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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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152 F.

JUDGES

OF THE

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

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* Resigned May 8, 1907. [1] Died June 2, 1907. [2] Appointed May 18, 1907.

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Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

CASES REPORTED.

CASES ON REHEARING.

CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED.

CASES

ARGUED AND DETERMINED

IN THE

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

TAYLOR v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 16, 1907.)

No. 191.

1. ALIENS—IMMIGRATION LAWS—PERMITTING ALIENS TO LAND FROM VESSEL.
The provisions of Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217 [U. S. Comp. St. Supp. 1905, p. 283], requiring officers of any vessel bringing an alien to the United States to "adopt due precautions" to prevent the landing of any such alien at any time or place other than that designated by the immigration officers, and making any person in charge of a vessel liable to prosecution if he shall "land or permit to land" any alien except at such designated time and place, are to be construed together, and the master of a ship cannot be held liable for the unlawful landing of an alien from his vessel, if he adopted due precautions to prevent it.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, § 114.]

2. SAME—CONSTRUCTION OF STATUTE.
In Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217 [U. S. Comp. St. Supp. 1905, p. 283], which requires officers of vessels to take due precautions to prevent aliens from landing therefrom, except at the time and place designated by the immigration officers, the word "aliens" is used in its broad and full meaning, and is not restricted to alien immigrants, but includes as well aliens who are members of the ship's crew. While the master of a vessel is not required to prevent officers or members of his crew who are aliens from going on shore in a port of the United States in every case, such section requires him to take reasonable precautions suited to the nature of the case to prevent them from deserting and remaining in this country.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, §§ 113, 114.]

3. SAME—PROSECUTION FOR VIOLATION—EVIDENCE.
The master of a vessel on trial for permitting an alien member of his crew to leave his vessel in New York, in violation of Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217 [U. S. Comp. St. Supp. 1905, p. 283], was properly allowed to be asked on his cross-examination as a witness whether a number of other alien members of his crew did not also desert in that port, as material to the question whether or not he took due precautions to prevent aliens from leaving the vessel, as required by the statute.

4. WITNESSES—CLAIM OF PRIVILEGE—REVIEW BY APPELLATE COURT.
The question whether a witness was privileged to refuse to answer a question on the ground that the answer might incriminate him is not be-

fore an appellate court for review, where the witness did not stand on his privilege, but answered the question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1053–1057.]

Wallace, Circuit Judge, dissenting, holds that Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217 [U. S. Comp. St. Supp. 1905, p. 283], properly construed, has no application to alien seamen who are bona fide members of a ship's crew.

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

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered May 21, 1906, on a verdict of "guilty" found by a jury after trial upon an indictment for a misdemeanor, under section 18 of the Immigration Act of 1903 which provides (Act March 3, 1903, c. 1012, 32 Stat. 1217 [U. S. Comp. St. Supp. 1905, p. 283]:

"That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine for each alien so permitted to land of not less than one hundred or more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

William G. Choate, for plaintiff in error.

Henry L. Stimson and Michael Byrne, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). Taylor was the captain of the Cunard steamship Slavonia, which arrived at her pier in New York City early in the morning of October 10, 1905, at the end of a voyage from Fiume, Hungary. At the time of her arrival the place of landing designated under the statute by the immigration officers for aliens landing from a vessel was Ellis Island. When the Slavonia was at Fiume, one Elias Ramadonawich, an alien, shipped on her as third cook in the steerage kitchen. He had previously served on an Austrian ship, and showed his previous shipping papers when he signed the articles of the Slavonia. He shipped for the round trip; the terms of the articles being that he should not be paid off until he returned to Fiume. The amount of wages earned by him on his arrival in New York was less than $6.

At a quarter of 6 o'clock in the evening of October 10th, after finishing his day's work he reported to the head of his department that his work was finished, but asked no permission of him, or of any one else, to go ashore. He then went to his room and washed and dressed. After this, with two other members of the crew, he walked down the gang plank out on the pier and into West street. No one stopped him either on the gang plank or on the pier, or interfered in any way with his departure. So far as appears his record during the short time of his service was good. It was the rule of the ship that members of the crew whose records were good could go ashore after the day's work

was over; each department merely keeping enough of its force to do the necessary night duty. No ticket of leave or written permission to the seaman desiring to go ashore was issued, nor any means provided to inform the watchman at the gang plank or on the pier whether any of the crew seeking to go past him had permission to go ashore or not. It does not appear whether on the evening in question there was any watchman, but Ramadonawich saw none, and from defendant's statement of the rule or custom of the ship when in port here it is not apparent that, if he had been there, it would have been his duty to make any inquiry before allowing any of crew to walk off the pier into the city streets.

Ramadonawich never returned to the ship, so that his landing became, as defendant's counsel expresses it, "the ordinary desertion of a roving seaman in a foreign port." The immigration officers first learned of his presence in this country from a letter dated November 10, 1905, received from the superintendent of the Flatbush Poorhouse. An inspector went in search of him, and found him (November 28th) in the Metropolitan Hospital, where he had been for 16 days. Evidently it did not take long for him to "become a public charge."

The court instructed the jury that, under section 18, "if the captain of the ship does not use due precaution to shut off opportunity for * * * desertion and landing, due precaution to prevent the overt act which the alien does, then he would fall under the condemnation of the act." Elsewhere he instructed them:

"It is his duty to exercise the care that any good business man in that occupation would exercise; take the precautions that such a man would take and see to it that men who are aliens and part of his crew, if allowed to go ashore, should be allowed to do so under such rules, discipline, and restraint as would tend to bring them back to the ship. Now, if the captain has done that he has done his whole duty, and that is the essential thing for you to grasp and say what would a typical business man in that occupation have done under those circumstances."

This seems to us an entirely fair and reasonable construction of this section. It gives force to all the clauses of its single sentence, coupling the penal provisions against permitting to land with the provisions requiring the adoption of due precautions against such landing, and thus making the test of offense committed, not the alien's mere landing, but the failure to adopt due precautions to prevent it. The statute certainly was not intended to make the owners, officers, and agents insurers against the escape of every alien who might be on board the vessel when she reached this port, and the language used does not require so harsh a construction. The careful and prudent man, who can satisfy a jury that he adopted precautions reasonably adequate to prevent the landing, need be under no apprehension that he incurs a penalty whenever an alien who has arrived in his ship steps ashore.

There was evidence which is discussed in the briefs as to the desertion of seamen generally in the port of New York, as to granting shore leave, and as to the extent to which seamen can be confined to the ship. None of this need be considered here. It deals with the question whether due precautions were taken, and that question was one wholly for the jury under proper instructions.

The main contention of plaintiff in error is that the word "alien," in section 18, does not include seamen. The reasons why we do not find this contention persuasive may be briefly stated:

The word "alien" is a broad one, with a definition wholly unambiguous and clearly understood by all, lawyers and laymen alike. To warrant a construction which will restrict the meaning of such a word deliberately selected by the draftsman of a statute, there must be something highly persuasive to show an intent not as far reaching as the use of such a word would import. The Supreme Court, in Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, construing an earlier immigration statute, found that certain broad language used therein should be given a restricted meaning, because of the "familiar rule that a thing may be within the letter of the statute and yet not within its spirit, nor within the intention of its makers." But, as was subsequently pointed out by the same court, such cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent, for the "lawmaker is presumed to know the meaning of words and the rules of grammar." As in that case (U. S. v. Goldenberg, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394), so in this, the language of the act, interpreted in its ordinary sense, "does not offend the moral sense. Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. It involves no injustice, oppression, or absurdity. U. S. v. Kirby, 7 Wall. 482, 19 L. Ed. 278; McKee v. U. S., 164 U. S. 287, 17 Sup. Ct. 92, 41 L. Ed. 437."

It may safely be assumed that the surest guide to the intent of a legislative body will be found in the recorded action of that body itself. Examination of these so-called "immigration statutes" discloses the fact that they have been frequently amended and recast, almost always in the direction of a more drastic exclusion. A review of some of these changes, following decisions of the courts which tended to relax the provisions of earlier acts, will be found in Re Ellis (C. C.) 124 Fed. 637. Turning, then, to the statute book, we find that section 18 of the act of 1903 (now under consideration) substantially re-enacts part of section 8 of the act of March 3, 1891. Act March 3, 1891, c. 551, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1298]. In the earlier statute it was made the duty of officers of vessels to adopt due precautions to prevent the landing "of any alien immigrant." The later statute makes it the duty of these officers to prevent the landing "of any alien" (omitting the word "immigrant"). "Alien immigrant" is a less comprehensive term than "alien," and, when it is deliberately discarded for the broader term, the change is highly significant. That the change was deliberate is also apparent. It was no single instance which might be accounted for by some clerical oversight. In sections 12, 13, 17, 20 the term "alien" was substituted for the term "alien immigrant" found in earlier acts. See section 8, Act March 3, 1891; sections 1, 2, 6, Act March 3, 1893; Act Oct. 19, 1888, c. 1210, 26 Stat. 566 [U. S. Comp. St. 1901, p. 1294]. Significantly, also, the act refers, in section 2, to the "admission," not the "immigration," of the excluded classes of aliens; in section 3 to the "importation," not merely the "immigration," of prostitutes; in sections 4, 5, and 6 to "importa-

tion or migration" of contract laborers; in section 9 to the "bringing to the United States of any alien afflicted with a loathsome or contagious disease"; in sections 12 and 13 to the "arrival of any alien"; in section 19 to "all aliens brought into this country in violation of law"; in section 20 to "any alien who shall come into the United States in violation of law"; in section 24 to "the right of any alien to enter the United States"; and in section 38 to the permitting of any "person who disbelieves in * * * organized government * * * to enter the United States." Such action by Congress would seem to indicate an intent to use the word "alien" in its ordinary and comprehensive meaning.

The diligence of counsel on both sides has submitted excerpts from the reports of committees and the debates in Congress upon this act while on its passage. It is sufficient to refer to them without quoting. They clearly indicate that Congress was satisfied that the use of the word "immigrant" had given rise to a construction of the earlier acts which rendered them inadequate to accomplish their purpose, and made it necessary to adopt the broader term "alien." 57th Congress, 1st Sess., 9 Sen. Rep. No. 2119; Congressional Record 57th Congress, 1st Sess. vol. 35, pt. 6, p. 5764; 57th Congress 1st Sess. H. R. Rep. No. 982; Congressional Rec. 57th Congress, 1st Sess. p. 5763; Congressional Record, 9 Sen. R. No. 2119, p. 137; Congressional Record 57th Congress, 1st Sess. p. 5816; 57th Congress, 1st Sess. 9 Sen. Rep. No. 2119, p. 135; 57th Congress, 1st Sess. Sen. Rep. No. 2119, pp. 152, 130; 57th Congress, 2d Sess. 37; Congressional Record, pt. 1, pp. 135, 136. In view of such an illumination as to the intent of Congress, the mere circumstance that the title is "An act to regulate the immigration of aliens into the United States" is immaterial.

The reasons urged by plaintiff in error for construing the section so as to read "aliens, other than bona fide members of a ship's crew," may next be considered. It is suggested that the crew of a vessel cannot properly be held to be "brought to the United States" by such vessel, because the word "bring" is used in the sense of "import." Cunard Co. v. Stranahan (C. C.) 134 Fed. 318. We do not see why seamen, who upon arrival become "importations" by leaving the ship and entering into the general body of resident population, are not "brought" here by the vessel as much as its passengers are.

It is next suggested that the statute, if held to cover seamen, would be so harsh and oppressive that it cannot be supposed that Congress would have passed such an act; and it is argued that every time an alien seaman or officer went ashore to report to his ship's owner, or to the consul, or to the customs authorities, the master would be liable to fine and imprisonment. This puts an unreasonable construction on the act. The offense is failure to provide due precautions against landing. It could not be held that there was any such failure where a trusted and apparently trustworthy officer or seaman was thus engaged temporarily on shore about the ship's business. Where a Chinese exclusion act made it a misdemeanor for the master of a vessel "to land or permit to be landed" any Chinese laborer, it was held that Chinese seamen would have the "right to be on shore temporarily, and not otherwise employed than in the business of the vessel during her stay in port."

In re Moncan (C. C.) 14 Fed. 44. See, also, In re Ah Kee (D. C.) 22 Fed. 519, In re Jam (D. C.) 101 Fed. 989.

Reference is made to U. S. v. Burke (C. C.) 99 Fed. 895, and Moffit v. U. S., 128 Fed. 375, 63 C. C. A. 117, as holding that the term "all aliens" did not include seamen. The opinions in both these cases show clearly that the conclusion of the court was induced by the circumstance that the statutes down to that date (1891) were directed only against the admission of "alien immigrants"; but, as we have seen, the present act is textually, and apparently intentionally, of broader scope.

Attention is called to various sections of the act providing that the master shall deliver to the customs officers lists or manifests, which shall state as to each alien his name and sex, whether he has a ticket to final destination, and whether the alien has paid his own passage; that all aliens arriving by water shall be listed in convenient groups, and each head of a family given a tag or ticket of identification; and that the immigration officers may temporarily remove the aliens so listed for examination. And comment is made on the absurdity of requiring the captain with all the officers and crew of a foreign ship, manned wholly by aliens, to list and tag themselves and proceed to Ellis Island leaving the ship without any persons in charge even to watch her, much less to work and navigate her. These difficulties, however, are more apparent than real. When a vessel brings to this country aliens, who, by coming aboard as passengers under no contract to return, have advised the captain that upon arrival they expect to leave the ship permanently and disappear into the general body of the population, he must take the steps to assist the immigration officers which these sections require; but where he is not thus advised, as in the case of a seaman of his crew who has signed articles for return voyage, he will discharge his full duty if he adopts due precautions to prevent that alien from effecting a landing which will defeat the objects of the statute by enabling him to become a part of the national population without having first been passed by the examining officers.

We find no error in the refusal of the court to allow testimony as to the practice of the immigration office, and as to its recommendations touching further legislation. Departmental construction is of value only in construing ambiguous provisions of statute, but we find no ambiguity in section 18. Nor do we find merit in the contention that the testimony was insufficient to support the verdict. In the case of an alien who had been a permanent member of the crew for years, proud it may be of his ship, and loyal to her flag, careful never to abuse any privilege of shore leave, it might be sufficient to let him go and come as he pleased while the ship was in port; but the same latitude in the case of an unknown alien of some other nationality than the ship, who was no sailorman, but merely a scullion or a waiter, might well be found to constitute a failure to adopt due precautions. The question was properly submitted to the jury under a charge which carefully instructed them in all essential points and which was not excepted to. There was no error in refusing a request to instruct them further that they might consider whether refusal of shore leave would tend to increase or diminish desertions. That was not the question for them to decide. They were substantially instructed that they could

not convict, unless they found that there was precautions which a reasonable man would have adopted, but which the captain failed to take. The last request made on behalf of defendant (they are not numbered) merely stated this proposition in another form.

Upon cross-examination the defendant was asked whether during the trip of the Slavonia then under consideration, and during her stay in New York October 10th to October 17th, 22 other alien seamen besides Ramadonawitch did not desert the ship. Counsel objected to this as immaterial, and because an answer would require defendant to incriminate himself as to other crimes. Objection was overruled, and exception reserved. The question of privilege is not before this court, since the witness did not stand on his privilege, but answered the question. Morgan v. Halberstadt, 60 Fed. 592, 9 C. C. A. 147. The testimony was clearly relevant to the main issue in the cause, namely, whether during the stay of the Slavonia in this port Capt. Taylor was adopting due precautions to prevent the landing of aliens from his ship. Information as to all the circumstances would certainly be helpful towards a conclusion, and there is no provision of law which would require the exclusion of such testimony on the theory that it tended to show the commission of other offenses against the same statute. Packer v. U. S., 106 Fed. 906, 46 C. C. A. 35.

The judgment is affirmed.

WALLACE, Circuit Judge. I dissent from the judgment of the court. I think the statutory provision under which the defendant was indicted is not to be construed as embracing sailors who are bona fide members of a ship's crew. It is true the section penalizes the landing of "any alien," and the term, read without reference to the context, or the history of the legislation of which it is a part, or the well-known objects of this legislation, is broad enough to include a sailor. It is also broad enough to include the ambassador of a foreign government to our own, who comes here by vessel to enter upon the duties of his post.

The act of March 3, 1903, is a collocation and revision of several pre-existing laws of Congress, some of which relate to the exclusion from the United States of objectionable immigrants, and others, to the importation of aliens who were under contract to perform labor or services. It is entitled "An act to regulate the immigration of aliens into the United States." In the earlier acts those relating to the exclusion of objectionable immigrants usually employed the term "alien immigrants." In those relating to the importation of contract laborers the term "foreigners" or "aliens" was used, possibly because such laborers might come either as immigrants—that is, with the purpose of acquiring a permanent residence here—or they might come as temporary sojourners, remaining only to perform the particular engagement which they had entered into; and the term "foreigners" or "aliens" was sufficiently broad to include both classes. In the revision of 1903 the short and comprehensive term "aliens" was used throughout, as well in the provisions particularly relating to immigrants, as in those relating to contract laborers. In codifications and revisions changes of phraseology for the sake of brevity or consistency are frequently

made, and should not be construed as intended to make a radical change in the previous laws, unless the language plainly contemplates the intention to make such a change. Taylor v. Delancey, 2 King's Cases, 143, 151; Chancellor Kent, in Goodell v. Jackson, 20 John. (N. Y.) 693, 11 Am. Dec. 351; United States v. Dauphin (C. C.) 20 Fed. 625.

There are two provisions, and only two, in the act of 1903, making it a misdemeanor for the master of a vessel to land aliens. One of these is section 8. This provision originated in section 4 of the act of February 28, 1885, to prohibit the importation of contract laborers, and made it a misdemeanor to knowingly land or permit to be landed "any alien laborer, mechanic or artisan" who previous to his embarkation was under contract. Section 4 was re-enacted in the act of March 3, 1891 (section 6), in somewhat different language, whereby it was made a misdemeanor to bring into or land in the United States "any alien not lawfully entitled to enter." That act enumerated the aliens who were not entitled to enter as belonging to two classes only, immigrants or contract laborers. Obviously section 8 of the present act is merely a reproduction of the former laws, which apply only to these two classes of aliens. The other provision (section 18), under which the plaintiff in error was indicted, is less comprehensive than section 8. The misdemeanor thereby created consists in permitting to land without due precautions to prevent it, "any such alien from such vessel," as is mentioned in the previous sections of the act and particularly in section 13. Section 13 provides that all aliens arriving by water shall be listed in convenient groups, and each list be verified by the oath of the master of the vessel that he believes:

"That no one of said aliens is an idiot, or insane person, or pauper, or likely to become a public charge, or is suffering from a loathsome or dangerous contagious disease, or is a person who has been convicted of felony or other crime involving turpitude, or a polygamist, or an anarchist, or not under promise, express or implied, to perform labor in the United States, or a prostitute."

The offense consists in landing or permitting to land any alien "at any place other than that designated by the immigration officers." Section 16 makes it the duty of the immigration officers to inspect all such aliens as are mentioned in section 13, and empowers them to "order a temporary removal of such aliens for examination at a designated time and place," and this is the only provision of the act authorizing the designation of any "time or place" by the immigration officers.

Section 18 is a part of section 8 of the act of 1891, which only applied to aliens who are immigrants, but as it uses the term "any aliens," instead of the term "any alien immigrant," it should be construed as applicable not only to alien immigrants, but to all aliens of the previously enumerated classes. Even if it were not by its terms applicable only to "such aliens," those mentioned in the preceding sections, it would be by implication, because it is to be read with all the provisions of the act in pari materia. This is not only a general rule of statutory interpretation, but it is one which is especially applicable to a general code or statutory revision. As to these the rule of construction is that the enactment is intended to form one system of statutory laws contemporaneous in time, and all the sections dealing with the same subject-matter are to be construed as one statute. The accepted canons

of interpretation of all statutes require every part of the act to be taken into view for the purpose of ascertaining the legislative intent; restrict general expressions whenever necessary to make all the parts harmonize and give an intelligible effect to each; and limit the application of general terms so as not to lead to injustice or an absurd conclusion. U. S. v. Terra Cotta Vases (C. C.) 18 Fed. 508; Case of Chinese Merchant, 13 Fed. 605; Carlisle v. U. S., 16 Wall. 153, 21 L. Ed. 426.

Section 2 is devoted to a preliminary enumeration of the classes of aliens who "shall be excluded from admission into the United States." This enumeration is somewhat more in detail than that contemplated by the provisions of section 13, but does not necessarily include any aliens who do not come intending to reside in the United States, and does not mention sailors. There is not a provision in the act which indicates any intention to embrace sailors in the classes of aliens to be excluded, otherwise than by the mere use of the term "aliens." Many of the provisions in which the classes are referred to by this comprehensive term are such as would be absurd, if they were intended to apply to sailors. Section 13 is an illustration, and it can hardly be seriously argued that here Congress intended to require the master of the vessel to give each seaman a ticket to identify himself and his family, and then to require the master to swear that he believes that no one of his sailors is an idiot or a prostitute.

These considerations would suffice to lead to the conclusion that section 18 does not by reasonable construction include sailors under the general term "any aliens"; but they are reinforced because at the time of the enactment it was perfectly well understood that the alien exclusion laws did not apply to sailors. This had been so decided in United States v. Sandrey (C. C.) 48 Fed. 550, and in United States v. Burke (C. C.) 99 Fed. 895.

In the latter of these cases the court said:

"These statutes do not contemplate the exclusion of crews of vessels which lawfully trade in our ports, and they do not, in spirit or in letter, apply to seamen engaged in either calling, whose home is on the sea, who are here to-day and gone to-morrow, who come on a vessel into the United States with no purpose to reside therein, but with the intention when they come of leaving again on that or some other vessel, for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious injuries to commerce."

The Attorney General of the United States had formulated an opinion on the subject to the same effect, and had so advised that department of the government charged with the administration of the alien exclusion laws. He said:

"That, although it was true that Congress had not excepted them (seamen) from the express language of these statutes, in the practical administration of these laws they have always been excepted, and their inclusion in the class of alien immigrants would lead to consequences so destructive to legitimate commerce, that such inclusion could fairly be regarded as beyond the intention of Congress." 23 Op. Atty. Gen. 521.

In view of the decisions of the federal courts whenever the question had been presented, the opinion of the chief law officer of the govern-

ment, and the construction which had been placed upon the pre-existing legislation by the administrative officers of the government, the circumstances that in the revision no change was made specifically enlarging the class of prohibited aliens so as to include sailors, is significant that Congress had no intention of including them.

The majority opinion adopts a construction of the statute which has not hitherto been supposed possible by the head of the Immigration Bureau. In his last official report, that of 1895, the Commissioner General of Immigration recommends that legislation should be adopted "to check violations of the immigration laws by professed seamen, and imposing a penalty upon masters for signing other than bona fide seamen upon their crew lists."

The majority opinion, in order to obviate the hardship and inconvenience which would result if alien seamen are included in the statute, attempts to mitigate these consequences by giving a more liberal interpretation to the term "landing" than is permitted by the language of the section. The opinion virtuallly declares that, if seamen are allowed to go ashore under such rules, discipline, and restraint as would tend to bring them back to the ship, they are not "landed," within the meaning of the section. According to the accepted meaning, the act of landing is "setting on shore; coming on shore." Giving the language of the section its ordinary meaning, it is none the less an offense to land a sailor that he has been landed under precautions which will insure his return to the ship. If sailors are included in the statute, it seems plain that they cannot be permitted to go ashore by the officers or the owner of a vessel, and any failure to take sufficient precautions in that behalf is a violation of the section. I cannot agree to such a latitudinarian construction of the statute for the purpose of eliminating its objectionable features and fortifying the argument that Congress intended to include sailors.

Congress either intended to include sailors under the general term of aliens, or it did not. The majority opinion is based merely on the employment by Congress of the broad term. If Congress by the use of this term intended to include sailors, it intended to include the officers of the ship; and the commanders of nearly all the foreign steamships, as well as the officers of foreign naval vessels upon a visit here, would be included in the term.

I think the conviction of the plaintiff in error proceeded upon a wrong interpretation of the statute, and that it should therefore be reversed.

RICKEY LAND & CATTLE CO. v. MILLER & LUX.*

(Circuit Court of Appeals, Ninth Circuit. March 4, 1907.)

No. 1,366.

1. WATERS AND WATER COURSES—IRRIGATION—RIGHTS OF APPROPRIATORS—INCORPOREAL HEREDITAMENTS.

The right of an appropriator of the water of a stream, for the purpose of irrigation, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament appurtenant to the ditch and coextensive with the owner's right to the ditch itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 15.]

2. SAME—QUIETING TITLE.

A suit to quiet title to a water right for irrigation purposes, and to determine the landowner's right to divert the waters from a stream for such purposes, is in the nature of an action to quiet title to real estate.

3. SAME—RIGHT TO SUE—VENUE—ACTS PARTLY IN DIFFERENT STATES.

Where complainant claimed title by prior appropriation to a certain part of the flow of a river to irrigate its lands in Nevada, and alleged that such rights were being interfered with by defendant, an appropriator of the waters of the same stream in California, of which state defendant was a resident, complainant was entitled to sue to quiet its title to such water right in the federal courts sitting in Nevada.

4. SAME.

The jurisdiction of the Nevada court was not defeated by the fact that defendant set up in its answer and cross-bill that it had an appropriation of water from the same stream in California for the purpose of irrigating lands in that state.

5. COURTS—STATE AND UNITED STATES COURTS—PRIORITY OF JURISDICTION.

Where a federal court sitting in Nevada acquired jurisdiction of a suit to quiet title to an appropriation of water from a stream in that state as against defendant, a resident of California, such jurisdiction would be maintained as against subsequent similar actions brought by defendant for the same purpose in the California state courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1345.

Pendency of action in state or federal court as ground for abatement in the other, see notes to 47 C. C. A. 205, 73 C. C. A. 521.]

6. SAME—INJUNCTION—ACTIONS IN STATE COURTS.

Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the granting of an injunction by a federal court to stay a proceeding in a state court, does not prevent a federal court having first acquired jurisdiction of the parties and subject-matter of an action from restraining the parties from resorting to proceedings in a state court having concurrent jurisdiction which would defeat or impair the federal court's jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1418–1430.]

7. LIS PENDENS—PURCHASE PENDENTE LITE—EFFECT.

Where defendant corporation acquired its property and water rights in controversy from R. after suit to quiet title to complainant's water rights in Nevada, as against R., had been begun in the federal court of Nevada, and after R. had answered therein and the court had acquired full jurisdiction over both the subject-matter and R., the corporation was a pendente lite purchaser, and bound to abide the judgment in such suit.

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

For opinion below, see 146 Fed. 574.

*Rehearing denied May 20, 1907.

Walker river is a stream flowing from within the state of California easterly into the state of Nevada. Toward its source it divides into two branches, known as the East and West Forks. The junction is in the state of Nevada. The appellant and the appellee are each incorporated, the former having its residence in the state of California, and the latter in the state of Nevada. On the 10th of June, 1902, the appellee filed its bill of complaint in the Circuit Court of the United States for the District of Nevada against Thomas B. Rickey and many other persons. Service of process was had upon Rickey, who thereafter appeared and answered. By said bill of complaint it was alleged, among other things, that complainant therein (the appellee here) was then, and for a long time prior thereto had been, the owner and seised in fee, and in actual possession, of certain lands situated in the county of Lyon, state and district of Nevada, particularly describing them; that Walker river is a natural stream and water course which flows, and from time immemorial has flowed, to, over, upon, and through the said lands, which said lands include the banks, bed, and stream of said river; that at divers times, in said bill set forth, the complainant, its grantors and predecessors in interest, had first appropriated and diverted from said river portions of the waters thereof, amounting in all to a flow of 943.29 cubic feet of water per second, and had carried the same to and upon certain lands, and used the same for the irrigation thereof, and that said complainant was then the owner by such appropriation of certain interests in the waters of said river; such interests being particularly set forth and enumerated. It was then further alleged that Rickey and other defendants in the suit had diverted the waters of said Walker river at divers places above the lands of the complainant, and above the points at which complainant so diverted said water, and that a large portion of the water so diverted by the defendants in said suit was never returned to the stream, and that such defendants were continuing the diversions aforesaid, and had thereby deprived, and were depriving, such complainant of a large portion of said water to which it was so entitled; that each of said diversions so made by such defendants was without right, but that they had diverted said water, and were so diverting the same, under claim of right so to do, adversely to the complainant; that by such diversions complainant had been and was being deprived of sufficient water to irrigate its said lands, and was thereby rendered unable, and so long as said diversions were continued would be unable, to irrigate such lands, which it had theretofore been accustomed to irrigate, and was thereby rendered unable, and would be unable, properly or successfully to cultivate the same, or to raise crops thereon. And it was further alleged that if said defendants, or either of them, had any right to divert any water from the said river, such rights, and each of them, were subsequent and subordinate to the aforesaid appropriations so made by complainant and its grantors and predecessors. The prayer was that the defendants in said suit, including Rickey, be enjoined and restrained from diverting any water from Walker river in subversion of the rights of complainant.

Subsequently, on the 15th day of October, 1904, the Rickey Land & Cattle Company commenced an action in the superior court of the county of Mono, state of California, against the appellee and a large number of other persons, by filing a complaint in said court, whereby it was alleged, among other things, that the said company was, and had been since the 6th day of August, 1902, the owner, in possession, and entitled to the possession of certain lands conveyed to it by Thomas B. Rickey, all situated in the state of California, and that the same constitued an entire contiguous body of land, over, through, and upon which flowed, and from time immemorial had flowed, a branch or tributary of Walker river called the "West Fork," and that said lands and all thereof were, and from time immemorial had been, riparian to said stream, and situated along and bordering thereupon; that the said company was the owner, in possession, and entitled to the possession of such lands, and had the right to divert and appropriate all the waters of said West Fork of Walker River, and its tributaries in the state of California, to the extent of a constant flow of 1,575 cubic feet of water per second. It was further alleged that the defendants in said action, and each of them, including the appellee herein,

claimed some right, title, and interest adverse to the said Rickey Land & Cattle Company in and to said constant flow of 1,575 cubic feet of water per second, or some part or portion thereof; that said right, title, and interest so claimed by such defendants, and each of them, including the appellee, in and to said water, was without right, and that all claims of them, and each of them, to the waters of said West Fork of said Walker River were subordinate and subject to the ownership of said company, and its alleged right to divert and appropriate from said West Fork of Walker River a constant flow of the amount of water specified. The prayer was that the Rickey Land & Cattle Company be decreed to be the owner of the amount of water specified, and entitled to the use and enjoyment of the same, and that appellee and the other defendants therein be subordinated to the interests of the said company in the flow of the waters of said West Fork of Walker River.

On the same day, October 15, 1904, the Rickey Land & Cattle Company commenced another action of like character in the same court, involving 504 cubic feet of water in the East Fork of Walker River, claimed under similar rights, and it was alleged that all of such rights were superior to the rights of defendants therein, including appellee, whatever they might be.

The bill of complaint herein sets forth all these facts and proceedings, and further shows that, after appellee had filed its bill of complaint in the Circuit Court of the United States for the District of Nevada, and after Rickey had appeared and filed his answer therein, he (Rickey), on August 6, 1906, organized and incorporated the Rickey Land & Cattle Company, and conveyed to it all the lands and water rights thereafter claimed by it in the two actions commenced in the superior court of Mono county, in the state of California. Then follows the allegation: "That the issues tendered by said complaints in said two actions so brought by the defendant herein as plaintiff against your orator, and said other persons are, so far as concerns your orator, the same issues which were tendered by the said bill of complaint of your orator so filed in this court, so far as the same related to the defendant, Thomas B. Rickey, in said suit." The prayer is that the defendant be enjoined from prosecuting either of the actions commenced in Mono county, state of California, against the complainant, and for general relief.

The cause having been heard upon the bill and certain affidavits filed in defense, a temporary restraining order was directed to issue, and the appeal is from the action of the court in this regard.

The record contains a supplemental complaint by the Pacific Live Stock Company, showing that it has succeeded to the interests of the appellee, but such complaint serves no essential purpose in the present controversy.

James F. Peck and Charles C. Boynton, for appellant.

W. C. Van Fleet and W. B. Treadwell (Frohman & Jacobs and Frank H. Short, of counsel), for appellee.

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

WOLVERTON, District Judge (after stating the facts). Let us inquire, first, touching the nature of the suit instituted by the appellee as complainant, against Rickey and others, in the Circuit Court of the United States for the District of Nevada, June 10, 1902, for the inquiry will settle the jurisdiction of the court to proceed in that cause, and in one aspect will determine its authority to grant the relief demanded in this cause. In the course of the inquiry, it is important that we first ascertain the nature of the subject-matter of the cause.

Says the court in the case of Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co., 60 Cal. 408:

" 'A water course consists of bed, banks and water.' Angell on Water Courses, § 4. The right of plaintiff, as stated in its complaint, to have the water

flow in the river to the head of its ditch, is an incorporeal hereditament appertaining to its water course. Granting that plaintiff does not own the corpus of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch. Real property consists of land, that which is affixed to land, and that which is incidental or appurtenant to land. Civil Code, 658. If the water course, consisting of the bed and banks of the trench, and of the water therein, be real property, the right to have water flow to it is incidental and appurtenant thereto."

So in Construction Co. v. Ditch Co., 41 Or. 209, 215, 69 Pac. 455, 458, 93 Am. St. Rep. 701:

"If the riparian owner grants a right to divert the water and convey it away to and upon the lands of the grantee, the grant becomes an easement appurtenant to such lands, which becomes thereby the dominant estate, and the grant an incorporeal hereditament. If title be acquired by prescription, the estate and the right are the same."

So, also, in Wyatt v. Larimer & Weld Irr. Co., 33 Pac. 144, 18 Colo. 298, 36 Am. St. Rep. 280, Mr. Justice Goddard, speaking for the court, says:

"That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, cannot well be disputed."

And, after citing Washburn on Easements and Servitudes, and Angell on Water Courses, proceeds:

"The right acquired to water by an appropriator under our system is of the same character as that defined by the foregoing authorities as an incorporeal hereditament and easement. The consumer under a ditch possesses a like property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch, for his use."

And, generally, it is held that:

"The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch, and coextensive with his right to the ditch itself." Willey v. Decker, 73 Pac. 210, 225, 11 Wyo. 496, 100 Am. St. Rep. 939; Smith v. Denniff, 60 Pac. 398, 24 Mont. 20, 81 Am. St. Rep. 408.

Or, putting it in another form, that:

"A right to divert and use the waters of a stream, acquired by appropriation, is a hereditament appurtenant to the land for the benefit of which the appropriation is made." Conant v. Deep Creek & Curlew Val. Irr. Co., 66 Pac. 188, 23 Utah, 627, 90 Am. St. Rep. 721.

See, also, Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Bear Lake & River Waterworks & Irrigation Co. v. Ogden City, 8 Utah, 494, 33 Pac. 135; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Sweetland v. Olsen, 11 Mont. 27, 27 Pac. 339; Cave v. Crafts, 53 Cal. 135.

So it follows, as a deduction from these principles, as was said in the Conant Case, that:

"An action, therefore, to quiet the title and determine and to establish the right to divert and use water for such purposes, is in the nature of an action to quiet the title to real estate."

Under the bill there is the assertion of a valid appropriation of the waters of Walker river, for use upon lands in Nevada which are specifically described, and which the complainant owns, and the further averment that the defendants claim a right of diversion and appropriation adverse to that which complainant has acquired; and the prayer is, in effect, that defendants be restrained from the exercise of their alleged right to the injury of complainant. Could there be a plainer case of an attempt to quiet title to the appropriation itself? Although the right to have the water of Walker river flow from above down to and within the complainant's canals and ditches, for use upon its lands, is an incorporeal hereditament, it is, nevertheless, under the foregoing authorities, appurtenant to the realty in connection with which the use is applied. It savors of, and is a part of, the realty itself. The suit, therefore, in its purpose and effect, is one to quiet title to realty. Complainant's diversion being in Nevada, and the use being upon realty situated in Nevada, and the suit being one concerning or pertaining to that realty, it is necessarily local in character, and was properly instituted in the state of Nevada. See Conant v. Deep Creek, etc., Company, supra. The proposition seems so clear that it is scarcely necessary to cite other authorities in its support. And it is equally clear that the courts of one state are without jurisdiction to hear and determine suits instituted in another for the adjustment of adverse claims respecting the legal title to realty, and which pertain to the realty as the subject-matter of the controversy.

There has been much discussion of the legal principle that, as to certain causes arising partly in one jurisdiction and partly in another, the right of action will be entertained in either jurisdiction. The principle is that, where two material facts are necessary to give a good cause of action, and they take place in different jurisdictions, the cause may be said to have arisen in either jurisdiction. Numerous authorities are cited in support of this principle, among which are the following:

"When an action is founded upon two things in different counties, both material to the maintenance of the action. it may be brought in the one county or the other." Com. Dig. "Action," N, 11.

"Where an injury has been committed in one county to real property situate in another, or wherever the action is founded upon two or more material facts which took place in different counties, the venue may be laid in either." 1 Saund. Pl. & Ev. 413.

"Supposing the foundation of the action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute the offense, the plaintiff may, ex necessitate, lay the venue in either." Ashurst, J., in Scott v. Brest, 2 Term R. 238.

And: "When matter in one county is depending upon the matter in the other county, there the plaintiff may choose in which county he will bring his action." And: "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default; or I may bring it in Middlesex, for there I have the damage." Bulwer's Case, 7 Coke, 1.

So, in Barden v. Crocker, 10 Pick. (Mass.) 383, in an action brought in the county where the property was damaged for diversion of water in another, it was held that the action could be maintained in either county. So, also, in the case of Foot v. Edwards, Fed. Cas. No. 4,908,

an action for damages for an injury to the mill property of the plaintiff situated in Massachusetts, that the action could be maintained in Connecticut, where the water was diverted to the injury of the mill. And again, in the case of Rundle v. Delaware & R. Canal, 1 Wall. Jr. 275, Fed. Cas. No. 12,139, an action was sustained in New Jersey "for damage done to plaintiff's realty in Pennsylvania." These authorities pertain to actions at law.

