entirely consistent with the position that he did not think it worth while to accept the changes that Bowers was willing

to concede. What he subsequently paid, whether by draft or by note, was no more than he owed and should have paid had nothing whatever been said about the amendment of the license. About seven months later Bowers and Barker met in Wisconsin and agreed upon the supplemental contract of June 18, 1900, but it contains no recognition of any prior changes in the original license, nor does it appear from the record that any discussion of the matter occurred between them.

As in the making of a contract so in the amendment of one there should be a meeting of the minds of the parties. Consent by one party to an amendment upon a specified condition to be precedently performed by the other must be followed by performance, unless the condition is waived by him who imposed it and the fact of waiver made known to the other. The condition is to be considered as rejected if, without knowledge of the waiver, there is failure to perform it. It is quite clear from Bowers' subsequent conduct that he regarded the license as having been made assignable. Since the license by its terms ran during the life of the patents, an assignable quality would have been of such benefit to Barker that slight evidence would have been sufficient to show his acceptance of an offer of it, but an acceptance cannot be inferred merely because it would have been beneficial. There is nothing in the evidence showing that Barker was aware of the waiver by Bowers of the condition, and nothing in his acts indicating that he regarded the provisions of the original license as having been changed. The trial court was, therefore, right in holding as it did that upon the evidence adduced Bowers and Barker did not come to an agreement upon the proposed amendment. But it is also clear that after Barker's death both Bowers and the executrix regarded the license as having passed to the latter. She continued the operation of the dredge West Superior, which was the subject thereof, without seeking or procuring from Bowers any new or additional authority, nor did Bowers himself consider that any act of his was necessary to confer upon her the lawful right to proceed in the same manner and under the same conditions as existed prior to her husband's death. She continued to make reports of work done by the dredge West Superior, and to make payments of royalty at the half-cent rate which her husband had been paying for the greater part of the preceding season. And when the controversy over the work of the emancipated dredge Northwestern, whether it should be considered as the second dredge under the contract of June 18, 1900, and, if not, whether she should pay the one-cent rate for the work of the West Superior, was settled by the payment of a less sum than was due upon either theory, Bowers and the executrix expressly agreed that the amount of royalty to be paid in the future should be determined by the contracts, letters, arrangements, and agreements as they existed prior to the death of Barker. This was evidently for the purpose of rebutting any presumption that a new arrangement was entered into with the executrix differing from that which theretofore existed, and it was consistent with a recognition that the license with its various conditions and modifications became at the death of Barker an asset of his estate. There was no evidence of the granting of a new license to the executrix. The

conduct of the parties showed that they considered the old one to have passed by operation of law, a species of assignment, to the estate of the original holder.

It is true, as contended by defendant, that a license may be created by parol and be established by clear implication from proven facts and circumstances (Solomons v. United States, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667; McClurg v. Kingsland, 1 How. [U. S.] 202, 205, 11 L. Ed. 102; Anderson v. Eiler, 1 C. C. A. 659, 50 Fed. 775; Withington-Cooley Mfg. Co. v. Kinney, 15 C. C. A. 531, 68 Fed. 500), but it is also true that by like implication arising from facts and circumstances and the conduct of the parties a continuing assignable quality may be given to a license originally unassignable. That the proof thereof rests in parol is not material where no one is concerned except the parties and their privies. Whatever Barker's position may have been, both Bowers and the executrix regarded the license as having passed to the latter by operation of law, and not as being held by her by reason of any new contract to that end. While this condition subsisted the executrix sold and gave to the defendant a bill of sale of the entire dredging plant, business, and dredging contracts, including the dredges Northwestern and West Superior and "all licenses to practice or enjoy patented inventions," and as part of the transaction turned over to defendant the Barker license affecting the West Superior and also the license papers connected with the Northwestern. The defendant accepted the bill of sale so worded and received and retained possession of the Barker license, and thereafter, without repudiating the license before this controversy arose, it continued the use and operation of the dredge to which it related. Bowers acquiesced in this last transfer. His attitude is indicated by his demand for royalty. After the death of Barker and until this controversy arose all parties treated the license as being assignable. That the defendant did so is shown by its knowledge that the executrix had been operating under the license, and that she asserted a right to transfer it and made manual delivery thereof, and by the fact that it accepted the license, and continued the use of the dredge with its patented appliances without disavowal of responsibility. It should not be allowed to occupy a position in which, if sued in tort for an infringement, it could interpose in defense the contract of license, and, if sued for royalty under the license, it could then deny any contract relation, and insist that its acts were in hostility to the validity of the patents. We are of the opinion that under the evidence the defendant should have been held as a licensee.

As the case must be again tried, it will be helpful to express our opinion upon the measure of recovery—whether royalty should be computed upon the work of both dredges or be confined to that of the West Superior, and, if the latter, then at what rate.

The supplemental contract of June 18, 1900, between Bowers and Barker did not impose upon the latter an obligation to procure and operate a second dredge. It merely gave him the option to do so, and, if exercised, applied a reduced rate to the excavations of both dredges. At this time Barker contemplated the construction of another dredge, but he seems to have abandoned the project. He pur-

chased the Northwestern, which, though licensed by Bowers, was emancipated from the future payment of royalty. Moreover, this dredge had scarcely half of the capacity required by Bowers in the option to Barker. What Barker's purpose was does not appear because he died before the Northwestern was put to work the ensuing season. Apart from the provisions of the contract of June 18th, it could have been operated without liability of any kind to Bowers. When the executrix operated both the Northwestern and the West Superior after her husband's death she availed herself of the reduction of the one-cent rate upon the government work done by the latter dredge to the half-cent rate which was to prevail upon compliance with the option. Her husband had been paying this same reduced rate during the greater part of the preceding season. Were this all, it might be inferred that it was the intention that the Northwestern should perform the part of the second dredge, and that its emancipation from royalty was waived for the time being. But, on the other hand, the executrix made no reports of the work of the Northwestern, and made no payments on account thereof before the controversy arose at the end of the season of 1901. Near the beginning of the following season she made the sale to the defendant. The settlement of the controversy did not indicate what theory was adopted, but it fairly appears that the executrix through her counsel persisted in claiming the continued exemption of the Northwestern from the payment of royalty. Considering the acts of the parties, the marked difference in capacity of the Northwestern from that of the second dredge required by Bowers, and the fact that it had been emancipated and was the subject of unrestricted use, we are of the opinion that the terms of the option had not been complied with, that the Northwestern remained a free dredge, and that recovery should be limited to royalty upon the operation of the West Superior. As there was no reduction by the employment of a second dredge, the rates for government and private contract work obviously remained as originally fixed in the license.

The judgment is reversed, and the cause is remanded for a new trial.

MURRAY CO. v. CONTINENTAL GIN CO.

(Circuit Court of Appeals, Third Circuit. January 6, 1907.)

No. 20.

1. PATENTS—ASSIGNMENTS—ACKNOWLEDGMENT.
   The acknowledgment of an assignment of a patent relates to the date of the assignment.
2. SAME—INFRINGEMENT—FEEDERS FOR COTTON GIN.
   The Murray patent, No. 472,607, for an improvement in apparatus for elevating, distributing, and feeding seed cotton to gins by pneumatic action, the principal feature of which is an automatic valve produced by the cotton itself whenever it becomes choked in a chute, which shuts off the suction and the delivery of cotton to that particular chute until the stoppage is overcome, was not anticipated, and, while the elements of the machine are old, discloses a new and patentable combination which produces new and decidedly useful result. Also *held* infringed as to claims 1, 2, 9, and 12.

3. SAME.

The Murray patent, No. 644,532, for improvements in cotton elevators and gin feeders, is void for anticipation.

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

See 126 Fed. 533.

Oliver Mitchell and Edmund Wetmore, for appellant.

Melville Church, for appellee.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The bill of complaint in this cause relates to letters patent No. 472,607, 488,446, and 644,532, and alleges that they have been infringed by the defendant. As to No. 488,446, however, counsel for the complainant has, since the commencement of the suit, abandoned all claim for relief thereunder, and it will, therefore, require no further mention. No. 472,607 was issued April 12, 1892, to Stephen D. Murray, assignor to William Burr and John H. Deems, for new and useful improvements in apparatus for elevating, distributing, and feeding seed-cotton to gins, and the bill of complaint alleges that the defendant has infringed claims Nos. 1, 2, 9, and 12 thereof, which are as follows:

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

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

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

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

Before discussing the merits of the case, we will first briefly consider the point made on behalf of the defendant, that the complainant has not shown title to this patent. Several alleged defects are set forth in the brief, but the only one urged at the oral argument was that notwithstanding the assignments, so far as appears, were duly executed and delivered at the times they were respectively dated, they nevertheless, having been acknowledged several years subsequently, only took effect, in the absence of strict proof of the assignments as at common law, from the dates of their acknowledgment, and that under the evidence no infringement of the patent was shown between those

dates and the time of filing the bill of complaint herein. In volume 1 of Am. & Eng. En. of Law, title "Acknowledgments," p. 524, the following rule is laid down:

"In the absence of a statute designating the period within which acknowledgments must be made, it is immaterial when a deed is acknowledged. The acknowledgment may be made after bringing suit when the instrument is offered in evidence."

It is true that in the case of Hollingsworth v. Flint, 101 U. S. 591, 25 L. Ed. 1028, where the acknowledgment and privy examination of a married woman was made after the commencement of the suit, it was held that the deed could not be offered in evidence; but the decision was put by Mr. Justice Harlan expressly upon the ground that at the time of the commencement of the suit the deed had not been acknowledged as required by the Texas statute in order to pass the title of a married woman under the law of that state. In Doe v. Dugan, 8 Ohio, 87, 31 Am. Dec. 432, a deed executed by a sheriff while in office was acknowledged by him after his term of office had expired, and it was held that such acknowledgment related back to the time of the execution of the deed. In Lanning v. Dolph et al., Fed. Cas. No. 8,073, a deed was offered in evidence in an action in ejectment, and objection was made to its admission because the deed was acknowledged and recorded after the suit was brought. Mr. Justice Washington, who tried the case, held the objection invalid, since the acknowledgment and recording related back to the execution of the deed. An acknowledgment is nothing more or less than a substitute method of proving a deed, and does not affect its validity in the least. Section 4898 of the Revised Statutes, as amended by Act March 3, 1897, c. 391, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3387], simply provides a new method of proof. The evident intent of the act was to substitute proof of execution by acknowledgment, instead of by the production of the subscribing witness, if there were one, or proof of the handwriting of the assignor, if there were no subscribing witness. In De Laval Separator Co. v. Vermont Farm Mach. Co. (C. C.) 109 Fed. 813, it was held that assignments which were acknowledged before the passage of that act were admissible in evidence thereunder, and that the act referred "to the time," to use the language of the court, "when the acknowledgment is produced in evidence, rather than to the time when it was taken." The rule thus laid down was approved by the Circuit Court of Appeals for the Eighth Circuit in Lanyon Zinc Co. v. Brown et al., 115 Fed. 150, 53 C. C. A. 354. The complainant in this case had in his possession, and produced at the hearing, assignments of the patent in suit acknowledged by the assignors, which showed at least a prima facie title thereto in the complainant.