The general doctrine of the common law is that an action for injury to real property, as trespass, or case for nuisance, is local, and must be commenced within the county or district in which the land lies. Watts' Administrators v. Kinney, 23 Wend. (N. Y.) 484. This seems to be controlled, however, by the rule above referred to, that, where an act has been committed in one jurisdiction which causes injury to realty in another, a suit may be brought in either. In further support of the latter proposition, Mr. Gould is authority. He says:

"If, however, a tortious act committed in one county occasions damage to land or any other local subject situate in another, an action for the injury thus occasioned may be laid in either of the two counties, at the choice of the party injured. Thus, if, by the diversion or obstruction of a water course in the county of A., damage is done to lands, mills, or other real property in the county of B., the party injured may lay his action in either of those two counties." Gould, Pl. p. 105, § 108.

In case of nuisance, however, where it is sought to abate the nuisance by injunctive process, it is requisite that the suit be instituted in the jurisdiction where the nuisance is maintained, because it is said the remedy is quasi in rem, and must act upon the thing itself which is causing the damage. This was held in the case of Stillman v. White Rock Manufacturing Co., Fed. Cas. No. 13,446 (23 Fed. Cas. 83).

There is but little question that the same rule as to venue in the commencement of suits in equity will apply as in actions at law. It is of primary importance, however, that a cause in equity exist, for, unless it does, the suit cannot be maintained anywhere. A suit may be local or transitory, as well as an action at law; and, if a suit pertains to or is concerning realty as the direct subject-matter of the inquiry, like an action at law in ejectment, it must be commenced in the jurisdiction where the realty is located. But if jurisdiction rests upon an equitable cause, such as multiplicity of suits, irreparable injury, specific performance, rescission, or the like, the suit need not necessarily be local. It may be transitory as actions are transitory, and if the appropriate conditions are present, the suit may be brought, as actions may be brought, in either jurisdiction, and is therefore governed by the same principle. But, as we have heretofore determined, the present suit is one affecting realty, and was therefore local, and for this reason the venue was properly laid in the state of Nevada.

It is well determined that:

"In a case of fraud, of trust, or of contract, the jurisdiction of a 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, 148, 3 L. Ed. 181.

Or, as expressed in general terms in the case of Phelps v. McDonald, 99 U. S. 298, 308, 25 L. Ed. 473, that:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitæ, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam."

This rule "has been often applied," says the court, in Cole v. Cunningham, 133 U. S. 107, 119, 10 Sup. Ct. 269, 273, 33 L. Ed. 538, "by the Courts of the domicile against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others."

If such be the law where the res is without the jurisdiction of the court, by how much stronger will be its application where the jurisdiction extends over the res as well as to the person. So that the court having jurisdiction of the res—that is, of the thing in controversy, which is the realty in the present instance—has undoubted authority and jurisdiction, having also jurisdiction of the person, to protect the thing against the encroachments of the person, whether those encroachments come from within the state or without.

The appellant's counsel maintain that, because the appellant has set up in its answer and cross-bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that state, therefore the court in Nevada has no jurisdiction to determine its rights in the state of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a cause of suit in the state of California, to defeat the jurisdiction of the court in the state of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant cannot defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant. It may be said that the court in Nevada has not the power to quiet the title of the defendant in the state of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the states in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the state of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the state of California, it may look, nevertheless, under the defensive answer to the appropriation in the state of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary state or

county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired although the stream is interstate and not local to one state; nor will the mere fact that the stream has its source in one state authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another state. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the state where made, is protected in such right as against subsequent appropriators, though the latter withdraw the water within the limits of a different state. Howell v. Johnson (C. C.) 89 Fed. 556; Hoge v. Eaton (C. C.) 135 Fed. 411; Anderson v. Bassman (C. C.) 140 Fed. 14. So that, in determining the right of appropriation in one state, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter state cannot operate to preclude the courts of the former from exercising cognizance over the entire subject-matter before them. The very question that appellant makes was determined in the case of Anderson v. Bassman, supra:

"It is objected by the defendants," says Morrow, Circuit Judge, "that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the West Fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the court to pass upon titles to real property in another state."

And the decision was against the contention. So the decision here must be against appellant's contention upon the point urged.

That the present bill is ancillary to the original suit instituted in the Circuit Court for the District of Nevada is not questioned. It is not infrequent that the state courts come in conflict with the federal courts, and vice versa of the federal with the state, and this where they exercise concurrent jurisdiction. In all such cases it has been firmly established that the court first acquiring jurisdiction of the subject-matter of the action or suit, and of the parties, is entitled to maintain it until the controversy is at an end and the rights of the parties are fully administered, without interference from, and to the exclusion of the other. Pitt v. Rodgers, 104 Fed. 387, 43 C. C. A. 600; Starr v. Chicago, R. I. & P. Ry. Co. (C. C.) 110 Fed. 3. In the maintenance of such jurisdiction, it is a common remedy to invoke the injunctive process, not against the court offending, but against the parties, to restrain them from proceeding therein in antagonism to the jurisdiction first acquired; and the remedy is available either before or after judgment or decree, either to enable the court to render an effective adjudication, or to command full obedience to its mandates. In support of the doctrine generally, we quote from three of the authorities out of many

that may be cited. In Peck v. Jenness, 7 How. 612, 624, 12 L. Ed. 841, the court says:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

So in Root v. Woolworth, 150 U. S. 401, 410, 14 Sup. Ct. 136, 138, 37 L. Ed. 1123:

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading (9th Ed.) § 338: 'A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution; or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defense made to it; or to bring forward parties before the court; or it may be used to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review, of which we shall treat hereafter. But where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court.'"

And again, in French, Trustee, v. Hay, 22 Wall. 250, 22 L. Ed. 857, Mr. Justice Swayne, speaking for the court:

"It (the bill then pending) is auxiliary and dependent in its character, as much so as if it were a bill of review. The court having jurisdiction in personam had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal."

The case relied upon by counsel for appellant—Oliver v. Parlin & Orendorff Co., 105 Fed. 272, 45 C. C. A. 200—is in harmony with these authorities; but there the federal court had not acquired previous jurisdiction over the person of the Groesbeck National Bank, which it was sought to enjoin.

The doctrine being thus established, and the jurisdiction of the federal court in the present case having first attached, section 720, Rev. St. [U. S. Comp. St. 1901, p. 581], is without application. As is well known, this section inhibits the granting of a writ of injunction by a federal court to stay the proceedings of a state court.

"It is well settled," says Mr. Bates, in his work on Federal Equity Procedure, § 541, "upon both reason and authority, that the prohibition contained in this statute 'does not apply where the federal court has first obtained jurisdiction, or where, the state court having first obtained jurisdiction, the case has been removed to the federal court. In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction has first attached.' If the rule were otherwise, 'after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court, after it had obtained full jurisdiction of person and subject-matter.'"

The appellant, the Rickey Land & Cattle Company, has succeeded to all the interest of Rickey, in so far as such interest affects and pertains to the subject-matter of the controversy in the case of Miller & Lux v. Rickey et al (C. C.) 146 Fed. 574. The position is so apparent from Rickey's own affidavit as to put at rest all contention about it. He says:

"That the said Rickey Land & Cattle Company acquired by conveyance from said Thomas B. Rickey all his right, title, and interest to certain water rights, and rights to the use of water; and said water rights, and rights to the use of water, are in part the water rights, and rights to the use of water, described and mentioned in the said complaints in said actions commenced in Mono county; but the said water rights so acquired by the said Rickey Land & Cattle Company from the said Thomas B. Rickey are not the same rights to water, and rights to the use of water, alleged in said complaints in said Mono county in this: that since the conveyance of said lands by Thomas B. Rickey, and said water rights, and the right to the use of water to said Rickey Land & Cattle Company, which conveyance was made, executed, and delivered on the 6th day of August, 1902, the Rickey Land & Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono county for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated, and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated, and used such water continuously, uninterruptedly, notoriously, adversely, exclusively, and peaceably."

The affiant attempts to show wherein the rights that the Rickey Land & Cattle Company now claim are different from those which were conveyed and transferred to it by Rickey himself, and in that attempt it is significant that he shows that whatever difference exists at the present time between the two rights is the result of what the company has done since its acquirement from Rickey, that is, in the way of continuing and increasing Rickey's alleged original appropriations of water, but not to the extent of acquiring any new or different rights by adverse holding and possession, or otherwise. In other words, the company has merely builded upon the rights obtained from Rickey, without acquiring any new or additional rights. These are the rights that the Rickey Land & Cattle Company is seeking to establish in the superior court of Mono county, Cal., against which it is maintained that the rights of the appellee are adverse and subordinate, and the same rights which the appellee asserts are subordinate to those that it has acquired and is possessed of and owns; so that the issues must needs be the same, and the controversy the same, whether Miller & Lux, the appellee, goes into the Mono county superior court, or the Rickey Land & Cattle Company makes defense in the United States

Circuit Court for the District of Nevada. The Nevada court, therefore, having first acquired jurisdiction, may maintain and exercise it to the end, to the exclusion of the state court in Mono county.

The next and final question relates to the doctrine of lis pendens, and its application here. As to this, there need be but little said. In the case of Mellen v. Moline Iron Works, 131 U. S. 352, 371, 9 Sup. Ct. 781, 787, 33 L. Ed. 178, the court says:

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them pendente lite. Eyster v. Gaff, 91 U. S. 521, 524, 23 L. Ed. 403; Union Trust Co. v. Inland Navigation & Improvement Co., 130 U. S. 565, 9 Sup. Ct. 606, 32 L. Ed. 1043; 1 Story's Eq. Jur. § 406; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566. As said by Sir William Grant, in Bishop of Winchester v. Paine, 11 Ves. 194, 197: 'The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, such suits would be indeterminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.' The present proceeding is an attempt, upon the part of a purchaser pendente lite to relitigate in an original, independent suit the matters determined in the suit to which his vendor was a party. That cannot be permitted consistently with the settled rules of equity practice."

The text of 2 Black on Judgments, § 550, seems authoritative. It is as follows:

"It is a general rule that a purchaser of property, * * * who buys pending a litigation concerning it, comes into privity with his vendor, so as to be bound by the judgment in that suit the same as if made a party of record. * * * 'We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased bona fide, and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record. The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset.' * * * In a late case it is said that the purpose of the rule is to keep the subject-matter of the litigation within the power of the court until judgment or decree shall be entered, since, otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. It is also said that two things seem to be indispensable to give effect to the doctrine of lis pendens: (1) That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit, and (2) that the particular property involved in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation."

The conditions present meet every requisite of these authorities. As is apparent from the record the Rickey Land & Cattle Company came into the property and rights of Thomas B. Rickey after the suit to quiet title was begun in the Circuit Court for the District of Nevada, and after Rickey had answered therein, and the court had acquired full and complete jurisdiction both over the subject-matter of the suit and over the person of Rickey. So that the Rickey Land & Cat-

tle Company stands in privity of title with Rickey, and can claim nothing beyond what Rickey could have claimed in the original suit. The company is bound as Rickey would have been bound, and must abide the termination of such suit for the adjustment of the adverse rights claimed to the appropriation of water from Walker river.

These considerations lead to the affirmance of the decree of the Circuit Court, and it is so ordered.

RICKEY LAND & CATTLE CO. v. WOOD et al.*

(Circuit Court of Appeals, Ninth Circuit. March 4, 1907.)

No. 1,365.

WATERS AND WATER COURSES—IRRIGATION—APPROPRIATION—QUIETING TITLE—CROSS-BILL—WHEN ALLOWED.

In a suit to quiet title to an alleged prior appropriation of water for irrigation purposes in Nevada against appellant, an appropriator on the same stream in California, appellees, who were also appropriators from the same stream in Nevada, were made codefendants and filed a cross-bill, in which they did not deny complainant's priority, but claimed a prior appropriation as against appellant, and prayed that their right be settled and determined. *Held*, that such cross-bill operated defensively on behalf of appellees, and was not therefore objectionable as not germane to the original bill.

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

For opinion below, see 146 Fed. 574.

The facts of this case differ from those upon which the case of Rickey Land & Cattle Company v. Miller & Lux (just decided) 152 Fed. 11, proceeded, only in that, in the original suit of Miller & Lux v. Rickey et al., the present appellees, being codefendants with Rickey in that suit, filed cross-bills therein, whereby they claimed to be entitled to certain appropriations of water from Walker river for use upon their lands—the diversions being made and the lands being situated in the state of Nevada; and it was alleged that Rickey had been and was then diverting the water from the stream above, which deprived the cross-complainants of the amount to which they were entitled under their appropriations. Such cross-bills were filed December 20, 1904, and writs of subpœna were issued thereon, and served upon Rickey the same day. And it is further shown that the summonses issued in the causes instituted in the superior court of Mono county, Cal., were served upon appellees December 26, 1904. The appellees obtained, after notice and hearing, an order of court temporarily restraining the appellant from making any diversions of water from Walker river to their detriment, from which order this appeal is prosecuted.

James F. Peck and Charles C. Boynton, for appellant.

W. C. Van Fleet and W. B. Treadwell (Frohman & Jacobs and Frank H. Short, of counsel), for appellees.

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

WOLVERTON, District Judge (after stating the facts). The single question urged here, in addition to those determined in the case of Rickey Land & Cattle Company v. Miller & Lux, 152 Fed. 11, is

*Rehearing denied May 20, 1907.

whether the appellees have a standing in court whereby to maintain their cross-bills as against the appellant. The appellant and the appellees are all codefendants in the cause of Miller & Lux v. Rickey et al., and all citizens of the state of Nevada; and in their cross-bills, it will be seen, the appellees do not dispute the right of diversion by Miller & Lux, nor claim that its diversions are in any way subordinate to theirs, but they do allege that the appropriations of Rickey, whatever they may be, are subject and subordinate to theirs, and pray that the Rickey Land & Cattle Company may be enjoined from diverting the waters of Walker river in any manner to their detriment or injury.

The nature and purpose of a cross-bill in equity have been clearly determined. Says Mr. Justice Nelson, in Ayres v. Carver, 17 How. 591, 595, 15 L. Ed. 179:

"A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross-bill constitute but one suit, so intimately are they connected together."

To the same purpose is Ex parte Railroad Co., 95 U. S. 221, 225, 24 L. Ed. 355, where it is said:

"A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action."

So Sanborn, Circuit Judge, says in Stuart v. Hayden, 72 Fed. 402, 410, 18 C. C. A. 618:

"A cross-bill is brought either to aid in the defense of the original suit, or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. If its purpose is different from this, it is not a cross-bill, although it may have a connection with the general subject of the original bill. It may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill, and must be dismissed, because there cannot be two original bills in the same case."

Cross v. De Valle, 1 Wall. 1, 17 L. Ed. 515; Rubber Co. v. Goodyear, 9 Wall. 807, 19 L. Ed. 587; Young v. Colt, 2 Blatchf. 373, Fed. Cas. No. 18,155; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co. (C. C.) 46 Fed. 851.

Counsel for appellant expressly admit that, if the cross-bills are ancillary in purpose and character, they should be entertained regardless of the citizenship of the parties defendant. This reduces the inquiry simply to whether such cross-bills are, in legal contemplation, ancillary to the original bill, or whether they introduce matter foreign to, and disconnected with, the subject-matter of the original suit.

In the light of the foregoing authorities, it may well be premised that,

if the cross-bills operate defensively in behalf of the appellees in some substantial way, then they are pertinent, and afford appellees a standing whereby to assert such rights as will protect them against the suit of complainant in such cause, and this although they might impinge upon the alleged rights of the appellant. A suit respecting water appropriations from a stream is sui generis, and it may, and does frequently, happen that, in order fully to protect the rights of one appropriator against those of another, it is necessary to determine also the rights of the former, not only with reference to those of that other, but also with reference to those of still others upon the same stream. We can adduce no better illustration than that suggested by counsel for appellees. Suppose that A., B., and C. are appropriators of 10 cubic feet of water each from the same stream, within which is running but 30 cubic feet. A., the lower appropriator, sues, and procures a decree and injunction against B. and C. from diverting more water than will allow A.'s 10 cubic feet to come down to him. B. might divert 20 feet, and C. but 10, the amount only to which the latter is entitled, and yet both B. and C. would be guilty of a violation of the injunctive decree, because A. has been deprived of his 10 feet of water. Now, does it not seem perfectly clear that if C. had set up, by cross-bill to A.'s original bill, his interest in the stream, the decree would have been different, and would have gone against B. and C. severally, and not jointly, so that a violation of the injunction by B. would not have been also a violation by C., who was innocent of any wrong? Is there not here matter for substantial defense to sustain such a cross-bill? The answer is obvious. The cross-bill in such a case would be germane to the subject-matter of the original bill, and would operate defensively in behalf of the defendant interposing it. So it would be a matter of defense for C. to have his appropriation fixed as against B. The identical question has received careful consideration, in the case of Ames Realty Co. v. Big Indian Mining Co. (C. C.) 146 Fed. 166, at the hands of Hunt, District Judge, whose reasoning is so able, lucid, and cogent as to scarcely admit of any further controversy. He concludes, after making apt illustration of the case in hand, as follows:

"Will not a court of equity take jurisdiction with respect to this property right as ancillary to its jurisdiction over the case between complainant and first defendant, and, having jurisdiction of the whole proceeding, will it not proceed to do justice between all the parties? Reflection leads me to answer the questions in the affirmative. It is true that, if complainant can secure protection of its own right, junior appropriators might be left to fight out their relative rights among themselves; but, as conditions frequently exist in litigation over usufruct of water, where it is practically impossible to make a just decree between complainant and one defendant without ascertaining rights of defendants as against one another, the court will permit cross-complaints to stand, to the end that a multiplicity of suits may be avoided, so that tedious, expensive, and unnecessary litigation may be saved."

In Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 73, as against the objection that the defendants, of whom there were about 125, were not all jointly interested in their appropriations to the injury of complainant, and therefore should not have been made parties, Judge Hawley has this to say:

"These conflicting rights, whatever they may be, can be determined by one suit. Complainant might not be able to maintain its suit against them singly, for it may be that no one of the respondents acting individually has deprived complainant of all the water to which it is entitled. Complainant is only entitled, if at all, to a certain amount of the water of the river, and it is by the action of all the respondents that it has been deprived of the water to which it claims to be entitled. Each respondent claims the right to divert a given quantity of water. The aggregate thus claimed so reduces the volume of the water in the river as to deprive complainant of the amount to which it is entitled. To this extent, even if there is no such unity or concert of action or common design in the use of the water to injure complainant, there is certainly such a result in the use of the water by the respondents as authorizes complainant to maintain this suit, upon the ground that the action of all the respondents has produced and brought about the injury of which it complains. Every one who contributes to such injury is properly made a party respondent."

The reasoning is cogent in demonstration of the interdependent relations that exist among different appropriators from the same stream, and of the condition that one appropriator cannot always be fully protected against the injunctive process of another, unless at the same time he has his own rights ascertained and determined with relation to still others who are also subject to the same process. And so we conclude that the order appealed from should be affirmed, and it is so ordered.

UNITED STATES v. CHANDLER-DUNBAR WATER POWER CO.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1907.)

No. 1,543.

1. ATTORNEY GENERAL—OUTSIDE COUNSEL—EMPLOYMENT—UNITED STATES—ACTIONS BY.

The question of employing the attorney for a private party to assist in the prosecution of a suit by the United States in the public interest is one addressed to the judgment and discretion of the Attorney General, and such employment should not influence the action of the court if the object of the private party and that of the United States are one and the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney General, §§ 2, 5.]

2. PUBLIC LANDS—SUIT FOR CANCELLATION OF PATENT—LIMITATION.

Under Act March 3, 1891, c. 559, 26 Stat. 1093 [U. S. Comp. St. 1901, p. 1521], which provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act," possession by the grantee is not necessary to the running of the limitation; and, while the limitation would not apply to patents for lands which were not public lands subject to disposition by the United States, it will protect a patent for public lands reserved from sale for a temporary purpose which was accomplished long prior to the issuance of the patent, although technically the reservation had not been withdrawn.

3. SAME—VALIDITY OF PATENT—SUFFICIENCY OF SURVEY.

Where the boundaries of a camp ground reserved to Indians by a treaty were fixed by a government survey of the adjoining lands and shown by the plat returned, the tract containing less than 40 acres, such survey was sufficient for the purpose of a subsequent conveyance of the land by the land department after the reservation had been relinquished by the Indians.

4. SAME—RESERVATION FROM SALE—CONSTRUCTION.

In creating the Lake Superior land district in 1847, Congress reserved from the lands opened for sale certain lands for school purposes, and also such reservations as the President should deem necessary for public purposes. Pursuant to the authority so given, the President, in order to have time to ascertain what lands were necessary for public purposes, reserved a number of tracts temporarily, one of which, consisting of half a township, included Fort Brady on St. Mary's river, together with the reservation on which it stood, and also a small tract previously reserved to the Indians by treaty for a camp, together with other lands. By a subsequent executive order in 1852 the reservations were more narrowly defined, and all the remaining lands so temporarily reserved, "except the military reservation at Fort Brady," were released from reservation. The Indian right was extinguished by treaty in 1855. *Held*, (1) that neither the reservation in the act of Congress nor in the executive orders had any reference to the Indian reservation, over which the government had no power of disposition; and (2) that the exception in the order of release of the "military reservation at Fort Brady" included only the original reservation as defined prior to 1847, and not the entire temporary reservation of that year, which was the contemporaneous construction of the order by the department, so that in any event the Indian reservation became public lands subject to disposition by the government after the treaty of 1855, and a patent subsequently issued therefor is valid.

5. NAVIGABLE WATERS—RIPARIAN RIGHTS—TITLE TO ISLANDS IN ST. MARY'S RIVER.

The United States has no title to islands lying in the St. Mary's river between the Michigan shore and the thread of the stream, which were not surveyed nor claimed at the time of its general survey; but such title, like that to the submerged land, remained in the state, and under the law of Michigan is surrendered to and vests in the owner of the adjoining shore land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 253–255.]

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

H. M. Hoyt and Duane E. Fox, for appellant.

A. B. Eldredge and Moses Hooper, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The bill in this cause was filed in behalf of the United States by the district attorney for the Western district of Michigan, under the direction of the Attorney General, for the purpose of removing a cloud upon the title which the United States claims to have in islands numbered 1 and 2, situated in the River St. Mary within the protracted lines of the north half of section 6, in township 47 north, of range 1 east, in the state of Michigan, and about 27 rods north of the south shore of the river. The islands are small, both of them containing not more than 1½ acres of rocks and bowlders projecting a little above the surface of the water. The title which the United States claims to have is one acquired by the cession of the Northwest Territory from the state of Virginia, and from the necessity imposed by the provision of the Constitution delegating to the United States the power to regulate commerce between the states and between the states and foreign countries. The cloud complained of consists in a patent for the land along the shore opposite to the islands granted by

the United States on December 15, 1883, to one Chandler, from whom the defendant claims to derive its title, and the assertion of the defendant that by virtue of the patent, Chandler, and the defendant by mesne conveyances from him, acquired the title to the islands. The pleadings raise these main controversies: First, the complainant contends that the patent to Chandler for the mainland was void because at the date of the patent it was under a reservation which excluded the authority of the land department to sell or convey it; and, second, assuming the patent to be valid, it did not carry the title to the submerged land adjacent and the islands situated therein. The defendant contests both these propositions. At the hearing in the court below upon pleadings and proofs, the bill was dismissed.

In order to understand the grounds on which the decree was rested, and also for the purpose of disposing of an objection raised here by the appellee and based on one of the grounds taken by the court below, it is necessary to make a preliminary statement of some special facts. There is a fall in the St. Mary's river along the front of the Chandler tract of about nine feet, the benefit of which the defendant wished to preserve. The Michigan-Lake Superior Power Company was proposing to divert the water of the river at a point above the Chandler tract, but on the same shore, and carry it behind that tract for the purpose of using it for power. Sharp controversy on this subject was pending between those parties, when on November 26, 1901, one of the attorneys employed by the Michigan-Lake Superior Power Company made application to locate some scrip on these islands and a narrow strip of land along the adjacent margin of the river. This strip would separate the land described in the Chandler patent from the bed of the stream. In March, 1902, the defendant brought suit by bill in equity against the Michigan-Lake Superior Power Company in the state circuit court to restrain the threatened diversion of the water. The defendant in that suit answered admitting the title to the mainland under the Chandler patent, but alleging that the title to the bed of the river was in the state. Shortly thereafter, the Michigan-Lake Superior Power Company employed an attorney at Washington to promote the application of the before-mentioned attorney to locate the islands and the marginal strip by virtue of the scrip as aforesaid. This was in December, 1902. In January following, the Secretary of the Interior requested the Attorney General to bring a proper action to obtain a judicial determination whether unsurveyed islands in the connecting waters of the Great Lakes passed by grants of the riparian tracts. In February following, the Washington attorney of the Michigan-Lake Superior Power Company was employed as special assistant to the United States attorney at a nominal consideration to be thereafter determined by the Attorney General. In April following, a bill was filed by the district attorney in behalf of the United States against the defendant in the court below to settle the question which the Secretary of the Interior had proposed. It assumed the validity of the Chandler patent, but complained that the defendant asserted title thereunder to the islands. This bill was subsequently withdrawn. On September 2, 1903, the present bill was filed, bearing the signature of the United States attorneys and of the special assistant employed in behalf of the United States as before stated. On the fol-

lowing day the Michigan-Lake Superior Power Company moved in the state court for leave to withdraw the admission it had made in its answer of title to the mainland in the complainant (the defendant here) on an affidavit that, from investigations at Washington made by its counsel, it had learned that the complainant (in that suit) had no title therein. The learned judge in the court below, the late Judge Wanty, after referring in his opinion to the presence of the representative of a private party in the promotion of the suit, refused to consider the validity of the Chandler patent, saying:

"The patent to the shore or upland, issued December 15, 1883, to the defendant's grantor, is attacked in the bill for the purpose of defeating any claim of the defendants to these islands; but those allegations will not be considered by the court, as they raise no questions which the United States has any interest in having determined in this suit. If in this case it should be held that the patent to the upland is invalid, then the title to these islands for that reason would be in the United States, and the only question for the determination of which this suit was authorized would be entirely eliminated, as any expression of opinion as to what the status of these islands would have been if the patent had been valid instead of invalid would be obiter dictum. The complainant does not here ask to have this patent set aside, and if it seriously questioned its validity for any reason set up in the bill of complaint its officers would undoubtedly take steps to annul the patent and resume title and possession of the valuable land on the shore as well as to these insignificant islands, whose only value to the complainant, if it does not own the upland, seems to lie in their position to form the subject-matter of a cause for the determination of the question for the adjudication of which this suit was authorized to be instituted in the name of the United States."

Thereupon he passed to the other question, that of the effect of the grant upon the title to the bed of the river, upon which question he held with the defendant. It is contended that the presence of the representative of a private interest to promote a private advantage vitiates the proceeding. We think, however, that the question of the propriety of employing an attorney for a private party to assist in the prosecution of a suit by the United States in the public interest is one addressed to the judgment and discretion of the Attorney General who is charged with the responsibility for the conduct of the suit. If the object of the private party and that of the United States are one and the same, there would seem to be no sound objection. If, however, the name and authority of the United States were likely to be perverted to the promotion of a merely private object, one in which the public has no interest, such facts would indicate the impropriety of such a course, and might in some circumstances rightly influence the judgment in the case. For the reason that in the present case we find no ground for entertaining this objection as a foundation for judicial action in the disposition of the case upon its merits, we overrule it. But of course there will remain to us the duty of considering and determining what results ought to follow from the particular facts exhibited by the record, and from the manner and occasion in which those facts are presented to the court for judgment.

The first question which we shall consider is whether the defendant does not have title to this land by virtue of the statute of limitation of March 3, 1891, c. 559, 26 Stat. 1093 [U. S. Comp. St. 1901, p. 1521], which declares "that suits by the United States to vacate and annul any

patent heretofore issued, shall only be brought within five years from the passage of this act," and the adverse possession held for that period by the defendant after the passage of the act, if indeed possession is necessary to its operation as a limitation. Counsel for complainant raise two objections to the application of this statute. One is that this suit is not a suit to annul the Chandler patent, but only to maintain the title to these islands, and that they attack the validity of the patent only for the purpose of maintaining the title to the islands. This amounts to a contention that although the patent could not be attacked directly, after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right to which flows from the patent itself. The proposition is too plainly untenable for argument. But we add that the general rule is that possession of land under a claim of title for the period prescribed by a statute of limitation vests the title in him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result. The right of action of the United States, assuming it to have had any, was complete at the date of the passage of the act, and the lapse of five years without action to annul the grant resulted in the confirmation of it.

The other objection to the application of this statute is that if, as contended, the Chandler patent is absolutely void, the statute cannot apply, "because," quoting from the brief, "in legal effect no such patent ever existed. Statutes of limitation may protect a voidable title from any question as to its validity, but no statute of limitations can operate upon a thing that never existed." This statement of statutory limitations is open to criticism. But it is sufficient now to say that the statute in question is general and contains in itself no exception. When it speaks of vacating or annulling patents, of course it means the grants of title which the patents purport to make, and which the United States had lawful right to make. Doubtless this would not extend to lands reserved by treaty, and probably not to lands which had at the date of the statute been taken out of its power of disposition in favor of other parties who had acquired contingent interests therein, though the prospective part of the statute, not quoted above, might perhaps cover such lands if they should fall back into its absolute control. Having regard to the objects of the statute, we cannot doubt that it was intended to reach and cover, after the lapse of the prescribed period, any such mistake of the land department (assuming it to be such) as the holding that the temporary reservation of the lands in question by the President's order of 1847 was discharged by his releasing order of December 9, 1852. This temporary reservation by the President and his releasing order are stated and explained in a subsequent part of this opinion, to which we must here make reference. Such questions are continually occurring in the land department, and it would be intolerable if mistakes in such matters should be visited upon purchasers buying in good faith, and cannot be curable by lapse of time. It is contrary to the policy of the United States that the validity of its patents should be doubted and distrusted, and that they should for all time continue so. And it was as well for its own interest and credit, as for giving the security due from the government to its purchasers, that the act of

1891 was passed. We can scarcely doubt that it is applicable to the case before us. Counsel for the United States refer us to the language of Mr. Justice Brewer in the opinion of the court in United States v. Winona, etc., Railroad, 165 U. S. 463, wherein, at page 476, 17 Sup. Ct. 368, 371, 41 L. Ed. 789, he says, "Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department;" and reliance is placed upon the proviso that the land be open to sale and conveyance through the land department. And it is claimed that this land was not open to sale, because of the President's reservation under the act of 1847. But we think that this is a narrower construction of the language used than the learned justice intended. This land was, in a larger sense, open to sale by the United States. There had been no absolute reservation of it. There was only a temporary reservation of it which operated only as a temporary suspension of sales by order of the President, for his own convenience, until he should be prepared to make the reservations intended by Congress. And the purpose of the suspension had been accomplished more than 30 years before the issue of the patent to Chandler. Even if the reservation of 1847 had survived the release of 1852 and continued to have its exhausted hold upon all the lands originally reserved, the sale of this land in 1883 would amount to nothing more than a technical error or mistake of the land department, which, if it needed curing, the statute would cure. But as it is possible that we may be mistaken about this, and the principal object of the suit would not be fully accomplished by its disposition upon this ground, we shall consider the merits of the case without regard to the statute of limitations.

We are much impressed by the contention of the appellee that the court below was right in holding, as it did, that upon this bill the question of the validity of the Chandler patent is not a legitimate subject of inquiry. It is not a direct attack. There is no prayer that the patent be declared void. Nevertheless such a decree as is asked in favor of the complainant, if it were rested upon the ground of the invalidity of the patent, would, as we suppose, operate as an estoppel in favor of the United States and of any grantee to whom it might convey. But there are cases in which it has been held that a patent which is utterly void, a patent issued without authority, may be collaterally attacked by any person whose interests are injuriously affected thereby; and such decisions lead us to doubt whether the reasons which we have stated would justify us in declining to pass upon the question of the validity of the patent. We therefore proceed to the solution of it.

The validity of the Chandler patent is questioned upon two grounds: First, because the land was at that time embraced in a reservation for public uses; and, second, because it had never been legally surveyed. On June 16, 1820, while Michigan was yet a territory, the United States entered into a treaty with the Chippewa tribe of Indians whereby, in consideration of the cession by the Indians of 16 square miles of land lying south of the river, and which included the lands now in question,

the United States agreed to secure to them a perpetual right of fishing at the Falls of St. Mary, "and also a place of encampment upon the tract hereby ceded, convenient to the fishing ground." 7 Stat. 206. This "place" was not specified by the treaty. But the locality upon which the Indians had been accustomed to make their encampment was on the south shore of the river at the place where this land is located, and extended back for an indefinite space. The Indians continued to occupy this place for many years with the consent of the government, and a practical location was thus established. The southern boundary remained indefinite for a considerable time, but that and the eastern and western boundaries were at length fixed, by surveys and the assent of the Indians, on lines which included 36.50 acres adjacent to the river, and in which what we here call the "Chandler tract" was included. This reservation, as thus finally located, came to be called and known as the "Indian Reserve." It may be here stated that the right of occupancy by the Indians under the treaty of 1820 was released by them by treaty with the United States on August 2, 1855. 11 Stat. 631. But meantime, on August 26, 1852, Congress, whether with or without the consent of the Indians does not appear, passed an act, 10 Stat. 35, c. 92, granting to the state of Michigan, for the purpose of building a canal, a strip of land 400 feet wide, extending nearly parallel with the general trend of the south shore of the river, across the Indian Reserve, and which, when located, divided it into three distinct parcels, of which the Chandler tract is one. In the act making the "Canal Grant," as it is called, the premises through which the canal was intended to pass was described as "the Military Reservation at the Falls of St. Mary's River," a designation which will be explained later on. The canal grant of the strip through the Indian Reserve was not intended as a substantial invasion of the rights of the Indians. They were already greatly diminished in numbers at that place. As the settlement of that region by the whites progressed, the Indians receded into remoter regions, and, while there were 40 wigwams at the time of the treaty, but 6 remained. Besides, the land was unfit for cultivation. And it was doubtless expected that before the canal would be built the reservation would be extinguished, and this was what happened.

The original survey of that region was made in 1845 by James H. Mullett under the direction of the Surveyor General. In his instructions to the surveyor the Surveyor General stated that in the territory to be surveyed by him there was an Indian reservation at Sault Ste. Marie as a place of encampment and for fishing, which was reported to have been surveyed and "located by the War Department in 1823," as to which he instructed the surveyor as follows: "This reserve you will exclude from the survey, and return a survey of its boundaries to this office." The meaning of this was that he was not to run the customary survey lines through the reserve, but simply survey it out in a lump. This the surveyor did. From this survey of the boundaries the Surveyor General computed the area included therein at 36.50 acres. And the surveyed boundaries and the area of the reservation were entered in the plat. This survey by Mullett having been made by the authority of the government, which directed the survey of the boundaries of the Indian Reserve, and having been approved and made as it was,

the basis of governmental action in dealing with the lands in that locality, is convincing evidence that this reserve had been located and its boundaries established as above stated. And the result was that nothing short of an act of Congress or a treaty could interfere with the right of the Indians to its occupancy. Such action by Congress would have been a breach of faith with the Indians, and its intention to do, or to authorize, any act which would have that consequence, ought only to be inferred from clear and explicit language which could not reasonably be interpreted in any other way. The canal grant when applied to its subject-matter was not susceptible of any other construction than that it was an invasion of the treaty, though in the circumstances, as we think, it was not realized to be more than a technical and practically harmless one. However that may be, it did not affect the reservation to any extent beyond the limits of, or further than, the plain language of the grant required. We postpone for the moment the consideration of the question of the sufficiency of the Mullett survey to justify a sale or other disposition of the land without a further survey.

The settlement at the Sault had increased to the extent that in 1849 it was incorporated as a village under the laws of Michigan. It was laid out in squares, blocks, and lots. Its bounds included the Indian Reserve as well as the reservation at Ft. Brady. Congress, having in mind apparently the desirability of a more accurate and detailed survey of the locality than the original survey, which was, as experience has shown, often inaccurate or defective, passed the act of September 26, 1850, providing for a new survey, which, however, was to be founded on the original survey, with proper corrections and extensions into greater detail. 9 Stat. 471, c. 71. By the seventh section it was directed that the "deputy shall prepare a plat exhibiting in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public lots, and also the outlots, designating the lots reserved for military or other purposes according to the extent and limits of the same, as fixed by the proper military officer, pursuant to the requirements of the second section of this act." This of course included the Indian Reserve, and required that its extent and limits should be exhibited by the plat. But after this act of 1850 was passed the canal grant was located, and the new survey was made subsequently to the location. The surveyor, one Whelpley, when he came to survey the Indian Reserve, found it cut into three parcels by the canal grant, which he naturally assumed excluded the strip within its limits. He therefore surveyed the separated parcels, and exhibited in his plat "the extent and limits" of each. This was manifestly the proper course to pursue. What Congress wanted was a plat which when adopted would exhibit the needful information of the conditions existing at its date. That one of these three parcels which became the subject of the Chandler patent was shown by this survey and plat to contain 9.10¾ acres, and, as already stated, described its bounds. The Whelpley survey was adopted by the department, and has since been acted upon as the final public survey. We may here conclude what we propose to say about the objection that the Chandler patent is void because there then had never been any survey of the land. It is true there has never been any survey of the land upon lines of sections and subdivi-

sions, as when such method of surveying is practicable. There are many instances where the public lands, if sold at all, must be surveyed in a different way from the more common method employed in a wide expense of territory. The object of a survey is as fully attained. If the land was at the time subject to the control and disposition of the department, we cannot think that its disposal upon the existing surveys could be assailed, certainly not in this collateral way.