On the part of the defendant it is maintained that the Munger patent, No. 308,790, dated December 2, 1884, the Sailor patent, No. 362,041, dated April 26, 1887, and the Schulze patent, No. 478,473, dated July 5, 1892, narrowed the art to such an extent that the complainant's patent, No. 472,607, must be narrowly and strictly construed in order to maintain its validity, and that thus construed the defendant's ap-

paratus did not infringe claims 1, 2, and 12 thereof. It is unnecessary to consider at any considerable length in this connection the Munger or the Sailor patent, although they both disclose a pneumatic cotton elevator, since the former has only a belt distributor, and the latter valves or deflectors, as the patentee calls them, whereby the passage of the cotton into the different vacuum boxes, arranged in series, is regulated, not automatically, but by hand. The Schulze patent undoubtedly represents the highest development of the art prior to the Murray patent under consideration, and it was upon that patent that counsel for the defendant mainly relied to show anticipation. It is quite true that the Schulze and Murray machines are in some respects alike, and from a mere cursory examination they might seem to be so much alike that very little, if anything, of novelty or invention could be discovered in the Murray patent; but, when carefully examined, it will appear that, while the elements embodied in the Murray patent are old, they are, nevertheless, combined and organized in such a way as to accomplish a new and decidedly useful result. What Murray more especially claims by his patent is an automatic valve produced by the seed-cotton itself, so that, when the cotton becomes choked in the chute and fills it to the top of the screen-walls, the air suction is entirely cut off, and the delivery of cotton to that particular chute is suspended until the stoppage in the chute is overcome, or, adopting the language of the patentee:

"When the cotton accumulates in the feeder too fast and reaches to the top of the screen-walls of the space 5, it is evident that the suction from pipe or tube 1 will be cut off and the cotton will cease to be drawn in; but as soon as one or more of the feeders have fed out sufficient of the cotton to allow some part of the screen-walls to be free or open, the suction again becomes effective in the manner already explained."

It is true that the claims do not in terms refer to the automatic action of his system, but we think such reference is wholly unnecessary. He sets out the orderly arrangement of the parts intended to produce the result, and which, as the evidence shows, do produce the result he has described in his specifications. The patent cannot be read without discovering that the main object of the inventor was to install an automatic valve produced by the seed-cotton itself, and which would at all times, in case of chokage of the cotton, prevent the cotton in the chute from rising above the bottom or lower side of the cotton pipe. Under his system the choked cotton, if any, is all contained within the perpendicular chute, and is in a position whence, as soon as the choke is relieved at the bottom of the chute, the cotton will fall by gravity; whereas, not only in the Schulze system, but also in all of the other systems, the cotton when choked is liable to be forced ultimately beyond the chute itself into the internal portion of the cotton pipe, from which position it cannot, under any circumstances, be released by gravity. The result achieved by Murray's device is accomplished by having the cotton feed-pipe located above the air pipe, as also by so arranging the screened air-passages that they do not extend upwardly above the bottom of the cotton feed-pipe. Schulze approximates this same result, but does not attain it, nor was it in his mind,

since his screened air-passage extends upward to the very top of the cotton feed-pipe, with the result that, when the cotton becomes choked in the chute, it will continue to fill up the chute, as it will also in the Murray system, until the air suction has been completely shut off by the choked cotton, but this will not happen under the Schulze device, owing to the height and location of the screen, until the cotton will have been forced over the bend or angle of the cotton-pipe and into the lateral portion thereof, whence it cannot be relieved by its own weight. Furthermore, Schulze, in order to accomplish what he did, deemed it necessary to adopt, and did adopt, various mechanical cut-offs and valves which are unnecessary to the Murray patent. Our conclusion, therefore, is that Murray's patent discloses a decided advance in the art, and very clearly shows novelty and invention.

What has been said pertains more appropriately to claims 1, 2, and 12, but we think claim 9 is also valid. It relates to feed-rollers supported at the bottom of the chute, with means to regulate the feed of the rollers. The use of such rollers was undoubtedly old in the art, but as theretofore used the rollers were located at or near the gin. Formerly the cotton fell from the chute upon a moving apron or conveyor-belt, which carried it to the feed-rollers, whence it was fed to the gin. Murray does not require the conveyor-belt, and locates the feed-rollers directly at the bottom of the chute, where they aid in releasing the cotton from the chute, a function which they did not at all perform before. Again, they pay it out at a predetermined rate, which may differ at every chute, whereby, in connection with the other elements of the combination, no more cotton is elevated by the machine than can be properly distributed and fed out. The claim, therefore, discloses in our opinion a true combination, and not a mere aggregation, and is also valid.

The defendant's device clearly infringes all of the claims in controversy, unless such claims are to be read with literal exactness. The defendant has unquestionably adopted and embodied in its apparatus all of the essential elements of the Murray patent, except that it claims that it does not use side air-passages and a central screened-space, emphasizing particularly the words "passages" and "central." It contends that both Munger and Schulze have a side air-passage and a screened-space, which space, however, is not central between side air-passages, and that consequently, in order to avoid the claims of those patents, and to disclose novelty, Murray was compelled to claim as he did. But, as already stated, neither Munger nor Schulze accomplishes what Murray did, nor do they show the same mode of operation. Murray devised what may very properly be called a system or mode of operation, whereby certain old elements of a cotton elevator and distributor, as the result of new organization and arrangement, produced automatic regulation of the device by the cotton itself, and it would be most unfortunate in view of what he has accomplished if we were compelled to construe his claim so narrowly that an infringer could appropriate the entire principle of his invention by using one air-passage, instead of two, and simply conjuring with the meaning of the word "central."

Counsel for the complainant have indicated how the different

elements comprised in the claims of the Murray patent may be so correlated and rearranged as perhaps to more clearly express Murray's invention, without doing violence to the claims themselves. Such rearrangement is as follows:

"In apparatus for elevating, distributing, and feeding seed-cotton to gins, in combination, a cotton pipe, an air pipe having side air-passages, a screen space organized, as described in the specification, below the cotton pipe, a chute or feeder communication with said space, the said space being central between the cotton pipe, air pipe, and chute, as described."

It would seem that the word "central," as used in the claims, is susceptible of the meaning they have attached to it. The claims do not show with entire precision what is meant by the words "central space"—that is to say, it does not clearly appear with what other elements the "central space" must be arranged in order that it may properly be defined as "central"—but, wherever it is located, we certainly find nothing in the claims which imperatively demands that it be located, as claimed by the defendant, between the side air-passages. It would seem that "central space," as used, may mean no more than the space inclosed within the box or casing, and that the phrase "side air-passages" is met by locating them upon one side only, as well as upon both sides. The language used does not require air-passages located on both sides, or on opposite sides, or anything equivalent thereto. There must be side air-passages, but that requirement would be met if there were a plurality of them located upon one side, equally as well as it would be if they were located upon two sides, or upon opposite sides. What has been said applies more especially to claims 1 and 2. Claim 12 is still more general, for in it there is nothing whatever said about side air-passages. All that this claim requires is that there shall be air-passages, and that they shall be screened. Since this is so, there surely is no invention in merely reducing the number of air-passages from two to one, as the defendant has done; nor, again, would such reduction conflict with the Schulze patent or other prior patents, because it is the location of the screened-passages in the Murray patent which, in combination with the other elements, produces its automatic feature, and this in principle the defendant has adopted. Upon the whole the complainant's interpretation of the claims is not unreasonable, and we would feel entirely justified in adopting it were it necessary under the circumstances to do so, in order to sustain the patent, but we do not think it is. Murray's invention, considered as an entirety, rested largely, as already stated, in the automatic valve produced by the cotton itself whenever it became choked in the chute, and which automatic function was accomplished by a new organization of old elements set forth in the claims as interpreted and described in the specifications, and it is this automatic feature which the defendant has appropriated by a like or an equivalent organization of the same elements. The defendant's device has, it is true, but a single screened air-passage, but that, as we have seen, is immaterial, since it is located and arranged in relation to the other elements, so as to perform the identical function which the screened air-passages of the Murray patent perform.

That claim 9 has also been infringed is too apparent to require extended remark. The claim provides for "a set of feed rollers supported at the bottom of said chute or feeder." The defendant contends that the phrase "supported at the bottom" requires the said rollers to be attached to, and to form a part of, the elevator and distributor, while in its device the feed-rollers, although supported directly at the bottom of the chute, are nevertheless detached from and are not a part of it, but of the gin. In other words, it is claimed that since the feed-rollers have been, as it were, sawed apart from the chute and removed therefrom by the width of a saw-cut, infringement of the Murray patent has been avoided. The mere statement of the proposition shows its lack of merit. The entire principle, and, indeed, the very language of the claim, is sought to be appropriated by transparent evasion.

Patent No. 644,532, the second in suit, is invalid. It was clearly anticipated by the Munger patent, No. 680,165. The only apparent difference between the construction described in claim 8, the only one relied upon, of the Murray patent now under consideration and the Munger patent, is that the Murray patent has a plurality of feed-rollers, whereas Munger has a single feed-roller which co-operates with an adjustable or spring pressed breast, a mechanical equivalent. The Murray patent does indeed claim a screw conveyor, whereas in the Munger patent air is used as the conveyor, but, even if these conveyors are not equivalents, still a screw-conveyor is clearly portrayed and described in a prior Munger patent, No. 547,671, where it is located substantially in the same place and performs practically the same function that it does in the patent in suit.

Upon the whole case, therefore, we conclude that the first patent in suit, No. 472,607, is valid, and as to claims 1, 2, 9, and 12, has been infringed by the defendant, and that the second patent in suit, No. 644,532, is invalid.

The decree below should be reversed, with costs, and a decree entered in conformity with the views hereinabove expressed.

MOTSINGER DEVICE MFG. CO. v. HENDRICKS NOVELTY CO.

(Circuit Court of Appeals, Seventh Circuit. November 9, 1906.)

No. 1,264.

PATENTS—INFRINGEMENT—CONTROLLER FOR SPARK GENERATORS.

The Motsinger patent, No. 642,869, for a controlling means for spark generators, adapted to maintain a constant speed of a driven shaft in a gas engine by means of a peripheral frictional contact between a driving wheel and a pulley on such shaft, and means whereby the grip of one wheel upon the other is automatically so varied that, though the driving wheel may rapidly change from low to high speed, the speed of the driven pulley will not substantially change, in view of the prior mechanical art in which all the means employed were old, is not a pioneer patent, and must be limited to the substantial construction shown. As so limited *held* not infringed.

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

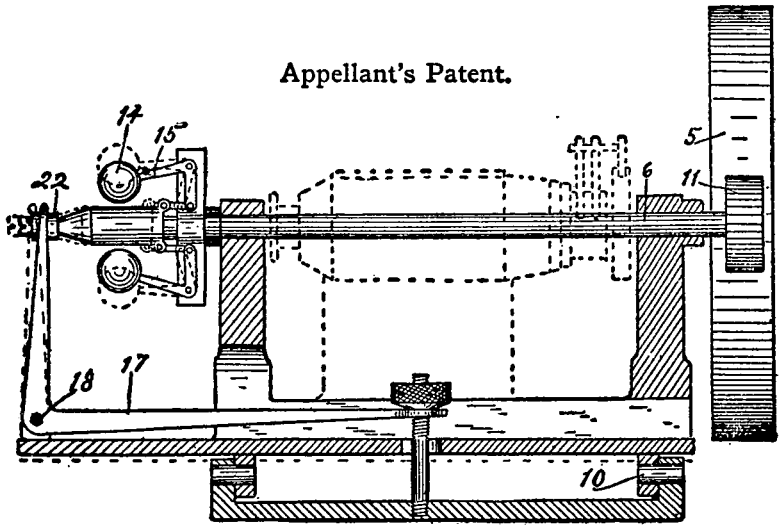
The bill is to restrain infringement of letters patent No. 642,869, issued Feb. 6th, 1900, to Homer N. Motsinger, for a new and useful Controlling Means for Spark Generators.

The claim relied upon is as follows:

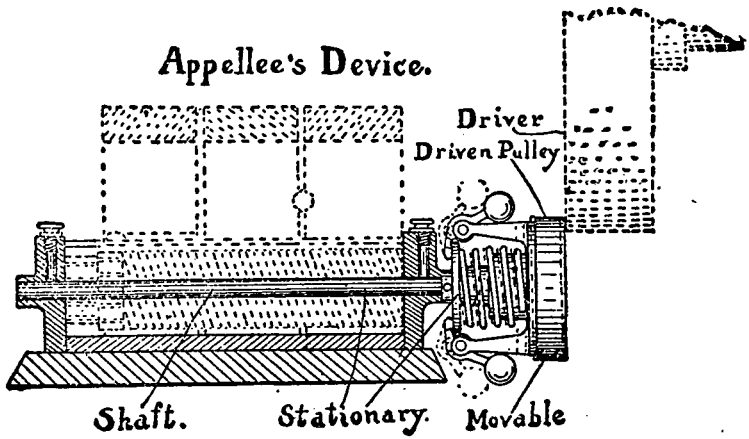
"In a mechanical movement for maintaining a constant speed of a driven shaft, a driving pulley, a driven shaft carrying a pulley adapted to engage peripherally the driving pulley, and a speed controlled governor carried by said driven shaft, and means for throwing said driven pulley out of and into engagement with the driving pulley."

The Circuit Court dismissed the bill for want of equity. The drawing in appellant's patent is as follows, and appellee's device is illustrated as follows:

Appellant's Patent.



Appellee's Device.



Other patents cited in the record are as follows:

No. 195,322, Sept. 18, 1877, J. S. Adams.
No. 210,847, Dec. 17, 1878, W. H. Fruen.
No. 230,264, July 20, 1880, E. T. Gilliland.
No. 267,965, Nov. 21, 1882, F. Anderson.
No. 295,060, March 11, 1884, C. J. Shuttleworth.
No. 345,670, July 20, 1886, A. Campbell.
No. 352,368, Nov. 9, 1886, C. E. Skinner.
No. 367,241, July 26, 1887, A. W. Schleicher.
No. 368,265, Aug. 16, 1887, G. T. Woods.
No. 403,376, May 14, 1889, N. Rogers et al.
No. 437,704, Oct. 7, 1890, R. Lundell.
No. 438,077, Oct. 7, 1890, D. Mackie.
No. 438,204, Oct. 14, 1890, E. Thompson.
No. 440,590, Nov. 11, 1890, F. D. Hardy.
No. 452,976, May 26, 1891, H. D. Goodwin.
No. 456,392, July 21, 1891, H. A. Ballard.
No. 462,348, Nov. 3, 1891, C. E. Chinnock.
No. 491,829, Feb. 14, 1893, J. A. Williams.
No. 504,132, Aug. 29, 1893, M. Moskowitz.
No. 633,516, Sept. 19, 1899, R. L. Hunter.
No. 659,194, Oct. 2, 1900, F. W. Baynes.
No. 751,993, Feb. 9, 1904, G. J. & G. Pelstring.
No. 757,891, April 19, 1904, I. J. Daily.

Further facts are stated in the opinion of the court.

Chester Bradford and Arthur M. Hood, for appellant.

H. V. Lockwood, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The mechanism employed by Motsinger, to put into effect the idea embodied in the patent in suit, is the fly wheel of a gas engine in frictional contact with a smaller wheel or pulley connected with the spark generator, together with means for throwing the generator pulley out of and into engagement with the fly wheel; the purpose being to so vary the contact or grip of the pulley upon the wheel, that when the wheel starts at a low rate of speed, the pulley will at once revolve at a much quicker speed, but when the wheel attains a high rate of speed, the speed of the pulley will not be drawn along with it—a speed approaching constancy being in that way secured to the pulley, and to the spark generator dependent on the pulley for its revolutions.

Laying aside for the moment the argument that Motsinger for the first time gave to the world the idea of a spark generator, "self contained," and looking to the mechanism only in which that idea is said to be embodied, we ascertain from the prior art that one wheel driven by another, through the device of frictional contact, is old. Also that a large wheel, driving a small wheel peripherally, around axes in different alignment, though by cog engagement, is old; so that Motsinger did nothing more than to substitute in the wheels of the old art, engagement by friction for engagement by cogs, a substitution that apart from all other considerations—frictional engagement being well known—would not in our judgment constitute pioneer invention. Indeed, outside of the concept of a "self contained" generator as a resultant, we do not think that any such claim would be urged.

Laying aside, again, for the moment, the argument that Motsinger

gave to the world, for the first time, a spark generator "self contained," it is plain that the immediate mechanical purpose of his frictional contact—the constancy of motion to be obtained for one of the wheels —is itself old, that being the purpose of nearly all of the devices where two wheels are frictionally engaged. And when we come to the mechanical means, other than those already pointed out, through which constancy of motion is effected, including the speed controlled governor —that is, the means whereby the grip of the one wheel upon the other is automatically so varied that though the one wheel may rapidly change from low to high speed, the speed of the other wheel will not substantially change—we find that they, too, are old, varying only with the kind of mechanism to which they are applied; so that the chief consideration in favor of this patent, as a pioneer invention, resides in the claim that in this combination for the first time, was made practicable a spark generator so "self contained, that it could be mounted in an operative position with any gas engine of any kind."

But standing in the way of this consideration is the fact, that before the Motsinger patent, there were generators, also self contained, that could be mounted in an operative position with any gas engine of any kind. Williams patent, No. 491,829, Thompson patent, No. 438,204, Rogers patent, No. 403,376. And standing also in the way of this consideration is the fact that before the Motsinger patent, generators were driven by the peripheral engagement of driving and driven pulleys; the only difference in this respect being that in the previous devices, the engagement was by cog wheel; so that Motsinger did not, for the first time, give to the world either the idea of a spark generator self contained, or a practical mechanism through which such spark generator could be operated.

Taking into consideration then just what Motsinger has done—the constructive idea being old, the mechanism being old, except his substitution of frictional peripheral engagement (frictional engagement being old) for cog peripheral engagement—we are forced to the conclusion, that though Motsinger's patent may cover a valuable improvement, it is not a pioneer patent, and must therefore be limited to the substantial mechanical means therein pointed out, or their mechanical equivalent.

Except to the extent that appellee's device has "a driven shaft carrying a pulley adapted to engage peripherally the driving pulley," the mechanical means employed by appellee confessedly differ from those of appellant. The contention of appellant, however, is that any arrangement of wheel and pulley whereby the center of the frictional contact or grip is near the periphery, or away from a common axis, is an engagement peripherally, and comes, thereby, within his specific mechanical construction; so that what is meant by the word "peripherally"—always remembering that the patent is not a pioneer patent —comes in point.

By "periphery," generally, is meant the outside or superficial part of a body. (Century Dictionary.) When applied to a sphere, it is of course the whole of the exterior surface. When applied to a disk, it means, we think, unless a larger meaning is clearly implied, the outer edge of the disk. That Motsinger had such a definition in mind, when

he drew up his letters patent, is evidenced by the fact that his drawings show nothing else, and that there is nothing in the description that the drawings are meant to be only a preferable or alternative method. Indeed, every mechanical expedient (and they are many) utilized by Motsinger to throw his device into, and out of, engagement, is wholly inapplicable to a like purpose in appellee's device—the adjustment in one case being effected by a parallel motion of the shaft, and in the other, by a longitudinal motion.

Nor is the issue thus raised, involving the word "peripherally," an issue simply over the definition of a word; for, in the absence of a nice adjustment of the shaft to the other parts of the generator, the so-called electric field cannot be made effective; and any wearing out of the shaft, that destroys this adjustment, tends to destroy the field; so that—the Motsinger drawings and description showing an engagement of the pulleys that subject it to side pressure only, and the appellee showing end pressure only—there are presented two mechanical devices that may differ very greatly, in degree at least, as to the dangers of wear and tear likely to affect the electric field.

Considered, then, as a limited patent for a specific form of construction, we do not think the appellee infringes appellant's patent. Progress in nearly every field of mechanical activity is like the advance of the tide—the last high mark having been attained, not by a single thought thrown far in advance of the flood, but by the column of thought that the weight of the flood projects. Where one inventive mind has run far out, marking a distinct field to be thereafter covered, it is not difficult for the courts to set the stakes that give boundary to the advance. But when the advance is an item only of a similar advance all along the line—is borrowed almost altogether from the advance along the line—care must be taken that the boundaries given do not include, up and down the line, every character of mechanism that may thereafter bring about similar results. And to give to this patent, through an enlargement of the word "peripherally," the scope now urged upon us—a definition growing out of what Motsinger has since seen, rather than out of any thought in his mind when the word was first employed—would be to give to his patent a monopoly on a practice in mechanics that in principle, at least, is as old as the day that wheels were first made that peripherally operated other wheels. This, of course, we cannot do. The decree is

Affirmed.

TILESTON v. VAUGHAN et al.

(Circuit Court of Appeals, Seventh Circuit. October 12, 1906.)

No. 1,270.

PATENTS—INVENTION—EYE-GUARDS.

The Tileston patent, No. 513,603, for a flexible ventilated eye-guard, is void for anticipation.

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

Appellant, grantee of letters patent No. 513,603, dated January 30, 1894, for a flexible, ventilated eye-guard, failed in his suit against appellees.