But it is said that the land was under a reservation which excluded the power of the Land Office to dispose of the land. The reservation for the Indians was extinguished by the treaty of 1855. There was another reservation lying to the east of this which had been reserved for military purposes, on which was located Ft. Brady. This had been gradually reduced to a tract of somewhat less than 40 acres. It had never included the Indian Reserve, and was separated from it by intervening lands. Officers of the War Department had, as the record shows, kept an eye on this part of the Indian Reserve as a place upon which the government might at some time desire to erect fortifications and other erections for defense, and had been in communication with the Treasury and Interior Departments on that subject. But no reservation was made nor could there be so long as the reservation for the Indians continued, without a breach of the treaty. By the act of March 1, 1847, the Lake Superior land district was created, a land office established, and the whole region was opened for sale in like manner as other public lands of the United States are sold. 9 Stat. 146, c. 32. This act contained an exception, in the second section, of sections 16 in each township for the use of schools, "and such reservations as the President should deem necessary for public purposes." On March 31st following, the Commissioner of the Land Office addressed the Secretary of the Treasury suggesting that reservations by the President should be made at a number of specified places on the Sault Ste. Marie and along the south shore of Lake Superior of so much of the lands designated by a list from the fifth auditor as might be found necessary for lighthouse purposes or other public structures until further investigations could be made. This communication was transmitted to the President with the Secretary's recommendation that such reservations be made "until the requisite investigation can be had," as he said. The President on April 3, 1847, ordered that the lands be reserved according to the recommendation. This reservation included a number of tracts in the land district of Lake Superior. The tract at the St. Mary's River included, though not by name, the Indian Reserve, but was more extensive than that, being of the whole north half of the township. This was reduced by executive order made September 2, 1847, but still retained a much larger tract than the Indian Reserve. By subsequent designations it was still further narrowed. But it still contained within its limits the reservation on which Ft. Brady was situated, and also the Indian Reserve. In April, 1852, several prominent citizens of Michigan, among them the Senators from that state, addressed a memorial to the Commissioner of the Land Office representing that it was highly important to the peace and prosperity of the community at Sault Ste. Marie that the locations of the reservations should

be definitely fixed. It is worth while to copy a paragraph of this memorial as indicating what was then the common understanding of what was considered as the "Military Reservation at Fort Brady":

"If we are correctly informed the line C. D., or westerly line of the military reservation, as marked on the land office survey or map, includes within said reservation a town house and several private buildings long occupied by citizens, and that if the westerly line of the present pickets of Fort Brady, or a line so far west of said pickets as not to include any private claims or buildings, can be made the westerly line of the military reservation, without prejudice to the interest of the government, it would remove all cause of complaint and be of great advantage to the village in enlarging the now very limited water front and would, in our opinion, give general satisfaction to the citizens of the place."

The line C, D, was the western boundary of the Ft. Brady Reservation. This memorial was transmitted to the Secretary of the Interior by a letter in which the Commissioner stated as follows:

"This office is of the opinion that the time has arrived when the reservations alluded to may be circumscribed within the limits of public utility for Light House, Military, Naval or other public purposes. If such opinion be concurred in by the proper authorities, and in order to facilitate action in the premises, diagrams exhibiting the bodies of land, so reserved, are herewith submitted, and after the Treasury, War, Navy & Interior Departments shall have designated all the permanent sites and circumjacent areas of land needed for Light House, Military, Naval and Indian purposes, the residue may be ordered by the Executive to be brought into market as desired by the memorialists."

Prior to December 9, 1852, Col. Abert of the Topographical Engineers in the War Department, to whom the question of the necessities of that department in the land still reserved was referred, had reported in substance that none of the lands west of the Ft. Brady Reservation were required. And no other reservation at Sault St. Marie was proposed by any other of the departments to which the Commissioner refers. Then, on December 9, 1852, a list of lands at several points on Lake Superior, exhibiting in green the areas therein which had been reserved at those points for lighthouse purposes, was laid before the President, and at the foot he made the following order:

"Let all the lands described in the above list and designated by the green shades on the annexed maps, be reserved for light house purposes; and all the remaining lands situated in the tracts which were temporarily reserved for 'public uses' in the year 1847, (except the military reservation at Fort Brady) be and the same are hereby released from reservation.

"Washington, December 9th, 1852. "By the President:

"Millard Fillmore."

Thereupon the Commissioner of the Land Office, in directions to the register and the receiver of the district, said: "You will perceive that the President's order releases all the balance of the reservation of 1847, (except the existing reserve for Fort Brady) and you will so note them in your books and plats." And the department has ever since followed that interpretation in disposing of the lands once contained in the reservation of 1847. It is now contended that by the "military reservation at Fort Brady" was intended the reservation of 1847 which was for "public purposes," and which was sometimes called a military reservation, though for no other reason that we can see except that the War Department was the original promoter of it, and because it

was understood to have been made in the anticipation that it might be required for military purposes. The further reservation for such purposes was, as we have seen, abandoned by the War Department when it was consulted upon the question as to what reservations it needed.

Now upon these facts we are of opinion;

First. That Congress did not intend by the act of 1847 that it should have any application to the Indian Reservation. That was already withdrawn from the sale by a treaty which Congress was bound to respect. The subject of its legislation was to reserve land which would otherwise be sold. The reservation made by the President was only precautionary, and covered large areas. It was gradually relinquished and was never made absolute. The exception by the President in his order of December 9, 1852, of the Ft. Brady Reservation was made to prevent the operation upon it of the general release. Nor is there anything whatever in the record to show that the President pretended to have any authority over the lands in the Indian Reservation. See the opinion by Mr. Justice White in Spalding v. Chandler, 160 U. S. 394, 16 Sup. Ct. 360, 40 L. Ed. 469. The general language of the act and of the President's orders thereunder should be interpreted to be limited to the subject to which they could properly apply.

Second. We have no doubt that by "the military reservation at Fort Brady" he intended the Ft. Brady Reservation, and it was suitably described. For, as we have said, he had no authority to deal with the Indian Reservation except to preserve its integrity, and it is to be presumed he did not intend to exceed his authority; further, if he had intended to except two reservations, he would have said so. As the Ft. Brady Reservation had been made for the government's own uses and had not been excluded by treaty with another party, it was prudent for the President, who by the statute was given power to make reservations in a territory which covered the Ft. Brady Reservation and which it was proposed to open for sale, to except it. As we have said, the contemporaneous construction of the President's order was that the only exception made thereby was the Ft. Brady Reservation, and that construction was subsequently followed by those who were charged with the carrying the order into effect. Counsel for appellant, however, point to an exception. This consists of a letter written by the Commissioner of the Land Office, Wilson, to the register and receiver of the district, June 9, 1853, in which, referring to certain lands about which they had written him, included in the first or precautionary reservation, but not in the Indian Reserve, he said:

"These lands are within the reservation for Fort Brady and are, in consequence, not liable to entry, by pre-emption or otherwise. The reservation, as made by order of the President of the United States on the 2nd day of September, 1847, embraces Sects. 4, 5 and 6 of T. 47 N., R. 1 E. & Sect. 1 and 2 of T. 47 N., R. 1 W. and your office was informed, in the letter of the 26th Feby. last of the reservation for Fort Brady, without however designating the tracts."

But in the letter of February 26, 1853, the same Commissioner had, as above stated, informed them that the President's order had released all the balance of the reservation of 1847 except the existing reserve

for Ft. Brady, and directed to so note them (the lands released) in their tractbooks and plats. It seems probable that the Commissioner, in writing his letter of June 9, 1853, was laboring under the misapprehension that the lands he was writing about lay in the Ft. Brady Reservation. Otherwise there is such a conflict in his statements as to render them without value as evidence of contemporaneous construction.

The Chandler tract was therefore open to the location of the scrip, and had been adequately surveyed. The location of the scrip was permissible, and the patent was and is valid.

We come, then, to the question which is of more general interest to the United States, and the one which constitutes the direct object of the bill, and this is whether the ownership of the mainland carries with it the title to the islands lying between it and the thread of the stream. At this point it seems proper to note an aspect of the case which otherwise it might be thought we had overlooked. It will be seen from what follows that we are of the opinion that the United States has neither the legal or equitable title in the bed of the stream or in these islands, and consequently has not such an interest in the land as is required to support a bill to remove a cloud upon a title. In short, we think the title is in the state of Michigan, if the state has not yielded it to the riparian owner. But this defense, if it be one, has not been raised or discussed by counsel, who have preferred to ignore it. And, as there is a colorable case for the presentation of the merits of the principal question, we have concluded to examine and decide it. But the principles upon which our decision must rest were long since settled, and it seems to us singular that the Department of the Interior requires any fresh judicial declaration of them. The relevant propositions established by the decisions of the Supreme Court of the United States, as we understand them to be, are:

(1) The original states which united under the Constitution owned the land submerged by the navigable waters within their respective boundaries in right of their sovereignty.

(2) This ownership was not surrendered by their union, and remained unaffected thereby except to the extent that they might be affected by the exercise of the power delegated to the United States to regulate commerce between the states and between the states and foreign countries.

(3) Upon the acquisition of territory by the United States, such new territory was held, the terra firma as well as the submerged lands, in trust for the several new states which should thereafter be formed of such territory, subject, however, to the right retained by the United States on parting with it to sell the land for revenue, and this doubtless included lands in islands as well as elsewhere, which the United States should regard as valuable and claim for itself.

(4) This trust was executed by the United States, and the ownership of the submerged lands relinquished when any state thus formed should be admitted into the Union, for upon such admission the new state was entitled to the same rights of sovereignty and be upon an equal footing "in all respects" with the original states. And this was one of the express conditions of the deed of cession executed March 1, 1784, by the

state of Virginia to the United States, of the Northwest Territory, out of which the state of Michigan was formed.

(5) In the case of the state of Michigan, the condition was performed by the act of Congress of June 16, 1836, by which it was admitted with its northern and eastern boundaries on the international boundary, the new state to be "on an equal footing with the original states in all respects whatever." And thereupon the title to the lands submerged by the navigable waters of the state was transferred to the state. But the title to the mainland and of such islands as it should claim was as in other cases expressly reserved to the United States by the act of admission, to be sold for the benefit of all the states.

(6) The title to unsurveyed and unclaimed islands in submerging waters is of the same character with that of the bed of the stream or other navigable waters.

(7) The ownership by the state of lands submerged by navigable waters is in all the states, and equally in them all, subject to such control by the United States as is necessary to the exercise of the power to regulate commerce. To this extent only is the complete title impaired.

(8) The United States has therefore in its several departments, legislative, executive, and judicial, recognized the right of the state in which such submerged lands and unclaimed islands are situated to make such disposition of them as it pleased.

(9) The state of Michigan, as have other states, has relinquished them to the riparian owner.

The leading case of Pollard's Lessee v. Hagan, 3 How. 212, 11 L. Ed. 565, presented nearly all of these questions, and the general principles there discussed and adjudged have ever since been accepted and applied. In that case the plaintiff sought to recover in ejectment lands which had been patented to him by the United States, and which at the date of the patent laid below high-water mark in the Mobile river at the city of Mobile. If the United States had any title, its grantee could recover upon it. And so the case presented the very questions which are presented upon this branch of the case before us. It was held that the plaintiff could not recover, because the United States had no title to convey. The whole subject was fully and ably discussed by Mr. Justice McKinley, in the opinion of the court. The subsequent decisions involving it are too numerous to be separately canvassed. It was examined afresh by Mr. Justice Gray in Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. The doctrines of the case of Pollard's Lessee v. Hagan were confirmed on all the questions involved in the present case. The only criticism made was of so much of the opinion in the earlier case as implied that Congress had not the power while Alabama was a territory, and had not yet been admitted as a state, to dispose of the land below high-water mark. This was obiter in Pollard's Lessee v. Hagan, for the grant in that case was made after Alabama became a state. As we infer, this criticism was founded upon the theory that, as the United States held the title to the land during the territorial status, Congress had the power to disappoint the expectation by diverting it to another purpose, whatever might be thought of the propriety of its action. But no such question arises here. We pass

by the numerous cases which have followed the cases of Pollard's Lessee v. Hagan, and Shively v. Bowlby, until we come to the recent case of Whitaker v. McBride, 197 U. S. 513, 25 Sup. Ct. 530, 49 L. Ed. 857. A special reason for citing this case exists in the facts that it arose in Nebraska, where the local law in regard to the title to land between high-water mark and the thread of rivers is the same as that of Michigan, and the case involved the title to an island in the river between those lines. In the opinion of the court, delivered by Mr. Justice Brewer, the opinion of Mr. Justice Bradley in Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428, was cited as authority for the doctrine that "the grants of the government for lands bounded on streams and other waters, without any reservation or restriction in terms, are to be construed, as to their effect, according to the law of the state in which the lands lie." Then, as to the circumstance that the lands in suit were an unsurveyed island of some 20 or more acres, the learned justice pointed out that the omission to include the island in the general survey of that locality was evidence that it was not claimed by the government, and referred to the case of the Grand Rapids & Indiana Railroad Company v. Butler, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85, which was also a case involving an island, for authority, said:

"Upon these surveys (of 1831 and 1837) the adjacent land and the islands (not the island of that suit) were sold and patented to private parties. In 1855 a parcel of ground in the river was, under instructions from the Surveyor General, surveyed and marked 'Island No. 5,' and for that island a patent was issued to the railroad company. We held that the patent to the riparian owner, issued before the date of the last survey, conveyed to him the title to the island."

The case of Grand Rapids & Indiana Railroad Company v. Butler was one in which the question of the title to the fundus or bed of navigable rivers in Michigan was directly involved, as well as that of islands in such rivers which remained derelict, so far as the claims of the United States were concerned, by their omission from the original surveys of the locality. There are numerous decisions of the Supreme Court of the United States in which dependent questions were involved. But there are none which run counter to the general doctrines we have stated. Perhaps the most serious difficulties have been encountered in cases which involved the circumstances, or the extent and manner, of the exercise of the power of Congress to regulate commerce. Of such was the case of Scranton v. Wheeler, which came before this court and again before the Supreme Court. 6 C. C. A. 585, 57 Fed. 80; Id., 163 U. S. 703, 16 Sup. Ct. 1206, 41 L. Ed. 318.

In Michigan the state has never claimed such islands. Differing in this regard from some of the other states, that state has relinquished them to the adjacent proprietors. In the early case of La Plaisance Bay Harbor Co. v. City of Monroe, Walk. Ch. 155, Chancellor Manning held that the complainant, which had erected wharves, piers, and warehouses on the banks and in the waters of a bay which was a part of Lake Erie, under charter from the state, had no title to the bed of the lake on the front of the land occupied by it. In his opinion he linked in his statement of the rule the bed of the rivers in the state. But

that was obiter. The complainants were not the owners of any land on the banks of the River Raisin, the diversion of which river was the matter complained of. Whether the decision paid a due regard to the rights of the complainant as a riparian owner on the bay in the circumstances of that case is not now material. The case was authority for the contention that the riparian owner on the shore of the Great Lakes had no title to the bed of the adjacent waters. But in the case of Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435, the question was presented to the Supreme Court of the state in regard to the riparian owners' title to the bed of the Detroit river. The action was for obstructing the plaintiff's right to get the ice on the river; and one of the questions reserved by the trial judge for the opinion of the Supreme Court was, "Have riparian proprietors on the Detroit river a right of property in the soil under the water, or in the ice, or the exclusive right of taking the same in front of the premises to the middle of the stream?" The answer of the court is thus stated in the headnote by the reporter, Cooley, afterwards a distinguished member of the court: "The common-law principle that the soil under such tideless public rivers is in the owner of the adjacent bank prevails in this state, and is applicable to the Detroit river." The case in Walker's Chancery Reports was cited in the briefs, but is not mentioned in the opinion. The former chancellor, Manning, had become a member of the Supreme Court and concurred in the opinion. This decision has been followed in the later cases decided by that court. Rice v. Ruddiman, 10 Mich. 125; Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154; Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182; Turner v. Holland, 65 Mich. 453, 33 N. W. 283; Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276. And later on the same rule has been recognized by the Supreme Court of Michigan in People v. Silberwood, 110 Mich. 103, 67 N. W. 1087, 32 L. R. A. 694, in regard to rivers. But in this later case the court drew a distinction between the land in the bed of rivers and that in the bed of the Great Lakes, and in regard to the latter reverted to the rule in La Plaisance Bay Harbor Co. v. City of Monroe, supra.

In behalf of the complainant it is contended that there is a difference between the land in the bed of the inland rivers of a state and those on its boundary, especially where the boundary is an international boundary; but no substantial ground for such a distinction has been suggested, nor can we find any. The Michigan rule has been applied indiscriminately to the inland waters of the state and those on its international border. Lorman v. Benson and Backus v. Detroit, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447 related to the Detroit river, and Ryan v. Brown related to the St. Mary's river.

The brief of counsel for the appellant discloses that upon a search in the early archives of the government it appears that the St. Mary's river was sometimes, indeed often, called a "strait," and it is likened by counsel to the Bosphorus and other like great connecting waters. Much industry is shown to have been given to this endeavor, and the object is to show that the St. Mary's river ought to be classed with the Great Lakes upon the distinction taken by the Supreme Court of Michigan in People v. Silberwood, 110 Mich. 103, 67 N. W. 1087, 32 L. R. A. 694,

between rivers and lakes. We have preferred to call the stream a river, not only because it seems the more proper appellation, but also because it has in recent times been so called. But it is a small matter to differ about. It is the same stream, by whatever name called, as was the subject of the decision in Ryan v. Brown, and it has a much smaller title to be called a strait than has the Detroit river, which has a much more even current and carries several times the volume of water, and which was the subject of decisions in two, at least, of the Michigan cases.

The complainant says that it needs these islands in order to fulfill its treaty with Great Britain that the Great Lakes and connecting waters should forever remain free and open to the commerce of the contracting parties. But it is not stated that these islands are a menace to the commerce of Great Britain, or that that country has made any complaint or requirement about them. But aside from this, the United States did not, by the treaty, stipulate to make improvements in these waters. It stipulated that it would interpose no obstacle to their navigation in the commerce of the other country. It might have left them all in their natural state without any violation of the treaty. A great number of cases are cited in the brief of appellee from the states where the Michigan rule prevails, and where the river is on the border line between states, and there are a number of cases from such states in the reports of the Supreme Court of the United States where the rule has been applied without regard to the fact that the river was a state boundary.

Again, it is said that the United States needs these islands for its convenience in its commerce on the river. But for what particular purpose of that sort is not stated. No action has been taken by Congress for the construction of any works or the removal of any obstructions at this place which would be affected by the existence of the islands. If the Congress shall at any time require them in order to properly regulate commerce, which in view of their location would seem a rather remote probability, the defendant will not be ousted of its title, but it will become subject to an easement for a public use which may more or less impair its value. But that was a liability to which it was exposed when it acquired the title.

Thus far we have considered this question on its strictly legal aspects. The elements of equity in the attack on the Chandler patent are scant. His application was made May 17, 1881. The Land Office had it under advisement until December 15, 1883, when it granted the patent. It does not appear that the particular objection now made was presented to the Commissioner. But the matter of the reservations in the locality, including the land applied for, must have been under his observation, and the issuance of the patent is at least prima facie evidence that no valid objection to its issuance was deemed to exist. The Land Office then had, and has continued to have in its possession, the same data for raising the question of the validity of the patent that are made the basis for the contention now made. Upon the faith of the grant, the patentee and his grantee have made permanent improvements upon the land costing from $135,000 to $150,000. Following the ancient common-law maxim, "nullum tempus occurrit regi," it has been settled as the rule here that the United States is not affected in respect to its

pursuit of remedies by mere delay or general statutes of limitation. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another.

The argument in this case took a very wide range. But we have endeavored to keep as nearly as we could within the limits of the controlling facts in the controversy and the principles which we think applicable to them.

We are of the opinion that the decree of the court below should be affirmed.

COOK et al. v. FOLEY et al.*

(Circuit Court of Appeals, Eighth Circuit. February 13, 1907.)

No. 2,224.

1. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

While it is the rule of the federal courts that if there be error apparent on the face of the record a presumption of prejudice arises which cannot be disregarded unless the record affirmatively discloses that the error was not prejudicial, it is equally well established in such courts that no judgment will be reversed for error when it is clear that such error did not and could not have prejudiced the rights of the party against whom the ruling was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4029–4037.]

2. CONTRACTS—RULES OF CONSTRUCTION.

It is a well-recognized canon of construction that the situation of the parties to a contract at the time it was entered into should be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 752.]

3. SAME—PRACTICAL CONSTRUCTION BY PARTIES.

Where the parties to an executory contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 753.

Practical construction of contracts by parties, see note to Davis v. Alpha Portland Cement Co., 73 C. C. A. 392.]

4. SAME.

Defendants took the contract to construct a railroad in accordance with specifications which by their terms were made a part thereof, and which provided, inter alia, for monthly payments based on approximate estimates made by the engineers of the railroad company, a certain percentage being reserved, and for a final estimate and payment after the work was completed. They also provided that "the engineers' measurements and classifications shall be final and conclusive." Plaintiffs submitted to defendants a proposal for a subcontract after having been given a copy of such specifications, which proposal stated "all work to be done according to the specifications of the * * * railroad company and to the satisfaction of their engineers." The proposal was accepted, and

*Rehearing denied May 23, 1907.

plaintiffs did the work. They received monthly payments on estimates made by the company's engineers, and on completion of the work received final payment on measurements and classifications so made without objection. They at no time had measurements or classifications made for themselves until a year after such final payment. *Held*, that while the provision of the specifications making the measurements and classifications of the company's engineers final and conclusive was not in terms made a part of the subcontract, yet in view of the situation of the parties when it was made, and their acts in making and receiving payments based solely on the estimates, measurements, and classification of such engineers, it was clearly intended that the specifications should be a part thereof, and that the rights of the parties thereto were governed by such provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 884–889.]

5. SAME—PROVISION FOR ESTIMATES BY ENGINEERS—CONCLUSIVENESS OF ESTIMATES.

Final measurements and classification of work made by engineers under a contract providing that they shall be final and conclusive between the parties are in legal effect an award made by arbitrators, and are final and conclusive, in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1326–1351.]

6. SAME—IMPEACHMENT FOR FRAUD OR MISTAKE.

Final estimates made by engineers in pursuance of a contract between the parties making such estimates final and conclusive when made the foundation of an action at law, or when interposed as a defense to an action at law, cannot be impeached for fraud, such gross mistakes as imply bad faith, or a failure to exercise an honest judgment on the part of the engineers if timely objection is made, but for such relief resort must be had to a court of equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1343.]

7. COURTS—PROCEDURE IN FEDERAL COURTS—MINGLING OF LEGAL AND EQUITABLE CAUSES OR DEFENSES.

In the federal courts there can be no blending of legal and equitable causes of action or defenses.

8. SAME—ISSUES—OBJECTIONS—WAIVER.

The objection that an issue raised by the pleadings in an action at law is cognizable in equity is waived by a failure to interpose it in apt time in the trial court.

9. CONTRACTS—ESTIMATES OF RAILROAD WORK BY ENGINEER—IMPEACHMENT FOR FRAUD.

A very high degree of proof is required to impeach the decision of a railroad engineer as to amount and classification of the work done by a contractor on the ground of fraud or bad faith, where by the contract such decision is made conclusive between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1347.]

Carland, District Judge, dissenting.

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

H. V. Mercer (George P. Wilson and George C. Greene, on the brief), for plaintiffs in error.

Harris Richardson, for defendants in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. The important and controlling facts in this case, as gleaned from the record, are:

Defendants in error (hereinafter called "defendants") were the original contractors with the Algoma Central Railway Company (hereinafter called the "railway company") for the grading of a line of road in Canada. On the 30th day of September, 1901, the defendants received from plaintiffs in error (hereinafter called "plaintiffs"), the following proposition to grade a portion of the road.

"St. Paul, Sept. 30, 1901.

"Messrs. Foley Bros., Porters & Whalen, Contractors.

"Gentlemen: We propose to do all the work on the Main Line near Batchewana of the Algoma Central Ry. from Station 885 to Station 1065 at the following prices:

Earth excavation, hauled 500 feet and under, per cu. yd.	$ 25
Loose rock excavation, hauled 500 feet and under, per cu. yd.	40
Solid rock excavation, hauled 500 feet and under, per cu. yd.	1 45
Hard pan excavation, hauled 500 feet and under, per cu. yd.	40
Material hauled beyond 500 feet.	01
Clearing per acre.	38 00
Close cutting per acre.	35 00
Grubbing per acre.	75 00

Cedar Box Culverts, $16.00 per M. ft. B. M.

"All work to be done according to the specifications of the Algoma Central Railway Company and to the satisfaction of their engineers, and to be completed by June 30, 1902. If, at any time in your opinion, or that of the engineers of the Algoma Central Ry. Co. there is not sufficient force on the work to complete the same within the time specified, we agree that you may put on what force you consider necessary and charge same to our account.

"Yours truly, Cook Bros."

To this proposition defendants replied:

"Messrs. Cook Bros., Contractors:

"Gentlemen: We accept the above proposition and authorize you to commence at once.

"Yours truly, Foley Bros., Porters & Whalen,
"By W. D. Barclay."

In accordance with the contract so made, plaintiffs did perform the work of grading the road between the sections named in the contract, and before the commencement of this action received therefor the sum of $70,639.74 for work done by them under the contract, based on estimates made by the engineers of the railway company. Plaintiffs also received the further sum of $8,542.30 for extra labor performed, materials furnished, and money expended for various purposes. Thereafter plaintiffs commenced this action at law to recover a balance of $21,965.78 claimed by them to be due on the contract price for work done under the terms of the contract, and the further sum of $3,206.52 as balance claimed by them to be due for extra work done, materials and money furnished and expended for defendants. The amount thus claimed by plaintiffs for work done in pursuance of the contract was based upon measurements and classifications of the work made by engineers, at their request, more than a year after the completion of their contract.

The petition is in three counts. The first, for balance due under the terms of the contract; second, for the same amount based upon

the common (quantum meruit) count; third, for balance claimed for extras furnished, extra work done, materials furnished, and money expended for the benefit of defendants. To this petition defendants answered, admitting the making of a contract with plaintiffs and the performance of the work and labor by plaintiffs under the contract, but alleged at the time of the making of the contract there was in existence certain specifications for the doing of the work which formed a part of the original contract between defendants and the railway company, and that by reference thereto in the contract made with plaintiffs said specifications were adopted and became a part of the subcontract between plaintiffs and defendants. These specifications were set out in the answer in full.

Paragraph 4 of the general provisions applicable to all work done under the specifications provides as follows:

"An approximate estimate will be made at the end of every month during the current month as provided for in the contract, reserving to the contractor the right to inquire into the correctness of the estimate. 15 per cent. of the monthly estimates will be reserved as a reserve fund until final completion of the work as provided for in the contract."

Paragraph 5 provides:

"Final estimates will be made for the work with reasonable diligence when completely performed, and the engineer reserves the right to reject the whole or any portion of the said work, should it be found to be inconsistent with the specifications. The engineer's measurements and classifications shall be final and conclusive."

Paragraph 19 provides:

"These specifications are hereby acknowledged, accepted and made a part of this contract."

The answer further alleged that the engineers of the railway company made a final estimate of the amount of work done by plaintiffs under the terms of their contract and its classification, and in accordance therewith defendants had made full payment to plaintiffs according to the terms of the contract.

As to the third count in plaintiffs' petition, the defendants in their answer pleaded full payment. In reply to this answer plaintiffs pleaded as follows: In the third paragraph admitted the railway company provided specifications substantially as set out by the defendants. In the second paragraph denied these specifications were a part of the contract made by plaintiffs with the defendants, and in the fourth and fifth paragraphs of the reply pleaded as follows:

"Denies that either the said engineer or engineers ever either made or caused to be made measurements of the said work according to the methods and at the times alleged in said answer, or at all; denies that either the said engineer or engineers ever made any estimates of said work except approximate estimates and measurements occasionally made of parts of said work, and alleges that said occasional and approximate estimates and measurements were not made every month or as often as every month, and were never made for the whole of said work, and not made after said work was completed: that neither of the plaintiffs ever had any notice or knowledge of either the time or place of either any estimate or measurement of said work, either approximate, preliminary or final, or otherwise, by either the said engineer or engineers; that neither of the plaintiffs were ever either present

or represented at such estimate or measurement; that neither of them ever had any opportunity to inquire into the correctness of any such estimate or measurement, or know whether it was made either fairly or correctly; that the plaintiffs were informed that said approximate and occasional estimates and measurements had been made of parts of said work from time to time, and requested and demanded of the said defendants, and the said engineer and engineers in charge of said work and railway company, that plaintiffs be permitted to have the right to examine such estimates as might be made by said engineer or engineers, and might have copies thereof; that said request was always refused to either examine or see either or any such reports or estimates; that plaintiffs are informed and believe, and upon that information and belief further allege, that, when said approximate and occasional estimates and measurements were made, they were for much less than the work actually performed, and were greatly erroneous as to the classifications; that after the work had been actually performed and said occasional measurements had been made, in so far as they were made, the result of said measurements and the classifications thereon and the estimates based upon said measurements and classifications were, from time to time, by the procurement of the said defendants, willfully and fraudulently manipulated and changed to decrease the apparent amount of work performed by these plaintiffs, and with a view and with a purpose and with the intention of so combining, manipulating, and changing the results of said estimates as to greatly reduce the amount of said work, and to falsely and erroneously classify the same so as to greatly reduce the amount owing from said defendants to these plaintiffs.

"And plaintiffs further allege that within and at a reasonable time after the conclusion of said work plaintiffs duly demanded of said engineers and said defendants that they measure or cause to be measured the said work for a final estimate thereof, and offered to pay one-half of the expense of such measurements, but said defendants refused to do so; deny that said engineer ever either measured or classified said work, either in accordance with the allegations of said answer, or at all; but allege that if said engineer ever either measured or attempted to measure, or ever either classified or attempted to classify, said work, or ever either found, or attempted to find, adjudge, or determine the same, or the rights of these plaintiffs, or the liability of the defendants therefor, that the same was done without either the knowledge or consent of plaintiffs, and without any agreement upon the part of plaintiffs therefor, and without any hearing or opportunity given to plaintiffs to be heard thereon; that such measurements and classifications or attempted measurements and classifications, if made or attempted to be made by said engineer, were wholly without authority as to these plaintiffs, and of no binding force or effect on them or their rights therein; that if the said engineer did make in fact such measurements, and did in fact attempt to classify said work and adjudge said work, that he could not, and did not, arrive at the amounts and classifications set forth in defendants' answer, if the same were done intelligently and honestly, and that if he did arrive at the said respective amounts and classifications, that his said measurements and classifications and each of them, in so far as they differ from the respective amounts set forth in the complaint herein, were, and are, incorrect and false, and wholly erroneous, and made so with the knowledge and consent and under the direction of the said defendants."

At the beginning of the trial on motion made by defendants' counsel to require the plaintiffs to elect whether they would proceed on the contract as set out in the first cause of action, or on the common count, as set forth in the second, the court ruled the plaintiffs to proceed on its first cause of action based on the contract; and further ruled, on the face of the pleadings as presented, the general provisions of the specifications applicable to all work done under them, making the engineers' measurements and classifications of the work done final and conclusive between the parties, did not form a part of the contract and was not binding upon plaintiffs.

At the conclusion of plaintiffs' testimony the court denied a motion for peremptory instruction in favor of defendants, and held the question of the amount due plaintiffs, in addition to that which it was admitted they had received, to be open for the determination of the jury.

Among other things, the trial court charged the jury with reference to the weight to be given to the measurements and classifications made by the engineers of the railway company, as follows:

"Now, it is for you, gentlemen of the jury, to determine in the case what the amount of these different materials was, and what the different classifications were. If you are satisfied that this work of measurement and of classification was honestly performed by these engineers, Mr. Anderson and Mr. Connell, and by Mr. Garden as far as he acted in the matter; that it was honestly performed by them, and they appear to have no interest in the matter; then it follows that they had better opportunities to ascertain the exact amount, not only of the entire amount of material that was removed, but of the different classifications of this material, than the engineers who went there afterwards, a year or more later, and had not the conformation of the ground to view, had nothing but the places from which the material was taken, frequently, and generally perhaps, not showing what the original surface of the ground was, or how high it might extend, except in some cases on the highest side of the cut; if you are satisfied that these men did this work honestly, it is quite apparent that they had a better opportunity to reach correct conclusions than could have been the case with the engineers who went on there afterwards at the instance of the plaintiffs; and, if you should come to that conclusion, it would substantially end the case.

"But if there is anything in the evidence which satisfies the jury that these measurements or classifications were not made honestly by the engineers of the railroad company, according to which Foley Bros. were paid, as well as the Cook Bros., then it will be for the jury to ascertain what the amount of the material really was, and its proper classification.

"In that case you have the testimony of the two engineers who made the latter measurements, the testimony of Mr. Spaulding, and the testimony of Mr. Bellamy. You have heard what they did. They went there after the work was all done; you have heard what measurements they took, and how they were taken; how that work was done by them; and if upon the whole evidence you are satisfied that the measurements were not made honestly by the engineers of the railroad company, and that thereby the plaintiffs were not paid fully such an amount as they ought to have been paid—if you are satisfied of that from the testimony—then it will be your duty to determine the facts and render a verdict for the plaintiffs for the balance which they ought to have."

It appears from the uncontradicted evidence found in the record the engineers of the railway company made measurements and classifications of the work done by plaintiffs under their contract, and that plaintiffs were paid and received payment for work done by them based on such estimates. It further appears the plaintiffs made no measurements and classifications of the work done by them as the work progressed, and caused none to be made until more than a year after their contract was completed. There is no evidence found in the record tending in the slightest degree to impeach the estimates made by the engineers of the railway company for fraud, nor is there any evidence found in the record tending to show such gross mistakes on the part of the engineers of the railway company in the making of their estimates as would imply bad faith or a failure to exercise an honest judgment on their part. The utmost that may be said of the evidence is, a dispute was raised as to the accuracy of the measurements

and classifications of the engineers as shown from their estimates. As to the third count, there was no sufficient evidence offered by plaintiffs to permit a recovery thereon. The trial resulted in a verdict and judgment for the defendants. Plaintiffs bring error.

In the view we have taken of this case, derived from a reading of the entire record and the briefs of counsel, we deem a separate consideration of the many errors assigned unnecessary. All of substantial merit are so related that a reference to and decision of one ground of error relied upon will show all to be untenable. As seen from the above statement, the trial court at the outset of the trial, on the face of the pleadings, tentatively ruled that provision of the specifications for the doing of the work furnished by the railway company, which formed a part of the contract between the railway company and defendants, and which made the measurements and classifications of the work done, as shown by the estimates of the engineers of the railway company, final and conclusive between it and the defendants, formed no part of the contract between the parties to this litigation. And, although, as clearly appears from the record, the parties proceeded to the trial of the case on all the issues joined as though this question had not been raised or decided, the court seems to have entertained this view of the contract throughout the trial, for while it does not appear from the record how the question was raised, or what called forth the ruling at the time it was made, the trial court in the charge to the jury, among other things, states he had so ruled and expresses satisfaction with the correctness of such ruling. Proceeding further on the assumption of the correctness of the ruling made in this respect, that plaintiffs were not bound or concluded by the measurements and classifications of the work done by them, as shown by the estimates of the engineers of the railway company, but that the true amount of the measurements and classification of their work was open for the determination of the jury as a basis for its verdict, on all the evidence, the court charged the jury as to the weight to be given such estimates, as above quoted from the charge given. If the trial proceeded from a correct view of the plaintiff's contract, this portion of the charge was erroneous, for that it accorded to the testimony of the engineers of the railway company and the estimates made by them of the work done by plaintiffs undue probative force and weight. In effect it charged the jury, if the estimates were honestly made by the engineers of the railway company, as shown by their testimony, that ended plaintiffs' case. In other words, it made the accuracy of the estimates of measurements and classifications of the engineers of no moment, but their honesty the sole test. However, it is the insistence of counsel for defendants that the arbitration clause found in the specifications furnished by the railway company does form a part of plaintiffs' contract, and by reason thereof the estimates made by the engineers of the railway company of measurements and classifications of the work done by plaintiffs for defendants are final, conclusive, and binding upon plaintiffs, as a matter of law, until set aside and annulled for fraud or such gross mistakes on the part of the engineers making them as would imply bad faith on their part, and as there is no testimony found in the record tending to impeach the validity of the estimates made, and as the

verdict and judgment is for defendants, and is right as a matter of law, the error committed, if any, in the giving of this portion of the charge is immaterial.

In view of this contention it becomes material to a decision of the case to inquire whether upon the whole record, as a matter of law, the trial court rightfully held the arbitration clause formed no part of the contract of plaintiffs, not for the purpose of reviewing or correcting the ruling so made in this respect, for, as the defendants had judgment in their favor, it is manifest this may not be done here on this record. Guarantee Co. of North America v. Phenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376, and cases cited. Yet, as the judgment below was for the defendants, if on the whole record such arbitration clause was, as a matter of law, a part of plaintiffs' contract, and it be true, as stated, such estimates of measurements and classifications of the work done by plaintiffs under their contract as are provided by the specifications were in fact made by the engineers of the railway company, and payment was made by defendants to plaintiffs in accordance with such estimates, and the record contains no evidence tending to impeach and avoid such estimates upon any ground for which they might be avoided, it then follows, of necessity, the judgment below is right and must be affirmed, because at another trial no other judgment than that complained of could rightfully be entered. Therefore the error committed in the charge given is without prejudice.

While it is the rule of the federal courts, if there be error apparent on the face of the record, a presumption of prejudice arises which cannot be disregarded unless the record affirmatively discloses the error was not prejudicial (Mexia v. Oliver, 148 U. S. 664, 13 Sup. Ct. 754, 37 L. Ed. 602; Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 172, 30 L. Ed. 299), yet it is equally as well established by the decisions of the federal courts that no judgment will be reversed for error when it is clear such error did not prejudice and could not have prejudiced the rights of the party against whom the ruling was made. (Lancaster v. Collins, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373; Smith v. Shoemaker, 17 Wall. 630, 21 L. Ed. 717; Decatur Bank v. St. Louis Bank, 21 Wall. 294, 22 L. Ed. 560; Railroad Co. v. Pratt, 22 Wall. 123, 22 L. Ed. 827; North v. McDonald, 1 Biss. 57, Fed. Cas. No. 10,312).

Was the view taken by the trial court of the contract existing between plaintiffs and defendants the correct one? The determination of this question depends upon whether or not those provisions of the specifications of the railway company making the admeasurements and classifications of the engineers of the railway company final and conclusive as to the work done under the specifications became a part of the contract between plaintiffs and defendants. The express language of the contract is, "all work to be done according to the specifications of the Algoma Central Railway Company and to the satisfaction of their engineers." From this language it is manifest plaintiffs must have advised themselves as to what the requirements of the specifications were as to the manner of performing the work to be done under their contract, and at least to this extent the specifications were made a part of their contract. The precise question, however,

is, did plaintiffs, by this reference to the specifications of the railway company made in their contract, adopt the provisions made therein for the admeasurement and classification of the work to be done by them? Having in mind only the language employed in the proposition submitted by plaintiffs and its acceptance by defendants, it is not entirely certain whether it includes the arbitration clause of the specifications, making the measurements and classifications of the engineers of the railway company final, conclusive, and binding upon plaintiffs as to the work agreed to be done by them under their contract. Woodruff et al. v. Hough et al., 91 U. S. 596, 23 L. Ed. 332. But a due regard for the established rules for the construction of executory contracts, in the light of the undisputed facts found in the record, leaves no room for doubt as to its true construction in this case, for the following reasons:

It is a well-recognized canon of construction that the situation of the parties to the contract at the time it was entered into should be considered, as was said by Judge Sanborn in Rockefeller v. Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633:

"One of the most satisfactory tests to ascertain the true meaning of a contract is made by putting ourselves in the place of the contracting parties when it was made, and then considering, in view of all the facts and circumstances surrounding them at the time of its execution, what the parties intend by the terms of their agreement. When their intention is thus made clear, it must prevail in the interpretation of the instrument, regardless of inapt expressions or careless recitals." Accumulator Co. v. Dubuque St. Ry. Co., 12 C. C. A. 37, 64 Fed. 70; United States v. Gibbons, 109 U. S. 200, 3 Sup. Ct. 117, 27 L. Ed. 906; Rock Island Ry. v. Rio Grande Ry., 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277.

Applying this rule to the facts shown by the record, what was the situation of the parties at the time this contract was made? The defendants were under contract with the railway company to perform the work here subcontracted to be done by plaintiffs. The specifications referred to in the contract under consideration formed a part of that contract. These specifications were submitted to and in the possession of plaintiffs before they made the proposition to contract with defendants. By the express terms of their contract plaintiffs agreed to do their work in accordance with these specifications. The specifications referred to were one paper, and an entirety, and contained general provisions applicable to all work done under the specifications, and under them is found the provisions for measurements and classification of the work by the engineers of the railway company. Hence plaintiffs knew they must examine the specifications in order to determine the manner of doing the work. Having examined them, they knew the defendants were bound by the measurements and classifications of the engineers of the railway company, and that the railway company would pay the defendants for the work done by plaintiffs only in accordance with the measurements and classifications of the engineers of the railway company, and they had no reason to suspect or believe that defendants were binding themselves to pay the plaintiffs for work done in accordance with different measurements or classifications than those made by the engineers of the railway company.

Again, there is another well-recognized and perfectly just rule of construction of executory contracts, which is:

"Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions." 9 Cyc., subject "Contracts," p. 588.

As said by Judge Thayer in Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C.) 34 Fed. 254:

"The agreement being executory, the practical construction adopted by the parties thereto, and by their successors, during a period of several years, is entitled to great, if not controlling, influence in determining what is the proper interpretation of the same, as was held in Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110, and Chicago v. Sheldon, 9 Wall, 54, 19 L. Ed. 594. It is well understood that the practical construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. In all such cases the intent of the parties must be determined by the language employed rather than by their acts; but if the language employed is of doubtful import, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, then beyond all question it is proper to consider how the parties have construed the instrument with respect to such debatable points. If both parties to an agreement for a considerable period, and while free to act, treat a contract as imposing certain duties or obligations, such conduct ought to settle the construction of the instrument if its provisions with reference to such matters are to any extent uncertain, obscure, or incomplete. 'A construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract,' if such construction does not conflict with its express provisions. The manner in which a construction of a contract adopted and acted upon by both parties may, so to speak, be worked into a contract, is well illustrated in Topliff v. Topliff, above cited, and also in the case of Robinson v. U. S., 13 Wall. 363, 20 L. Ed. 653. In the latter case Robinson had contracted to deliver a certain quantity of barley, but whether the delivery should be made in bulk or in sacks was not specified. For a period of six months the barley was delivered in sacks. The court refers to this fact as a proper reason for construing the contract as requiring a delivery in sacks, rather than in bulk. It will rarely be found, we apprehend, that a court will go far astray in arriving at the actual intent of the parties to a contract (which, after all, is the purpose of all rules of construction) by adopting that interpretation which the parties, without compulsion, have themselves adopted and acted upon."

To like effect, see Merriam v. U. S., 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531; Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; Michigan Home Colony Co. v. Tabor, 141 Fed. 332, 72 C. C. A. 480; and the many cases cited in 9 Cyc., subject "Contracts," p. 589.

What was the conduct of the plaintiffs during the time this work was being performed by them? As shown by the record, they employed no engineers to measure or classify the work done by them under this contract, and made no such measurements or classifications of the work themselves. The engineers of the railway company were present on the work, and did make such measurements and classifications as the work progressed. Plaintiffs received part payments for work done by them as the work advanced, based alone on estimates made by the engineers of the railway company. And after the completion of their work called for a final estimate of the work done

by them and received payment, not in a round sum, but in odd dollars and cents, based on such final estimates, as made by the engineers of the railway company, and not until more than a year after the completion of their work, and after receiving payment based on the final estimate of the engineers of the railway company, without protest, did they take any steps to make an independent measurement and classification of the work done by them.

The entire record considered, we are of the opinion, even if it might be said the part of the specifications making the estimates of the engineers of the railway company final and conclusive was not in the express terms made a part of plaintiffs' contract, yet the situation and knowledge of the parties at the time the contract was made, and their conduct during the progress of the work, all clearly show their intent to be bound by the stipulation in question, and that such stipulation was worked into and became as fully a part of the contract as though in express terms incorporated therein when made.

Such being the contract between the parties, and the evidence found in the record being as above stated, a brief reference to a few well-settled and fundamental principles governing the effect and the manner of avoidance of such estimates renders entirely clear the rights of the parties to this litigation. Final estimates made by engineers in pursuance of such a contract are in legal effect an award made by arbitrators, and are final and conclusive in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment. Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Sweeney v. United States, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; Chicago & Santa Fé R. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; Wood v. Chicago, S. F. & C. Ry. Co. (C. C.) 39 Fed. 52; Elliott v. Missouri, K. & T. Ry. Co., 74 Fed. 707, 21 C. C. A. 3; Guild v. Andrews, 137 Fed. 369, 70 C. C. A. 49; Choctaw & M. R. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655; Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co. (C. C.) 140 Fed. 465; Hartford F. Ins. Co. v. Bonner Mercantile Co. (C. C.) 44 Fed. 151, 11 L. R. A. 623; Republic of Columbia v. Cauca Co. (C. C.) 106 Fed. 337.

Again, final estimates made by engineers in pursuance of a contract between the parties making such estimates final and conclusive when made the foundation of an action at law, or when interposed as a defense to an action at law, cannot be assailed in such action for fraud, such gross mistakes as imply bad faith, or a failure to exercise an honest judgment on the part of the arbitrators, or other like extrinsic matters, if objection to such method of attack be timely made; but for such relief resort must be had to a court of equity. 2 Story's Eq. Jur. § 1452; 3 Cyc. p. 750; Hartshorn et al. v. Day, 19 How. 211, 15 L. Ed. 605; George v. Tate, 102 U. S. 564, 26 L. Ed. 232; Emmet v. Hoyt, 17 Wend. (N. Y.) 410; Truesdale v. Straw, 58 N. H. 207; Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C.) 44 Fed. 151, 11 L. R. A. 623; Missouri, K. & T. Ry. Co. v. Elliott (C. C.) 56 Fed. 772; Vandervelden v. Chicago & N. W. Ry. Co. (C. C.) 61 Fed. 54; Stephenson v. Supreme Council

A. L. H. (C. C.) 130 Fed. 491; Levin v. Northwestern Nat. Ins. Co. (C. C.) 146 Fed. 76; Wood v. Chicago, S. F. & C. R. Co. (C. C.) 39 Fed. 52; Herrick v. Railroad Company, 27 Vt. 673; Kidwell v. Baltimore & Ohio Railroad Co., 11 Grat. (Va.) 676; Mansfield & Sandusky R. R. Co. v. Veeder & Co., 17 Ohio, 396; Grant v. Railroad Co., 51 Ga. 352.

Not only has this precise question been ruled, but the very fact that courts of equity have invariably assumed jurisdiction to determine the validity of estimates made by engineers in pursuance of contracts making their findings final, conclusive, and binding between the parties when sought to be impeached for fraud or other extrinsic matters, is conclusive evidence that a court of law has no jurisdiction over such matters if objection thereto be timely made, for, of necessity, if a court of law possesses such jurisdiction a court of equity does not, for in federal courts the distinction between actions at law and suits in equity, and between legal and equitable defenses, is fundamental and jurisdictional. An equitable defense is not admissible in an action at law. In the national courts a case cannot be part law and part equity; there can be no blending of legal and equitable causes of action and defenses. Anglo-American Land, M. & A. Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89, and cases therein cited; Bagnell v. Broderick, 13 Pet. 436, 10 L. Ed. 235; Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Thompson v. Railroad Companies, 6 Wall. 134, 18 L. Ed. 765; Foster v. Mora, 98 U. S. 425, 25 L. Ed. 191; Northern Pacific Railroad v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; Lindsay v. First Nat. Bank, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39 L. Ed. 505; Davis v. Davis, 18 C. C. A. 438, 72 Fed. 81; Schoolfield v. Rhodes, 27 C. C. A. 95, 82 Fed. 153; Highland Boy Gold Min. Co. v. Strickley, 54 C. C. A. 186, 116 Fed. 852; Crissey v. Morrill, 60 C. C. A. 460, 125 Fed. 878, 886; Platt v. Larter (C. C.) 94 Fed. 610.

It follows, therefore, of necessity, if plaintiffs, not content to rely on that part of the reply denying estimates of the work done by them under their contract to have been made by the engineers of the railway company, and denying the arbitration clause of the specifications furnished by the railway company to be a part of their contract, desired to avoid estimates which had been made by the engineers of the railway company in pursuance of the contract for reasons set forth in the reply, they must have resort to a court of equity, and could not interpose such defense to the estimates made by the engineers in this action at law if timely objection had been made thereto by the defendants. But, as defendants failed to interpose such objection in the court below, they must be held to have waived it and to have acquiesced in the trial of such equitable issues in this law action, for, it has been held by this court in such cases as this, the objection that an action or any material issue therein raised by the pleadings is cognizable in equity or vice versa is waived by a failure to interpose it in apt time in the trial court. Union Pac. Ry. Co. v. Harris, 63 Fed. 800, 12 C. C. A. 598; Highland Boy Gold Mining Co. v. Strickley, 116 Fed. 852, 54

C. C. A. 186. Hence, while defendants must be held to have consented to the trial of both the legal and equitable issues raised by the reply in this law action because they did not object thereto, yet this waiver did not change the character of proofs required to impeach the validity of the estimates actually made by the engineers of the railway company in pursuance of the contract.

The character of evidence required to overcome the estimates of engineers made in pursuance of a contract between the parties making such estimates final and conclusive as to the measurements and classifications of work done under the contract has very often received the consideration of the courts. The rules as stated by Mr. Justice Redfield in Vandewerker et al. v. Vermont Cent. R. Co., 27 Vt. 130, is as follows:

"After an estimate by the engineer, no recovery could be had beyond that sum, unless upon the most irrefragable proof of mistake in fact, or positive fraud in the opposite party in procuring an under estimate, or corruption in the engineer."

Or as said by this court in Choctaw & M. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655:

"Hence it has become the settled doctrine of the law that to give the contractor any standing in a court of equity to vacate the final award of the engineer, and give him judgment for a greater sum than that allowed in the final estimate, the contractor must show by an overwhelming weight of the evidence that the engineer was guilty of fraud, 'or exhibited such an arbitrary and wanton disregard of the complainant's plain rights under the contract as to be the equivalent of fraud, or committed errors and mistakes to the complainant's prejudice so gross and palpable as to leave no doubt in the mind of the court that grave injustice was thereby done him. * * * It is not material how the weight of the evidence may be upon this point, unless it shall appear reasons for thinking that the chief engineer's judgment was biased, partial, and consciously unjust.'" Mundy v. Louisville & No. Ry. Co., 67 Fed. 633, 638, 14 C. C. A. 583; Elliott v. M., K. & T. R. Co., 74 Fed. 707, 21 C. C. A. 3.

Measured by this rule, we are convinced, from a careful examination of the evidence found in the record, it falls far short of that high standard required to impeach the estimates made by the engineers of the railway company, as that issue was tendered by the reply in this action at law, or had it been adduced by plaintiffs in a proper suit brought to set aside such estimates. For although, as appears from the record, plaintiffs, without objection from defendants or interposition on the part of the court, were permitted to fully try out this issue and bring forward all the proofs they had, yet in all the evidence there is found no suggestion even of fraudulent conduct or unfairness on the part of the engineers making the estimates. The evidence offered by plaintiffs for the purpose of showing the estimates of the engineers to be erroneous is entirely consistent with the good faith of the engineers who made them. In brief, there is an absolute want of any evidence found in the record of the character required to impeach the validity of the estimates made by the engineers of the railway company.

Therefore, as the contract between the parties, as found from a consideration of the entire record, must be held to include the arbitration clause found in the specifications for the doing of the work, and as the

undisputed evidence shows the engineers of the railway company did make estimates of the work done by plaintiffs in pursuance of their contract, and plaintiffs did receive payment for their work based on such estimates, and as there is not even a semblance of evidence to be found in the record of that character required to impeach the validity of the estimates made by the engineers of the railway company in pursuance of the contract under which plaintiffs performed their work, it follows, as a matter of law, the judgment sought to be reversed is right, that plaintiffs were not prejudiced by the errors of which they complain, and the judgment must therefore be affirmed.

CARLAND, District Judge (dissenting). If the court has the right and authority to try the issues between the parties de novo, the result reached by the majority of the court may be justified. The record, however, was brought here by writ of error sued out by the plaintiffs below to review errors of law which occurred at the trial. Eighty-four errors are assigned to the rulings of the trial court. I understand that on writ of error the court is limited to a review of these rulings, and that it will reverse or affirm as it finds prejudicial error or not in the making of the same. That the trial court erred in its charge to the jury is conceded in the majority opinion. But it is therein held that the error was without prejudice, not in relation to the theory on which the case was actually tried, but in relation to a theory upon which a majority of the court thinks it ought to have been tried, Without the defendants in error having any power or authority to complain of any ruling of the trial court against them on this writ of error, the judgment in their favor is affirmed, for the reason that on the theory on which the case ought to have been tried the judgment is right.

The majority opinion says that the court is not attempting to review errors committed at the trial against defendants in error, but that as it appears as matter of law that the trial court erred in holding that the umpire and arbitration clause did not apply to the contract between the parties, and as it appears to the majority that the umpire and arbitration clause did apply, and as it also appears to the majority that there was no competent evidence to impeach the award of the engineers of the Algoma Central Railway, therefore the judgment must be affirmed.

The trial in the court below was had on the theory that the arbitration and umpire clause did not apply. The majority of this court have tried the case here as if the arbitration and umpire clause did apply. In so doing, I believe the court has deprived the plaintiffs in error of a substantial right. This court will not allow litigants to try a case below on one theory, and when the case is brought here try it on another. Does not the decision of the court herein accomplish the same result? It is certainly true that the plaintiffs in error have never tried their case on the theory that the arbitration and umpire clause did apply, and yet the judgment against them is affirmed on that theory alone. On the theory on which the case was tried below, there was confessedly prejudicial error in the charge of the court, saying nothing about the other errors assigned.

I think the judgment below should be reversed and a new trial ordered, so that a fair opportunity may be given to the plaintiffs to present such case as they may have.

BEAUMONT v. BEAUMONT (two cases).

(Circuit Court of Appeals, Third Circuit. March 1, 1907.)

Nos. 66, 67.

1. GIFTS—GIFTS INTER VIVOS—DELIVERY—NECESSITY.
   It is essential to a completed gift that the donee should have such control, and such control only, of the subject-matter of the gift, as is consistent with the ownership purported to be transferred to him.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 31, 34.]

2. SAME.
   Where delivery of property as a gift has once been made, and possession transferred, the gift is irrevocable, and is not affected by the fact that the donor immediately thereafter comes into physical possession and control of the property without any retransfer of the ownership by the donee.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 20.]

3. SAME—CONDITIONS.
   A donor may attach a condition to a gift in presenti, if that condition be not inconsistent with possession or control by the donee of the thing given.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 68.]

4. SAME—JOINT ACCESS TO PROPERTY BY DONOR AND DONEE.
   If a donor, with the clearly expressed intention of making a gift, make an actual delivery into the hands of the donee, the fact that the donor has lawful access to the depository of the thing given does not invalidate the gift, if the donee has also the same access to said depository, and has such control over the thing given that he may remove it at any time he chooses to do so.

5. SAME.
   The owner of 50 bonds rented a box of a safety deposit company in the name of himself and his two brothers, whom he took to the company, introduced them, and had them sign the contract of renting, and then retired with them to a room, taking the box and the bonds. He then handed one-half the bonds to each brother, stating that they were a gift, but that he desired the brothers to give him the coupons therefrom which should mature during his lifetime. After some conversation, they cut off some of the coupons next maturing, and gave them to him. They then placed the bonds and the coupons in the box, which was put in the vault; he taking one key, and giving them the other. *Held*, that the fact that he retained a key, and that he afterward visited the vault and took coupons from the box was not such a retention of control over the bonds as to invalidate the gift.

6. TRIAL—INSTRUCTIONS—CREDIBILITY OF TESTIMONY.
   An instruction *held* erroneous, in that it intimated to the jury that the testimony of a witness which was uncontradicted was inherently improbable, and was discredited by the cross-examination, which inferences were not warranted.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 414–419.]

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

See 144 Fed. 288.

Wm. Findley Brown and Gilbert Collins, for plaintiff in error.

John B. Leavitt, for defendant in error.

Before DALLAS and GRAY, Circuit Judges.

GRAY, Circuit Judge. The writs of error in these cases are to judgments in two separate actions of replevin, brought in the court below by the same plaintiff, who is the defendant in error in each. Both cases depended upon the same material facts, although in one, there was some testimony additional to that adduced in the other. Being so related as to both the facts and the law applicable thereto, they have been so argued, and may now be considered together.

The facts in evidence common to the two cases are as follows:

It appears that one Jacob A. Bostwick died about 1893 or 1894. For many years prior to his death, Lucius S. Beaumont, the intestate of the plaintiff below, had been Mr. Bostwick's confidential agent. From the date of the latter's death until October 23rd, 1901, Lucius S. Beaumont was the confidential agent of Mr. Bostwick's widow. On the last mentioned date, Mrs. Bostwick presented to Lucius S. Beaumont, then about sixty years of age and about to leave her employment, the sum of $50,000. On October 24th, 1901, Lucius S. Beaumont purchased fifty bonds of the New York Gas, Electric Light, Heat & Power Co., of the par value of one thousand dollars each, and made a partial payment thereon. On the same day, he also rented a box in the safety vault of the Lincoln Safe Deposit Company of New York (a different deposit company from that in which he kept his other valuables), in the names of himself and his two brothers, John and Charles. On October 25th, 1901, he paid the balance due on the bonds, secured possession of them, met his two brothers by previous arrangement, at the Grand Central Station in New York, took them to the office of the Lincoln Safe Deposit Company, introduced them to an employé of that company, had them sign the card containing the contract of renting, which he had signed on the previous day, and retired with them and the box to a small room. He then put his hand in his coat pocket, and, taking out a package, said: "Here, John, is 25 bonds, $1,000 each, I give to you," and handed them over to John. He then took out of his other pocket another package, and said: "Here, Charley, is 25 bonds, which I give to you. What I want you to do, is to give me the coupons,—cut off the coupons and give me the coupons of these bonds as long as I live." "He then said we were to go there once in six months cut them off, and then it was decided, as he was going to leave New York and going West, it would be inconvenient for us to get away from our work; that we had better cut off two or three years' coupons; we then cut off the coupons for two and a half years and gave them to him." He then put an elastic band around each six months' coupons and put them in an envelope. The next coupon was due February, 1902, and the coupons from February to February were cut off, which included February, 1904. He also said: "Sit down and take the numbers of the bonds and see if they are all right. Count

them and see if they are there," and this was done, John taking the numbers down as Charles called them off. John then put his bonds into the box and Charles, his, and Lucius put his coupons in. Charles then took up the box and carried it to the vault, where it was locked in its receptacle. One key was given to Charles for both the brothers, and the number of the box and the pass-word were communicated to them, Lucius telling them that they had access to the box when they pleased, but that he trusted them (presumably about the coupons). The other key was kept by Lucius. On being asked by one of his brothers whether his wife knew anything of the transaction, he said that she did not; that he did not want her to know; that she was otherwise provided for. He said: "She thinks Mrs. Bostwick has given me a pension, and I want her to think so, and on my death it ceases."

These, in the main, are the facts testified to in each suit by the brother of the defendant, the defendant himself being incapable, by reason of section 858 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 659], of testifying in his own behalf.

In the case against Charles Beaumont, there was some additional testimony in corroboration of that given by his brother John. The custodian of the vault of the Lincoln Safe Deposit Company testified that he knew Lucius in his lifetime, and that when he applied to him for a box in the safe deposit vault, Lucius told him, as explaining why he wanted it, of his gift from Mrs. Bostwick, and that he was going to present $25,000 to each of his brothers; that he spoke of it as an "absolute" or "outright" gift, and that he wanted to bring them there to sign for the box that he was about to rent. He also told him that he had provided for his wife, and how he had done so, and witness testified that he provided him, at his request, with a box of dimensions just sufficient to hold the two packages of bonds. Other minor facts and incidents were testified to by this witness, or were otherwise in evidence, which arguably corroborate the story of the brothers as to the gift of the bonds; but it is unnecessary to recite them here. The testimony of this witness (Carter) is criticised by counsel for defendant in error, as being confused and inconsistent with itself, and therefore unreliable. A careful examination, however, of this testimony, as it appears in the record, only discloses the fact that, upon cross-examination, the witness failed to appreciate the distinction between a gift outright of the bonds, and a gift to take effect at the death of the donor. This confusion does not seem to have been other than what was to be expected in the mind of a layman, subjected to a cross-examination on a distinction between gifts inter vivos and those which are intended to be testamentary in their character. His corroboration, however, of the testimony of the brothers, that Lucius intended in some way to give them these bonds, and had provided a box in a safe deposit vault, of which he gave them the key and in which they were to be deposited, is full and unequivocal. None of the witnesses were contradicted, discredited or impeached, otherwise than by the suggestion of the improbability of their story, in view of what was called the common experience of human nature under such circumstances, and the assignments of error raise a question as to the propriety of some

one or more of such suggestions as dealt with by the learned judge of the court below in his charge to the jury.

In both of these cases, there was a verdict for the plaintiff, a motion for a new trial, which was refused, and a judgment entered in pursuance of the verdict. In the case against Charles Beaumont, there are twenty-six assignments of error. We shall only discuss those which we think controlling and upon which our judgment is rested. In both cases, there was a motion that the court should charge the jury that, under all the evidence, their verdict should be for the defendant. Notwithstanding the fact that the testimony on behalf of the defendants was uncontradicted and unimpeached, we do not think, after a careful examination of the whole testimony, as disclosed in the record, that the court erred in refusing to so charge. It was for the jury to determine the weight of the evidence, and where there is any bona fide ground upon which it is assailed, the credibility of the testimony. There was also some question, which the court thought right to submit to the jury, touching the character of the control over the bonds conferred by Lucius on his brothers at the time of the alleged gift. We are not disposed to say that such a question should not have been submitted, though the manner of its submission may be open to criticism.

Turning to the record in the case against Charles Beaumont, we find twenty-six assignments of error. In the view we take, however, it is only necessary to now consider the 18th and 19th assignments. They are as follows:

"Eighteenth.—Because the court instructed the jury as follows:

'I have said to you and I again repeat that, if the testimony as to what took place in that little room leaves you in any uncertainty of mind, then you have the right to look at the subsequent conduct of the parties, and see if it is consistent with a gift on October 25, 1901; and I refer, therefore, to the fact that Mr. Carter says that Lucius came from Butler on one occasion and told him he was living on these coupons which came from the bonds he had given to his brothers.'"

"Nineteenth.—Because the court instructed the jury as follows:

'Well, furthermore, it appears that Lucius came from Butler on one occasion at least and went to the box and took some coupons out. What was his object? What did that act indicate or suggest? Did he reserve in himself a power and control over the bonds that were in that box? Did he reserve in himself the right to go there and cut off coupons from the bonds? If he did, then he reserved a control over the bonds and did not give up all control over them and consequently did not make a gift.'"

The underlying question of these assignments is, what are the essentials required by the law to constitute a valid gift of personal property inter vivos, in a case like the present? Undoubtedly, there must be shown an intention to give; that is, an expressed purpose to divest the donor of title in and ownership of the thing given, carried into effect and evidenced by a delivery of possession to the donee, and acceptance by him. It, of course, inheres in the conception of the possession essential to a completed gift, that the donee should have such control, and such control only, of the subject matter of the gift, as is consistent with the ownership purported to be transferred to him. What shall constitute the essential delivery, possession or control, must depend always on the circumstances of each case and the environment

of the parties. Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that the donee immediately thereafter comes into the physical possession and control of the property, without any retransfer of the ownership by the donee. Corle v. Monkhouse, 50 N. J. Eq. 537, 546, 25 Atl. 157; Matthews v. Hoagland, 48 N. J. Eq. 455, 485, 21 Atl. 1054. This being so, we see no reason why a gift should not be affected by a condition requiring temporary or partial control of the the thing given by the donor, where the intention to transfer the ownership is made clear, and a possession commensurate with that ownership conferred upon the donee.

In Industrial Trust Co. v. Scanlan, 58 Atl. 786, 26 R. I. 228, decided in 1904, it appears that one Patrick Scanlan went to the bank and asked if a deposit could be made payable there to him or his brother, Dennis, so that if either of them should die, it would then be payable to the survivor. The treasurer of the bank explained to him that in that way either could draw it if he had the book. Subsequently Patrick opened the account in the names of himself and brother, Dennis Scanlan, payable to either or the survivor of them, and Dennis, though not present at the time, went soon after to the bank and signed the signature book. Patrick gave the book to Dennis on the day of transfer, saying that it was his, to do as he pleased with, and that he could draw the whole or any part as he wished. Dennis continued to have possession of the book, except on two occasions when Patrick made withdrawals of different sums for his own use, returning the book after the withdrawals to Dennis. The court held it clear, that a gift from Patrick to Dennis was both intended and completed. In the course of its opinion, the court says:

"The argument against the vesting of a joint title in a donee is that, because the donor can defeat the gift by drawing the deposit, control of the deposit is thereby retained, and so the gift is not absolute and complete. To this, it may be replied that the donee has the same power, if he has possession of the book. Both parties cannot hold the book at the same time, and the mere fact that one has possession of it, ought not to be conclusive against the rights of the other. * * * Some cases go so far as to hold that the entry on the book of joint title, is self-operative, and that delivery of the book is not necessary (McElroy v. Natl. Sav. Bk., 8 App. Div. 192, 40 N. Y. Supp. 340), and that the retention of the right to draw the money deposited, does not affect the validity of the gift (Dennin v. Hilton [N. J. Eq.] 50 Atl. 600)."

It is true that, in the case just cited, the book, possession of which was necessary to enable either of the joint depositors to draw the money, had been delivered by the donor to his brother, but that, delivery once being made, completed the gift of the joint ownership intended by Patrick to Dennis, and thereafter, it mattered not who had possession of the book. The gift was complete by the expressed intention of Patrick and the delivery of the book and its having been returned by Dennis to Patrick without intention to retransfer his joint ownership, did not affect the validity of the gift, the Supreme Court saying, by Mr. Chief Justice Stiness:—"There can be no doubt that the owner of personal property has the right to give it away in whole or in part. Consequently, he can give a joint ownership to another." The court,

however, evidently would have been willing to go to the extent of the cases it cited, if the facts of the case at bar had made it necessary. In one of these cases, Dennin v. Hilton (N. J. Eq.) 50 Atl. 600, the donor deposited a certain amount of money in her own name and that of the donee, jointly, with the understanding stamped upon the account, that "This account and all money to be credited to it belongs to us as joint tenants, and will be the absolute property of the survivor of us, either and the survivor to draw." Afterwards, the donor delivered the deposit passbook to the donee. It was held by Vice Chancellor Pitney, that though the donor retained the right to draw the money deposited, her delivery of the depositor's passbook to the donee constituted an absolute delivery of the deposits to him, making the gift valid.

In Matthews v. Hoagland, supra, a father sent for his son and daughter. They went to his old home and were told to come up stairs, as he had something for them. They went up stairs with him, into his bedroom. He took his box out and took certain papers out of the box and handed them to them, saying: "Here, take these. Life is uncertain and they are yours." The papers consisted of certain mortgages he held against the daughter; also railroad stocks and bonds. The children then said they did not want to use the things given them then, and asked their father to keep them, and handed the papers back to him, and he replaced them in the box, putting the box back in his secretary. After this, the father collected the interest and dividends on these securities. It was held by Vice Chancellor Green that this constituted a valid gift to the children, saying in the course of his opinion (page 485 of 48 N. J. Eq., page 1065 of 21 Atl.):

"If the gift is complete, the whole title of the donor has passed from him to the donee and the subsequent redelivery of the subject matter of the gift to the donor, to keep for the donee, will not disturb the title of the latter in the thing given."

There is uncontradicted testimony in this case, that Lucius Beaumont not only intended to give and transfer the ownership of the bonds in question to his two brothers, but that he actually delivered the possession thereof to his brothers in the private room of the Safe Deposit Company, stating in substance that the bonds were theirs, although he intended to retain his property in the interest coupons during his life. If it be contended, as it is, that the retention of a key to the deposit box by Lucius, with the right to resort to it for the purpose of getting the coupons, was such a retention of control and possession as would enable him to carry the bonds away, and was therefore inconsistent with the idea of a gift of the same, it may be replied that the donee had the same possession and control and the same power of taking away the subject matter of the gift, and not only so, they had the rightful power to do so, as well as the physical opportunity. By the giving of the key of the box to his brothers, he evidenced his intention of making a gift in presenti of the bonds themselves, and gave them immediate possession and control. There is evidence that he did more than give the bonds and transfer the possession thereof, retaining his property and right to possession of the coupons. It is the testimony of the only person present competent to testify, that he gave the bonds and delivered the possession of the same, with the coupons attached,

to his brothers, intending that they should have possessory control of both, though coupled with a promise from them that they would cut off and deliver the interest coupons as they became due, to him during his life, and that in pursuance of that understanding, they actually did cut off and deliver to him all the coupons that were ever used by him, and also those that came due in the February after his death. We do not think, however, that it is necessary to so narrow the ground upon which such a gift, if gift it be, may rest, but that a donor may attach a condition to a gift in presenti, if that condition be not inconsistent with possession or control by the donee of the thing given. Why may not a father make a valid gift of a horse to his son, delivering possession and control thereof, on condition that the donor shall still have a limited use of the horse, with such control as is evidenced by a key to the stable? The control, incident to the possession given by Lucius Beaumont to his brothers, of these bonds, was complete. Their physical possession was such, that they could have carried them away from their place of deposit at any time, and the donor would have had no legal right to complain, so long as he was allowed to enjoy the interest as it accrued thereof. The possession and control of the bonds was exclusive, and not the less so in legal contemplation that the donor had also a key to their place of deposit, and could, in violation of their rights accruing from his gift, have carried them away. Such an act on his part, however, would have been a tort, if not a crime, and the physical opportunity of committing it, no more derogates from the complete right of ownership and possession in the donees, than would such an act committed by one who had no lawful access to the property. That the possession and control of the brothers was thus complete, was practically demonstrated by the fact that, after the death of Lucius Beaumont, they removed the bonds to depositories of their own selection.

It is sufficient for the facts of this case to say, if the donor, with the clearly expressed intention of making a gift, make an actual delivery into the hands of the donee, the fact that the donor has lawful access to the depository of the thing given, does not invalidate the gift, if the donee has also the same access to said depository, and has such control over the thing given, that he may remove it at any time he chooses to do so. The intention of the donor to give, and the once vesting physical control in the donee, are, we think, the crucial points in this case. So thinking, we must hold that the parts of the charge of the learned judge of the court below, covered by the 18th and 19th assignments, above quoted, were calculated to mislead the jury, as to the essential characteristics of a gift inter vivos, to the prejudice of the plaintiff in error. With great respect for the learned trial judge, we cannot agree that the fact that Mr. Carter said that Lucius came from Butler on one occasion, and told him that he was living on these coupons, which came from the bonds which he had given to his brothers, is inconsistent with a valid gift of these bonds to them, and yet the intimation is clearly given to the jury, by the language quoted in the 18th assignment, that such was the case. It may be that this intimation was not intended to be given, but the language used was clearly calculated to give the impression that any claim by Lucius, of

a right to take the coupons of these bonds from the safe deposit box, to which he had secured access by having a key with the consent of his brothers, was an exercise of control over the bonds which invalidated the gift. For the reasons stated, we think that, in the use of this language, there was error.

More direct and unequivocal still, is the language used in the charge, covered by the 19th assignment of error. After saying, categorically, that Lucius came from Butler on one occasion at least, and went to the box and took some coupons out, the jury is told, in effect, though it is put interrogatively, that that act indicated a control over the bonds reserved to himself, and that, consequently, he did not make a gift. It is hard to believe that this language, coming from the learned trial judge, did not absolutely control the action of the jury, and, as we think, to the prejudice of the plaintiff in error. We have examined, not only the context of the parts of the charge recited in the assignments above referred to, but, the whole charge, to see whether the language here criticised has been qualified or explained. We find, however, and are not surprised to find, that the charge of the learned trial judge is consistent throughout, and that the language excepted to must be attributed to a view of what is required to make a valid gift inter vivos, that differs from what we conceive to be the true one. We know of no rule of law by which the dissociation of the interest or coupons on these bonds, and their reservation to the donor for the purposes of the gift, would invalidate a gift of the bonds themselves to the donees, as testified to by the brother of the plaintiff in error. We do not think it is necessary to review the many cases cited by the learned counsel for the plaintiff in error (most of which we have examined), which support the conclusion at which we have arrived.

Finding error in the respects stated, the judgment below is reversed, with instructions to award a venire de novo.

In the case against John L. Beaumont, there are seven assignments of error. It will only be necessary to consider the first and second. They are as follows:

"First. Because the court instructed the jury, with reference to the testimony of Charles Beaumont as to what Lucius S. Beaumont said and did at the time of the alleged gift, as follows:

'You have no right to reject except for good reasons—reasons perfectly satisfactory to you'; adding the following words on that subject: 'You have no right, as counsel for defendant argued in this case, to ignore credible, unimpeached and uncontradicted testimony adduced by the defendant, and if you regard Charles' testimony or any other testimony produced by the defendant in relation to the alleged gift as credible, unimpeached and uncontradicted testimony, why, of course, you cannot ignore it or disregard it, but the facts of this case are such that I feel very sure I would not be justified in saying to you that you were bound to accept as absolute truth all that Charles has testified to. Testimony must be credible in its nature to be influential and must come from a credible source. You are bound, I repeat, to consider very carefully the testimony given by Charles. It is testimony of a most vital character in this case, but as was said by the Supreme Court of New Jersey in the case which I have referred to—I refer to the case of Cooley v. Barcroft, in 43 N. J. Law, 363: "The character of a witness or a number of witnesses may be so impeached, or their story so shattered by cross-examination or rendered so doubtful by inherent improbabilities, that their testimony, standing unopposed by direct counter testimony, would be fairly subjected to suspicion.

No court upon review could say, as a legal conclusion, that, under such circumstances, a judgment which ignored such testimony was illegal.'"

"Second. Because the court instructed the jury that:

'If, however, you are of the opinion that the transaction was one which Lucius intended to reserve a control over these bonds, during his lifetime, and that that accounts for the fact that this box was rented, not only in the names of his two brothers, but in his own as well—if you are of opinion that he intended to retain a control over these bonds during his lifetime and to assert the right of cutting off these coupons from time to time during his lifetime, as they matured, then Lucius did not part with all control over them and he did not make a valid gift. It may be that he intended that the bonds should go to John after his death, and if that is what he intended then the gift is void, and your verdict should be for the plaintiff, because he could not give the bonds in that way except by will.'"

We think the language used by the learned trial judge, as recited in the first assignment, while quite accurately stating, as an abstract proposition, the rights and duty of the jury in regard to credible, unimpeached and uncontradicted testimony, was on the whole, when taken in connection with the allusions made to the testimony of Charles Beaumont, calculated to prejudice the jury unduly against the plaintiff in error. We do not think that any inference could have been drawn by the jury from this part of the charge, other than that, in the opinion of the learned trial judge, the testimony of Charles Beaumont should be considered as inherently improbable, and that the truth of his story had been shattered by cross-examination, and that they were justified in rejecting it. A careful reading of this testimony has not disclosed to us any ground for such an inference. We do not discover that there is inherent improbability in the story of Charles, or that that story has been shattered by cross-examination. Although the trial judge does not directly assert these things, it seems to be suggested by the manner in which the instruction is framed.

The part of the charge recited in the second assignment, is open to the criticism we have already made in the other case, of the view apparently taken by the learned trial judge, of what is requisite to a gift inter vivos. We do not think that, even if there was evidence that Lucius intended to reserve such a control over these bonds during his lifetime, as would enable him to assert his right of cutting off the coupons for interest from time to time, he thereby invalidated the gift of the bonds which he evidently intended to make to his brothers. We need not again discuss what we consider as essential or nonessential to the making of such a gift as was intended to be made by Lucius to his brothers, according to their testimony. It suffices to say that we think that the instruction excepted to was calculated to give the jury the erroneous impression that, if Lucius Beaumont asserted the right of cutting off these coupons from time to time, during his lifetime, and for that purpose had reserved to himself the right of access to the box in which they were placed, under the circumstances shown by the evidence, there was no valid gift of the bonds. It is true that the instruction is prefaced with the assumption that the jury should be of the opinion that the transaction was one in which "Lucius intended to reserve a control over these bonds," but the evidence of that control, as put by the learned trial judge, was made to appear to the jury to be the right asserted by Lucius (which was not denied by the donees

of the bonds) to take the coupons out of the box from time to time, whether they were those which were cut off by the brothers and handed to him after the gift, or those which were still attached to the bonds.