The following portions of the specification describe the device:

"My invention is to provide a flexible eye-guard that is ventilated by means employed in its construction which allows the air to circulate through the frame or portions thereof, while protecting the wearer against various annoyances, still, gives to the eye, unobstructed by frame material, full scope of vision."

"In the said drawings A represents the outer or marginal rim, constructed of longitudinal half round pieces of material or other suitable flexible material, between which or to which the edges of the ventilated flexible material, C, are held, being riveted, sewed or by other suitable means held in position. The inner rims, A', surrounding the elongated flexible centers or flexible lenses, B, may be constructed of the same material as the marginal rim, A, or of other suitable material which will hold the lenses or centers in position and to the flexible ventilated material, C. The rims may be constructed of metal, gutta percha, cloth or any suitable flexible substance, held together by rivets, a, a, a, or sewed, or by other means fastened to the ventilated portion of the frame.

"The ventilated portion of the frame holding the elongated centers or lenses may be of any perforated or porous substance which will permit the circulation of air and yet obstruct partially or entirely the passage of dust, insects or other substances liable to annoy or do injury to the wearer and I employ such material as hair cloth, wire gauze, perforated sheet metal, or other suitable flexible material.

"The lenses may be transparent or semitransparent of any flexible nature and if desired waterproof I use mica, flexible glass, or other suitable material. However it is not essential at all times to employ the use of waterproof material in which event I use veiling, wire gauze, bolting cloth or other suitable material for the centers.

"The centers or lenses are elongated to cover beyond the outer corners of the eye, thus enabling the wearer to obtain full scope for the use of the eye without necessitating turning the head.

"The eye-guard is held in position in front of the eyes by means of elastic cord or suitable fastenings attached to the sides at b or by means of the ordinary spectacle bow with fastening adapted to apply when the eye-guard should be reversed.

"Due allowance must be made in construction for the eye-guard to conform to the features of the face."

The claims which are alleged to be infringed are these:

"(1) A flexible ventilated eye-guard consisting of an outer flexible rim inclosing a flexible ventilated frame surrounding the orbital space having flexible lenses secured thereto in the manner and for the purpose substantially as described.

"(2) A flexible ventilated eye-guard consisting of an outer flexible rim inclosing a flexible ventilated inner frame surrounding the orbital space having interchangeable flexible lenses secured thereto in the manner substantially as described.

"(3) The combination in an eye-guard composed of an outer flexible rim, A, of an inner flexible ventilated frame, C, of the flexible lenses, B, and the fastenings therefor substantially as described."

Among nearly a score of prior patents in the record are No. 295,242, Genese, 1884, and No. 41,209, Everett, 1864.

Charles Turner Brown, for appellant.

Florence King, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). From the wording of the specification and claims it is quite evident that Tileston believed himself entitled to a monopoly of all forms of flexible ventilat-

ed eye-guards, in which appears the combination of a flexible rim, a flexible, ventilated frame, and flexible lenses.

Genese described and claimed "a flexible, air-tight, eye-guard, consisting of a frame of flexible material completely surrounding the orbital space, and having plane lenses of mica, or other transparent and flexible substance, and an elastic marginal body secured to said frame."

This Genese eye-guard is made air-tight because it is designed to guard from noxious vapors the eyes of employés in metal working and chemical manufactories; but it covers the device of the patent in suit, element for element, flexible rim, flexible frame, and flexible lenses, except that the frame is made of solid instead of perforated or porous material. In his specification Genese states that his frame is "made from thin plates of easily flexible material, such as lead or copper"; that is, the frame can be bent and will stay bent so as to secure a close contact between the rim of the guard and the face of the wearer. Appellant's counsel seeks to differentiate by asserting that the flexibility which Tileston described and claimed was the resilience which, when the bending pressure is removed, springs the material back to its original position. The contention has its basis in the ingenuity of counsel, not in the patent. Tileston's frame is made from "hair cloth, wire-gauze, perforated sheet-metal, or other suitable flexible material." So the Tileston frame is obtained by perforating the flexible sheet metal of Genese's frame. And invention cannot be predicated merely on making holes for purposes of ventilation, even if Everett and others, as early as 1864, had not shown the use of wire-gauze for the frame of eye-guards.

The decree is affirmed.

CLARK et al. v. HARMON S. PALMER HOLLOW CONCRETE BLDG. BLOCK CO.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1906.)

No. 1,268.

PATENTS—ANTICIPATION—DESIGN FOR BUILDING STONE.

The Palmer design patent, No. 36,806, for a design for artificial building blocks, showing the upper portion of the block having a rock face and the lower part smooth, is void for anticipation and lack of invention; it being shown without contradiction that houses still standing were built, prior to the application for the patent, of alternate layers of rock-face and smooth-face stone, presenting substantially the same appearance to the eye as a building of stone made after the design of the patent.

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

The decree appealed from enjoins appellants not to infringe a patent belonging to appellee and not to compete unfairly in trade. The patent is No. 36,806, issued on February 16, 1904, to Palmer for an ornamental design for artificial building blocks, and reads as follows:

"To All Whom It May Concern:

"Be it known that I, Harmon S. Palmer, a citizen of the United States, residing at No. 1450 Binney street northwest, in the city of Washington, District

of Columbia, have invented a new, original, and ornamental design for artificial building blocks, as disclosed by the accompanying drawings, made a part of this specification, of which the following is a description.

"Figure 1 is a front view of the block, and Fig. 2 is a side view.

"Having thus disclosed my invention, what I claim, and desire to secure by letters patent, is—

"The ornamental design for an artificial building-block substantially as herein shown."

FIG. 1.

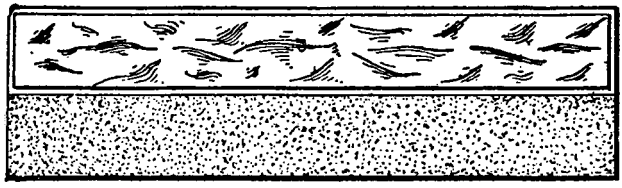
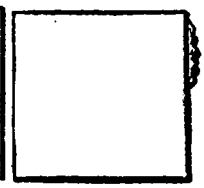


FIG. 2."



The alleged unfair competition in trade consisted in selling the alleged infringing building blocks.

Howard G. Cook, for appellants.

Chas. J. Williamson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Witnesses for appellants, whose testimony stands uncontradicted and whose veracity is unassailed, establish several instances of prior use.

In a house, built years before the patent was applied for, layers of rock-face and of smooth-face stones were alternated. If one rock-face stone lying upon a smooth-face stone be taken as a unit, the seam between them is so fine that to the eye of the ordinary observer the design is the same as if one stone were dressed partly rock-face and partly smooth-face. The smooth part in this instance was only about one-fourth of the width of the rock-face, while the patent indicates that the parts are of substantially equal width. On this ground, and for the further reason that the smooth-face and the rock-face parts were not made in one piece, it is contended that the instance in question is not an anticipation. The architect testified that there is no fixed rule respecting the comparative widths of the two layers; and the appearance to the eye would be the same, we find, whether two stones were used or only one with a line of separation marked thereon. But, if it were conceded that this instance is not sufficient as an anticipation, we are of the opinion that there was no invention in taking as a design for one piece a design that had appeared from the use of two pieces in conjunction.

The objections as to the relative widths and as to the design not appearing on one stone are met by the other instances.

Bearing in mind the familiar rule, we find no basis for the slightest doubt of the testimony concerning prior use. The witnesses said that the structures were in existence, as erected, at the time they were testifying. Owners, architects, workmen, averred that the structures were put up many years prior to the application for the patent. Ap-

pel'ee offered no evidence in contradiction, and was and is content to invoke the rule of reasonable doubt. The structures speak for themselves on the question of design. Their nature and their location were such that no pretense can be made that they were erected for the purposes of this case. As to their age, the pertinent question here was not whether a particular building was erected in 1881 or in 1882, for instance, but whether the buildings were in existence prior to the alleged invention in 1904. On that we think it not unfair to conclude that the appearance of the structures convinced appellee that the testimony as to age could not be disputed. The Barb Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, Bettendorf Patents Company v. Little Metal Wheel Company, 123 Fed. 433, 59 C. C. A. 473, and other cases in which the thing done can only be known as it is reconstructed, years afterwards, from the memory of witnesses, have no pertinency.

As to the unfair competition branch of the case, there is no evidence whatever on which to support the decree. Appellants simply sold the alleged infringing blocks as of their own make, with no attempt and no intent to palm them off as the goods of another.

The decree is reversed, with the direction to dismiss the bill for want of equity.

NATIONAL GLASS CO. et al. v. UNITED STATES GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. January 16, 1907.)

No. 50.

PATENTS—INFRINGEMENT—FURNACES FOR REHEATING GLASSWARE.

The Schulze-Berge patent, No. 411,131, and the Caldwell patent, No. 442,855, both for furnaces for reheating or fire-finishing glassware, as limited by construction in prior suits to the precise mechanism described, *held* not infringed by a furnace which does not have a laterally projecting floor, which is an essential feature of both.

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

For opinion below, see 147 Fed. 254.

James K. Bakewell, for appellants.

M. A. Christy and George H. Christy, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the National Glass Company and another filed a bill charging the United States Glass Company and another with infringement of patent No: 411,131, to Schulze-Berge, and No. 442,855, to Caldwell. That court, in an opinion reported at 147 Fed. 254, dismissed the bill for noninfringement. Thereupon this appeal was entered.

These patents were before this court in the case of Bryce Bros. v. National Glass Company. In an opinion reported at 116 Fed. 186, 53 C. C. A. 611, the art is so fully set forth, and the devices illustrated and so fully described, that reference to these opinions precludes the neces-

sity of present description. Referring to both these patents it was in the last-mentioned case held by this court:

"That the inventions are not of a pioneer or primary character, and that therefore they must be confined and limited to the precise device, as described in the specifications and claims of that art."

Of the Schulze-Berge patent, here involved, it was there said:

"The essential structural peculiarity, therefore, is a furnace with a laterally projecting floor, 0^2, of the combustion chamber, in which floor the glory holes are placed, so that a glass article may be vertically raised or lowered, in presenting it to them and withdrawing it from them."

And of the Caldwell patent:

"It will thus be seen that there is described and shown a glass furnace and combustion chamber, having the essential characteristic of that patented in No. 411,131, to wit, the laterally projecting cover, with the glory holes therein and thus accessible from below. Both require a glass-heating furnace, and both require that that furnace should be so constructed as to have a laterally projecting floor that would admit of a glory hole therein and be accessible from below."

Now, the construction thus placed on these patents, which is now the law thereof, the court below followed and applied. The respondents' device has no laterally projecting floor. Lacking this essential feature of the two patents in question, there can be no question that it does not infringe. Moreover, this laterally projecting floor made possible the use of a revolving table on which the glassware was carried through the furnace. This table is an element in all the claims of the Caldwell patent here involved, and a revolving table cannot be used in the respondents' structure. Restricting the claims, as the court below rightly did, to the limited scope awarded them by this court in the prior case, its decree was a logical sequence.