The last sentence of the part of the charge recited in this second assignment, was also, we think, likely to unduly influence the jury against the defendants. The line of demarcation between gifts in presenti and inter vivos, and those which are intended to take effect at the death of the donor, and which are invalid by reason of their testamentary character, is often so shifting and uncertain, that it would seem that a jury, if they wanted the plaintiff in this case to succeed, could easily avail themselves of this alternative presented by the trial judge, however far that might have been from his purpose. We do not think the testimony in the case justified the suggestion, and if it had, the difference between the two transactions should have been more clearly distinguished and guarded. It is not without significance that the trial judge did not himself seem to have been able to escape the conclusion, that there was an intention on the part of Lucius that his brothers should have the ownership of these bonds, if he could have the interest thereon for his life. We do not think that this clear intention on the part of Lucius Beaumont should be or can be defeated by the technical suggestion of so construing the gift intended to be made, as that it should be void as an attempted testamentary disposition of the bonds. There is no testimony as to what occurred between the three brothers in relation to these bonds, except that of the two brothers, who undeniably had possession of them at the death of Lucius, and the important corroborating testimony of Carter, the custodian of the safe deposit vault, in the suit against Charles. If the story of the two brothers is to be accepted, there was a valid gift in presenti to them, by Lucius, of the bonds in question, reserving to himself, by condition subsequent, the right to the interest coupons thereon during his life, or stipulating with his brothers, after the gift, that they should, from time to time during his life, detach these coupons and deliver them to him. But if this story is not to be accepted, as told, it seems to us it must be rejected in toto, as it is not susceptible of a different interpretation from that above given.

The judgment below in each of these cases is therefore reversed, with instructions for the award of a venire de novo.

In re FIRST NAT. BANK OF BELLE FOURCHE et al.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1907.)

No. 69.

1. BANKRUPTCY—MANUFACTURING CORPORATION—BUILDER OF CONCRETE ARCHES AND BRIDGES IS.

A corporation which is principally engaged in building concrete arches and bridges and dressing stone is a manufacturing corporation, and may be adjudged a bankrupt under section 4b of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423] as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 683]).

[Ed. Note.—What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

2. SAME—PLEADING—DEFECTIVE PETITION GOOD IN SUBSTANCE, IMPREGNABLE AFTER JUDGMENT.

After verdict or judgment, an objection that the petition fails to state facts sufficient to constitute a cause of action is tenable only when the pleading fails to allege the substance or foundation of a cause of action, and it is impregnable to attack because it is otherwise defective, informal, indefinite or incomplete, and was demurrable before answer or judgment.

The averment that the alleged bankrupt was a corporation "engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same, and railroad and ditch contracting," was demurrable, and amendable before, and invulnerable after, adjudication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1451, 1459.]

3. SAME—JURISDICTIONAL FACTS—WHAT ARE—WHAT ARE NOT—THOSE OF LATTER CLASS CONCLUDED BY JUDGMENT—OCCUPATION OF CORPORATION OF THIS CLASS.

Jurisdictional facts are those which condition the power of the court to decide some of the issues in the case, like the nature of the subject-matter and the service of process. Other facts, which condition the character of the decree or the nature of the relief that should be granted or denied, are not jurisdictional, and final adjudications of issues relating to them conclusively estop the parties to the proceedings from again litigating them.

The issue whether or not a corporation is subject to adjudication as a bankrupt is not jurisdictional, and is concluded by the adjudication.

4. JUDGMENT—FEDERAL COURTS—JUDGMENTS OF FEDERAL COURTS CONCLUSIVE—ABSENCE OF APPEARANCE OF JURISDICTIONAL FACTS ON THEIR RECORDS IMMATERIAL.

While the jurisdiction of the national courts is limited, they are not inferior courts, and their judgments possess every attribute of finality and estoppel appertaining to those of courts of general jurisdiction. The absence from their records of all appearance of jurisdictional facts is immaterial.

5. SAME—MOTION TO VACATE ADJUDICATION—ABUSE OF DISCRETION.

There was no abuse of discretion in a denial by a bankruptcy court of a motion by creditors to vacate the adjudication of the bankruptcy of a corporation and to permit them to answer and litigate the question whether or not the corporation was principally engaged in such a pursuit that it was subject to be adjudged a bankrupt, where the motion was first made 7 weeks after the petition was filed and receivers were appointed, and 5 weeks after the adjudication, when the creditors were aware of the filing of the petition within 48 hours thereafter, and the administration of the estate had proceeded without objection meanwhile.

(Syllabus by the Court.)

On Petition for Review.

Arnold L. Guesmer (Rome G. Brown, Charles S. Albert, and T. W. La Fleiche, on the brief), for petitioners.

Harrison L. Schmitt (John W. Schmitt, William A. Kerr, and Charles R. Fowler, on the brief), for respondents.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is a petition of creditors to revise in matter of law the proceedings of the District Court which resulted in a denial of their motion to vacate the order of adjudication of the bankruptcy of the Widell-Finley Company, a corporation, and to permit them to file an answer and to litigate the issue whether or not that corporation

was principally engaged in any pursuit which subjected it to adjudication as a bankrupt. On February 14, 1906, certain creditors of the Widell Company filed a petition against it for such an adjudication, and on February 26, 1906, it was adjudged a bankrupt by default upon this petition. On the day the petition was filed receivers of its property were appointed, and thereafter proceeded to manage its estate, until on March 17, 1906, at the first meeting of creditors, a trustee was appointed. On April 9, 1906, the petitioners filed their motion. There was a hearing upon it on April 16, 1906, it was denied on May 11, 1906, and the order of denial is assailed by the petition for revision. Between the date of the filing of the petition and the date of the filing of the motion of the petitioners to vacate the adjudication, the receivers made agreements with certain parties, with whom the Widell Company had contracts, relative to the completion of unfinished work, which were approved by the court on February 19, 1906. The trustee was appointed and with the approval of the referee he sold and delivered to the purchasers the office furniture and stationery of the bankrupt in its main office.

On February 15, 1906, the petitioners knew that a petition in bankruptcy had been filed against the Widell Company, and before the 26th day of February, 1906, the day of the adjudication, they were aware that receivers had been appointed. But none of them took any steps to challenge or answer the petition in bankruptcy, or to oppose or avoid the adjudication, until the 9th day of April, 1906. They were creditors of the Widell-Finley Company. They knew, the next day after the 14th of February, that a petition in bankruptcy had been filed against it. The bankruptcy law prescribed the time within which they were permitted to challenge that petition for insufficiency in law or for misstatements of facts. Section 18b, 30 Stat. 551, c. 541 [U. S. Comp. St. 1901, p. 3429], as amended by Act Feb. 5, 1903, c. 487, § 6b, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 685]. That time expired on February 25th. They filed neither demurrer nor answer, and on the next day the corporation was adjudged a bankrupt. Their right to demur or answer to the petition then ceased, and their motion for a removal of their default and for leave to answer demanded the enforcement of no right, but merely invoked the judicial discretion of the District Court. The petition for revision does not invite the exercise of the discretion of this court; for the discretion to grant or refuse the motion was not intrusted to us, but to the court below, and in the absence of a manifest abuse of its exercise of that discretion it is not reviewable here.

Counsel for the petitioners insist that the court below abused this discretion (1) because the petition for the adjudication failed to show that the Widell Company was one of the class of corporations judicable in bankruptcy, but disclosed the fact that it was not so and hence they insist that the court was without jurisdiction; (2) because the record after the adjudication disclosed the same state of facts, and hence, as they contend, that the judgment was vulnerable to collateral attack and everywhere void; and (3) because the answer alleged that the Widell Company was not judicable in bankruptcy, and hence, as they insist, that the court was without jurisdiction. "Any corporation en-

gaged 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." Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683].

The pertinent averment of the petition for the adjudication was that the Widell Company "is, and during all said time has been, engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same, and railroad and ditch contracting." The word "manufacturing" is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, lumber makers, steel makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in manufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement or the steel it uses in its structure. If so, it is engaged in manufacturing the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it.

As usual in respect to every question which involves the construction or operation of the bankruptcy law, there is a conflict of authority. Butt v. C. F. MacNichol Const. Co., 140 Fed. 840, 72 C. C. A. 252; In re Minnesota & A. Const. Co., 60 Pac. 881, 7 Ariz. 137; In re Smith, 2 Lowell, 69, Fed. Cas. No. 12,981; In re Tontine Surety Co. (D. C.) 116 Fed. 401. But the more persuasive reasons and the weight of the decisions support the view, and our conclusion is, that a corporation principally engaged in constructing concrete arches and bridges and in dressing and selling stone is engaged in a manufacturing pursuit and subject to adjudication in bankruptcy upon an involuntary petition. Columbia Iron Works v. National Lead Co., 127 Fed. 99, 102, 62 C. C. A. 99, 102, 64 L. R. A. 645; In re Niagara Contracting Co. (D. C.) 127 Fed. 782; In re Marine Const., etc., Co., 130 Fed. 446, 64 C. C. A. 648; In re Matthews Consolidated Slate Co., 144 Fed. 737, 738, 75 C. C. A. 603; In re Quincy Granite Quarries Co. (D. C.) 147 Fed. 279; In re H. R. Leighton & Co. (D. C.) 147 Fed. 311, 313; In re Troy Steam Laundering Co. (D. C.) 132 Fed. 266; White Mountain Paper Co. v. Morse & Co., 127 Fed. 643, 644, 62 C. C. A. 369, 370.

The concession is freely made that a demurrer or an objection to evidence, before the adjudication, upon the general ground that the petition for it did not contain a clear averment that the corporation was principally engaged in manufacturing concrete arches and bridges and dressing stone, would have been well taken. But, if either of them had been made and sustained, the petition would have been immediately

amendable. In re Plymouth Cordage Co., 135 Fed. 1000, 1003, 68 C. C. A. 434, 437. The creditors who now complain filed no demurrer and made no objection. In that way they waived this defect as fully as they would have done if they had been present at the adjudication and had permitted the introduction of evidence and the decision without objection. Can there be any doubt that the admission of the evidence and the judgment in bankruptcy would have been permissible and conclusive upon them under such circumstances? The purpose of a pleading is to advise the opposing parties and the court of the facts constituting the cause of action. The petition in this case prayed that the Widell Company might be adjudged a bankrupt. These creditors knew the law, and hence they knew that the fact that the corporation was principally engaged in manufacturing or trading was essential to the adjudication. The petition contained the allegation that the corporation was engaged in manufacturing concrete arches and bridges, in manufacturing, dressing, and selling stone, and in railroad and ditch contracting; and no one could have read it in the light of the bankruptcy law without notice that it contained a substantial, though incomplete, statement that the corporation was principally engaged in a manufacturing pursuit. The sufficiency of this pleading was not challenged until more than a month after the adjudication upon it, and after verdict or judgment an objection that the petition fails to state facts sufficient to constitute a cause of action is tenable only when the pleading fails to allege the substance or foundation of a good cause of action, and the fact that it is otherwise defective, informal, indefinite, or incomplete is no longer material. Less v. English, 85 Fed. 471, 476, 29 C. C. A. 275, 280; Laithe v. McDonald, 7 Kan. 254, 261; Rush v. Newman, 58 Fed. 158, 160, 7 C. C. A. 136, 138; City of Plankinton v. Gray, 63 Fed. 415, 11 C. C. A. 268. The petition contained no statement that the Widell corporation was not engaged principally in a manufacturing pursuit, and no showing that the court was without jurisdiction of the case; but it set forth the substance of a good cause of action, and it was impregnable to attack after the adjudication.

The argument of counsel that it was the duty of the court below to avoid the adjudication, and to allow their clients to answer, upon the ground that the court was without jurisdiction to render the adjudication, because it was not true that the bankrupt was principally engaged in a manufacturing pursuit, and because the record did not show that it was, but that it was not thus engaged, overlooks the effect of the adjudication.

The contention that the fact that the Widell Company was principally engaged in manufacturing conditioned the jurisdiction of the court and the validity of the adjudication, that the judgment is a nullity because this fact did not exist, and that its invalidity may be shown at any time by collateral attack, or otherwise by proof that the Widell Company was not engaged in any pursuit which subjected it to adjudication in bankruptcy, disregards the fundamental distinction between the facts essential to the jurisdiction of a court over the subject-matter and the parties and those requisite to establish the cause of action. Jurisdiction of the subject-matter and of the parties is the right to hear and deter-

mine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceeding. The fact that the Widell Company was engaged in a manufacturing pursuit was not of the former, but of the latter, class. It was not essential to invoke the jurisdiction of the court over the parties to the proceeding and the property it involved, because the act of Congress gave that court, upon the filing of the petition of the creditors, jurisdiction to hear and determine the questions it presented, upon proper service of the subpœna upon the defendant. The facts which conditioned the jurisdiction of the court were the filing of the petition and the service of the subpœna. In re Plymouth Cordage Co., 135 Fed. 1000, 1004, 68 C. C. A. 434, 438.

Concede, for we do not stop to consider or decide, that the nonexistence of either of these facts might be shown at any time, by collateral attack or otherwise, to destroy the validity of the adjudication, and this is the extent of the effect of many of the authorities cited by counsel here. Williamson v. Berry, 8 How. 495, 540, 12 L. Ed. 1170; Adams v. Terrell (C. C.) 4 Fed. 796, 800. Nevertheless, the fact that the Widell Company was, or that it was not, principally engaged in manufacturing, was not of this class. It did not condition the jurisdiction of the court, but the judgment which it ought to render, only. The court had the same jurisdiction to decide the issues between the parties, whether the Widell Company was or was not principally engaged in a manufacturing pursuit. The only difference the determination of that issue made was that if it was so engaged the court should have given judgment for the petitioners, and if it was not thus occupied it should have rendered judgment against them. The jurisdiction and the duty to decide remained in the court, whichever way it was its duty to determine the issue. The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal or vacated by some direct proceeding. The filing of the petition for the adjudication and the service of the order to show cause upon the Widell Company conferred plenary jurisdiction of this proceeding upon the court below. The power was thereby vested in, and the duty was imposed upon, it to decide whether or not the Widell Company was principally engaged in a manufacturing pursuit, because the determination

of that issue was indispensable to the adjudication in bankruptcy. The adjudication is therefore a demonstration that the court below adjudged that the Widell Company was thus engaged, since it could not have lawfully made the adjudication without such a decision. That judgment, therefore, conclusively estops the complaining creditors here and everywhere from proving the contrary to avoid the adjudication in bankruptcy until the latter is reversed or vacated in some direct proceeding. Dowell v. Applegate, 152 U. S. 327, 340, 14 Sup. Ct. 611, 38 L. Ed. 463; Foltz v. St. Louis & S. F. R. Co., 8 C. C. A. 635, 637, 60 Fed. 317, 319; Board of Commissioners v. Platt, 25 C. C. A. 87, 90, 79 Fed. 567, 570.

This conclusion has not been reached without a thoughtful perusal of the opinion of the referee, adopted by the court, to the contrary, in Re Elmira Steel Co. (D. C.) 109 Fed. 456, 479; but that portion of the opinion which relates to this question does not commend itself to our judgment. The only showing upon the face of the record regarding the occupation of the Widell Company is the averment in the original petition which has been set forth.

The argument of counsel for the creditors that the adjudication is void, because the fact appears upon the face of the record that the Widell Company was not engaged principally in a manufacturing pursuit, and because the fact does not appear upon the face of the record that it was so engaged, is untenable (1) because the record does not sustain the position that it shows that the corporation was not thus engaged; (2) because the adjudication was a conclusive judgment that it was so employed, since the petition contained a sufficient averment of that fact, after judgment; (3) because that fact was not jurisdictional; and (4) because, if it had been, its absence from the record would not have destroyed the estoppel of the adjudication. While the jurisdiction of the national courts is limited, they are not inferior courts, and their judgments possess every attribute of finality and estoppel which pertains to those of courts of general jurisdiction. McCormick v. Sullivant, 10 Wheat. 192, 199, 6 L. Ed. 300; Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650; Des Moines Nav. & R. Co., v. Iowa Homestead Co., 123 U. S. 552, 557, 559, 8 Sup. Ct. 217, 31 L. Ed. 202; Edelstein v. U. S. (C. C. A.) 149 Fed. 636. Thus in McCormick v. Sullivant diversity of citizenship was indispensable to the jurisdiction of a federal court which had rendered a judgment, and it nowhere appeared in the record. But the judgment was held to be conclusive, in the absence of any writ of error to reverse it. And in Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 557, 559, 8 Sup. Ct. 217, 31 L. Ed. 202, the Supreme Court said:

"Although the judgments and decrees of the Circuit Courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different states from the defendants, yet they were not nullities, and would bind the parties until reversed or otherwise set aside."

The adjudication in bankruptcy in this case, therefore, until reversed or vacated in some direct proceeding, conclusively estopped all the parties to this proceeding, including the petitioning creditors here, from claiming from the record or upon evidence aliunde that the Widell Com-

pany was not principally engaged in a manufacturing pursuit and was not rightly adjudicated a bankrupt.

A single question remains. A proceeding in bankruptcy is a continuous suit. There are no terms of the bankruptcy court. It is always open, and until the termination of the pending suit that court has the power to re-examine its orders therein upon a timely application in an appropriate form. Sandusky v. National Bank, 90 U. S. 289, 293, 23 L. Ed. 155; Lockman v. Lang, 132 Fed. 1, 4, 65 C. C. A. 621, 624. Was the court below guilty of any abuse of its discretion in that it denied the motion of the petitioners here to vacate the adjudication and to permit them to answer and litigate the question whether or not the Widell Company was principally engaged in manufacturing? The creditors who complain had been aware of the filing of the petition in ample time for them to demur to it, or to interpose an answer and present the question they now seek to litigate. They had known that receivers of the bankrupt's estate had been appointed, and that they were making agreements about the contracts of the bankrupt, many weeks before their motion was presented, and they took no action to assail the adjudication or to stay the proceeding in the administration of the estate until nearly two months after the petition was filed. The theory of the bankruptcy law is that estates should be converted into money and distributed among the creditors as speedily as practicable. After a proceeding under it is commenced, the relations of the parties and the nature of the property involved are subject to frequent and rapid changes. Hence creditors who would assail the adjudication or the other orders of the court, and would thereby stop the transformation of the property of the bankrupt and its distribution among his creditors, should act with reasonable promptness after they receive notice of the proceeding and of the reasons for their objection. In view of the delay and neglect of the petitioners, and the changes in the condition of the property and in the relations of the parties interested in this estate, between the filing of the petition and the presentation of their motion, the record fails to persuade that the court below was guilty of any abuse of its discretion when it denied it.

The question whether or not the petition for revision was filed in proper time has not been considered, and no opinion is expressed upon it, because the same result has been reached upon a consideration of the merits of the case that would have followed if the motion to dismiss the petition had been granted.

The petition must be dismissed in any event; and it is so ordered.

WHITEHOUSE v. EDWARDS.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1907.)

No. 1,351.

1. NEGLIGENCE—WHEN QUESTION FOR JURY—CONFLICTING TESTIMONY.
An action to recover for a personal injury, alleged to have resulted from defendant's negligence, was properly submitted to the jury, where, although there was direct and positive testimony to a fact which would tend to acquit defendant of negligence, there was other testimony and circumstances tending to discredit it, and to make it proper for the jury to determine its credibility.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 298.]

2. SAME—INSTRUCTIONS—REFUSAL OF REQUESTS.
The action of a trial court in giving and refusing instructions, in an action for personal injury, *held* without error.

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

Henry M. Hoyt, James W. Bell, and Edward W. Rice, for plaintiff in error.

George D. Schofield and Albert H. Elliot, for defendant in error.

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

WOLVERTON, District Judge. On September 17, 1904, the Johnston Lighterage Company was under contract with the Nome Fuel Company to transport fuel oil from the ship Rosencranz to the shore at Nome, Alaska. Its engagement was to bring the lighters or barges used for carrying the oil from the ship's side to the beach, and to furnish men for the crafts. In pursuance thereof, it employed the defendant, being the plaintiff in error, to do the towing with his tugs; and the Nome Fuel Company, the consignee, also employed defendant to convey the oil from the barges to shore. The plaintiff was the employé of the lighterage company upon the barges. The defendant used a pump for conveying the oil to shore, which was operated through means of an engine, and a derrick erected for handling a large iron pipe, 6 inches in diameter, and about 60 feet in length, extending from the shore seaward to the barges, with an elbow at right angles at the outer end, and a further extension of 6 feet. The derrick was adjusted to a stationary post, or mast, as it is termed, set in the ground, on the beach near the water's edge, and the engine was stationed farther in shore, so as to make its distance from the barges, while being discharged, about 150 feet; the mast being about 60 feet, or the length of the pipe, from the hatches of such crafts. The defendant had charge of the operation of the engine and derrick for lowering the outer end of the pipe into the holds of the barges, and, when discharged of the oil, for raising it again in place; his place of duty being at the engine. He had in his employ a man at the winch, and another for firing the engine. The duties of plaintiff were to see that the pipe when lowered was conducted into the holds of the barges, and, when being raised, that the

valve thereof did not come in contact with the coamings of the hatch. At the time of the accident of which plaintiff complains, the defendant had hoisted the pipe at a signal from the barge, and, while the plaintiff was replacing the cover upon the hatch, the pipe fell upon him. In this relation, the complaint states that:

"Plaintiff was engaged in the performance of his duties as longshoreman on board one of said oil barges, exercising care and discretion in his work, when without any warning whatever, and in the absence of the watchman, said defendant, who then and there had charge of the hoisting engine, then and there carelessly, negligently, and in a grossly unskillful manner operated said hoisting engine and raised said conduit and suction pipe in such a way as to cause the parting of the lines suspending said conduit and suction pipe, wherein and whereby said pipe was precipitated upon plaintiff and across said barge, thereby inflicting upon plaintiff a painful and dangerous wound," etc.

By the further and separate answer, it is alleged, as a defense, that it was one of the duties of plaintiff to signal to the engineer to hoist the pipe or conduit, and, after the giving of the signal, it was one of his duties also to signal to the engineer to stop hoisting, when, in his judgment, the said pipe or conduit had been raised to a sufficient height, and that the defendant relied solely and acted only upon the signals as given from said plaintiff and his co-employés; that, at the time of the alleged accident, the signal was given by the plaintiff, or one of his fellow servants on the barge, to defendant to hoist the pipe or conduit; that, upon receiving the signal, defendant started the engine, and began hoisting, and continued until the defendant believed he had raised the pipe to a sufficient height, then slowed the engine down almost to a stop, expecting to receive a signal from plaintiff, or his fellow servants, to cease hoisting; that none such was given, but, on the contrary, defendant was given a signal by plaintiff, or his fellow servants, to hoist said pipe still higher, which defendant began to do, when the alleged accident occurred, and before any signal was given to stop hoisting.

Replying, plaintiff avers that it was his duty to give the signal to defendant to raise or lower the pipe, but that he gave no such signal at the time of receiving the injury, and that the injury was caused by defendant operating the hoisting engine without a signal from plaintiff, and without giving plaintiff any warning whatever of his intention to raise the pipe.

This reduces the issue to concise and narrow limits. There was a motion by defendant, at the close of the evidence, for a directed verdict in his favor, which was overruled. The first question, therefore, for decision, is whether the court erred in this disposition of the motion. The special reason urged by counsel for defendant in support of the motion is that the evidence shows, beyond rational controversy, that a signal, consisting of the words "Hoist higher," uttered, or as is otherwise expressed, "sung out," by one Charles L. Johnson, was thus given from the shore or beach in the direction of the barge, and that, defendant having acted upon such signal, supposing that it came from proper authority, his conduct in continuing to hoist the pipe, which caused the parting of the line and the precipitation of the pipe upon the plaintiff, was not such as to render him liable for negligence.

The principal witness for plaintiff, aside from himself, was R. G. Healy, who was under the employ of the lighterage company at the time, and engaged with plaintiff on the barge. His duty was to see that the barge was made fast, and to assist plaintiff in managing the pipe while being lifted and lowered. Both men were on the barge at the time. Healy states that it had been usual to have a man on shore whose duty it was to make the boat fast and to attend to the surf line, and to give the signal to the engineer when to start the engine for hoisting the pipe, also the signal when to lower it; but that, owing to a shortage in help on the barge at the time, he was discharging that duty in connection with assisting plaintiff in lifting and lowering the pipe. He further testifies that, when the oil had been pumped from the barge, he gave the signal to the engineer (meaning the defendant) to hoist the pipe; that the defendant hoisted it to its accustomed height, and left it there, and walked away from the winch, but that, from three to five minutes afterwards, he started to hoist again, and without giving any signal that he intended to do so; that, in the meantime, plaintiff had returned to the hatch, and was putting the cover upon it, when the pipe fell, and he was injured; that both the witness and the plaintiff stepped away to the outside of the boat while the pipe was being hoisted; but, that after the engineer had stopped hoisting, the plaintiff returned to his work at the hatch, and that there was no signal given by any one to hoist the second time, after the pipe had been made fast.

The plaintiff testifies that he gave the signal to hoist the pipe by singing out to the defendant that the barge was pumped out, and for him to hoist, in the accustomed manner; that defendant hoisted the pipe to the usual height, and sang out, "All right," meaning that the pipe had been made fast; that defendant then stepped down, away from the platform where the engine sat, and that plaintiff started to put on the hatch cover. He says further:

"My business while hoisting the pipe out was to try and keep it clear of the hatchway while they were hoisting the pipe out of the hatch, and see that the coams of the hatch didn't catch the foot of the valve, and it was my business to keep the suction pipe clear of the hatch until she got up so as to clear the hatch, and then it was my business to get out of the road. On this day I naturally gets the pipe out and clear of the coam of the hatch, and, after she has cleared the hatch, I takes my accustomed side, after she is clear of all obstacles. Then the pipe is entirely in the engineer's hands to hoist the pipe up. I generally watched him until he stops the engine and she is fully out up out of the way. The next thing I did I steps to one side on the barge, where I generally holds on while the pipe is being hoisted, which I did on that day. Of course, when they had the pipe out, and it is entirely out of my hands, then the next thing is to cover up the hatch, and, on account of the deck being oily and slippery on account of the oil over the decks, I holds onto the hatch, and gets up alongside to put the cover onto the hatch, and, while I was doing that, the pipe come down on top of me. * * * After the pipe was hoisted to its accustomed and regular height and made fast, I did not signal to the engineer to hoist the pipe up higher, and I don't think Mr. Healy did. * * * It was my duty to place the barge in position on the beach for pumping, to see that the suction pipe was properly lowered into the hatch, and that it cleared the hatch in hoisting. The men on the barge gave the signal when to hoist."

The defendant testifies that he was given the signal to hoist the pipe, and obeyed it, and that, while hoisting it, thinking that it had reached

the proper height, he was given the signal, "Hoist higher," and in obedience thereto he continued with the engine in motion; and that, before any further signal had been given him to stop hoisting, the line broke, and the pipe fell upon the plaintiff; and that both signals came from the direction of the barge. He produced also three other witnesses, each of whom testified that he heard the signal, "Hoist higher," given. One of these was Gifford, who was at the winch managing the rope; another was Adams, who was firing for the boiler at the time, and was standing alongside or near it, being about two feet back of the winch; and one Charles L. Johnson, who says that he not only heard the signal, but gave it himself. He testifies, on cross-examination:

"I gave the signal. I was kind of looking after the Nome Fuel Company to see that none of the oil was being wasted. Capt. Whitehouse had the contract from the Nome Fuel Company to pump this oil. I thought the men on the barge heard the signal, and I didn't see that they were there. They were through with the pumping and with the pipe at the time, and at that time they were not doing anything with it. It might be hard for the men to retain their footing on the barge when it was rough. I claim no authority at that time either through Mr. Whitehouse's employ or under his contract with reference to the discharge of this oil. I was practically a stranger, the same as any other bystander."

He further testifies that, at the time he was on the lower side of the dock, towards the beach, between the mast and the boom, on the west side in front of the dock, 75 or 80 or 100 feet from the pump, about halfway between the beach and the pump.

The plaintiff produced two other witnesses. One was W. H. Smith, who testified that he was working for Johnston, and was down on the beach at the time, about 40 or 50 feet westward from the barge; that he was acting in the capacity of timekeeper, keeping note of the number of barges that were towed in and out; that he saw the pipe when it fell, but that he did not hear the signal given to hoist higher. And Charles A. McArthur testified that he was about 60 feet from the barge, on the beach on the west side, and that he did not hear any one give the signal to hoist higher.

There was some testimony introduced by defendant that the view upon the barge was obstructed somewhat by reason of the derrick and stationary mast and other fixtures, and that it was necessary to depend entirely upon the signals for determining when to hoist or lower the pipe; but the plaintiff's testimony in the case is that the barge was in plain view of the engineer, and that the pipe while being raised, and the men on the barge, and their actions, could all be observed readily by the engineer from his station. So that these are matters also about which the witnesses do not agree.

The rule of the Supreme Court touching the question of fact as to negligence is that it "is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." Gardner v. Michigan Central Railroad, 150 U. S. 349, 361, 14 Sup. Ct. 140, 144, 37 L. Ed. 1107. And, again,

it is held, in Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 683, 36 L. Ed. 485, that:

"When a given state of facts is such that reasonable men may fairly differ upon the question 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."

Now, in the light of the testimony as it has been briefly outlined, it seems clear that there is room for reasonable men to differ touching the fact which counsel make the turning point as to their motion for a directed verdict. Both the plaintiff and Mr. Healy, who was with him on the barge, say positively that they gave no signal after the first to hoist the pipe. Two men who were standing near, and who had equal opportunities with the engineer and the men at the winch or the fireman for hearing such signal, if it was given at all, say that they did not hear it. The testimony of the defendant, it must be conceded, is strong that such a signal was given; four men coinciding and concurring in the statement that they heard the words "Hoist higher" uttered, and Johnson affirming that he gave the signal himself. It is significant, however, that these men all testify to having heard a signal consisting of exactly the same words, and that Johnson apparently studiously avoided stating as to who gave it until he was cross-examined. From Johnson's own testimony, it appears that he was solely an officious meddler, who was not engaged for Whitehouse, or in his employ; nor was he in the employ of the lighterage company, but simply an outside party, with authority from no one. And it is altogether unlikely that a person of this sort would be giving the signals for conducting the work to the parties concerned. There is, as between this evidence and that of plaintiff, a direct conflict, and the jury are the exclusive judges of the weight of the evidence. It is for them to determine whether witnesses speak the truth, or whether they are worthy of belief, and, it being altogether clear that reasonable men might differ as to the result, it was the proper function of the jury in the present controversy to determine the fact as to whether this signal, "Hoist higher," was ever given or not, and as to whether the action of the defendant was controlled thereby. If there was no such signal given, and he continued to hoist the pipe without one, which caused the breaking of the line, then he was guilty of negligence. We think that the case was properly left to the jury for their determination. It may be questionable whether the especial point urged is within the pleadings, it having been alleged that defendant was given a signal by plaintiff, or his fellow servants, to hoist the pipe or conduit higher; but it has been so treated by counsel upon both sides, and we have, accordingly, so considered it.

Reference is made by counsel to the allegation of the complaint that, in operating said conduit or suction pipe, it was necessary or customary to station a man between the derrick and the hoisting engine to watch the running of the lines, and to give warning in case of danger. The only proof as to the custom which prevailed in that regard is the evidence of Healy, who testifies that theretofore his duty was on the beach, to make the surf line fast, and that the man on the

beach gave the signals for raising and lowering the pipe. It appears, however, that on this occasion the lighterage company was short of help, and that Healy was not only discharging the duty of making the line fast, but was assisting the plaintiff on the barge, and that the signals to hoist the pipe were all being given from the barge. It is not improbable that Whitehouse knew of this condition, by reason of the fact that he could see the barge a part, if not all, of the time from where he was employed, and was in a position to observe who was assisting there, and in what manner the men were discharging their duty. So that, while this allegation is contained in the complaint, it is surplusage merely, and it was not necessary that it should have been in there. There exists a good cause of action without it, and it was a thing for the jury to determine, as we have seen, whether the defendant was guilty of negligence as otherwise charged. The motion for an instructed verdict was therefore properly denied.

The next ground of error is based upon the refusal of the trial court to give instructions which were requested by the defendant. These are contained in three clauses. As to the first two, it is very clear, from a reading of the instructions given by the court, that they were fully and fairly covered by the general charge. The third clause is as follows:

"The plaintiff was also bound to use ordinary care and precaution not to expose himself in any unnecessary danger, and to keep in a safe place in case of danger; and in doing so he should exercise all his faculties of seeing and hearing. And if, by so exercising his faculties of seeing and hearing, he could have anticipated the danger in time to escape to a place of safety, it was his duty so to do, and a failure in such cases to use ordinary care, as intimated, would be fatal to his recovery."

While this instruction may not be so fully covered, it was not necessary that it should be given, as the case, under the pleadings and evidence, does not call for it. The answer does not set up any contributory negligence on the part of the plaintiff; nor does the evidence anywhere tend to show that plaintiff was injured because he did not use due care in seeking a place of safety. So that the instruction was abstract and irrelevant.

The third ground of error consists of an exception to an instruction given, as follows:

"You are instructed that pain and suffering are naturally connected with all physical injuries, and may be considered as the direct and proximate results thereof, and, when physical injury results from the negligent or willful act of another, a recovery may be had for the pain and suffering connected with such injury, both at the time of its occurrence and subsequently; such recovery being in law in the nature of an award of compensatory damages."

It is urged that there is no allegation in the pleadings as to any willful act or wrong done by the defendant, and that the natural tendency of the use of the term "willful" in the instruction was to suggest to the jury that the defendant knowingly or purposely inflicted the injury. But it is entirely manifest that the jury could not have been misled by the use of the word, and elsewhere the court instructed especially that compensation should be the measure of damages. The

trial court committed no error, therefore, touching the instructions either given or refused.

These considerations lead to the affirmation of the judgment rendered, and it is so ordered.

INTERNATIONAL TRUST CO. v. DECKER BROS. et al.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1907.)

No. 1,335.

1. RECEIVERS—AUTHORITY TO APPOINT—GROUNDS OF APPOINTMENT.

To warrant the appointment of a receiver by a court of equity, it is as a general rule essential that the plaintiff should show that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim, and that the property itself or the income arising therefrom is in danger of loss from neglect, waste, misconduct, or insolvency of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 21–31.]

2. SAME—RECEIVERS' CERTIFICATES—POWER OF COURT TO AUTHORIZE.

The practice of issuing receivers' certificates to continue the business and giving them priority of lien is peculiar to cases of insolvent railroad companies or other public service corporations, and finds its reason in the necessity of keeping the business a going concern both for the convenience of the public and the preservation of the security, but neither the practice nor the reasons supporting it apply to corporations engaged in a strictly private business, and, in case of such corporations, the court has not the power to authorize a receiver to incur indebtedness for carrying on the business and to make the same a paramount lien upon the corpus of the property, to the displacement of prior contract liens, without the consent of the holders of such liens. In such cases the power to authorize the issuance of receivers' certificates extends only to the necessary expenditures incident to the administration and preservation of the property until the business can be wound up and the receivership ended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42. Receivers, §§ 204–223.]

3. SAME—SUITS AGAINST INSOLVENT CORPORATION—ORDER FOR SALE OF PROPERTY.

At suit of a simple contract creditor for a comparatively small sum a receiver was appointed for the property of certain mining companies, and was continued in possession for eight years, during which he issued, under authority given by the court, receivers' certificates for some $400,000, which were by the orders made first liens on the property, and the proceeds of which were for the most part expended in operating and developing the property. The property was subject to a prior mortgage for a large sum securing bonds, but the mortgagee was not a party to the suit at the time such certificates were issued. Being subsequently brought in, it filed a cross-bill for foreclosure, and also asked that new parties be brought in and certain adverse claims affecting the property be adjudicated and the priority of liens determined, to the end that the property might be sold for the highest possible price. *Held*, that it was an abuse of discretion for the court to order a sale of the property without first determining such matters; it clearly appearing that they would largely affect the sale of the property and prevent its bringing its full value.

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska.

On July 1, 1896, the Berners Bay Mining & Milling Company, a corporation existing under the laws of the state of Maine, but doing business in Alaska, mortgaged its properties, consisting of mines, mining claims, mill sites, and water rights, and the appurtenances thereto, comprising mills, buildings, railroads, tramways, machinery, and equipment, all situated in Alaska, to the International Trust Company, of the commonwealth of Massachusetts, to secure the payment of certain bonds aggregating the sum of $500,000, all issued and disposed of for the benefit of the mining company. Subsequently, on December 15, 1897, Decker Bros. instituted an action against the Berners Bay Mining & Milling Company, the Seward Gold Mining Company, the Northern Belle Gold Mining Company, and the Ophir Gold Mining Company as parties defendant, the three last-named corporations having succeeded on November 1, 1897, to all the property, rights, and interests, and assumed all the obligations, indebtedness, and liabilities, of the first. From the complaint it appears that the defendants were indebted to the plaintiffs in the sum of $154.65 for goods and wares sold and delivered; that latterly the companies had employed many men, at an expense of from $12,000 to $15,000 per month; that the output of the mines was insufficient with which to meet the running expenses for the six months preceding the commencement of the action; that an indebtedness of about $500,000 was outstanding; that many of the creditors were threatening suit, and the property of the defendant companies was in danger of being wasted and exhausted; that said companies were in imminent danger of becoming insolvent; that, if a receiver were appointed to manage their business under the direction of the court, they would be able to discharge all of their indebtedness, but that otherwise they would not; that plaintiffs had previously cashed a large number of checks issued by defendants, amounting to from $3,000 to $3,500, which were yet outstanding and unpaid; and that, according to the belief of plaintiffs, if the property of defendants were put up at forced sale, there would not be realized a sum sufficient to meet their liabilities, wherefore, plaintiffs prayed the appointment of a suitable person to take charge of the property and effects, and to manage the business of the defendant corporations, and for the payment of their demands during the course of such receivership. Nothing further appears from the record to have been done until July 13, 1905, when the defendants in the action joined in a petition to the court, praying that the International Trust Company be made a party to the proceeding; that such company, and all persons interested, be required to appear and show cause why the properties of the defendant companies should not be sold; and that upon such hearing a master be appointed to dispose of the same. The petition shows, among other things, that the "receivership was made necessary by reason of the fact that the said properties were undeveloped, and the expenses of development necessary to put them upon a paying basis exceeded the means available for that purpose"; that the receiver had since his appointment borrowed a large amount of money on receiver's certificates, aggregating between $385,000 and $390,000, under the orders of the court, made with the consent of the holders of the bonded indebtedness of the defendants, and by means thereof had developed the properties and increased their intrinsic value to an amount largely in excess of the amount of such indebtedness; that, in addition to the said liabilities of the receiver, the defendants were indebted in the sum of $500,000, with interest aggregating about $700,000, evidenced by bonds secured by trust deed to the International Trust Company; that, in order to make the property productive, it was necessary to erect a larger reduction plant and to continue the development work already done, and that about $150,000 would be required for that purpose; that the defendants were wholly insolvent and unable to pay such indebtedness, or to operate the property; that for several years previous the parties interested in the property, including the bondholders and holders of the receiver's certificates, had been endeavoring to reorganize, but all without avail; and that the indebtedness of the defendant companies was rapidly increasing.

Subsequently, on December 9, 1905, defendants in said action filed an answer and cross-complaint, which alleged that the claim of the plaintiffs had been paid by the receiver; that in the month of December, 1897, the defendants were largely indebted for wages and salaries of employés, and for sup-

plies and other expenses for operating the mining properties of the defendants, aggregating $100,000 or more; and that they were, and ever since had been, insolvent and unable to pay their debts in due course of business. It then recited the fact of the appointment of the receiver, the execution and delivery of the mortgage deed of trust to the International Trust Company (setting out a copy), the disposal of the bonds upon the market, and that none of the defendants had been able to pay anything upon the principal or interest thereof; that subsequent to his appointment the receiver had been acting at the instance of the bondholders, had obtained orders from the court in pursuance whereof he had borrowed large sums of money upon receiver's certificates, and otherwise incurred indebtedness in the administration and betterment of the properties, which indebtedness was in equity a primary lien against said properties, superior and prior to said bonded indebtedness, and that by reason of the accumulation of such liabilities there was a necessity for the sale of all of the properties of the defendant corporations, and a distribution of the proceeds arising therefrom, so that the business might be wound up and the affairs settled. The defendants demanded that the International Trust Company be made a party defendant, that the court should decree a sale of the properties, and that the proceeds thereof should be applied to the indebtedness according to priority and rank.

On February 28, 1906, F. D. Nowell, the receiver, moved the court for an order directing the sale of all the properties of the defendants in his hands, that the same might be converted into money, and paid out under the orders of the court to parties entitled thereto. He averred that the receivership had continued for a long period of more than eight years; that in the meanwhile the parties concerned had made repeated efforts to reorganize; that for the payment of the current and necessary expenses of the receivership he had borrowed large sums of money, aggregating $400,000, on receiver's certificates, all of which indebtedness was a prior and paramount lien against the properties in his hands; that such indebtedness was constantly increasing; and that he believed a reconciliation and agreement among the parties concerned was impossible. Subsequently, on March 5, 1906, the International Trust Company appeared and answered the cross-complaint of defendants. It admitted the execution of the mortgage deed of trust, and further alleged that it at no time ever consented, acquiesced in, approved, or ratified any action of the receiver in borrowing money or incurring indebtedness, on receiver's certificates or otherwise, in the administration of the estate, and that none of the money borrowed by the receiver was ever used or went toward the betterment of the properties, or was necessary to preserve the status thereof, but that whatever moneys were expended were improvidently and illegally applied to exploiting and developing a number of contingent, speculative, and uncertain mining prospects and locations, and in the promotion of a speculative, uncertain, and contingent mining business; that the indebtedness incurred by the receiver was not in equity a primary lien against said properties, and that any orders of court had authorizing the borrowing of such funds were made and entered ex parte, without notice to the defendant the International Trust Company, and that it had never had its day in court with reference thereto; that it at no time consented or agreed to any subordination of its rights under said mortgage deed of trust to any of the rights arising from the issuance of such receiver's certificates, or any of them, wherefore, it prayed that the receiver should account and the court adjudicate upon the orders previously made permitting receiver's certificates to issue, and that the relative rank of such receiver's certificates should be established by an order and decree of the court, and that the mortgage deed of trust of the defendant trust company should be declared a valid subsisting first lien upon the property in the hands of the receiver, and that the same should be foreclosed and the property sold in accordance with the prayer of its cross-complaint then filed.

On the same day the International Trust Company filed a petition, praying leave to be permitted to file a cross-complaint for the foreclosure of its mortgage, and to bring in new parties, who, it was alleged, had or claimed some interest in the properties in the hands of the receivers, F. D. Nowell and W. B. Hoggatt. The petition showed, among other things, that the property could

be sold to the greatest advantage as a whole, that its value did not exceed the principal due upon the trust company's mortgage, and that it would be inopportune to place the same upon the market until the title thereto was settled, and the rank of the various claims ascertained and determined.

An order of the court was accordingly entered March 13, 1906, granting leave as prayed and another permitting suit to be instituted against the receivers. It appears by the former order that W. B. Hoggatt was on January 3, 1906, appointed receiver for special purposes. The cross-complaint was filed concurrently with the entry of these orders, and, after reciting the institution of the action by Decker Bros. and the appointment of the receivers, it sets up a cause for foreclosure of the trust company's mortgage, and prays that it be declared a paramount lien to all other claims, and that the properties in litigation be sold for its satisfaction. On the same day of the entry of such orders and the filing of this cross-complaint, namely, March 13, 1906, the court made and entered an order of sale directing that the entire properties of the mining companies be sold as an entirety by a special master, but that no bids should be received for a less sum than $400,000, that the master convey to the purchaser all of the title of the mining companies, freed and discharged of all claims and incumbrances of every kind and nature, and that all liens existing against the properties should follow and attach to the proceeds of sale, provided, however, that if the liens, easements, and rights of way claimed upon said properties by the Alaska Nowell Gold Mining Company, the Nowell Mining and Milling Company, Willis E. Nowell, and Thomas S. Nowell, or any other cloud upon the title to the properties ordered sold, should not be released, discharged, and satisfactorily cleared 10 days prior to the day of sale, then that the court would revoke or extend the order as might appear just and proper. Thereafter, but on the same day and before the order was entered, the trust company filed its objections to such entry, assigning numerous grounds therefor, among which are that the priorities between the different lienholders had not been determined; that certain issues between the mining companies and the trust company on the cross-complaint of the former remained unsettled, no reply having then been interposed; that a certain easement referred to in the cross-complaint of the trust company was a cloud upon the title; and that the properties would be sacrificed if sold prior to the determination of priorities and the settlement of the title. The appeal to this court is prosecuted from the order of sale made and entered as indicated.

Several orders of the court are contained in the record authorizing the issuance of receiver's certificates. The first bears date March 7, 1898, and grants leave to the receiver "to borrow money to pay off the claims for labor against the defendants," in the aggregate sum of $3,000, for the Berners Bay Mining & Milling Company, and $4,000 each for the Northern Belle Gold Mining Company and the Seward Gold Mining Company, and authorizes him to issue his certificates therefor. It was further declared that such certificates, when issued, should be a first lien upon the income and corpus of the property of each of said companies, respectively, in the hands of the receiver. This order was made upon a petition of the receiver; no appearance of any other parties being noted. The second order was entered September 23, 1898, also upon the petition of the receiver; both the plaintiffs and defendants appearing. This granted leave to borrow money upon receiver's certificates for the purpose of developing and preserving the property of the defendants Northern Belle Gold Mining Company and the Seward Gold Mining Company. The amount authorized was $37,500 for each of said companies. It was alike declared, as in the former order, that the certificates should be a first lien upon the income and corpus of the properties of such companies. The third order was a modification of the second. This was made November 21, 1898. The fourth order was entered December 28, 1898, and authorized the receiver to borrow $35,000 for temporary purposes, pending the negotiation of receiver's certificates under the previous order. The fifth was made December 13, 1900, upon the petition of the receiver—no appearance being noted of the parties to the suit—and granted authority to borrow $150,000 on receiver's certificates "to pay the present indebtedness of the receiver, and to make up any deficiency that may arise in developing and operating the Kensington mine and mill over

the gross earnings from such operation." A like declaration is made, as in previous orders, relative to the priority of the lien of such certificates over the lien of all mortgages and trust deeds affecting the property. The order specifies that out of the proceeds of the loan there shall be paid, first, the outstanding receiver's certificates, amounting to $40,000; second, the floating indebtedness of $60,000; and, third, for development purposes, $50,000. And the sixth order was entered October 29, 1901, authorizing the receiver to borrow $190,000 for purposes of like nature as of the next preceding issue, and with like declarations as to priority of liens over other incumbrances.

John J. Boyce, Shackleford & Lyons, and Pillsbury, Madison & Sutro, for appellant.

Curtis H. Lindley and Henry Eickhoff, for appellees.

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

WOLVERTON, District Judge, after stating the facts, delivered the opinion of the court.

The essential and ultimate inquiry is whether the court erred in decreeing a sale of the mining properties, in view of the proceedings theretofore had and the administration of the affairs of the defendant corporations under the receivership, and it is important to a clear understanding and solution of the principal question that certain legal principles be first ascertained and determined. As a general rule, "to warrant the interposition of a court of equity by the aid of a receiver, it is essential that plaintiff should show, first, either a clear, legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand; and, secondly, it must appear that possession of the property was obtained by defendant through fraud, or that the property itself, or the income from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant." High on Receivers (2d Ed.) § 11. See, also, 23 Am. & Eng. Enc. of Law, 1036.

The receiver being an arm of the court, his authority for taking over the properties of the concerns involved, for administering their business affairs, and for issuing receiver's certificates, with a view to obtaining funds for discharging liabilities and obligations incident to the receivership, is but another expression for the authority of the court, without whose orders and directions the receiver is powerless to do anything. A practice has grown up incident to railroad receiverships, which, indeed, has become firmly established by judicial sanction, whereby the receiver is considered to be legally competent under conditions of insolvency, and perhaps for other causes peculiar to the business of public service corporations, to issue receiver's certificates for the purpose of paying labor claims, within prescribed limits as to time, and other incidental and necessary expenses for carrying forward the business of the corporation, so that it may continue a going concern, and thereby to supplant or supersede the liens of mortgage claimants. The reasons, however, for the authority are peculiar to railroad corporations, and to the enterprises in which they engage, the most salient of which are that railroads are quasi public concerns, through which the public interests and convenience, as well as private owner-

ship, are largely subserved, and that a maintenance of the roadway and equipment, and a continuation of the business and operation of the road, are essential to the preservation of the mortgage security. Any person or corporation, in taking and accepting a mortgage upon the property of a railroad, therefore, does so with reference to the law governing such corporations, and with knowledge, presumably, of the legal condition that, for the purpose of keeping the enterprise a going concern, receivers may be appointed and receiver's certificates issued in appropriate cases, which, in their force and effect, will supplant the mortgage, and hence with the understanding that the mortgage lien may be superseded by the necessary expenses for continuing the business and thereby preserving the security of the mortgage. These principles have been established by numerous adjudications in the Supreme Court of the United States. Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Miltenberger v. Logansport Railway Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Wood v. Guarantee Trust Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; Kneeland v. American Loan Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379. Neither the rule, nor the reasons which go to its support, have application to corporations engaged in strictly private enterprise. The Supreme Court of the United States has not as yet expressly said this, but it has so strongly observed the distinction in that relation between the two characters of corporations that there is left but little room for conjecture as to what its determination in a case calling for a decision in the premises would be. It is said in Wood v. Guarantee Trust Co., supra, that:

"The doctrine of Fosdick v. Schall has never yet been applied in any case, except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

And so in Kneeland v. American Loan Co., supra:

"It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

The federal courts, in both the circuit and district, have, however, passed upon the question, and are uniform in holding that a receiver of a private corporation has no such latitude in legal contemplation as it respects the issuance of receiver's certificates as do those of a railroad or public-service corporation, and that his authority for displacing mortgage liens, unless by the consent of the mortgagee, extends only to the necessary expenditures incident to administering the assets and preserving the property from deterioration pending the winding up of the business and the settlement of the receivership. This was held in Farmers' Loan & Trust Co. v. Grape Creek Coal Co. (C. C.) 50 Fed. 481, 16 L. R. A. 603. We quote from the headnote:

"In a suit to foreclose a mortgage on the property of a coal-mining company the court has no power, as against the objection of even a small minority of the holders of the mortgage bonds, to authorize a receiver appointed in the suit to issue certificates which shall be a first lien on the mortgaged property, in order to enable him to continue the operation of the mines."

So in Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C.) 68 Fed. 623:

"A court of equity has no power, without the consent of all lien creditors, to authorize the receiver of an insolvent private corporation, whose business is not affected with any public interest, to issue certificates which will be a paramount lien upon its property for the purpose of carrying on its business, unless it be necessary to do so in order to preserve the existence of the property or franchises."

The same doctrine was enunciated in the case of Hanna v. State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201, wherein it was sought to issue receiver's certificates for the purpose of raising funds whereby to carry out certain contracts of sale of real property with purchasers. And in Newton v. Eagle & Phœnix Manufacturing Co. (C. C.) 76 Fed. 418, it was determined that the court would not order receiver's certificates to issue for the purpose of raising money to pay interest on the bonds of the company, and thus displace existing liens. To the same purpose is Baltimore Building & Loan Association v. Alderson, 90 Fed. 142, 32 C. C. A. 542, wherein the court says:

"In the case of private corporations the court cannot authorize the issue of receiver's certificates for the purpose of improving, adding to, or carrying on the business of the company, without first having the consent of creditors whose liens would be affected thereby."

The state courts are quite as uniform in their enunciation of and adherence to the doctrine. In Merriam v. Victory Mining Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997, which involved the operation of mining property, the same as in the case at bar, Mr. Justice Bean, after a review of the adjudications of the courts of the United States touching the authority of the receiver in railroad matters to issue certificates in displacement of mortgage liens, says:

"It will thus be seen that the right of a court appointing a receiver to give priority of payment to unsecured debts over the lien of a mortgage is restricted to creditors of railroads which are public concerns, and is only exercised as to them under special circumstances, and in favor of a particular class of claims."

See, also, Investment Corp. v. Hospital, 40 Or. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627.

In the case of Raht v. Attrill et al., 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456, it is held, in effect, that the court, in administering assets through the receiver, is not empowered to displace a mortgage lien by receiver's certificates, except for "expenses of realization, and also certain expenses, which are called expenses of preservation," which may be incurred under the order of the court on the credit of the property. That was a case wherein it was sought to have issued receiver's certificates by which to raise the necessary funds for completing a hotel then in course of construction. A later case is that of International Trust Co. v. United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am.

St. Rep. 59. The court there, after having examined many authorities, some of which we have cited, says:

"We are of opinion that, in administering the affairs of an ordinary insolvent private business corporation for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lienholders, without their consent. While it may, in a proper action, and with the proper parties present, through the instrumentality of a receiver, carry on the business of private corporations or individuals temporarily, and incur obligations therefor that may be made a paramount lien on the corpus of the property, such obligations must have been contracted for, and must relate strictly to, the preservation of the status of the property at the time of the appointment of the receiver."

This is the clearest enunciation of the rule that we have found. In a very late and well-considered case from Idaho the same conclusion is reached. Dalliba v. Winschell, 82 Pac. 107, 11 Idaho, 364.

So that, in the light of these authorities, there can remain no question as to the rule as it relates to private corporations. The court is without authority, except by the consent of the mortgage lienholders, to supplant their liens by receiver's certificates issued for any obligations other than those arising by way of expenditures for realization and for preserving the property while the business is in course of administration under the receivership. It cannot, by its edict, make any debt or obligation a prior lien, unless appropriately entitled thereto under the law governing receiverships.

Now, to the order of sale. From an inspection of the complaint of Decker Bros. it is extremely doubtful whether it states a cause entitling the plaintiffs to the appointment of a receiver. Under the rule above first noted the plaintiffs were required to show that the property of the mining companies constituted a special fund to which they had a right to resort for the satisfaction of their claims, and that the property itself, or the income arising therefrom, was in danger of loss from neglect, waste, misconduct, or insolvency of the defendant companies. Being simple contract creditors only, the property of the mining companies could not be regarded as a special fund for their peculiar protection, and they had a right to resort to it only as other creditors had the right; that is, to reach it through the process of law, by way of attachment or execution, or, in case of insolvency, through a creditors' bill. But there was no insolvency in the present case at the time. At most, there was only danger of the companies becoming insolvent, and this because it was feared that a large number of suits would be instituted, whereby the assets would be wasted and exhausted. This, it must be conceded, was scant cause for the appointment of a receiver. Further than this, it is apparent that the purpose of the appointment was not that the assets of the mining company should be disposed of for the payment of indebtedness and liabilities, but that the properties might be operated as mines, and, presumably, that the claims should be discharged out of the earnings of such operation. Not only does the complaint indicate as much by very strong implication, but the subsequent management and conduct of the parties proves it. The first order obtained, whereby leave was granted for

issuing receiver's certificates, extended no further than to enable the receiver to borrow money for the payment of labor claims without specification as to any particular claim. But the second, fifth, and sixth orders clearly contemplated the development of the mines, as well as their operation. Clearly the court was without authority of law to permit the receiver to conduct the business of the defendant companies in this way, even if the complaint was sufficient to warrant his appointment in the first instance. These orders were probably all entered by the consent and sanction of the defendant companies (although the record is not explicit as to that), which would estop them to deny their validity. But the thing of peculiar moment is that they were made and entered without the appearance or consent of the International Trust Company, although they purport to subordinate its mortgage lien to the lien of the receiver's certificates. This would be the conclusion from the record up to the time of filing the petition of the defendants with a view to having the trust company brought in and made a party to the suit or proceeding. By this petition, and by the answer and cross-complaint subsequently filed by the defendant companies, it is alleged that all such orders were made and entered with the consent and approval of the holders of the bonds. These allegations, however, are specifically denied by the trust company, thus bringing into the record an issue as to the real fact. By the further petition of the trust company for leave to sue the receiver, and its cross-complaint, it appears that the presence of other parties is necessary to a complete determination of the matters at issue; it being shown that such parties are claiming such an interest as beclouds the title to some of the properties. Now, without settling these matters, or determining priorities in any way, the court made and entered the order of sale complained of. The order is one resting in the sound discretion of the court—a judicial discretion, however, not arbitrary, but impartial, to be exercised in obedience to the rules of law.

It is inevitable that all these properties must be sold to satisfy the various demands existing against them, and it is most important that they bring the very highest price in the market. To our minds the questionable irregularity attending the appointment of the receiver, the clear want of authority in the court, first, to authorize the receiver to develop the properties or to operate them for any purposes except for those of realization for the payment of creditors; and, second, to subordinate, without the assent of the mortgage claimants, the lien of the mortgage to that of the receiver's certificates, and the alleged existence of adverse claims undetermined—will stand largely in the way of realizing full value at the sale, and that such value cannot be obtained except under the foreclosure of the trust company's mortgage, which may be required in the original suit, or may be had under the cross-bill of that company filed by leave first granted.

We quite agree with the trial judge (who, it should be said, was not on the bench when the suit was instituted or the orders authorizing the issuance of the receiver's certificates were made and entered) that "eight years is too long for a court to hold a mining property in its custody." The main trouble is, however, that it ever assumed custody in the first instance, and attempted to subordinate the mortgage lien

of the trust company, without its assent, to the supposed lien of receiver's certificates issued wholly without warrant or authority of law. It is manifest that such patent irregularities must necessarily detract largely from the realization of a full or fair value of the properties under a sale had in pursuance thereof.

The decree of the trial court will therefore be reversed, and the cause remanded for such other proceedings as may seem proper.

ANDERSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February, 1907.)

No. 1,334.

1. PUBLIC LANDS—TIMBER DEPREDATIONS—ACTIONS—EVIDENCE.
   Where, in an action to recover for timber alleged to have been wrongfully cut from the public domain, defendants claimed the right to cut under the mineral land acts, evidence as to the steps a witness had taken to procure certain mineral land outside the area of the lands on which the timber was cut and by what method he intended to work such land was immaterial.

2. SAME—GOOD FAITH—EVIDENCE.
   Where it was claimed that defendants B. and A. had unlawfully cut timber sued for from the public domain and sold the same to G., evidence that about the time they made such contract they located a number of placer mining claims, etc., at another point, and then, without doing any work on such claims except the necessary assessment work, proceeded to cut timber from such claims and from adjoining lands without reference to the boundaries thereof, was admissible on the issue of their good faith.

3. SAME.
   Where certain of the defendants located unsurveyed government land by scrip, and immediately proceeded to cut timber therefrom and from adjoining lands without reference to boundary lines, and the timber cut from the adjoining lands exceeded that cut on the land located, it would be presumed that the cutting from such adjoining lands was unlawful.

4. EVIDENCE—SELF-SERVING DECLARATIONS.
   Where a contract for cutting timber provided that the logs should be cut from lands owned by defendants B. and A., and the United States claimed that the timber was, in fact, cut from the unsurveyed public domain, evidence as to conversations between the contracting parties at the time the contract was executed concerning the particular lands on which the timber was to be cut was inadmissible as self-serving.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1068–1075.]

5. PUBLIC LANDS—RIGHT TO CUT TIMBER—MINERAL LANDS—EVIDENCE—EXPERTS.
   Where, in an action by the United States for timber alleged to have been wrongfully cut from the public domain, defendants claimed the right to cut the timber under the mineral land acts, the government was entitled to show by an expert miner that, in his opinion, the ground where the timber was cut was not worth locating for placer mining purposes.

6. SAME—DAMAGES.
   Where a corporation became the owner of a contract for the delivery of logs which were, in fact, unlawfully cut from the public domain, and the contract, though declaring that the buyer should have title to the

logs when cut, also required the sellers to deliver the logs at a particular point, there was no conversion of the logs by the corporation prior to such delivery so that the court in action to recover for logs wrongfully cut from the public domain properly refused to charge that the measure of damages was the value of the logs on the ground, provided the transaction, so far as the corporation was concerned, was an innocent one.

7. SAME—MINERAL LANDS—INSTRUCTIONS.

Where, in an action to recover for logs wrongfully cut from the public domain, defendants claimed the right to cut under the mineral land acts, instructions that the mere appearance of mineral was not sufficient to constitute the land mineral, but that there must be sufficient mineral to induce mining men of experience to go on the land and take and work it with the expectation of finding mineral, etc., were not erroneous.

8. SAME—LIABILITY OF PURCHASER.

Where defendant corporation purchased timber which had been wrongfully cut from the public domain, the corporation acquired no better title than the sellers, and could not defend an action by the United States to recover the value of the logs on the ground that it was acting in good faith.

In Error to the Circuit Court of the United States for the Central Division of the District of Idaho.

The defendant in error brought an action against the plaintiffs in error charging the unlawful cutting and removal of 2,218,974 feet of timber from the public lands of the United States, and converting the same into saw logs, which were of the value of $8 per thousand feet, and of the total value of $17,751.79. The case was tried before a jury, and a verdict was returned in favor of the defendant in error in the sum of $6,102.18. In the complaint it was alleged that Anderson, Baker, and Sandlin as copartners unlawfully and willfully entered upon certain tracts and parcels of vacant, public, unsurveyed lands of the United States lying on and along both banks of the South Boise river, in what will be, when surveyed, township 3 N., ranges 10 and 11 E., Boise meridian; that the timber so cut was by said copartners converted into saw logs and by them conveyed to a pond near Boise City, Idaho, where they unlawfully and willfully sold and delivered the same to the Page-Mott Lumber Company, Limited, a corporation; that said corporation then and there unlawfully and wrongfully received said logs into its possession and converted the same to its own use, to the damage of the defendant in error in the sum of $17,751.79. The answer of the plaintiffs in error admitted that the United States was the owner of the lands from which the timber was cut, but denied that the cutting was unlawful, and justified the cutting and removal of the timber under the act of Congress approved June 3, 1878, entitled "An act entitling the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes" (Act June 3, 1878, 20 Stat. 88, c. 150 [U. S. Comp. St. 1901, p. 1528]), and alleged that the said lands upon which such timber was cut were public mineral lands of the United States not subject to entry except for mineral entry; that said timber was cut by the said Baker, Anderson, and Sandlin at the instance and request of the Page-Mott Lumber Company, Limited, for the purpose of manufacturing the same into lumber by said corporation, the lumber to be used for general agricultural, domestic, mining, and building uses in the vicinity of Boise City, Idaho, and that none thereof has been exported or was intended for export from the state of Idaho; that the plaintiffs in error observed all rules and regulations then and there in force and promulgated by the Secretary of the Interior for the protection of timber and undergrowth growing upon said lands, and that the stumpage value of said timber did not exceed the sum of 30 cents per 1,000 feet, board measure. On the trial the contract between Baker, Anderson, and Sandlin, as parties of the first part, and N. H. Goodwin, who was the predecessor in interest of the Page-Mott Lumber Company, Limited, as party of the second part, was admitted in evidence. That contract provided that Baker, Anderson, and Sandlin should cut from 2,500,000 to 3,500,000 feet of merchantable timber (saw logs), and deliver the same to

the said Goodwin at Boise City, Idaho, in the summer of 1904, "the logs to be cut on lands owned by said first parties in the vicinity of the South Boise river, Elmore county, state of Idaho." It further provided that the title of the logs should be in the party of the second part as soon as cut, but payment should be made only for the amount of timber delivered at the pond. (The pond here referred to was at Boise). The contract provided for the payment of $9 per 1,000 feet for the logs. It was shown in the evidence that the Page-Mott Lumber Company became the assignee of Goodwin in the contract. It was also shown that before the commencement of the present action, and while the logs were still upon the bank of the river near where they were cut, an injunction suit was commenced by the United States against Baker, Anderson, and Sandlin to prevent the removal of the logs from the place where they were banked; that prior to the commencement of that suit a special agent of the General Land Office had taken possession of said logs and placed the brand of the United States thereon, and had left a person in charge thereof; and that after the issuance of a restraining order, an additional order was entered by the court permitting the defendants in that suit to remove said logs and convey the same to Boise City, upon giving a bond for their value as fixed by the court, which was done.

S. H. Hays and Fremont Wood, for plaintiffs in error.

N. M. Ruick, U. S. Dist. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

On the trial the plaintiffs in error introduced evidence for the purpose of showing that the land from which the timber was cut was mineral land. The record contains numerous assignments of error relating to the admission and exclusion of evidence upon that branch of the case. It is not necessary to consider them all in detail. It is assigned as error that, after a certain witness had testified that he owned mining claims on Feather river, he was not permitted to tell the jury by what method he proposed to work them, and that, when he had testified about a certain mineral lode on Marsh Creek, objection was sustained to the question: "Did you take any steps or were you taking any steps toward procuring it?" Both these questions related to mining claims entirely outside the area of the lands on which the timber was cut, and, in any view of it, the evidence so excluded was wholly immaterial. The same is true of the exclusion of evidence concerning the extent of the working of the Bonaparte mine. That mine was several miles distant from the lands on which the timber was cut.

A series of assignments of error relate to the admission of evidence as to the cutting of timber by Baker and Anderson prior to the time of the contract which is involved in the present action. It was shown that about the time of making the contract with Goodwin, Baker and Anderson located a number of placer mining claims on the South Fork of Boise River, both above and below Junction bar, and elsewhere within the area of lands on which the timber in question in the present action was cut, and that the timber was removed from these placer claims and the land immediately adjoining the same. It was the theory of the government that the placer mining locations were not made by Baker and Anderson in good faith but as a blind to cover their contemplated timber cutting. As tending to sustain that theory, the court permitted the defendant in error to show the former timber operations

of Baker and Anderson at Long Gulch on and in the vicinity of land on which they had located lieu land scrip, and to show that they had cut a considerable tract of unsurveyed government timber land immediately adjoining the land so located by them. This testimony, the court was careful to say, was admitted only for its bearing upon the question of the good faith of Baker and Anderson, and we think that for that purpose it was admissible. In this connection it is assigned as error that the court refused to instruct the jury, as requested by the plaintiffs in error, that the cutting of timber upon vacant public lands on Long Gulch by Baker and Anderson should not be considered by the jury, unless it was followed by other evidence showing that such cutting was unlawful, and that having refused that instruction, the court proceeded to charge the jury as to the evidence so admitted as follows:

"That evidence was introduced for the purpose of showing that they had located scrip upon certain lands, and then, regardless of the lines of that scrip location, they cut timber upon lands outside of its boundaries, using the location as a blind for the purpose of giving them a license to cut where they pleased. One of the witnesses, Mr. Baker, said he did not know where the lines were. That makes no difference. He was bound by it just the same. It was his duty to know where the lines were, and he had no right to cut until he did know, and if he cut beyond those lines he is just as guilty without knowledge as if he had known. Now, if he cut in bad faith in that instance, you may infer that he cut in bad faith in this. That is the only reason that that evidence was introduced."

Plaintiffs in error contend that there are several laws under which timber may be cut from unsurveyed public lands, that under a railway right of way, for instance, timber may be cut for right of way purposes, and also under the law of June 3, 1878, timber may be cut from mineral lands for general local and domestic purposes, etc., and argue that while if the plaintiffs in error were defending an action for cutting timber from the land in Long Gulch they would be called upon to show their right so to do, the rule does not apply here, because, first, the cutting and removal of timber in Long Gulch could have no bearing upon the issues involved in the present case, and, second, if admissible for any purpose it must be shown that the timber was unlawfully cut. But the plaintiffs in error made no attempt to justify their action under any law, and it having been shown that they cut timber, as much timber, if not more, from adjoining unsurveyed government land as upon the land so located by scrip, the presumption at once attached that the cutting upon the former was unlawful. It was for them to show that it was not. They were in the possession of the facts.

It is contended that the court erred in excluding testimony offered by the plaintiffs in error as to conversations between Baker, Anderson, and Sandlin and Goodwin, at the time of the execution of the contract, concerning the particular lands upon which the timber was to be cut. The contract itself provided that the logs were to be cut on the lands owned by Baker and Anderson. There was no error in excluding the conversations between the parties, since at most they were self-serving, and nothing that was said could excuse a trespass thereafter committed by Baker, Anderson, and Sandlin in cutting timber on public lands. The questions for the jury to determine were whether the logs were

cut on the public lands of the United States, and, if so, whether there was authority from the United States so to do.

It is assigned as error that the court permitted a witness, an expert miner of long experience, to express the opinion that the ground where the timber was cut was not worth locating for placer mining purposes. We find no error in admitting such testimony. One of the issues of the case was whether the land on which the timber was cut was mineral land. The evidence was that Baker and Anderson located between 1,100 and 1,200 acres of land as placer mining claims, in the names of their friends and members of their families, that the land was covered with valuable timber, and that no work was done on these placer claims except the assessment work necessary to hold them. The court in reviewing the testimony alluded to the fact that there was not a paying mine, either placer or quartz, in the whole section of country in the region in which the timber was cut, that the ledge mines had been located and abandoned and thereafter relocated and abandoned again, and that in the last 15 or 20 years there had not been $1,000 worth of ore taken out or shipped from that country, and said:

"There is virtually nobody at work there now. There is not a paying mine, either placer or quartz, in that section of country."

Error is assigned to the refusal of the court to instruct the jury that if they found that the property was converted by the Page-Mott Lumber Company, Limited, at the time when it took title, to wit, as soon as it was converted into saw logs, then the measure of damages is the value of the logs on the ground, provided that the transaction, so far as the corporation was concerned, was an innocent one. This requested instruction was not applicable to the facts. There was no proof that the corporation had converted the logs prior to their delivery. By the contract, the logs were to be delivered at the company's pond at Boise City. It was there that they were delivered, and it was there that they were converted by the corporation. The provision in the contract that the title to the logs "should be in the second party as soon as cut" did not amount to a conversion. There could be no conversion until there was an appropriation to the corporation's own use. Nor does the decision in Wooden-Ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, sustain a different conclusion. In that case the sale and delivery were coincident. The court held that the right to recover against the vendee was just what it was against his vendor "the moment before he interfered and acquired possession."

But the contention principally relied upon is that the court erred in its instructions to the jury on the general question of what constitutes mineral land within the meaning of the act of June 3, 1878. This court fully considered that question in United States v. Basic Co., 121 Fed. 507, 57 C. C. A. 624, and United States v. Rossi, 133 Fed. 380, 66 C. C. A. 442. But the plaintiff in error contends that the instructions given by the court in the present case were not in harmony with those decisions. On a careful consideration of the charge, we are convinced that the contention cannot be sustained. In those cases we held, it is true, that in determining the right to remove timber from mineral lands it is not necessary to establish the presence of mineral in paying quantities

in the particular land from which timber was cut, but that the presence of adjacent land valuable for mineral may be shown for the purpose of determining the mineral or nonmineral character of the land from which the timber was cut. But the plaintiffs in error complain that the court below in the present case instructed the jury that before they could reasonably find land to be mineral country it must be proven to contain minerals in fact, and that timber could be cut only from lands in mining districts or in a country that was substantially a mining district, which meant that the mining interest must be an important interest. When the whole of the charge is considered, it will be seen that the court did not so instruct. The court said that the mere appearance of mineral, the mere appearance of colors here and there, as in a placer claim, is not sufficient to constitute land mineral; that there must be at least sufficient mineral to induce mining men of experience to go upon the ground and take and work it with the expectation of finding mineral. It should be borne in mind that the instruction was given with reference to a country that had, during a long series of years, been thoroughly explored and prospected. It was not a case of newly discovered mineral country. We do not see that the instructions were inappropriate to the facts.

It is urged that the court charged the jury in substance that the locator of a mining claim must, in order to show the good faith of his location, do more than the assessment work on his claim. But that is not what was said or implied in the instruction. The court did not announce as a rule that the failure to do more than the assessment work was to be taken as evidence of bad faith on the part of the locator, but that the jury, in view of all the facts disclosed in the present case, might take that fact into consideration in determining whether the locations were made in good faith or merely as a blind to cover timber depredations.

It is contended that the court erred in instructing the jury in substance that the Page-Mott Lumber Company cannot protect itself by the defense that it was acting in good faith. But the instruction given was clearly within the authority of the Wooden-Ware Case, in which the court said:

"It is also plain that by purchase from the wrongdoer, defendant did not acquire any better title to the property than his said vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of caveat emptor applies, and hence the right of recovery in plaintiff."

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

HEADRICK et al. v. LARSON et al.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1907.)

No. 1,249.

1. APPEAL—SCOPE OF REVIEW—STIPULATIONS.

Certain proceedings relating to the condemnation of a mining tunnel were not consolidated in the trial court, but, on appeal from an order sustaining a demurrer to the bill in one of the cases, a stipulation was entered into for the consolidation of all of the proceedings and for the submission to the Court of Appeals of the questions involved therein. This stipulation was not signed by the counsel who appeared for appellees on the appeal, and they objected to the court's jurisdiction to review any question not directly involved in the appeal. *Held*, that such objection was rightfully made, and that the court's jurisdiction was confined to a review of errors committed in the case brought up by the appeal.

2. EQUITY—MULTIPLICITY OF SUITS—JURISDICTION.

Complainants cannot maintain a separate suit in equity for the sole purpose of preventing a multiplicity of their own suits, which are still pending.

3. EMINENT DOMAIN—TUNNEL RIGHTS—MINES—TITLE AND RIGHTS ACQUIRED.

Rev. St. Idaho 1887, § 5212, provides that property appropriated to public use shall not be taken unless for a more necessary public use than that to which it has already been appropriated. *Held*, that where defendants acquired a right to drive a tunnel through complainants' mining claims, which divided complainants' veins, complainants did not thereby acquire the right to use such tunnel to work their veins, on the theory that defendants' condemnation had been made for a public use; there being neither allegation nor proof of necessity for such common use, nor that complainants could not proceed to condemn a right of way for a tunnel to be used for their own purposes.

[Ed. Note.—Nature of estate or interest acquired in condemnation proceedings, see note to Newton v. Manufacturers' Ry. Co., 53 C. C. A. 604.]

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

The appellants, as complainants, filed a bill in equity against the appellees alleging that the appellants were the owners of the Hawk Eye lode mining claim, the Black Hawk lode mining claim, the Black Hawk Fraction lode mining claim and the Alvy lode mining claim, by patents from the United States. That in each of said claims there is the apex of a vein of mineral-bearing rock in place which extends on its downward course to a depth of more than 1,700 feet. That by reason of the conformation of the surface of the mountain whereon said claims are situated and the existence of the patented mining claims of the appellees and other valid mining claims on either side, every approach to the property of the appellants is cut off, so that it is impossible through the means of any tunnel which they might desire to run, to reasonably and economically reach the ores in their said claims. That the appellees have constructed a tunnel which is so run as to penetrate the Black Hawk mining claim and pass through the same to other claims owned by the appellants. That said tunnel has encountered and passed through, at a depth below the surface of about 1,700 feet, a ledge of mineral-bearing rock in place, the apex of which lies within the Black Hawk claim. That it is practicable now to enter upon the work of developing said ledge at the point where the same is intersected by the tunnel, through and by means of said tunnel, without interfering in an unreasonable degree or manner with the work of the appellees in said tunnel, or with their use thereof. That, after passing through the Black Hawk claim, the tunnel entered the Alvy claim at a depth

of 1,750 feet below the surface, and there encountered a ledge, which apexes within said Alvy claim, which is about 15 feet wide and contains silver, lead, iron, and other valuable substances. That it is practicable to enter upon the work of developing the ledge at such point of intersection by means of said tunnel without interfering in an unreasonable degree with the work of the appellees. That said Black Hawk and Alvy claims have, and will have, great value because of their production of ores and metals, thereby contributing to the development of the mineral resources of the United States and of the state of Idaho, and that such work will constitute a public benefit and public use. That the appellees are constructing said tunnel on the ground that it will enable them to develop and operate their claims and will be a public use for and on behalf of which they may exercise the right of eminent domain. That in pursuance thereof they "are now proceeding in this court in the suit No. 346 of Peter Larson and Thomas L. Greenough v. A. A. Headrick and Charles M. Baillie to condemn a right of way through the Black Hawk and Alvy mining claims," claiming in their complaint that such use is a public use for which they may condemn such right of way. That the court has made an order declaring the taking to be for public use, and has appointed commissioners to assess damages resulting therefrom. That thereafter, on May 13, 1905, the appellants commenced in the same court a suit against the appellees to enjoin the construction of said tunnel through the appellants' ground; that thereafter the court denied their application for a temporary injunction and sustained the right of the appellees to construct and use said tunnel under their condemnation proceedings. That said court having overruled the appellants' demurrer to the complaint in the condemnation suit, and having refused to grant the appellants protection against the trespass of the appellees, the appellants bring the present suit for the purpose of obtaining, through a decree of the court, the right to proceed in the use of the tunnel for the purpose of developing and mining their ledges intersected by the same, provided such taking by the appellees is lawful. That the tunnel is of sufficient size to render its use by the appellants in conjunction with the appellees entirely practicable, and that such use is a reasonable use, and would constitute the participation in a public use which would develop the mineral resources of the United States and of Idaho. That said ledges are of great width and value and cannot be successfully, completely, or profitably worked, prospected, or developed at the depth of said tunnel by any other means than by said tunnel, and that there exists a necessity for the appropriation by the appellants of the joint use of said tunnel. That they have made application for a reasonable joint use of said tunnel, but their application has been rejected by the appellees. That, before filing their bill, the appellants tendered to the appellees the sum of $500 as compensation for any damages resulting from the granting of such right of common use.