It must therefore be affirmed.

THE RESOLUTE.

(District Court, S. D. New York. November 30, 1906.)

TOWAGE—STRANDING OF TOW—LIABILITY OF TUG.

Damage to a cargo of coal laden on a barge belonging to the claimant, by the stranding of the barge in the harbor of New Haven while in tow of claimant's tug, *held* recoverable from the tug; it having failed to sustain the burden of proving its allegation that the stranding was due to an unknown obstruction, either in the main channel or the anchorage grounds of the harbor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 34.]

In Admiralty. Suit against tug to recover damage to cargo resulting from stranding of tow.

James J. Macklin, for libellant.
Robinson, Biddle & Ward, for claimant.

ADAMS, District Judge. In this action, the libellant, the Providence-Washington Insurance Company, the assignee of the owners of a cargo of coal laden on the barge H. M. Fuller, seeks to recover from the tug Resolute the loss of or damage to the said cargo caused through the barke striking bottom in New Haven, Connecticut, harbor, while in tow of the tug on a hawser on the 8th day of November, 1904. The tow was bound to Providence, Rhode Island, but went into New Haven harbor on the 7th about 2 o'clock P. M. to remain over night and was anchored there till the morning in question, when the tow started for Providence and the Fuller brought up, causing the damage sued for. The barge was owned by the same corporation as the tug.

The defense in the answer is that the barge grounded upon an unknown obstruction in the regular and usual channel about 11 o'clock A. M., the tide being about high water. On the trial, the testimony of the tug was directed to showing that the accident happened within the anchorage limits defined by the Government on the west side of the channel and not in the usual and regular channel as claimed in the answer. The master testified that the Fuller was alone at the tail of the tow. She was preceded in the tow by 4 other boats, 1 alone ahead of her and 2 alongside of each other next to the tug. Two of the boats, as well as the tug, were drawing about the same water as the Fuller.

It was further testified on the part of the tug that the place of anchorage on the 7th was within the anchorage limits and when, the next morning, the tug started with the tow, she proceeded on a course which for a short distance kept her to the westward of the eastern line of such limits and after going about an eighth of a mile, the Fuller struck and stopped the tow. The tug then anchored the tow and went to the Fuller's assistance but did not succeed in getting her off. Further testimony on the part of the tug is to the effect that it required the efforts of several tugs to relieve the barge, all of whom circled around her without difficulty, there being from 12 to 18 feet of water in her vicinity while she was fast on an obstruction, which was composed of hard sand, gravel and stone, leaving but from 5 to 7 feet of water under her. The position of the barge was also noted from a

place in New Haven which enabled observers there to see water all around her as she lay headed toward the south. The witness from the Resolute said that the tug worked around the barge for nearly an hour on an ebbing tide without touching bottom, even after the water had fallen as much as a foot. It was said that another tug, drawing 12 feet 4 or 5 inches, did the same without experiencing any difficulty. Several witnesses familiar with the waters said that they were astonished to see the barge aground there. It is further urged on behalf of the tug that she had a right to rely upon the Government chart of the place, which gives 16, 17, 18 and 22 feet of water on the grounds at low water, and nothing less than 16.

The libellant contends that the grounding of the barge did not take place in the channel or within the anchorage grounds but in a place to the westward of both, where the bottom was uneven, irregular, and the water shallow, in some places, near at hand as well as under the boat, not being more than about 6 feet in depth. It urges that there is a strong burden of proof upon the claimant here which it has failed to sustain. The testimony of the claimant is criticised with much force and ingenuity and it is said, among other things, that no witness from the tow other than the master of the Resolute was either called or accounted for. It appears that no attempt was made on the first day of the striking to ascertain what the trouble was by sounding or otherwise, or what kind of an obstruction the barge was on. The libellant then enlarges upon the claim set forth in the pleadings, mentioned above, that the cause of the stranding was an unknown obstruction in the channel, when no such claim was made in the testimony, and suggests that if the grounding had taken place in the anchorage ground as stated, there could have been abundant testimony produced to show such fact. It urges also that there is a great improbability of the truth of the allegation in view of the fact of no report having been made of the obstruction to Government officials, so that the difficulty in the harbor could have been remedied. It then proceeds to criticise the testimony adduced by the claimant and urges that some of the witnesses examined really sustained the libellant's claim. It then comments upon the testimony of two persons who were examined upon the part of the libellant and stated that they made soundings at the place which was pointed out to them as that of the grounding and that there was practically no navigable water there.

It appears in the testimony of the master of the Resolute that he was towing 4 boats, 2 alongside of each other nearest the tug and the others following tandem, close up to the boats preceding them, and that all, including the tug, except one of the boats in the head tier, drew the same water as the Fuller and yet none but the latter struck bottom. There was nothing in the set of the tide or the direction of the wind to account for any deviation of the tow from the course pursued by the tug.

The strength of the libellant's case lies in the undisputed grounding of the Fuller and the improbability of such an accident having happened in a dredged anchorage ground which was being constantly used and the proceeding by the tow without the tug or other barges striking. The strength of the claimant's case lies principally in the tes-

timony of several witnesses that the boat was anchored where several tugs, drawing as much water, were able to go all around her without difficulty.

The burden of proving that an unknown obstruction caused the accident, was upon the claimant. The testimony on its part is not reconcilable with other facts in the case. I have not been able to conclude that the burden has been met by the testimony presented.

There will be a decree for the libellant, with an order of reference.

In re FLINT HILL STONE & CONSTRUCTION CO.

(District Court, N. D. New York. January 28, 1907.)

BANKRUPTCY—INVOLUNTARY PETITION—ACTS OF BANKRUPTCY.

The giving of a mortgage by an insolvent corporation in order to constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (1) or (2), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], must have been to secure an antecedent debt, or for a grossly inadequate consideration and with intent either to hinder, delay, or defraud its creditors or to prefer the mortgagee over other creditors, and a petition in involuntary bankruptcy which fails to allege such facts and intent or facts from which such intent would be inferred as matter of law, or even to allege that there were other creditors at the time, is insufficient.

In Bankruptcy. Demurrer to the petition in involuntary bankruptcy proceedings on ground that it does not charge an act of bankruptcy.

H. Judd Ward, for demurrer.

Herman C. Grupe, for petitioners.

RAY, District Judge. The petition of the moving creditors alleges the acts of the alleged bankrupt, which is a domestic corporation of the state of New York, and which acts are claimed to have been acts of bankruptcy:

"That, within four months preceding the filing of this petition, viz., on the 9th day of July, 1906, the said Flint Hill Stone & Construction Company, while insolvent, committed an act of bankruptcy, in that it did execute and caused to be filed on that day in the office of the clerk of the county of Rensselaer, the place where its principal office for the transaction of its business is located, a chattel mortgage for one thousand dollars ($1,000) to H. Judd Ward and others, directors of said Flint Hill Stone & Construction Company and indorsers of certain promissory notes, upon all of its chattels and property; and, further, in that it did execute and cause to be filed on that day in the office of the clerk of the county of Rensselaer, the place where its principal office for the transaction of its business is located, a chattel mortgage for fifteen hundred dollars ($1,500) to H. Judd Ward and others, directors of said Flint Hill Stone & Construction Company and indorsers of certain promissory notes, upon all of its chattels and property."

This allegation is clearly insufficient. There is no allegation that such chattel mortgages were given "with intent to hinder, delay, or defraud" the creditors of the corporation or any of them, or "with intent to prefer such creditors" (the mortgagees) over the other creditors of such corporation, nor is there any allegation or statement of any fact or facts from which the inference may legally be drawn or must follow that the giving of the mortgages was with intent to hinder,

delay, or defraud creditors, or any of them, or with intent to prefer one or more of the creditors of the corporation over its other creditors. Section 3 of "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898 (30 Stat. 546, c. 541 [U. S. Comp. St. 1901, p. 3422]), as amended by act approved February 5, 1903 (32 Stat. 797, c. 487, § 2 [U. S. Comp. St. Supp. 1905, p. 683]), provides:

"(a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

The acts alleged come under either subdivisions (1) or (2) of this section, and "intent to hinder, delay or defraud" or "intent to prefer" one creditor over another is of the very essence of the act. If an alleged bankrupt, being insolvent, has within four months of the filing of the petition given a chattel mortgage on all his property to another creditor to secure an antecedent debt or to secure an indorsement previously made, and such facts are alleged, or has given such a mortgage for a present grossly inadequate consideration and such fact is alleged, such inference of intent to prefer or defraud would perhaps follow as matter of law, although I do not so decide, as it is unnecessary, but to give a mortgage, while insolvent, to secure an honest debt incurred in his business at the time the mortgage is given to carry on the business, or to secure an indorsement made at the time of giving a note which is for a present full consideration in carrying on his business, the mortgage being given at the same time, even if these acts are done within four months of filing the petition, is not necessarily an act of bankruptcy, as in such case there may not exist either an intent to hinder, delay, or defraud or to prefer one creditor over another. If the mortgage in question was given to secure a prior indorsement or prior indorsements, even pursuant to a prior agreement to give such security, it would show an intent to prefer one creditor over another. But here we have no allegation that the indorsements were not made at the time, or even that the mortgages were given to secure indorsements past or present, or that they were not given in due course of business for a present full and adequate consideration. The petition is silent as to the consideration. True, it says the mortgagees were indorsers, but it does not say the mortgages were given to secure such indorsements. Nor is there any allegation that the officers of the corporation knew of its insolvency when the mortgages were given. Neither does it affirmatively appear that, when the mortgages were given, the alleged bankrupt had other creditors. The petitioners were creditors when the petition was verified, but it is not alleged that they

were such when the mortgages were given. For anything that appears, the chattel mortgages were for money borrowed to pay off and satisfy all the debts owing by such corporation, if any, existing at the time such mortgages were given. If such was the case, there was neither intent to hinder, delay, or defraud, or to prefer one creditor over another. There must be an allegation either that the mortgages were given with intent to hinder, delay, and defraud the other creditors of the alleged bankrupt, or that they were given with intent to prefer the mortgagees over the other creditors of the corporation. The petition should also allege that there were other creditors, and that the debts or indorsements secured by the mortgages were pre-existing, or if then incurred or made that the mortgages were given for an inadequate consideration, etc., as the case may be.

The demurrer is sustained, but the petitioners may amend within 15 days after being served with a copy of the order to be entered pursuant hereto.

In re WATT & DOHAN.

(Circuit Court, E. D. Pennsylvania. January 8, 1907.)

No. 34.

ATTORNEY AND CLIENT—DISBARMENT OF ATTORNEY—GROUNDS.

The action of the Circuit Court of Appeals of another circuit in suspending attorneys indefinitely from practice before that court for filing a brief therein containing scandalous and insulting matter is not alone sufficient ground for their disbarment by a Circuit Court.