The bill then prays for the consolidation of the action and the suits involving the right to use said tunnel and the right to condemn a right of way for its construction, alleges that the appellants are either entitled to a joint user of said tunnel or to a decree adjudging that said tunnel is not for a public use, and prays that the appellees be enjoined from appropriating their property therefor, and offers on behalf of the appellants to do and abide by such terms and conditions in regard to sharing in the said public use of the tunnel for the purpose of mining and operating their mining claims as may seem equitable and just in the way of compensation, restrictions, and regulations to be fixed and determined by the court.

The appellees interposed a demurrer to the bill on the grounds: First, for want of equity; second, for want of jurisdiction; and third, that there is another action pending in the same court, between the same parties for the same cause. The court sustained the demurrer, and, the appellants electing to stand upon their bill, a decree was entered dismissing the same. After the appeal was taken, the parties thereto on October 24, 1905, filed in this court a stipulation reciting, in substance, that there were pending in the court below, in addition to the present case, three other actions between the same parties, namely, cause No. 343, an action of ejectment brought by the appellants herein against the appellees; cause No. 344, the suit for an injunction

referred to in the bill in the present case; and cause No. 346, the condemnation suit brought by the appellees against the appellants, which is referred to in the bill. That said suits involve, in substance, the issues which are presented in the bill in the present suit, and that the appellants submit to this court the pleadings in the said several suits, together with the pleadings in this suit, to the end that this court may determine the propriety of consolidating said actions for the purpose of determining the several issues common thereto, and thus avoid a multiplicity of suits. The stipulation recites that: Whereas, in the bill in the present case it is stated that the court below held in said case No. 346 that the appellees might be given the exclusive use of the tunnel and the right of way therein, which was sought to be condemned for public use, and thus disregarded the rights of the appellants under the fifth and fourteenth amendments to the Constitution of the United States; and that, whereas, said suit 346 involves the right of the appellees to condemn for their exclusive use a right of way through the appellants' mining claims, and said suit has been continued in the court below to await the decision of this court as to the right of the said appellees to thus exercise the right of public domain; that, whereas, the pleadings and issues upon the present appeal present the question of the right of the appellees to condemn said right of way, notwithstanding said question is pending in said suit No. 346: "Now, therefore, it is hereby stipulated and agreed by and between the respective parties, acting through their respective counsel, that the United States Circuit Court of Appeals for the Ninth Circuit, having jurisdiction of this cause on appeal in the case No. 1,249, may take under consideration and determine upon the appeal in this cause the right of the appellees in this cause, who are the plaintiffs in said suit No. 346, * * * to condemn a right of way for their said tunnel No. 6 through the said Black Hawk and Alvy mining claims, as the right so to do is claimed in their complaint in said suit No. 346. so pending as aforesaid, notwithstanding any objection that may be raised or urged against the consideration and determination of said action by reason of the pending of the said cause No. 346, or by reason of the demurrer to the bill on the ground of a prior action pending."

The stipulation further provided that the records in said cause so referred to be filed as an additional transcript on the appeal, and that the stipulation was made in consideration of the postponement of the trial of said cause No. 346, which postponement was requested by the appellees. "The object and purpose of this stipulation is that, notwithstanding the record or any objections that may be urged upon said record to the consideration and determination by this court of the question of the right of the appellees to condemn their right of way as by them claimed in their complaint in said cause No. 346. such question may be determined and adjudicated as a part of and in connection with the determination of the appeal in this case in this court."

See, 138 Fed. 177.

W. B. Heyburn and W. H. Batting, for appellants.

John P. Gray, F. T. Post, Walter A. Jones, and George Turner, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The bill is so framed as to present two questions: First, whether the appellees could lawfully condemn the right of way for a tunnel; and, second, whether, sustaining such right, the appellants can be decreed to have the use of the tunnel in common with the appellees. The bill shows that the first of the questions had been decided in the affirmative by the court below in two causes pending therein, one the action to condemn the right of way, and the other a suit in equity brought by the appellants to enjoin the appellees from extending the

tunnel through their mining property. One of the grounds of the demurrer to the bill in the present case was the pendency of these prior causes and the decisions therein rendered. The judgment on the demurrer specifies no particular ground on which it was sustained in the court below. It may be assumed that it was sustained on the ground just indicated, as well as for want of equity. The stipulation for the consolidation of all these proceedings and for the submission to this court of the questions involved therein is filed in this court. There was no stipulation in the court below, nor were the causes there consolidated. The jurisdiction of this court is confined to the review of error committed in the court below in the cause which is brought before us upon appeal. It does not extend to errors committed in other causes. The counsel who appear for the appellees in this court were not the counsel who signed the stipulation, and they now object to the jurisdiction of this court to review any question which is not directly involved in this appeal. This they have the right to do. It is not alleged in the bill, nor is it contended, that the appellants cannot obtain as full, complete, and adequate relief as to the appellees' assertion of right to condemn the right of way for a tunnel in the prior causes so pending as they could in this. It is sought to maintain the present suit, so far as it concerns the matters involved in the prior suits, on the equitable ground of the prevention of a multiplicity of suits; but it is obvious that the appellants cannot maintain a separate suit for the sole purpose of preventing a multiplicity of their own suits, suits which they have brought and which are still pending. The parties cannot by their stipulation inject into the present appeal matters not determined in the cause in which the decree which is appealed from was rendered, or give to this court jurisdiction to consider the same. Hoe v. Wilson, 9 Wall. 501, 19 L. Ed. 762; Washington County v. Durant, 131 U. S. Append. lxxx; Montgomery et al. v. Anderson et al., 21 How. 386, 16 L. Ed. 160; Mills v. Brown, 16 Pet. 525, 10 L. Ed. 1055; South Carolina v. Wesley, 155 U. S. 542, 15 Sup. Ct. 230, 39 L. Ed. 254.

The bill alleges that the tunnel has been constructed from the place of its outlet to and through the mining claims of the appellants. Assuming, as we must on this appeal, but not deciding, that the appellees were authorized to condemn the right of way for that tunnel, the single question presented for our decision is whether or not the appellants can be decreed to have a use thereof in common with the appellees. The appellants contend that the right to such common use is implied in the very fact that the right of way for the tunnel has been condemned by judicial proceedings in the exercise of eminent domain, and that such right of way can have been condemned only for a public use. They cite Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, as authority for that contention. That was a case in which it was sought to condemn a right of way, so-called, by enlarging a ditch which had been made to convey water across the land of the defendant under a statute of the state of Utah, permitting condemnation by an individual for the purpose of obtaining water for his land or for mining purposes. The court sustained the right, in view of special conditions obtaining in the state of Utah as to agricultural and mining industries, and held that a statute of that state permitting an

individual to enlarge the ditch of another, and thereby obtain water for his own land, is within the legislative power of the state, and does not violate any provision of the federal Constitution. Said the court:

"We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it."

In Strickley v. Highland Boy Min. Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, the court said of the decision in Clark v. Nash:

"In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test."

If the appellants were here seeking to condemn a right of way to widen the tunnel of the appellees, and showing a necessity therefor for the purpose of laying their own tracks in the widened portion thereof for working their mines and extracting ores from their subterranean ledges, the doctrine of Clark v. Nash would be pertinent; but the purpose of the bill is to obtain the right to use a tunnel which has been made by the appellees at their own expense for their own purposes, with track and facilities, it may be assumed, no more than sufficient for their own use. We find no statutory authority, no precedent, and no recognized principle of law or of equity upon which to base such a right. In section 257a, of Lewis on Eminent Domain, it is said:

"It would seem clear that, under the general rule already stated, nothing but an express authority or absolute necessity created by the Legislature itself could justify one railroad company in taking the tracks of another company, or even the joint use of such tracks."

There is no legislative provision in Idaho which authorizes the granting to one of the right to use a tunnel acquired by another under condemnation proceedings. Section 5212 of the Revised Statutes of 1887 of that state provides that property appropriated to public use "shall not be taken unless for a more necessary public use than that to which it has already been appropriated."

But the present suit is not a suit to condemn a right of way over the tunnel. It is a suit in equity to compel the joint use of a right of way already condemned by another, and to obtain the right to participate in the benefits thereof, on the theory that the condemnation has been made for a public use, and that the appellants are members of the public for whom such condemnation has been adjudged. There is no allegation showing the necessity for such common use, and nothing to show that the appellants cannot proceed and condemn a right of way for a tunnel, as was done by the appellees.

The decree of the Circuit Court is affirmed.

FERGUSON v. BLOOD.

(Circuit Court of Appeals, Ninth Circuit. March 11, 1907.)

1. VENDOR AND PURCHASER—CONTRACTS—EXECUTION—EVIDENCE.
Defendant, having agreed to purchase an interest in certain mining claims, at a meeting of all the parties stated to plaintiff that he would sign the contract on its receipt from his agent, L. Defendant proceeded under the contract as though it had been signed by all the parties, made payments under it, went into possession of the property, participated in its development as though the contract had been executed, and on the trial refused to produce the original on notice. *Held* to warrant an inference, in the absence of evidence to the contrary, that defendant in fact signed the contract.

2. FRAUDS, STATUTE OF—RIGHT TO URGE—ESTOPPEL.
Where defendant led plaintiff to believe that he had signed a written contract for an interest in certain mining claims, and induced plaintiff to purchase claims on which he had options, and to otherwise expend money and time to carry out the provisions of the agreement, defendant could not assert that the contract was void under the Idaho statute of frauds because he did not in fact sign the same, under Rev. St. Idaho 1887, § 3225, declaring that, where a contract which is required by law to be in writing is prevented from being put in writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts on such belief to his prejudice, may enforce it against the fraudulent party.

3. SAME—PART PERFORMANCE.
Where a contract for the purchase of an interest in certain mining claims was wholly performed by the vendor, and almost completely performed by the purchaser, prior to the latter's repudiation thereof, such performance was effective to take it out of the statute of frauds.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 293, 294.]

4. VENDOR AND PURCHASER—VENDOR'S LIEN—FORECLOSURE—DEFICIENCY JUDGMENT.
Where a seller of an interest in certain mining claims retained title to the buyer's interest to secure payment of the price, the vendor was entitled to foreclose the lien so retained on the purchaser's default, as provided by Rev. St. Idaho 1887, §§ 3440, 4520, and 4521, and to recover a a deficiency judgment against the purchaser on the failure of his interest to sell for enough to satisfy the debt.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 822, 823.]

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Hawley, Puckett & Hawley, for appellant.
Richards & Haga, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee was plaintiff in the court below, the suit being brought by him against the appellant and one S. C. Fulton, based upon an alleged written contract entered into between the appellant, Ferguson, as party of the first part, and Blood and Fulton, as parties of the second part, concerning certain placer ground in Boise county, Idaho. The plaintiff below in his complaint set out a descrip-

tion of the property alleged to be included and intended to be included in the contract, and charged that one-half of the amount to be paid by the appellant, Ferguson, under its terms, was to belong to Blood, and the other one-half thereof to Fulton; that pursuant to the terms of the contract the appellant, Ferguson, paid to Blood and Fulton $19,500 each, but defaulted in the payment of the last $11,000 due, and refused to pay the same, or any part thereof, after demand made for such payment; that Blood and Fulton "fully kept and performed all and every of the terms of said agreement by them and each of them to be kept and performed"; that Fulton refused to join as plaintiff in the suit, for which reason he was made a defendant thereto; and that there remains due and owing the plaintiff, Blood, from Ferguson, under the terms of the contract, the sum of $5,500, with interest thereon from the 15th day of August, 1902—the plaintiff's prayer being for judgment against Ferguson for that sum, with interest, and that a decree be made for the sale of all of his interest in and to the described premises, the proceeds of which sale to be applied in the payment of the amount due the plaintiff and the costs and expenses of the suit, and that the defendant, Ferguson, and all persons claiming under him, be barred and foreclosed of all rights and equities in the premises, and for general relief.

The alleged written contract was annexed to the complaint and made a part thereof. It bears date July 26, 1901, and purports to have been made by and between Ferguson as party of the first part, and Blood and Fulton as parties of the second part, by which the parties of the second part agreed to convey and deliver to the party of the first part an undivided one-half interest in certain described mining ground situated in Boise county, Idaho, "to all of which properties the said parties of the second part hereby agree to secure undisputed titles before any consideration shall be given by the party of the first part," and by which the parties of the second part further agree to convey to the party of the first part an undivided one-half interest in all the personal property on the premises described, consisting of cabins, ditches, water rights, flumes, piping, Hotchkiss giants, and other tools and implements used in working the property; in consideration of which grant and the other considerations mentioned in the contract, the party of the first part agrees to pay the parties of the second part the sum of $50,000, in manner following, to wit:

"Seventeen thousand dollars ($17,000) at or before the signing of this agreement; ten thousand dollars ($10,000) in three months from the date hereof; seven thousand dollars ($7,000) in five months from the date hereof, or at a later date (it being hereby stipulated and agreed by the parties of the second part that they will earnestly endeavor to secure an extension of payment on the options now held by them and which the aforesaid seven thousand dollars is intended to liquidate, which will permit deferring this latter payment of seven thousand dollars to a date three months later than above stated). Three thousand dollars ($3,000) in eight months from the date hereof, and the remainder or thirteen thousand dollars ($13,000) on the 15th day of August, A. D. 1902; and should the party of the first part default or be unable to make these latter two payments at the time specified it is agreed by the parties of the second part that he shall have further time to make such payments, and shall not forfeit any right or interest he may have acquired in the said property by reason thereof."

The alleged written contract further provides that out of the first payment of $17,000 the parties of the second part would erect, build and equip a first-class dredging plant of the Morris pattern, or some similar pattern, to be mutually agreed upon by the parties to the agreement, and place the same upon a boat 30 feet wide and 75 feet long on the mining ground described, together with a force pump having a nozzle pressure of 100 pounds to the square inch, one tubular boiler of 75 horse power, and one engine of 70 horse power, with all necessary connections, including shafting, pulleys, belts, derricks, head box, double sluice boxes, and riffling, and all other auxiliaries, tools, etc., requisite in a first class dredging plant of the kind, the pump to be equipped with a suction pipe not smaller than 10 inches in diameter.

The alleged written contract contains these further stipulations:

"It is further agreed by the parties of the second part that if a certain tract of land of about five hundred acres of land lying west of the Lippincott property, as described above, shall be available, they will locate the same and add it to the lands above described which are to be the joint property of the parties hereto under this agreement, and that the expense of locating, recording and doing assessment work on the said lands shall be borne by the parties hereto jointly.

"It is also agreed that if a certain placer property comprising fifteen hundred acres more or less, located on Kanley Creek adjacent to the properties above described and owned and controlled by the Gold Sand Mining and Milling Company, of which Messrs. Blood and Fulton, parties of the second part, are parties in interest, shall become available and can be purchased, the parties of the second part agree to acquire the same and consolidate it with the property first described herein on conditions hereafter to be agreed upon by the parties hereto, provided a mutual and satisfactory agreement can be reached relating thereto.

"It is further agreed that upon the completion of the dredge above referred to and described, and when the same shall be ready for operation, a sinking fund of one thousand dollars ($1,000) shall be created to pay the expenses of operation until the plant shall be self-sustaining, by each of the parties hereto contributing five hundred dollars ($500), the residue or remainder of which shall be covered into the treasury of the corporation, which it is the purpose of the parties hereto to incorporate, with all other moneys and earnings accruing to the said corporation."

The answer of the appellant, Ferguson, put in issue the execution by him of the alleged contract, and also denied that the property described in the complaint is the property included and intended to be included in that or any other contract entered into between the parties. In his answer Ferguson admitted the payment by him to Blood and Fulton of $19,500 each, but denied that such payments were made under or in pursuance of the alleged contract, and denies that anything remains due from him under said contract, or at all, or that any demand has been made upon him for such balance, and denies the performance by Blood and Fulton of their part of the alleged contract.

On the trial the defendant Ferguson introduced no evidence, so that the case rests solely upon the plaintiff's proof. By that it appears that in the spring of 1901 the appellee began negotiations with the appellant for the purchase by him of an undivided half interest in certain placer ground owned by the appellee and Fulton, and upon some of which they held options from others. The negotiations culminated

in a telegram of date April 18, 1901, from the appellant to the appellee, notifying the latter that in a few days one M. J. Lawlor would arrive, clothed with full authority to act for the appellant in the matter concerning which they had been negotiating. Accordingly. Lawlor met the appellee and Fulton in Denver, and the three then went to Idaho to examine the ground; and, after spending some time in such examination, Lawlor, according to the only evidence in the case, said to Blood and Fulton:

"There is no use prospecting any further; I am satisfied, and now we will go out to Boise and I will make my report to Mr. Ferguson."

He did so, and the three remained in Boise to hear from the appellant. On the 26th day of June, 1901, Lawlor received a telegram from the appellant stating that he would send $1,000 that day, $9,000 in 20 days, $7,000 in 30 days, and the balance in four months, and asking where he could buy machinery. This telegram was shown by Lawlor to the appellee, and $1,000 paid to the latter and Fulton. Lawlor then returned to Shenandoah, Pa., where the appellant resided, and on July 18, 1901, the appellee received from Lawlor a telegram from Shenandoah, Pa., saying:

"Ferguson cannot leave until Tuesday or go farther than Buffalo. Want you to meet us Iroquois Hotel Tuesday evening. Notify Fulton other matter arranged, answer."

And two days later the appellee received from Lawlor another telegram sent from Shenandoah, reading:

"Meet us in Buffalo as requested in former message to sign papers. Have money for both payments, answer."

In response to these telegrams, the appellee went to Buffalo, where he met the appellant in the evening of July 25th, when and where they talked over the matter for some time. The next morning appellant, appellee, and Lawlor met and again went over the matter, when the appellant told the appellee that he could not make the payments as stated in the telegram of June 26th, but that in addition to the $1,000 already paid he would pay $9,000 in 20 days, $7,000 in 30 days, $10,000 in 3 months, and the balance of $13,000 August 15, 1902. The appellee consented to this, and thereupon the appellant dictated the terms of the agreement to be formerly prepared by Lawlor and appellant, saying to his representative, Lawlor:

"You people are competent to draw up this agreement. Have Mr. Blood sign it and acknowledge it, and forward it to my home in Shenandoah, Pennsylvania, and I will sign it and acknowledge it there."

Accordingly, the agreement was drawn up by Lawlor, and signed and acknowledged by the appellee and delivered to Lawlor, who said that he would send it to the appellant for execution—at the same time giving to the appellee a compared copy of the agreement. Later Lawlor went to Idaho, and, with the appellee, examined the county records to ascertain the title of the property that was to be transferred, and, after having some defects cured, expressed himself as satisfied with the title, and thereupon delivered to the appellee two checks signed by the appellant, one for $9,000 and the other for $7,000. All of the

other payments provided for by the contract were subsequently made by the appellant except the last, on which he also paid $2,000, leaving a balance unpaid of $11,000.

Blood and Fulton built the dredge provided for by the contract, equipped it, and commenced working the property, the appellant being represented on the ground by Lawlor, and personally spending some time there in the summer of 1902, watching the operations, and making suggestions as to equipment and the place to work. At that time he had paid $37,000 under the contract, and there discussed with the appellee the last payment to be made by him, saying that he was not certain that he could make that payment promptly, but would advise the appellee as soon as he returned to his home. At no time did he intimate that he had not signed the written agreement, and the uncontradicted testimony of the appellee is to the effect that both the appellant, and Lawlor told him that appellant had signed it, and, furthermore, after notice to him to produce the original instrument, the appellant failed to do so at the trial. Under such circumstances he should not be heard to say that the contract was void under the Idaho statute of frauds (Rev. St. 1887) the provisions of which are as follows:

"Sec. 6007. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

"Sec. 6008. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

"Sec. 6009. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents: * * * (5) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

There are several reasons why this contention on the part of the appellant is wholly untenable. In the first place, in view of the appellant's statement to the appellee at Buffalo that he would sign the contract upon its receipt; that the written contract was sent to him by his agent, Lawlor; that he proceeded under the contract as though it had been signed by all the parties thereto, making payments under it, going into possession of the property under it, participating in the development of the property, and conducting himself in all respects as though it was an executed contract, thus leading the appellee to believe that he had signed it, as he stated he would; and considering the further fact that he failed to produce the original at the trial when notified to do so—we think the conclusion inevitable, in the absence of any evidence to the contrary, that he did in fact sign the paper.

In the second place, if it be conceded that the statutes above quoted require that such contracts as are here involved be signed by both grantor and grantee, the appellant cannot avail himself of such requirement, in view of the facts here shown, because of section 3225 of the Revised Statutes of 1887 of Idaho, which provides that:

"Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party."

Certainly the appellant, by his conduct, led the appellee to believe that he had signed the contract, and to purchase claims on which he had only options, and to otherwise expend money and time in carrying out the provisions of the agreement. Under such circumstances, to permit the appellant to repudiate the contract on the ground that he did not in fact affix his signature to it, would manifestly be to permit him to practice fraud and deception upon the appellee. Moreover, part performance of a contract takes it out of the statute of frauds. In this case not only was the contract partly, but it was almost completely, performed by the appellant. 26 Enc. of Law, pp. 50–52; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664; Riggles v. Erney, 154 U. S. 244, 14 Sup. Ct. 1083, 38 L. Ed. 976; Deeds v. Stephens, 69 Pac. 534, 8 Idaho, 514; Fleming v. Backer (Idaho) 85 Pac. 1092; Barton v. Dunlap, 66 Pac. 832, 8 Idaho, 82; Francis v. Green, 65 Pac. 362, 7 Idaho, 668; Male v. Leflang, 63 Pac. 108, 7 Idaho, 348.

Where one contracts to convey real estate to another upon the payment of the agreed price, retaining the title until payment is fully made, it is not very important, in our opinion, what the security so retained is called, whether a trust, a vendor's lien, an equitable mortgage, an equitable security, or any other kind of a lien. Like the Supreme Court of Tennessee:

"We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt. In both cases, courts of chancery consider the estate only as security for the payment of the debt, upon a discharge of which the debtor is entitled to a conveyance in one instance, and a reconveyance in the other." Graham v. McCampbell, 19 Tenn. 52, 33 Am. Dec. 126.

Where the title is retained by the seller as security for the payment of the debt, the security is, in this country, very generally regarded as possessing all the essential features of a mortgage, and the vendor as standing for all practical purposes as mortgagee in relation to the vendee. See 29 Cyc., pp. 770, 771, and notes; Hardin v. Boyd, 113 U. S. 764, 5 Sup. Ct. 771, 28 L. Ed. 1141; Lewis v. Hawkins, 90 U. S. 126, 23 L. Ed. 113; Wheeling Bridge & T. Ry. Co. v. Reymann Brewing Co., 90 Fed. 189, 32 C. C. A. 571; Seattle L. S. & E. Ry. Co. v. Union Trust Co., 79 Fed. 179, 24 C. C. A. 512; White v. Ewing, 69 Fed. 452, 16 C. C. A. 296. And as such, he seems to be regarded by statute in Idaho. Rev. St. Idaho 1887, §§ 3440, 4520, and 4521. So regarded, there can be no doubt of the power of the court to enter a deficiency

judgment, where, as in the present case, the sale of the vendee's interest in the property fails to bring enough to satisfy his debt. Authorities supra.

The judgment is affirmed.

PENNSYLVANIA R. CO. v. GARCIA.

(Circuit Court of Appeals, Second Circuit. March 5, 1907.)

No. 140.

1. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where in an action for injuries to a servant the jury were correctly charged as to the acts and omissions of defendant on which fault might be predicated, the failure to post rules not being among them, defendant was not prejudiced by evidence that witness had never seen or read any rules providing for the inspection or repair of tools in the tool shop, objected to because there was no charge in the complaint covering such question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4178–4184.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, an ignorant laborer in a railroad shop, had been employed by defendant for nine years to do low-grade work. He had not been employed for flange work to any great extent, but was ordered by his foreman to hammer the head of a defective fuller in making a flange on a sheet of hot iron, the fuller being held by the foreman. Plaintiff saw nothing dangerous about the fuller, and proceeded to strike the same, when a piece of steel flew from the head thereof into plaintiff's eye, causing its loss. *Held*, that plaintiff was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1098–1105.]

3. SAME—FELLOW SERVANT.

Plaintiff's foreman had been informed prior to the accident that a fuller head by which plaintiff was injured was defective and dangerous, but with knowledge of such defect held the head against a hot iron plate and directed plaintiff to strike the same for the purpose of making a flange, resulting in plaintiff's injury by a piece of steel flying from the head. It also appeared that defendant's system for repair of tools was too cumbersome for practical operation, the servant being required to get an order therefor and have the same visaed by at least two different foremen before they could be repaired. *Held*, that the negligence of plaintiff's foreman acting as his fellow servant in using such dangerous tool was not the sole cause of the accident, and was therefore not sufficient to prevent a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 515–534.]

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

On writ of error to the Circuit Court for the Eastern District of New York to review a judgment entered upon the verdict of a jury in favor of the plaintiff for $1,500 damages for the loss of an eye while in the employ of the defendant in its shops at Jersey City, N. J.

H. G. Ward, Geo. H. Emerson, and Robinson, Biddle & Ward, for plaintiff in error.

Henry F. Dossenheim and Theodore Prince, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. At the date of the accident—February 6, 1900—the plaintiff was in the defendant's employ as boilermaker's assistant. At that time Rooney, the gang boss, Finnigan, a boilermaker, and the plaintiff were engaged in turning the flange around a square opening in a sheet of hot iron. Finnigan was holding the sheet on an iron block, Rooney was holding a heavy steel hammer, called a "fuller," against the heated iron sheet and the plaintiff was striking the fuller with a button-set hammer. While so engaged a spicula of steel flew off the flat end or head of the fuller into the plaintiff's eye, causing its loss. The testimony is undisputed that the head of the fuller was worn down and cracked on its edges, the ragged portions extending around the four sides and being from an eighth of an inch to a quarter of an inch apart. Complaint as to the dangerous condition of the fuller had frequently been made to the gang boss, Rooney.

The first assignment of error argued is based upon the ruling of the trial court in permitting the witness Finnigan to answer the following question:

"Were there any rules posted for the inspection or repair of tools in the tool shop?"

The question was objected to upon the sole ground—

"That there is no charge in the complaint that covers this question."

The answer was:

"I never read any. I never saw any rules there posted."

It might be argued with considerable plausibility that the testimony was admissible under the pleadings and that the objection was not comprehensive enough to present the question whether the testimony was incompetent or immaterial, but we prefer to rest our decision upon the broader ground that the answer to the question was in no way prejudicial to the defendant, for the reason that the jury were correctly instructed as to the acts and omissions of the defendant of which fault might be predicated, the failure to post rules not being among them.

In deciding defendant's motion to dismiss the complaint the court said:

"I shall not submit the question to the jury whether the defendant was negligent in not maintaining a rule; but of course I have allowed that evidence to come in so that the jury should know just what had been done or had not been done, and thereby have been able to determine whether the system for the protection of the employés with regard to the use of this tool was in accordance with the duty which rested upon it."

Subsequently the court refused the following request of the plaintiff:

"Eighth. In determining the question, therefore, of whether or not the defendant was negligent, the jury may take into consideration the question of whether or not the plaintiff should have made rules for the inspection of tools

and whether or not the tools were inspected in the manner that the nature of the case required.

"The Court: The eighth I refuse to charge."

In these circumstances we are convinced that the injurious effect of the answer, assuming it to have been improperly admitted, was negligible. The jury were, in effect, instructed to disregard it.

It is argued that a verdict should have been directed for the defendant for the reasons, first, that the plaintiff knew or should have known of the dangerous condition of the fuller; and, second, that the accident was occasioned by the negligence of a fellow servant.

We think the question of contributory negligence was properly submitted to the jury. The plaintiff was not a man of superior intelligence; he understood English imperfectly and gave his testimony through an interpreter. He had been employed by the defendant for nine years previous to the accident, but always, apparently, in work of the lowest grade, such as breaking screws, making rivets and assisting in making the fires. He was employed on the flange work only a day and a half, although on previous occasions the foreman had sent for him to assist on similar work. He was a little near sighted. An oculist who examined the plaintiff's remaining eye testified that he found there a mascula of the cornea existing from childhood, "causing a great deal of obscurity of vision without total loss of sight." The plaintiff testified that he did not notice anything about the fuller at the time of the accident; that when ordered to do flanging work he did it; otherwise not. On the morning in question he had been working on the flange but two hours when the accident happened. The defendant offered no testimony and there is no contradiction of the plaintiff's statement that he was entirely ignorant of the dangerous condition of the fuller. Here was an ignorant laborer, ordered by his boss to hammer the head of a fuller, which was being held by the boss himself. Seeing nothing dangerous about the fuller and supposing that he might do so in safety he proceeded with the work and was injured. In these circumstances we think the court was not justified in saying as matter of law that the plaintiff was guilty of negligence. The question was for the jury. Hayward v. Key, 138 Fed. 34, 70 C. C. A. 402.

The other contention of the defendant that the accident happened through the negligence of the plaintiff's fellow servants and particularly through the negligence of the gang boss, Rooney, presents a question of more difficulty. Rooney was actually holding the dangerous tool at the time of the accident and it is undisputed that his attention was frequently called to its condition, with the statement that someone would be injured if it were not repaired. Assuming the negligence of Rooney in using a tool which he knew to be dangerous, the defendant is not exculpated unless Rooney's fault was the sole cause of the injury. If the injury were due to the concurring negligence of Rooney and the defendant, the latter is liable. In short, if the defendant is shown to be at fault it must respond. In Flike v. B. & A. R. Co., 53 N. Y. 549, 13 Am. Rep. 545, the court, at page 555, of 53 N. Y. (13 Am. Rep. 545), says:

"Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make

the negligence contributory with the brakeman, but would not affect the liability of the company."

Was the defendant at fault? Upon the question of the defendant's duty to provide a suitable system of repair the court said:

"The master ought also to provide some safe system for having tools repaired. There are several ways. In other words, he should so conduct his business that there will be a practical scheme whereby these tools may, as they become defective from time to time, be either repaired, or other tools taken in their place. * * * It is for you to say, as I look at it, whether there was a practice there for supplying tools, or for repairing tools, that showed that the master had used the ordinary care of a good business man, and whether it was maintained; whether it was kept in operation in such a way that the master continued to be a good master within the rules which I have stated; whether he was a master who was faithful to his contract, as I have suggested the contract to you. If you find that he was, there certainly is no cause of action here."

It is contended by the plaintiff that the defendant's repair system was so cumbersome, complicated and inadequate as to be unworkable in practice. The fuller had been in a cracked and ragged condition for five months and was daily growing worse. The gang boss was repeatedly notified and yet it was unrepaired. Why? The testimony shows that a workman, employed in the gang in question, desiring to get a tool repaired would have to go first to the flange turner, Rooney, for an order upon Murphy, the foreman of the boiler shop. If Murphy approved he would give an order for the repair and the tool was then taken to the blacksmith's shop for that purpose. The men worked only about 20 feet from the blacksmith and yet a workman could not take an injured tool to the shop and have it repaired. He could not even get the order from Murphy unless the request was visaed by Rooney. The deplorable accident which destroyed the plaintiff's eye was not an unnatural result of so complicated a scheme. It is not improbable that the workmen continued to use unsuitable tools rather than subject themselves to all the circumlocution necessary to secure their repair. We do not say that the defendant's system was inadequate, but we think that sufficient appeared to warrant the submission of the testimony to the jury.

We have examined the other assignments, with the result that we find no reversible error.

The judgment is affirmed.

AMERICAN BONDING CO. OF BALTIMORE v. MILLS, Sheriff.

SAME v. FINNEY, Sheriff.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

Nos. 1,320, 1,321.

REMOVAL OF CAUSES—TIME FOR REMOVAL.

A federal court cannot acquire jurisdiction of a cause by removal, on a petition filed several months after the removing defendant had voluntarily appeared in the state court both by demurrer and answer, and after the cause had been set for trial by that court without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 135, 136, 141.]

In Error to the Circuit Court of the United States for the Central Division of the District of Idaho.

Neal & Kinyon, Morrison & Pence, and Jesse W. Lilienthal, for plaintiff in error.

H. L. Fisher, F. J. Smith, and W. E. Borah, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

ROSS, Circuit Judge. These cases have been argued and submitted together. Each of the actions was originally brought in a state court of Idaho, by a sheriff of one of the counties of that state, upon a bond of indemnity given to him by the Flato Commission Company, a Nebraska corporation, as principal, and the American Bonding Company, a corporation of the state of Maryland, as surety. Each action in the state court was against these two corporations. The American Bonding Company, the plaintiff in error in each of the cases, appeared in the state court and filed a general demurrer to each complaint, at the same time filing in each case a petition for its removal to the court below, on the ground of the diverse citizenship of the parties, and tendering the usual bond. All of this was done May 27, 1904. The cases were transferred to the court below, but remanded by that court to the state court on the 22d of September, 1904, on the ground that both defendants did not join in the petition for removal; it then appearing that the summons issued in the actions had been served on one Charles F. Neal, as the resident agent of the Flato Commission Company in the state of Idaho. On the 26th of December, 1904, the plaintiff in error appeared in the state court and argued its demurrers, which were overruled, and thereupon it asked for and obtained a stipulation for time within which to answer the complaints, which it thereafter did. The cases were afterwards set for trial in the state court February 4, 1905.

On the 1st day of February, 1905, the Flato Commission Company moved the state court, supported by an affidavit of Charles F. Neal, to quash the service of the summons made upon him as its statutory agent, on the ground that he was not at the time of such service, and never was, such agent. This motion was sustained in each case, whereupon the counsel for the plaintiff in each case immediately directed that an alias summons be issued for service upon the Flato Commission Company. Before such issuance, however, and on February 4, 1905, the American Bonding Company presented to the state court its second petition and bond in each case for the removal thereof to the United States court, on the ground that the summons served upon Neal, as the statutory agent of the Flato Commission Company, had been quashed, and that it was the sole defendant and a citizen of the state of Maryland. The state court "declined to rule on the motions for removal till some action is taken in the matter by the United States court"; but action was there taken, and the causes were, on the 7th day of February, 1905, for a second time remanded to the state court, "for the reason that the proceedings before that court show that there was process outstanding at the time of hearing as against the defendant the Flato Commission Company." The alias summons had been issued on the

4th day of February, 1905, and on the 7th day of the same month was served upon the defendant Flato Commission Company by delivering a true copy thereof, together with a copy of the complaint, to the auditor of the county, pursuant to the provisions of section 4144 of the Revised Statutes of 1887, of the state. The Flato Commission Company did not plead to the complaints in the state court, but on the 16th of February, 1905, filed therein its petition and bond for the removal of the cases to the court below, prior to which time, according to the affidavit of the counsel for the plaintiff, filed in opposition to the petition, the default of that company for failure to appear had been entered, and judgment taken against it in the state court. Meanwhile, to wit, in February, the cases came on for trial as against the plaintiff in error here, the American Bonding Company; the record reciting:

"Counsel for the defendants at this time, before the jury was impaneled, but after the case was called for trial, objected to going to trial at this time, and filed a petition and bond for removal to the federal court. Whereupon the court overruled the objection of the defendants and ordered that the trial of the cause be proceeded with. To which ruling of the court counsel for defendants excepted."

We do not sit to review or consider the validity or regularity of the proceedings of that court in respect to that trial. It is sufficient to say that the result of it was a verdict against the American Bonding Company for $21,593.71, returned and recorded February 16, 1906.

At the same time that the Flato Commission Company filed in the state court its petition for removal of the cases to the federal court, to wit, February 16, 1905, the American Bonding Company filed therein its third petition for such removal, and on the 23d of March, 1905, filed in the state court what it denominated "a supplemental petition for removal." These petitions set up, in substance, the matters already alluded to, and, in addition, the supplemental petition set forth the following:

"That after the due filing of its petition and bond for removal on said 16th day of February, 1905, and after the due filing of the petition and bond for removal filed herein by the Flato Commission Company, the codefendant herein with this petitioner, and the due calling of the attention of the said court, which was then and there in session, to said petitions and bonds, and the request on the part of each of said defendants that said district court, in and for said Ada county, enter its order, that it proceed no further, and that it enter its order that this petitioner and its codefendant, the said Flato Commission Company, had lawfully removed said cause to the Circuit Court of the United States for the District of Idaho, the said court did then and there refuse to enter said order, or any part thereof, and did, notwithstanding said proceedings so as aforesaid taken by petitioner and its codefendant, the Flato Commission Company, order that said cause proceed to immediate trial as to this petitioner only, whereupon this petitioner filed its objections thereto, on the ground that said cause had been on that date lawfully removed to this court, and further objected and protested against said court taking any proceedings whatever therein, and demanded that said cause be continued until such time as its codefendant, the said Flato Commission Company, was by law required to plead and answer. That notwithstanding said objections and protests of this petitioner, said court, at the request of plaintiff in this cause, did proceed to impanel a jury and try this cause, notwithstanding the same was not at issue as to its codefendant, the Flato Commission Company, and notwithstanding the said Flato Commission Company had not answered or pleaded to said complaint, and notwith-

standing the time in which said Flato Commission Company was required by law to answer or plead had not expired, and did so try the same on the 17th day of February, 1905, over the said protest and objections of your petitioner as aforesaid, made and caused to be duly entered of record, and did submit said cause to said jury as aforesaid against the said protests and objections of this petitioner so as aforesaid made and caused to be entered of record, and caused said action to be tried and verdict found as to this defendant only. That then and thereby by the acts of the said plaintiff, done as aforesaid over the protests and objections of this petitioner so as aforesaid made and entered, and with full knowledge of the fact that as to the Flato Commission Company, defendant herein as aforesaid, the time to answer or plead had not expired, the said plaintiff elected to proceed against this defendant separately, and then and thereby there was by the act of said plaintiff a severance of said cause of action as to the said defendants, and each of them, and then and thereby for the first time this petitioner had a separate right of removal from the right of its codefendant herein, and said cause was for the first time removable as to this petitioner, without the joint and concurrent action of its codefendant herein, which facts more fully appear by the records filed herein, as well as by the affidavits in support of petitioner filed by this petitioner herein."