On Petition of Board of Censors of Philadelphia Bar Association for Disbarment. Hearing on petition and answer.

J. B. Colahan, Jr., Frank P. Prichard, and A. H. Wintersteen, for board of censors.

D. Webster Dougherty, for Watt & Dohan.

J. B. McPHERSON, District Judge. I heartily approve of the action of the Court of Appeals of the Second Circuit in suspending indefinitely the respondents from practice before that court. The brief which they filed was scandalous and insulting, and richly deserved the punishment that was inflicted; but I have serious doubts whether the Circuit Court for the Eastern District of Pennyslvania, to which they have been admitted to practice, ought to punish them again for this single fault, aggravated though it was. It is quite clear that, while this example of their professional delinquency was aggravated, it falls short of criminal conduct, and I think, therefore, that I should resolve the doubt in their favor concerning the propriety of striking their names from the roll of attorneys of this court, and should merely leave them to feel the well-deserved punishment that was inflicted upon them by the Court of Appeals for the Second Circuit.

The rule to disbar is, therefore, discharged.

UNITED STATES v. NEUSTAEDTER.

(Circuit Court, S. D. New York. December 31, 1906.)

INTERNAL REVENUE—PLAYING CARDS—STAMP TAX.

The statute imposing an internal revenue tax on playing cards requires that each pack of cards shall show a stamp denoting the payment of the tax, so that a dealer may not reassemble cards from packs that have paid the tax and offer the reassembled packs for sale in new wrappings without restamping.

Henry L. Stimson, U. S. Atty., and Goldthwaite H. Dorr, Asst. U. S. Atty.

Samuel S. Koenig, for defendant.

THOMAS, District Judge. It is probable that Congress intended to have every pack of cards stamped and kept stamped so long as it was in the market for sale. Hence upon every vendor is imposed the responsibility of a manufacturer, and it is his duty to see that the article he offers for sale has the stamp evidencing the payment of the tax. Such intention should have been expressed distinctly, in language that a person of ordinary intelligence could understand, rather than in a form that causes doubt and tends to baffle an appreciation of the meaning. The statute can, by a process of reasoning, be made to mean what the government claims; and it is reluctantly concluded that such is its effect. Hence a pack of cards must show a stamp denoting the payment of the tax, and it is unimportant that such cards are reassembled from packs that have paid the tax, and that are thereupon, in that new form, offered for sale. In the present case the old packs were severally stripped of their former wrappings, the stamps advising the government that the taxes had been paid were removed, certain cards were cast aside, and the new pack, in a new paper band, and without stamp, was offered for sale. This gave the consolidated pack the appearance of a new article of manufacture. The statute is so ambiguous as to be positively unfair, and it is so obviously misleading as to offend the sense of justice.

In the present case the sentence should, upon defendant's request, be suspended; and it is hoped that the attention of Congress may be called to the necessity of amending the statute, so that its meaning may be plain.

RANKIN v. COOPER et al.

(Circuit Court, W. D. Arkansas. E. D. January 16, 1907.)

No. 1,162.

1. BANKS AND BANKING—NATIONAL BANKS—DUTIES AND RESPONSIBILITY OF DIRECTORS.

It is the duty of directors of a national bank to exercise reasonable control and supervision over its affairs, and to use ordinary care and diligence in ascertaining the condition of its business, which is such care as an ordinarily prudent and diligent man would exercise in view of all the circumstances.

2. SAME.

Directors of a national bank are not insurers or guarantors of the fidelity and proper conduct of its executive officers, and are not responsible for losses resulting from the wrongful acts or omissions of such officers, provided they have exercised ordinary care in the exercise of their own duties as directors.

3. SAME.

If nothing has come to the knowledge of the directors of a national bank to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is all that is required of them, but if, on the other hand, they know, or by the exercise of ordinary care should know, any facts which should awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the danger to be avoided is required, and a failure to exercise such care makes them responsible.

4. SAME.

Directors of a national bank are not expected to watch the routine of every day's business, but they should have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally know of and give direction to its important and general affairs.

5. SAME.

It is incumbent upon the directors of a national bank in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency.

6. SAME.

Where the directors of a national bank became aware, through the report of a committee of their number, and also by notices sent them individually by the Comptroller of the Currency, that the bank had been making excessive loans to its president and to other persons, firms, and corporations with which he was associated, but took no effective steps to reduce such loans, or to prevent their increase, which continued until the bank became insolvent, they will be held jointly and severally liable for all losses which the bank sustained through subsequent transactions and which could have been prevented by a proper discharge of their duties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 947.]

7. SAME—SUIT TO CHARGE DIRECTORS—LIMITATIONS.

Where a national bank suffered losses through the continued negligence of its directors, which was unknown to its creditors, and such directors remained in control until the appointment of a receiver on the bank's insolvency, a court of equity will entertain a suit to charge them with personal liability, notwithstanding the fact that an action at law to recover for their wrongful acts would be barred by limitation under the laws of the state.

8. SAME—DEFENSES—ABSENCE OF DIRECTOR.

The mere fact that a director of a national bank does not attend to his duties by reason of continued ill health or other business engagements does not necessarily relieve him from liability for losses sustained by the bank through the failure of the directors to exercise proper care and supervision over its affairs.

9. SAME—NEW DIRECTORS.

While a director of a national bank ought not to be held responsible for the conduct of its business from the very day of his election, if he has not been a director before, he becomes responsible for acts or omissions from the time he acquires knowledge of the bank's condition and begins to actively participate in its affairs.

In Equity. On exceptions to master's report.

John M. Moore, for complainant.

Rose, Hemingway & Rose, John McClure, and Morris M. Cohn, for defendants.

FINKELNBURG, District Judge.* This suit was originally brought on the 19th day of June, 1895, by Sterling R. Cockrill, the predecessor of George C. Rankin, the present receiver of the First National Bank of Little Rock, against 16 directors of said bank, to recover losses alleged to have been sustained by said bank by reason of alleged negligence and violations of the laws of the United States governing the management of national banks. In the course of its prolonged history four of the original defendants have dropped out of the case by deaths and failure to revive, and by dismissals for other causes, so that at present there are but 12 left, who are as follows: Gus. Blass, John W. Goodwin, H. G. Fleming, James Joyce, Mark M. Cohn, Charles T. Abeles, P. K. Roots, and the estates of Nick Kupferle, Henry M. Cooper, William Farrell, Logan H. Roots, and C. M. Taylor. The case has been prolonged by the interposition of numerous motions and demurrers, and by an appeal from a decision sustaining one of those demurrers, which decision was afterwards reversed by the Circuit Court of Appeals, as will more fully appear from the report of that decision under the name of Cockrill v. Cooper, 86 Fed. 7, 29 C. C. A. 529, to which reference is hereby made for further statements of facts. In 1900, after the case had been reversed and remanded, the taking of testimony was begun before a master in chancery under an order of reference, and the case was finally heard and submitted on the merits in February, 1906. The testimony is very voluminous, embracing several thousand pages, there are over 100 exhibits, and the questions involved are complicated. I have given the matter much consideration —all the consideration which other pressing duties would permit since the case was submitted—and I realize now that a decision ought not to be delayed any longer.

At the threshold of this case it must be said that the testimony does not show that any of the defendants in this proceeding gained or intended to obtain any pecuniary advantage or to make any improper personal gain out of the various transactions involved. So far as the evidence shows, the defendants were men in good standing in the community, and many of them active business men of high standing. Nor does it appear that they were guilty of knowingly assenting to or participating in the malversations of funds by the president of the bank which wrecked this one-time flourishing financial institution. The question rather is whether they were guilty of neglect in not knowing or ascertaining these things and in not taking steps to prevent or remedy them—such culpable neglect as would make them liable under the general principles of the common law governing the duties of bank directors which apply to national banks as well as all other banks, and also under section 5145, Rev. St. [U. S. Comp. St. 1901, p. 3463]—the national bank law—which provides that the affairs of such banks shall be managed by not less than five directors, and section 5147,

*By assignment.

which makes it incumbent on every such director to diligently administer the affairs of such banks.

Briefly summarized, I understand the law on this subject to be as follows: (1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. (2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. (3) Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances. (4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. (5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. (6) Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. (7) It is incumbent upon bank directors in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency. I have drawn the foregoing propositions largely from the leading cases of Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, Gibbons v. Anderson (C. C.) 80 Fed. 345, Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, Warner v. Penoyer, 91 Fed. 588, 33 C. C. A. 222, 44 L. R. A. 761, Cockrill v. Cooper, 86 Fed. 7, 29 C. C. A. 529, and the recent decision of the Supreme Court of Ohio in the case of Mason v. Moore, 76 N. E. 932.

In applying the foregoing rules to the present case, I will first speak of the directors collectively, leaving any discriminations to be made between them for subsequent consideration. Briefly stated, it appears from the evidence that up to June 19, 1890, when H. G. Allis was elected president of the First National Bank of Little Rock, it had been a successful and prosperous institution; that soon after Allis assumed charge of its affairs he began to divert the proceeds of the bank partly in the form of improvident, excessive, and improper loans to himself, and partly in the shape of improvident, excessive, and improper loans to other persons and corporations with whom he was affiliated and engaged in speculative enterprises, notably the City Electric Street Railway Company of Little Rock, the McCarthy-Joyce Com-

pany, a mercantile company of Little Rock, the Press Printing Company, a corporation of Little Rock, and a number of other corporations and individuals which will be hereafter more particularly referred to. This diversion and misappropriation of the funds of the bank continued from June 19, 1890, until February 1, 1893, when the bank closed in an utterly insolvent condition, and a receiver was appointed to wind up its affairs. It appears that after realizing what could be realized on the assets of the bank, and after an assessment on the stockholders, there still remained a balance of $300,000 due and unpaid.

It further appears from the evidence that during the excellent administration of the affairs of this bank by Col. Logan H. Roots, the predecessor of Allis, the directors gradually fell into the habit of permitting the executive officers to manage the business of the bank with very little, if any, supervision on their part. There were no periodical examinations made by examining committees such as were customary in other banks at Little Rock and banks generally. The directors simply trusted Col. Roots and the executive officers acting under him. It appears that this policy of trusting and relying upon the president, cashier, and their assistants was tacitly transferred to Mr. Allis and his staff when he came into office in June, 1890, and the business of the bank was carried on in the traditional way, without any disturbing cause calculated to arouse suspicion or inquiry on the part of the directors until about the month of July, 1891, when rumors began to circulate in and about Little Rock unfavorable to Allis' management of the bank's affairs, and at the request of Dr. G. M. Taylor, one of the directors, a committee was appointed to examine the affairs of the bank, which committee made an elaborate report on the 25th day of November, 1891. In this report the attention of the board is directed to the large indebtedness of Mr. Allis and of his "immediate associates and enterprises," and that "they merit more careful consideration." It is also stated in this report that the committee does not think that the securities in the case of the City Electric and Belt Railways would sell for enough at that time to liquidate the indebtedness, and it is suggested that an early liquidation or payment in full of these accounts, together with a large reduction of Mr. Allis' personal indebtedness, is deemed desirable. It seems that about the same time a government examiner made an examination which led to a letter from the Comptroller of the Currency, dated November 28, 1891, addressed to the cashier, and to which personal attention was also called by an individual notice from the Comptroller mailed to each director. In this letter, which is lengthy, the Comptroller calls attention to the loans to Mr. Allis, the City Electric Railway Company, the Belt Line, Bradford & Brown, and alludes to Allis' connection with those parties and companies, and reminds the directors that the "use of the funds of a bank by any officer to forward his interests in any speculative enterprises is most reprehensible and dangerous, and the directors of your bank, who are by law made responsible for the management of its affairs, should spare no efforts and lose no time in eliminating all paper of this character from the assets of your bank." The Comptroller in this letter also admonishes the directors that it is the duty of the board to meet more frequently, and that "the conduct of the affairs of a national bank

is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable." This letter presumably reached the bank on or about December 1, 1891, and was answered by the board in a lengthy reply December 8, 1891, signed by all the directors individually, except three (Logan H. Roots, William Farrell, and C. M. Taylor), reported as absent from the meeting at which the reply was agreed upon. In this letter the directors undertake to answer the Comptroller's criticism in many particulars, and show an apparent familiarity with the bank's affairs. They also express continued confidence in Mr. Allis' management and in the success of the bank. Notwithstanding all these warnings and admonitions, the directors seem to have proceeded in the same passive way as they did before, relying on Mr. Allis to straighten things out. Instead of that, however, Mr. Allis involved the institution more and more, finally leading to absolute ruin to himself as well as the bank. Even though the bad debts existing at the period referred to could not be recovered or reduced, no adequate effort, indeed no effort whatever, seems to have been made by the defendants to arrest their increase after they had been warned by the Comptroller and a committee of their own body. They failed to arouse themselves from their lethargy.

As has been well said, the courts in dealing with instances of negligence by the directors of banks "are under perplexing restraint lest they should, by severity in their rulings, make directorships repulsive to the class of men whose services are most needed, or, by laxity in dealing with glaring negligences, render worthless the supervision of directors over national banks, and leave these institutions a prey to dishonest executive officers." Robinson v. Hall, 63 Fed. 225, 12 C. C. A. 677. With grave misgiving as to the liability of the members of the board for the wrongdoings of the president and his associates prior to December 1, 1891, I have finally determined upon that date as indicating a period of time when the members of the board certainly had been sufficiently warned to arouse suspicion, and when they either knew, or by the exercise of ordinary care should have known, that the affairs of the bank were being imperiled by Mr. Allis and his associates, and it follows from the rules of law, hereinbefore referred to, that the directors should be held liable for all losses that could have been prevented by a proper discharge by them of their duties after December 1, 1891. I need hardly add that I have reached this conclusion with great reluctance, because the neglect of a proper supervision of the bank was in a sense unintentional, and because many of the defendants have already sustained severe losses as stockholders and depositors; but, on the other hand, the court cannot ignore the rights of innocent third persons who confided in this bank, relying upon the protection which the names of these directors and a proper discharge of their duties held out to the public.

As to the statute of limitations, I have come to the conclusion that it does not apply, because the case in my opinion falls under the exceptional circumstances referred to by Sanborn, J., in Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402, circumstances under which a court of equity will permit a suit to be maintained notwithstanding the statute (see pages 590, 591 of 94 Fed., pages 410, 411 of 36 C. C. A.),

and also because at the time of the commission of the wrongful acts in question and afterwards, until the appointment of a receiver, the defendants who were concerned therein constituted a majority, if not the whole, of the board of directors, and that in consequence of their having full control of the corporation no suit could be brought to redress the alleged grievances until a receiver was appointed. See Judge Thayer's opinion in Cockrill v. Abeles, 86 Fed. 505, loc. cit. 512, 30 C. C. A. 223, 230.

A special defense is set up by the executors of Logan H. Roots, deceased, on account of ill health and absence from the city, and in that connection Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, has been referred to. I think a passing illness, temporary in character, is an excuse for the period it lasts, but, if a person becomes a confirmed invalid for a number of years and unable to attend to the duties of a director, he has no right to hold on to the position and at the same time decline its corresponding responsibilities. By doing so he invites others to trust the bank on the strength of his name, and in such case he ought to bear his share of the consequences growing out of such a dual situation. This is peculiarly applicable to Col. Roots because of his high reputation in the community and the great trust that was placed in him as a director, as abundantly appears from the evidence in this case. Nor does it appear from the evidence that Col. Roots was in fact such an invalid that he could not give any attention to the affairs of the bank. On the contrary, it appears that he attended 46 meetings in 1890; 38 in 1891; 48 in 1892, and 9 in January, 1893. He also in writing indorsed and approved the report of the examining committee of November 25, 1891, signed the letter to the Comptroller of January 16, 1892, was re-elected and accepted the office of president in January, 1893, and accepted the office of receiver for this bank when it closed. Defendant Blass in his testimony says:

"Logan H. Roots attended the board meetings whenever he was in the city. Being an old bank man, he was counseled in all matters of the bank by myself and directors. He had access to the books and papers of the bank at all times as a director."

Several other directors and a number of witnesses testified that Logan H. Roots had been identified with the bank for many years; that he was a man of unusual business ability; that they saw no change in his mental capacity down to the last; and that they relied very largely on his advice. The situation is not like that of Charles T. Coit in Briggs v. Spaulding, supra. Mr. Coit proclaimed his sickness and inability to act by asking for and obtaining a year's leave of absence. The court held that he had a right to act upon this leave of absence, and that he should not be held responsible for what occurred during such absence. It is also urged in defense of Col. Roots that he was necessarily absent from Little Rock a great deal, and hence unable to attend many board meetings. The same defense is made on behalf of defendant Blass, who spent much of his time in trips to the East in connection with his mercantile business. But to permit this to operate as a defense in a case of this kind would be putting a premium on the

failure to attend board meetings and a penalty on those who attend regularly.

The next question is: What should be the measure of damage in a case like this, and what the extent of liability of each party? The question is involved in complications and difficulties. Counsel have given the court no aid in this direction. The prayer in the bill of complaint is general in language. Nor has complainant's counsel suggested any definite theory on this subject, either in oral argument or brief. Nor, after a long search, have I been able to find analogous precedents throwing light on the situation as it presents itself in this case, so that the court is left to carve out a decree for itself according to what, to it, would appear to be right and just under the general principles of law heretofore announced as applied to the evidence in this case. It should be mentioned, however, in this connection, that the Circuit Court of Appeals of this circuit has in the case of Cooper v. Hill laid down this general rule that:

"When a loss has been caused by the appropriation of the funds of a corporation to a purpose unauthorized by its charter, or by culpable negligence, or by a conversion of its funds, all the officers of the corporation who are chargeable with the fault which occasioned the loss are liable for the entire misappropriation, without regard to the degree of dereliction of which each is guilty." Sanborn, J., in Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402.

An examination of the bill of complaint in this case has led me to the conclusion that it states a common-law cause of action for damages sustained by the bank by reason of losses caused by the negligence of the directors so far as improvident loans to Mr. Allis and his associates are concerned. But that in regard to improvident loans to the City Electric Railway Company, the McCarthy-Joyce Company, and the Press Printing Company, complainant has expressly limited the right of recovery to the excess over the 10 per cent. limitation imposed by the national bank act, viz., $50,000. I find from the evidence in this case that, aside from these three corporations, the persons and corporations referred to in the bill as Allis' associates in speculative enterprises to whom loans were made for Mr. Allis' use, and whose notes were used in reduction of or substitution for his indebtedness, were the following: Bradford & Brown, H. P. Bradford, Bradford, Taylor & O'Connell, H. G. Fleming, Belt Railway Company, Capital Construction Company, Capital Street Railway Company, and Electric Addition Company.

I further find from the evidence that the terms of service of the present defendants as directors of the bank were as follows: N. Kupferle, Gus Blass, John W. Goodwin, and Logan H. Roots, served from June 2, 1890, and prior thereto, up to the close of the bank; Henry M. Cooper from October 19, 1891, to the close of the bank; H. G. Fleming from October 19, 1891, to January 23, 1893; Mark M. Cohn from June 2, 1890, and prior thereto, up to January 12, 1892; Charles T. Abeles from January 12, 1892, to the close of the bank; James Joyce from January 12, 1892, to January 10, 1893; P. K. Roots from June 2, 1890, to January 16th, 1891; C. M. Taylor from January 16, 1891, to November 6, 1891; and William Farrell from January 16, 1891, to November 28, 1891.

As to the claim made against the defendant directors on account of the so-called "raised balances," I find in favor of the defendants on the law and the evidence applicable thereto.

As to dividends, I find that the last dividend declared January 10, 1893, was declared and paid contrary to the statutory restrictions, and that those defendants who were directors at that time are responsible for the amount thereof as funds improperly diverted from the assets of the bank.

In view of the premises, as hereinabove stated, the court now finds and adjudges that a decree should be entered against defendants Gus Blass, John W. Goodwin, H. G. Fleming, and the estates of Logan H. Roots, Nick Kupferle, and Henry M. Cooper, as follows: (1) For all losses sustained by the bank by reason of any increase in the amount of money loaned to or permitted to be drawn by Mr. Allis and his associates, viz., Bradford & Brown, H. P. Bradford, Bradford, Taylor & O'Connell, H. G. Fleming, Belt Railway Company, Capital Construction Company, Capital Street Railway Company, and Electric Addition Company, after December 1, 1891, and up to February 1, 1893, when the bank closed. (2) For all losses sustained by the bank by reason of any money loaned to or permitted to be drawn by the City Electric Street Railway Company, the McCarthy-Joyce Company, and the Press Printing Company, or either of them, since December 1, 1891, in excess of a total indebtedness of $50,000 on the part of either of said corporations; the liability on account of these three corporations being for such increase in excess only. (3) For any losses sustained by the bank by the declaration and payment of the dividend of January 10, 1893.

The court finds and adjudges that a decree should be entered against defendant Mark M. Cohn (1) for all losses sustained by the bank by reason of any increase in the amount of money loaned to or permitted to be drawn by Mr. Allis and his associates, being the persons hereinbefore designated as such in the decree against Gus Blass et al., after December 1, 1891, and up to January 12, 1892, when defendant Cohn went out of office; (2) for all losses sustained by the bank by reason of any money loaned to or permitted to be drawn by the City Electric Street Railway Company, the McCarthy-Joyce Company, and the Press Printing Company, or either of them, after December 1, 1891, and up to January 12, 1892, in excess of a total indebtedness of $50,000, on the part of either of said corporations, the liability on account of these three corporations being for such increase in excess only.

A director ought not to be held responsible for the conduct of the business of a bank from the very day of his election if he has not been a director theretofore, but the evidence shows that defendant Abeles was put on the discount committee at once, and he was present at the board meeting of February 13, 1892 (30 days after his election), when the directors manifested a very anxious state of mind about the bank's finances, and when the telegram from Mr. Allis was received concerning the negotiations of his speculative stocks in New York. I think this was sufficient warning to Mr. Abeles, and that his responsibility ought to begin on that day.

The court therefore finds and adjudges that a decree should be entered against defendant Charles T. Abeles, as follows: (1) For all losses sustained by the bank by reason of the increase, if any, in the amount of money loaned to or permitted to be drawn by Mr. Allis and his associates, being the persons hereinbefore designated as such in the decree against Gus Blass et al., after February 13, 1892, and up to February 1, 1893, when the bank closed. (2) For all losses sustained by the bank by reason of any money loaned to or permitted to be drawn by the City Electric Street Railway Company, the McCarthy-Joyce Company, and the Press Printing Company, or either of them, after February 13, 1892, in excess of a total indebtedness of $50,000 on the part of either of said parties; the liability on account of these three corporations being for such increase in excess only. (3) For any losses sustained by the bank by the declaration and payment of the dividend of January 10, 1893.

As to defendant Joyce, the evidence shows that the circumstances of his election and his relations to Mr. Allis and the bank were such that a 30-day period should be sufficient interval between election and responsibility for future management.

The court, therefore, finds and adjudges that a decree should be entered against defendant James Joyce, as follows: (1) For all losses sustained by the bank by reason of the increase, if any, in the amount of money loaned to or permitted to be drawn by Mr. Allis and his associates, being the persons heretofore designated as such, after February 12, 1892 (being 30 days after he was elected a director), and up to January 10, 1893, when he went out of office. (2) For all losses sustained by the bank by reason of any money loaned to or permitted to be drawn by the City Electric Street Railway Company, the McCarthy–Joyce Company, and the Press Printing Company, or either of them, between the 12th day of February, 1892, and January 10, 1893, when he went out of office, in excess of a total indebtedness of $50,000 on the part of either of said corporations; the liability on account of these three corporations being for such increase in excess only.

And the court finds and adjudges that under the evidence a decree should be entered in favor of the estates of C. M. Taylor and William Farrell, and defendant P. K. Roots, and that the bill should be dismissed as to them.

In so far as the findings of fact and law submitted by the special master heretofore appointed in this case are in conflict with this decision, they are hereby overruled, and the exceptions to such findings are sustained, and a new order of reference will now be made for the ascertainment of the amount of losses and liabilities in conformity with this decision, and a decree will be entered in conformity with this decision covering all the matters and things aforesaid.

EVANS v. FREEMAN et al.

(Circuit Court, E. D. Pennsylvania. January 26, 1907.)

No. 58.

1. NEW TRIAL—ORDER—REVOCATION—VERDICT—REINSTATEMENT.

Plaintiff sued two defendants for conspiracy, alleging that the injury was caused by defendants' joint deception. The verdict was rendered against one of the defendants alone, whereupon J., the other defendant, caused judgment to be entered in his favor. Thereafter a new trial was granted as against both defendants, and the judgment in favor of J. stricken, on the ground that the court erred in authorizing a verdict against one of the defendants alone, after which J. appealed and succeeded in reversing the order granting a new trial as to him; the Circuit Court of Appeals holding that damages could be recovered against one, notwithstanding the statement alleged an injury by defendants' joint deception. *Held*, that plaintiff was thereupon entitled to have the order granting a new trial as to the defendant charged stricken from the record, and the verdict reinstated.

2. SAME—JURISDICTION.

The court has a right to reinstate a verdict on a motion to reconsider an order awarding a new trial, and to set aside such order, after the cause has been set down for trial at several subsequent terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 334.]

At Law. Order granting a new trial revoked, and verdict reinstated. See 140 Fed. 419.

George T. Hunsicker, for plaintiff.
George P. Rich, for defendant Freeman.
John C. Swartley, for defendant James.

HOLLAND, District Judge. The plaintiff brought suit against the two defendants, alleging she was damaged by reason of a conspiracy entered into by them to fraudulently induce her to exchange her property, real and personal, for valueless equities in real estate in Philadelphia. On May 3, 1905, a verdict was rendered against Henry G. Freeman, Jr., alone for the sum of $7,273.33. The jury in their verdict made no mention of Wynne James, the other defendant, and he, assuming this to be a verdict in his favor, requested the clerk, on May 10, 1905, to enter judgment in his favor on the verdict, which was accordingly done. On May 6, 1905, Henry G. Freeman, Jr., filed a motion and reasons for a new trial, and on September 6, 1905, the court entered an order granting a new trial of the case as against both defendants, and directed that the judgment in favor of Wynne James, entered by the clerk, should be stricken from the record. From the order striking James' judgment from the record and awarding a new trial as to him, he took an appeal to the Circuit Court of Appeals, and on December 17, 1906, that court, in the case of Wynne James v. Regina Evans, 149 Fed. 136, reversed the order of the court below as to Wynne James. Whereupon the plaintiff, by her attorney, presented a petition asking this court to strike from the record the order granting a new trial as to Freeman and reinstate the verdict.

James was an attorney at law, and employed by the plaintiff for the purpose of effecting a cash private sale of her farm and personal property thereon. The cause of action set out in the statement in the case tried

was that Freeman and James "did fraudulently, deceitfully, maliciously, and unlawfully conspire, combine, and confederate and agree together to cheat and deprive plaintiff of her said real and personal property by effecting a fraudulent exchange thereof for a worthless equity in said house." This combination or conspiracy between plaintiff's attorney and Freeman to deceive her in the exchange of real estate is the cause or ground of this action or claim for damage. After the trial, the jury, under instructions that a verdict could be rendered against one or both defendants, rendered a verdict against Freeman alone. On a motion for a new trial, the trial court held that as James was an attorney for plaintiff, and in contemplation of law was the plaintiff herself in the transaction, and his knowledge her knowledge, and the alleged cause of damage the joint—not separate—acts of deception of her attorney and Freeman, it logically followed that both were guilty of the deceptive and fraudulent acts, or none were committed; but the jury found the acts complained of were committed, and the evidence clearly sustained that verdict. There was no claim in the statement that plaintiff was injured by any separate acts of deceit by either defendant. So that, upon the theory that as there was no claim of separate wrong done the plaintiff by either defendant, and the plaintiff could not be injured unless, in the language of the pleadings, the plaintiff's attorney conspired with Freeman to deceive her, the court granted a new trial on Freeman's motion, because of the instruction to the jury that under the pleadings the jury could find for plaintiff against one or both, and the jury found against Freeman alone.

The Circuit Court of Appeals, in Wynne James v. Regina Evans, supra, holds these instructions to the jury to be correct, and that the awarding of a new trial as to James for that reason was an abuse of discretion, and the order awarding a new trial and striking from the record the judgment in favor of James was reversed. Freeman, of course, was not before the Circuit Court of Appeals, and none of his rights were or could be affected. But this is a motion to reconsider the award of a new trial as to Freeman and reinstate the verdict against him. The Circuit Court of Appeals has said in effect that damages in this case can be recovered against one, notwithstanding the statement sets out the injury was caused the plaintiff by the joint deception. The evidence fully sustained the plaintiff's damage in accordance with the pleadings, and as the new trial was granted against both of the defendants for the same reason, and the Circuit Court of Appeals holds that for that reason the order should be reversed as to James, it follows that, for the same reason, the order granting a new trial as to Freeman must also be stricken from the record and the verdict reinstated. The court has this right on a motion to reconsider an order awarding a new trial. It has been held bythe Supreme Court in Pennsylvania that an order allowing a new trial may be stricken off after the cause has been set down for trial at several subsequent terms. Troubat & Haly's Practice, § 768; Clouser v. Hill (Pa.) 33 Leg. Int. 297.

The order, therefore, awarding a new trial as to Freeman, entered September 6, 1905, should be, and the same is, hereby stricken from the record, and the verdict against said Freeman reinstated, with interest from this date.

MEMORANDUM DECISIONS.

ALFRED H. SMITH CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 4, 1906.) No. 79 (3,956). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 143 Fed. 691, affirming a decision of the Board of United States General Appraisers (G. A. 5,944; T. D. 26,091). Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer. D. Frank Lloyd, Asst. U. S. Atty. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed.

AMERICAN NEWS CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 16, 1906.) No. 77 (3,962). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 142 Fed. 786, affirming a decision of the Board of United States General Appraisers (G. A. 5,952; T. D. 26,099). Comstock & Washburn (Albert H. Washburn, of counsel), for importer. J. Osgood Nichols, Asst. U. S. Atty. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed in open court.

AUSTIN BALDWIN & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 20, 1906.) No. 89 (4,013). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 144 Fed. 702, affirming a decision of the Board of United States General Appraisers (G. A. 6,026; T. D. 26,334). Walden & Webster (Henry J. Webster, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed.

A. WIMPFHEIMER & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 4, 1906.) No. 60 (3,006). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 142 Fed. 849, affirming a decision of the Board of United States General Appraisers (G. A. 4,542; T. D. 21,569). Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. We agree with the conclusion reached by the Board of General Appraisers and by the Circuit Court. The decision of the Circuit Court is therefore affirmed.

FRAME & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 20, 1906.) No. 88 (4,034). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 143 Fed. 692, affirming a decision of the Board of United States General Appraisers (G. A. 6,045; T. D. 26,374). Walden & Webster

(Henry J. Webster, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decision affirmed.

FRANK v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 20, 1906.) No. 81 (3,754). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 143 Fed. 702, affirming a decision of the Board of United States General Appraisers (G. A. 5,854; T. D. 25,779). Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer. D. Frank Lloyd, Asst. U. S. Atty. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed on opinions of Board of General Appraisers and Circuit Court.

JUNG YUEN v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. October 13, 1906.) No. 1,534. Appeal from the District Court of the United States for the Northern District of Ohio. F. R. Marvin, for appellant. John J. Sullivan, for the United States.

PER CURIAM. In this cause only a question of fact is controverted, which is whether this appellant was a "laborer" before the passage of the acts of 1892 and 1893 relating to the deportation of Chinese persons illegally in this country, within the intent and meaning of those acts. Differing from the conclusion of the district judge, we think it sufficiently proven that he was a resident of the United States before that time and was not then a "laborer." The order of deportation is reversed, with directions to discharge the respondent, who is the appellant here.

ISLER & GUYE v. UNITED STATES. (Circuit Court, S. D. New York. July 11, 1906.) No. 4,134. On Application for Review of a Decision of the Board of United States General Appraisers. Walden & Webster (Howard T. Walden, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. These braids of chip and silk were in part assessed as silk chief value, as shown by the decision of the Board. The testimony taken in this court shows as to those goods chip chief value, and that the assessment as to them is erroneous. Decision reversed.

END OF CASES IN VOL. 149.