When the third and supplemental petitions were brought before the court below, a motion to remand the cases was again made, and, after argument, denied; the order of the court, under date of April 4, 1905, being:

"On this day was announced the decision of the court upon the motion to remand this cause heretofore argued and submitted, to the effect that said motion be denied; to which ruling plaintiff by his counsel excepted."

The court below having thus retained the cases, they afterwards came on for trial in that court, resulting in the judgments from which the present writs of error are taken.

Counsel for the plaintiff in error confine themselves wholly to the merits of the case. We think we are precluded from considering the merits by the total lack of jurisdiction of the court below over the cases. The court remanded them upon the first and second petitions, and we are unable to understand upon what ground it entertained the jurisdiction upon the third and supplemental petitions. Whether or not the state court erred in proceeding with a trial against the American Bonding Company, before the cases were also at issue as to the Flato Commission Company, is a matter with which the federal courts have nothing whatever to do. The controlling fact here is that at the time of the presentation of the petition upon which the court below took jurisdiction, and long before, the plaintiff in error had voluntarily appeared in the state court both by demurrer and answer, and the cases as to it been, without objection on its part, actually set for trial in the state court. Manifestly it could not thereafter remove them into the federal court. The filing of the petition for removal by the Flato Commission Company on the 16th of February, 1905, cannot aid the plaintiff in error. That petition was filed not only after the plaintiff in error had voluntarily appeared in the state court by demurrer and answer, and after the trial of the cases as to it had been, without objection on its part, actually set for trial in the state court, but also, according to the uncontradicted affidavit of the counsel for the plaintiff in the cases, after judgment had been entered in the state court against the Flato Commission Company for its failure to appear therein.

It results that in each case the judgment of the court below must be and is reversed, with directions to remand the cases to the state court, with costs to the defendant in error.

WALKER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1907.)

No. 1,327.

1. POST OFFICE—USING MAILS TO DEFRAUD—INDICTMENT.

The concluding clause of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], which provides that in prosecutions thereunder for using the mails to defraud, the indictment may charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence, has no relation to the offense which is fully defined elsewhere in the section, but relates to the mode of procedure only; and an indictment containing more than three counts, each charging a violation of the section, is not for that reason fatally defective, where no demurrer or other objection was taken thereto in the trial court and only a single sentence was given thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 72.]

2. SAME—ELEMENTS OF OFFENSE—SCHEME TO DEFRAUD.

The issuance of certificates in the name of a company by which the holder paid in $1 per month, and on maturity of his certificate in its turn was entitled to receive double the amount paid in from a "mutual benefit credit fund" created solely by the payment into it of less than 75 per cent. of the amounts paid in, *held* to be a scheme to defraud, which when carried on by means of the post office department was in violation of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697].

3. SAME—EVIDENCE—LETTERS.

On the trial of a defendant charged under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], with using the mails to carry out a scheme to defraud, letters shown to have been mailed or received by defendant need not be effective to forward such scheme to render them admissible in evidence, but it is sufficient if it appears therefrom that they were intended to be utilized in some way in connection with it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 85.]

4. SAME—PROOF OF INTENT.

In a prosecution under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], for using the mails in conducting a scheme to defraud, it is not necessary to prove a specific intent to defraud, where such intent is manifest from the nature of the scheme itself.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington.

The plaintiff in error (defendant below) was indicted for having knowingly, willfully, and falsely devised a scheme and artifice to defraud, which scheme and artifice was to be effected through and by means of the post office establishment of the United States, contrary to section 5480 of the Revised Statutes [U. S. Comp. St. 1901, p. 3697]. The scheme consisted in the issuance of a certificate to the purchaser by the Cumulative Credit Company, by which the holder agreed to pay and contribute the amount of $1 per week to the company, for the purpose of creating an expense credit fund and a mutual benefit credit fund for the uses and purposes therein provided. By a stipulation of the certificate the company agreed to set aside 75 per cent. of the sixth to the hundredth payments, inclusive, and 90 per cent. of all payments thereafter, and to place the same in the mutual benefit credit fund, from

which were to be paid the amounts due on the certificates as they severally matured. It was provided that the certificates should be deemed to be matured when, at any time after 50 weeks from the date thereof, all like certificates of prior date and number should have been matured and canceled; that at its maturity the owner thereof, upon presentation and surrender to the company of the certificate, should be paid by the company from the mutual benefit credit fund the sum designated in the maturity table on the back thereof and in accordance with the conditions contained in such table, provided there should be sufficient money in the mutual benefit credit fund available for that purpose. By a further stipulation it was agreed that the certificate was one of a continuous series of like certificates, in all of which the obligations of and the benefits to the several owners thereof were mutual with the owner of such certificate, and in which the compensation to and the duties of the company were identical with its compensation and duties therein provided; that the certificate constituted a mutual agreement between the owner thereof and all of the owners of like certificates; and that the time and manner of payments therein and in such other certificates provided for was the essence of the agreement. The table referred to is styled "Maturity Table," and purports to show the amount returnable at maturity of the certificate at different weekly maturity periods, as follows:

"If Matured in	Amount Paid in.	Maturity Value.
50 weeks	$50.00	$100.00
51 weeks	51.00	102.00"
—and so on in uniform increase to		
"99 weeks	99.00	198.00
100 weeks or over		200.00."

As a part of the same scheme, it is alleged that the defendant issued divers and sundry circulars, whereby it was represented, in effect, that money so invested was without the possibility of loss, that the certificates had formerly matured in from 42 to 72 weeks, that they would mature in about 60 weeks, that they had been maturing in less than a year, and that future maturities would be more rapid.

The indictment contains four counts, by the first of which the defendant is accused of having, through and by means of said scheme and artifice, and through and by means of the post office establishment of the United States, received from such post office establishment a letter, contained in an envelope directed to Mr. T. P. Miller, and signed M. Langguth. The second count is for receiving, under like circumstances and conditions, a letter contained in an envelope directed as above, and signed Orlando K. Fitzsimmons; the third, for receiving a letter to the same address, and signed Paul J. Edmeston; and the fourth is for employing a fictitious name and address, to wit, T. P. Miller, that not being the true name of the defendant.

After trial, a verdict was returned finding the defendant guilty as charged, and the court rendered a single judgment thereon. The case comes here on the bill of exceptions.

Walter R. Bacon, for plaintiff in error.
P. C. Sullivan, U. S. Atty.

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

WOLVERTON, District Judge (after stating the facts). The first error assigned relates to the trial under the indictment, by reason of its containing four counts. It is provided by the last clause of section 5480 [U. S. Comp. St. 1901, p. 3697], that:

"The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office es-

tablishment enters as an instrument into such fraudulent scheme and device."

And it is insisted that the injunction of the statute in this regard is jurisdictional. No demurrer was interposed to the indictment, and the question is now raised here for the first time. By a survey of the statute it will be seen that the offense denounced against is created and perfectly and completely defined without any reference to the clause above recited. In other words, the clause does not perform any part of the function of defining or prescribing what shall constitute the offense, and an elimination of the clause will allow the offense to remain intact. What, then, is the purpose of such provision? It can only be to prescribe the mode of procedure in such cases, so that there is a distinction to be held between the defining or creating of the offense and the prescribing of the procedure whereby it shall be prosecuted. The contention, therefore, that the matter of combining more than three offenses in one indictment is jurisdictional, is without merit. This position has been judicially determined in the case of the United States v. Nye (C. C.) 4 Fed. 888.

Later cases have been decided, not involving the identical question, but so closely analogous that they may be deemed authoritative. In the case of Ex parte Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174, which came up on habeas corpus, the petitioner was indicted for a violation of this statute, charged by three separate and distinct counts of three offenses, and was convicted. At a subsequent term he was accused of three other and different offenses by as many counts contained in one indictment. All these offenses were committed within the same six calendar months. He was convicted under the last indictment, and the habeas corpus proceeding was to determine the legality of the conviction. It was contended that there could be but one punishment for all the offenses committed within the six calendar months; but the court ruled that they did not constitute a continuous and therefore a single offense, and that in general effect the provision alluded to "is not materially different from that of section 1024 of the Revised Statutes [U. S. Comp. St. 1901, p. 720], which allows the joinder in one indictment of charges against a person 'for two or more acts or transactions of the same class of crimes or offenses,' and the consolidation of two or more indictments found in such cases. Under the present statute three separate offenses committed in the same six months may be joined, but not more, and when joined there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself." It will be borne in mind that here was a second indictment by three counts upon which the defendant was a second time convicted, thus permitting the indictment for six offenses committed within the six calendar months, but under two indictments containing three counts each. In another case in the Court of Appeals for the Sixth Circuit (Howard v. United States, 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509) it is distinctly said:

"It was entirely competent, according to the Henry Case, to charge the petitioner with 24 separate offenses committed within the same six calendar months in eight separate indictments containing three counts each; and upon conviction the court might pronounce eight sentences, one on each indictment, just as was done in the case at bar, and the judgments would be neither erroneous nor void."

These cases emphasize the idea that this clause in the statute is only meant for the regulation of the practice, or to prescribe the mode of procedure. Being for that purpose, it was competent, as was done in the case of United States v. Nye, supra, for the prosecuting attorney to nolle one count out of four comprised in the indictment, and proceed to trial upon the other three. No exception having been taken to the form of the indictment in the court below, it is now too late to be heard with reference to it. The first error is, therefore, not well assigned.

It is next insisted that the scheme shows upon its face that it was not one designed for defrauding. But we think that the certificate, when viewed in connection with the further allegations of the indictment, touching the representations as to the investment and the time when it would mature, was well designed and calculated to entrap, and thereby to defraud, the unwary. The scheme is fairly well described by the defendant himself in his admissions to C. L. Wayland, the post office inspector. That officer says that he (defendant) explained that the Cumulative Credit Company sold certificates at the cost of $1 a week to the certificate purchaser, and that they agreed at the maturity of the certificate, which he said had never exceeded at that time 42 weeks, to pay back twice the amount paid in; that they set aside after the first five payments 75 per cent. of the total amount received for maturity refunding, and 25 per cent. they retained for the expense fund; that they did not invest the maturity fund, and had no income whatever except what they got from outsiders; and that they expected to make the money out of the people that lapsed payment—forfeited what they had paid in. It should be further stated that the certificate contained a provision that the first five payments should be made weekly, and if any default occurred therein, the payments should be forfeited, unless the purchaser complied with other conditions which would reinstate him. This is the only provision contained in the certificate for any forfeiture, and the only source from which it was expected that the company would be able to pay the large margin of profit as represented. That such a device or contrivance is wholly impracticable is at once manifest. It must be true, therefore, in view of all the conditions, that the defendant had no expectation of repaying anything that should be paid in upon such certificates, or that they should ever mature under the terms and conditions thereof, so as to entitle the purchaser to the payment of the amount stipulated to be returned. So we say that the scheme was, on its face and in the light of the charges of the indictment, a fraudulent one. See Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

The next assignment of error relates to the introduction of certain letters, one each under the first, second, and third counts. It is com-

plained that none of these letters appear from their reading to have any reference to or connection with the scheme to defraud. All the letters are addressed to Walker, and were conveyed in envelopes addressed "Mr. T. B. Miller." The first and last indicate that they have relation with the scheme, although perhaps remotely. The second is very brief. It simply says: "I desire very much to get into communication with Mr. Denham. Can you tell me how I can reach him by letter?" This text by itself shows nothing of a purpose of furthering the contrivance. The letter, however, appears to have been written upon paper containing a letter head representing the incorporation of the Cumulative Credit Company, giving the names of the president, secretary, and treasurer, and the attorney, and the home offices of the company in Los Angeles and San Francisco. It would, therefore, seem that all these letters were intended in some way to be utilized in connection with the scheme and artifice set up in the indictment. But it was not necessary that this purpose should be shown by the letters absolutely, and it was so held in the case of Durland v. United States, supra. Mr. Justice Brewer, in the course of his opinion in that case, has this to say upon the subject:

"We do not wish to be understood as intimating that in order to constitute the offense it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view to executing it deposits in the post office letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor."

The letters were, therefore, competent to go to the jury, and the ruling of the court complained against was not error.

It is further insisted that there was no intent to defraud shown, looking throughout the whole testimony given in the case, which has been brought up in the record. It is entirely clear, however, that the intent is patent when the scheme itself is understood, and that it was unnecessary that it be further shown by the admissions, or the express assertions, of the defendant himself as to what his purpose was in devising the artifice or scheme, and in working in pursuance thereof.

These considerations lead to the affirmance of the judgment of the trial court, and it is so ordered.

PERRY et al. v. TACOMA MILL CO.

(Circuit Court of Appeals, Ninth Circuit. March 11, 1907.)

1. APPEAL AND ERROR—LIABILITY ON SUPERSEDEAS BOND—DEFENSES.

A claim that certain property was not that covered by a mortgage, as it was adjudged to be by a decree of foreclosure, cannot be set up in defense to an action on a bond given to supersede said decree pending an appeal therefrom, that question having been concluded by the decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4792–4794.]

2. EQUITY—MASTERS IN CHANCERY—LIABILITY FOR ACTS—MORTGAGE FORECLOSURE—WRONGFUL SEIZURE OF PROPERTY.

In case property not embraced in a decree foreclosing a mortgage is seized for sale by the master appointed to sell, such officer is liable to the owner in trespass, or the owner may pursue any other appropriate remedy in any proper court, subject to the limitation that while the property is in the actual or constructive possession of the court under whose process it was taken it cannot be interfered with by any other court.

3. APPEAL AND ERROR—SUPERSEDEAS BOND—NATURE—BREACH—LIABILITY.

After the rendition of a decree foreclosing a mortgage certain property was seized thereunder for sale. No application was made to the court for the release of the property as not embraced in the mortgage and decree, but a defendant obtained possession of it by taking an appeal from the decree and giving a supersedeas bond conditioned that he would hold the property "subject to the proper order and decree that may be entered finally in said cause." The decree was affirmed, but pending the appeal the property was destroyed by fire. *Held*, that such bond was a forthcoming bond, and the obligors were liable thereon for the value of the property as therein stated.

4. SAME—SUMMARY ENTRY OF JUDGMENT.

The court has power to enter a summary judgment on a supersedeas bond given on appeal from a decree foreclosing a mortgage on personal property for the value of such property, where, after affirmance of the decree, it is not produced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4778.]

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

Vance & Mitchell, for appellants.

James M. Ashton, for appellee.

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

ROSS, Circuit Judge. A suit was brought in the court below by the Tacoma Mill Company against George Lawler, George Lawler doing business under the name of Sunset Lumber Company, A. P. Perry, and others, to foreclose a mortgage executed by Lawler to the plaintiff. A final decree of foreclosure was entered therein October 3, 1904, in and by which judgment in the aggregate amount of $19,865.57 was given against George Lawler, and George Lawler doing business as the Sunset Lumber Company, and foreclosing the mortgage, which was thereby adjudged to cover:

"One complete double circular sawmill plant, capacity 40,000 feet per diem, including all engines, boilers, saws, head-blocks, carriages, jackworks, shafts, pulleys, belting, conveyors, trucks, dryhouses, buildings, and all machinery and personal property of every kind, nature, and description used in and about said sawmill, including all mill tools, trucks, platforms, and tramways; also ten small portable houses for workmen, and two cookhouses with outfits contained therein; also six horses, one cow, eight pigs, forty chickens, and all cooking utensils, supplies of every kind and nature, together with all leases, rights, and equities from the Northern Pacific Railway Company or others to the ground and premises upon which said mill is located; two steam logging engines, built by the Washington Iron Works at Seattle, Wash., and now used in connection with the logging business of said mill in the timber adjacent to said mill; the planer in said mill, together with all machinery

and personal property of every kind, nature, and description in and about said logging camp or in any manner connected therewith, and adjacent and tributary to said mill and operated in connection therewith, the said mill plant and all the property therein mentioned being located at what is known as 'Mackintosh Siding' on the shore of Clear Lake, and near or upon the right of way of the Northern Pacific Railway in Thurston county, state of Washington, the same being situate in section 23, township 16 north, range 1 west of the Willamette meridian, and all property in connection with said sawmill and logging plant at or near its said location, save and excepting only the manufactured lumber and logs, located at said mill and above named, be forthwith sold."

The decree contained these further provisions:

"That the sale be conducted by and under the supervision of the Hon. Warren A. Worden, master of this court, and with his approbation and in accordance with this decree and the act of Congress and rules of this court in such cases made and provided, and that upon the filing of the master's report of said sale and the confirmation thereof, and upon a proper instrument or bills of sale being executed and delivered by said master, the purchaser or purchasers at said sale be let unto (into) the immediate possession of any property so purchased, and said master is hereby directed to so place said purchaser or purchasers in possession, and in the event of possession being withheld by the said A. P. Perry, or any defendant herein, or their privies, or any one coming into possession thereof since, or claiming same under a right accruing since the commencement of this suit, the clerk of this court is hereby directed to issue a writ of assistance against any parties so withholding possession, and the United States marshal for the District of Washington shall execute said writ.

"It is further ordered, adjudged, and decreed that the defendant A. P. Perry, and all of the defendants herein, and all persons whomsoever, are hereby, and each of them is hereby, together with his employés, attorneys, servants, and agents, restrained and enjoined from in any manner interfering with the purchaser in the exercise of his right to the immediate possession and use of said property as such purchaser; and, the plaintiff having specially moved therefor, this court doth further order, adjudge, and decree that the said A. P. Perry, the defendant herein, and all other persons and their employés, agents, and servants be, and they are hereby, enjoined and restrained from destroying, removing, altering, changing, or in any manner taking away from the premises upon which said property is now located any part of the same pending the sale hereinbefore directed and the delivery of said property to the purchaser or purchasers thereof, and if, in the opinion of said master, there is danger of said property or any of it being removed or injured pending said sale and the purchaser or purchasers being placed in possession thereof, he is hereby authorized to take and safely keep said property, or any part thereof (pending said sale, confirmation, and the taking of possession by the purchaser or purchasers), without further order from this court so to do.

"That the defendants herein, A. P. Perry, Charles E. Hill, and National Bank of Commerce of Tacoma, and each and all of them, and each and all of their attorneys, agents, employés, successors in interest, or assigns be, and they are hereby, forever barred and foreclosed from and out of all right, title, and interest of any kind or character whatsoever in and to or growing out of the mortgaged property hereinbefore described."

Perry was not a party to the mortgage, but set up in defense of the suit ownership in himself of a large part of the property adjudged by the court to be covered by the mortgage, and therefore appealed to this court from the decree, and gave a supersedeas bond in the sum of $12,000, with his present co-appellant as surety, the condition of which bond is as follows:

"The condition of the above obligation is such that whereas, on October 3, 1904, a decree was entered and signed in above cause ordering and directing a foreclosure of one certain mortgage described in the pleadings herein, and whereas, A. P. Perry, principal herein, and defendant in said cause, is desirous of prosecuting an appeal from said decree to the Circuit Court of Appeals of the United States from the said decree and has on this 3rd day of October, 1904, given notice of appeal from the said decree and every part thereof, and whereas, the said A. P. Perry, principal herein and defendant in above cause, is desirous of superseding, setting aside and vacating the said decree so entered pending said appeal to the Circuit Court of Appeals of the United States:

"Now, therefore, if the said A. P. Perry, principal herein, shall well and truly prosecute the said appeal and shall pay all costs and damages that may be adjudged against him by reason of the said appeal or the dismissal thereof, and if the said A. P. Perry, principal herein, shall hold all of the property levied on and seized by the United States marshal and the master in chancery under and pursuant to said decree subject to the proper order and decree that may be entered finally in said cause by said Circuit Court of Appeals of the United States, and shall not waste or destroy any part thereof but shall hold the same as above said, subject to the order and disposition of this court or of said Circuit Court of Appeals, then this obligation shall be null and void, otherwise it shall have full force and effect."

Upon the giving of this bond the proceedings initiated for the sale of the property claimed by Perry were suspended, and the property left in his possession. His appeal was subsequently dismissed by this court, leaving the decree of October 3, 1904, in full force and effect. Upon the going down of the mandate from this court the complainant in the case moved the court below for summary judgment against Perry and his surety for the amount of the penalty stated in the bond. A rule to show cause why such judgment should not be entered was issued and served upon the obligors of the bond, to which rule both of them made return, by motion to quash and demurrer, and, after a denial of the motion and the overruling of the demurrer, by answer to the merits, by which answer they alleged in effect that the only part of the mortgaged property held by Perry was one engine and one edger, which were held by him subject to the mortgage, and that upon the hearing of the foreclosure cause Perry "offered to prove and did prove that the articles described in the mortgage herein and the plaintiff's bill were not in his possession at any of said times, and had not been." The appellants, in their answer to the rule to show cause, further set up that immediately after the entry of the decree of foreclosure of October 3, 1904, the master of the court below, "notwithstanding the testimony introduced and uncontroverted in this court at the taking of testimony herein," under and by virtue of the decree of foreclosure took possession of a certain mill and all of its contents, alleged by the appellants to have been the property of Perry, "claiming that the said mill, together with all of its contents and articles described in the said mortgage, and as well taking possession of all shops, bunkhouses, stables, offices, and paraphernalia of any, every, and all kind situated on the said premises of this defendant; and that the said commissioner, by procurement of plaintiff herein, and acting under the guise and color of the said described decree, did oust this answering defendant from possession of his said premises, did interfere with the operation of his said mill and close up and injuriously impede the conduct of his

said business at said time, notwithstanding the protest and declaration of this defendant formally and lawfully made to said acts; that at the time of the entry of the said commissioner upon the said premises and his doing of the acts immediately above described at and by the procurement of plaintiff herein, the plaintiff, its officers, agents and employés well knew that the property so situated upon the premises of this answering defendant at said place and taken possession of by said commissioner, as above described, was not the property described in the mortgage herein and that the said mortgaged property was not in the possession of this answering defendant, and had not been and was not at the time of the institution of these proceedings; that the acts of the said commissioner and master in chancery in so entering the premises of defendant and in doing the things above described were unlawful, and that the procurement to their so being done by plaintiff herein was unlawful, was a trespass and was without warrant in law, all of which things were well known to plaintiff at the time of their doing." The answer then states that to obtain a release of the property so seized by the master under and by virtue of the decree, for the purposes of sale in accordance with its provisions, the supersedeas bond in question was given, and that shortly after the property was returned to Perry it was totally destroyed by fire.

We agree with the court below that the matters set up in respect to the ownership and identity of the property, and as to whether it was covered by the mortgage, constitute no defense to the present proceeding. It is admitted by the appellants that it was claimed by the plaintiff in the suit to be embraced by the mortgage and the decree of foreclosure, and that it was seized by the master under and by virtue of the decree, for sale thereunder, and that to release it from such sale, and to secure its return to Perry, the supersedeas bond was given. Appellant Perry had an opportunity to contest, on the trial of the foreclosure suit, the question whether the property was covered by the mortgage, and apparently did so without success. And if any of his property, not embraced by the final decree of foreclosure, was seized by the court's officer thereunder, the latter was liable to such owner for such illegal seizure "in trespass, or to any other legal remedy, at the suit of the party injured, in any proper court, with this limitation: that no such court can be permitted to interfere with the property while it is in the actual or constructive possession of the court under whose process it was taken." St. Paul, M. & N. Railway Co. v. Drake, 72 Fed. 945–948, 19 C. C. A. 252.

In the present case the property in question was seized and held for sale by an officer of the court below under and by virtue of its final decree of foreclosure. No application was made to the court for a release of the property by Perry, but, instead, he undertook to supersede the decree, and to cause the return of the property to him, by a bond conditioned that he (the appellant Perry) would hold the property "subject to the proper order and decree that may be entered finally in said cause by said Circuit Court of Appeals of the United States, and shall not waste or destroy any part thereof, but shall hold the same as above said, subject to the order and disposition of this court or of said Circuit Court of Appeals." We think the court below was clearly

right in holding the obligation a forthcoming bond, and, the property having admittedly been totally destroyed by fire, in holding the obligors liable for its value as therein stated. Omaha Hotel Co. v. Kountze, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609; Dexter v. Sayward (C. C.) 79 Fed. 237; Mahlman v. Williams, 12 S. W. 335, 89 Ky. 282; Hinkle v. Holmes, 85 Ind. 405. The power of the court, to enter summary judgment upon a similar bond given in a foreclosure suit was affirmed by the Circuit Court of Appeals of the Eighth Circuit, in the case of Brown v. Northwestern Mutual Life Ins. Co., 119 Fed. 148, 55 C. C. A. 654, and in the same case by the Supreme Court under the title of "Woodworth v. Mutual Life Ins. Co.," 185 U. S. 354, 22 Sup. Ct. 676, 46 L. Ed. 945. See, also, Johnson v. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; Moore v. Huntington, 17 Wall. 417, 21 L. Ed. 642; Blossom v. R. R. Co., 1 Wall. 655, 17 L. Ed. 673; Bank v. Gordon (C. C.) 53 Fed. 471; Gordon v. Bank, 56 Fed. 790, 6 C. C. A. 125; Pullman Palace Car Co. v. Washburn (C. C.) 66 Fed. 790.

The judgment is affirmed.

KREIGH v. WESTINGHOUSE, CHURCH, KERR & COMPANY.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1907.)

No. 2,423.

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.

Roofers were using a derrick and bucket to hoist cement from the ground and unload it on the roof. No one but these workmen had been at work or moving about on the roof for several days. The brick walls had not reached the top of the building. The plaintiff was the superintendent of the brickwork. They were all employés of the defendant. The roofers swung the boom and bucket in over the north wall by means of a rope attached to the end of the boom, and sent it back by a push. Just as they pushed it back on one of its trips the plaintiff came up on to a plank just beyond the north wall, stepped into the path of the bucket, and stood there looking north to direct the construction of a scaffold, and the bucket knocked him off and injured him.

Held, the defendant was not guilty of negligence because it failed to establish a code of signals for the roofers to enable them to warn other employés of the approach of the bucket, nor because the derrick was not provided with a lever nor the boom with a guy rope on its north side to steady and control its movements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954–977.]

2. NEGLIGENCE—INJURY NOT PROBABLE RESULT OF, NOT ACTIONABLE, NOT PROXIMATE CAUSE.

An injury which could not have been foreseen or reasonably anticipated as the natural and probable result of an act of negligence is not actionable, because it is not the proximate cause, but either the remote cause or no cause whatever of the damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69–82.]

3. MASTER AND SERVANT—WHERE WORK NECESSARILY CHANGES CHARACTER AS TO SAFETY, DUTY OF CARE FOR SAFETY THE SERVANT'S AND NOT THE MASTER'S.

The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do necessarily

changes the character of the place or of the machinery as to safety, as the work progresses, is the duty of the servants to whom the work is intrusted, and it is not the duty of the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171, 266.]

4. SAME—DUTY TO PROTECT FROM DANGERS OF NEGLIGENT OPERATION SERVANT'S AND NOT MASTER'S.

The duty of construction and provision is the master's. The duty of operation and of protection from negligent use is the servant's.

The duty of so using a reasonably safe place, and of so operating a reasonably safe machine, that neither the place nor the machine shall become dangerous by their negligent use or operation, is the duty of the servants to whom the use or operation is intrusted, and it is not any part of the positive duty of the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 267.]

(Syllabus by the Court.)

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

Rees Turpin and Robert E. Morris (Edward D. Ellison and John E. McFadden, on the brief), for plaintiff in error.

J. H. Harkless (C. S. Crysler and Clifford Histed, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff, the foreman in charge of the brickwork, and certain roofers were engaged in constructing a building. The steel frame had been erected and was about 42 feet in height, the bricklayers were at work raising the walls which had not reached the roof, and the roofers were laying cement upon the top of the building and were using a stiff leg derrick and an engine to hoist the material. This derrick was near the northeast corner of the structure, and the cement was on the north side of the building. To a rope which extended over a pully on the end of the boom a bucket was attached. This was the method of operation: This bucket was filled with cement and raised by means of the engine and rope to a point a little higher than the top of the building, and was then swung in over the roof by means of a guy rope attached to the end of the boom on its south side. The cement was then dumped from the bucket, and the roofers pushed the empty bucket back with sufficient force to cause it to swing clear of the north wall, and it was then lowered to the ground for another load. The plaintiff had been at work on this building, and the roofers had been raising the cement in this way, for some days, so that the plaintiff knew the location and the general operation of the derrick. As the concrete was hoisted, the bucket swung in over the north wall at the same place and in the same path each time. No one but the roofers was or had been at work or moving about on the top of the building for several days. Under these circumstances, when, upon one of its trips, the bucket had been hoisted, drawn in over the north wall, and dumped, the plaintiff climbed upon a plank on the north side of the north wall to superintend the construction of a scaffold below, and stood there looking north at the exact

place where the bucket swung over the wall at the exact time that the roofers pushed it back for another load. The bucket knocked the plaintiff to the ground and severely injured him. At the time of the injury he had been above the top of the building from 50 seconds to 3 minutes. There was no evidence that he attempted to notify the roofers of his presence or that they were aware of it. Upon this state of facts the plaintiff sought to recover of the defendant for his injuries, on the ground that they were caused by its negligence in that it did not establish a system of signals to be used by the roofers to warn employés when the bucket was to cross the wall, and in that it did not provide the derrick with a lever, or the boom with a guy rope on its north side to steady and control its movements, and the error assigned is that the court instructed the jury to return a verdict for the defendant.

Negligence is a breach of duty. Where there is no duty or no breach, there is no negligence. An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act or omission is not actionable, and such an act or omission is either the remote cause or no cause whatever of the injury. Cole v. German Savings & Loan Society, 124 Fed. 113, 115, 59 C. C. A. 593, 595, 63 L. R. A. 416. If the defendant had directed the plaintiff to work in the path of this bucket, if he could have performed his service in no other place, and if in the discharge of his duty he could not have foreseen or protected himself against its approach, it might have been the duty of the defendant to establish a code of signals and to so construct the derrick that the bucket could not have struck him unawares, and this because his injury might have been reasonably anticipated from a failure to exercise such care. Western Electric Co. v. Hanselmann, 69 C. C. A. 348, 136 Fed. 566, 70 L. R. A. 765; The Magdaline, 91 Fed. 798, 800. But the plaintiff was free to discharge his duty of superintendence at any place on or about the building. He could have performed it as efficiently without as within the track of this bucket. Neither he nor any one except the roofers had been at work or moving about upon the top of the building for several days, and no one could have reasonably anticipated that he would suddenly rise above the roof and station himself upon the plank in the path of the bucket without notice to its operators and without watching for its approach. His injury was not the natural or probable result of, it could not have been anticipated from, the lack of a code of signals when there had been no one on the building to signal to for days, nor from the lack of a lever on the derrick with which to swing the boom, nor of a guy rope on the north side to draw it across the wall. As the accident could not have been foreseen to be the natural or probable result of the failure to provide signals, lever, or guy rope, the defendant owed the plaintiff no duty to do so, and was guilty of no actionable negligence. Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Elliott, 5 C. C. A. 347, 350, 55 Fed. 949, 952, 20 L. R. A. 582; Railway Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Hoag v. Railroad Co., 85 Pa. 293, 298, 299, 27 Am. Rep. 653.

The rule of safe place is inapplicable to this case. The duty of construction and provision is the master's. The duty of operation and protection from negligent use is the servant's. The duty of so using a reasonably safe place and of so operating a reasonably safe machine that neither the place nor the machine shall become dangerous by their negligent use or operation is the duty of the servants to whom the use or operation is intrusted, and it is not any part of the positive duty of the master. The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the machinery as to safety as the work progresses is the duty of the servants to whom the work is intrusted, and it is not the duty of the master. American Bridge Co. v. Seeds, 75 C. C. A. 407, 144 Fed. 605, 611–613, and cases there cited. The plaintiff and the roofers were fellow servants engaged in the common undertaking of constructing the building for a common master. The place where the building was constructed, the materials, and the machinery were free from any defects which contributed to this injury. A lever on the derrick to swing the boom or a guy rope on the north side of the boom to pull it over the wall would not have prevented the injury if the plaintiff had given no notice of his presence and the operator of the lever or of the guy rope had not seen him or notified him of the approach of the bucket. In other words, if the plaintiff himself and his fellow servants had pursued the same course with the lever and the guy rope as they pursued without them, the same result would inevitably have followed. Moreover, the only purpose of the lever or of the guy rope upon the north side of the boom would be to control the movement of the boom so that the bucket would not strike the plaintiff. But their absence did not prevent such a control, because there was a guy rope on the south side of the boom the end of which lay upon the roof of the building with which the roofers might have effectively controlled the northern movement of the boom and the bucket. The truth is that if there was any negligence in this case it was the negligence of the operation of a reasonably safe machine in a reasonably safe place. It was the negligence of the fellow servants of the plaintiff or of the plaintiff himself, and the defendant was free from any act or omission from which the accident could have reasonably been anticipated, or from which it would have resulted had it not been for the subsequent interposition of other human agencies.

There was no error in the ruling of the trial court, and the judgment below is affirmed.

In re GREAT WESTERN MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1907.)

No. 81.

1. BANKRUPTCY—TRUSTEE'S TITLE THAT OF BANKRUPT IN ABSENCE OF ATTACHING OR JUDGMENT CREDITORS OR FRAUD.

A trustee in bankruptcy stands in the shoes of the bankrupt, and has no better title than he, in the absence of fraud, or of attaching or judgment creditors at the time of the filing of the petition.

2. SAME—UNFILED CONTRACT OF CONDITIONAL SALE RETAINING TITLE IN VENDOR VALID AGAINST TRUSTEE IN NEBRASKA.

A contract of conditional sale whereby the parties agree that the title shall remain in the vendor until the purchase price is fully paid is voidable, under the statutes of Nebraska, by purchasers, attaching creditors, and judgment creditors only, if not filed in the office of the county clerk.

It is valid against all other creditors though unfiled, and hence against a trustee in bankruptcy who represents no attaching or judgment creditors.

3. SAME—DISTRIBUTION—SHARES OF PROCEEDS OF MIXED PROPERTY PROPORTIONED TO VALUES OF RESPECTIVE OWNERS OF PROPERTY SOLD.

One who acquiesces in a sale under an order of the court of his property and the property of the estate of the bankrupt in one lot, and thereafter prays for a preference in payment out of the proceeds of the sale, is estopped from receiving a larger proportion of the proceeds than the value of his property bore to the value of the lot sold at the time of the sale.

4. SAME—VOIDABLE PREFERENCE—CONTRACT PRIOR TO FOUR MONTHS WILL NOT PROTECT.

A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or validated by the fact that it was executed in the performance of a contract to do so made more than four months before the filing of the petition.

(Syllabus by the Court.)

On Petition for Review.

John H. Atwood (William W. Hooper, on the brief), for petitioner.
W. J. Courtright (Geo. L. Loomis, on the brief), for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The J. T. Royston Milling Company, a corporation, was adjudged a bankrupt upon a petition filed on January 6, 1905. Prior to September 6, 1904, the Great Western Manufacturing Company, a corporation, had sold, installed, and put in operation in the Royston Company's mill at Fremont, in the state of Nebraska, certain machinery and material, for which at the time of their final acceptance it gave its promissory notes for $10,034.60 and an agreement that the title and the right to the possession of the machinery and material should remain in the vendor until the notes were paid, notwithstanding any agreement or security that was or might be taken for the performance of the agreement, and that the payment of the notes should be secured by a mortgage on the mill and its appurtenances, or equivalent security, at the election of the Great Western Company. This agreement was first filed in the proper county clerk's office on October 8, 1904. On October 10, 1904, the vendee made a mortgage on the mill and its appurtenances which was recorded in the office of the register of deeds of the proper county on the same day. The mill and its appurtenances, including the machinery and material sold by the Great Western Manufacturing Company, were sold by order of the court below for $16,400. The Great Western Company immediately thereafter filed its claim, and asked that it be paid in full out of the proceeds of the sale in preference to the claims of other creditors. The referee allowed the claim for $10,-

532.50, and denied it any preference. The District Court reversed this order, held that the agreement was valid and the mortgage a voidable preference, and directed that the vendor should be paid in preference to the other creditors such a proportion of the $16,400 as the value of the machinery and material it sold bore to the value of the mill and appurtenances at the time of the sale of the latter. It now presents its petition to revise this order because the court below did not uphold the mortgage and sustain its claim for a preference thereunder for the entire amount of the bankrupt's debt to it. The trustee moves to dismiss the petition because it was filed more than 10 days after the order assailed was made, and because it involves disputed questions of fact which it is alleged can only be determined by appeal, and the trustee prays that if the merits of the case are considered the petitioner be denied any preference whatever.

While it is true that counsel do not agree upon the facts, the record fairly establishes those which have been stated, and upon them the case will be determined. The agreement of conditional sale whereby the vendor retained the title to the machinery and material until its purchase price was paid did not create a preference voidable under the bankruptcy law because it was given for a present consideration, for the machinery and material which were and continued to be the property of the vendor, and because it was made more than four months before the petition in bankruptcy was filed. Agreements of this nature which are not filed or recorded in the proper public office are voidable by purchasers, attaching creditors, and judgment creditors only, under the statutes of Nebraska (Comp. St. 1901, Neb. c. 32, § 26; Campbell Printing, etc., Co. v. Dyer, 46 Neb. 830, 836, 65 N. W. 904; McCormick Harvesting Machine Co. v. Callen, 48 Neb. 849, 67 N. W. 863), and there was none of either class when the petition in bankruptcy was filed in this case. The contract was therefore valid and enforceable against the bankrupt and against his ordinary creditors, and hence against the trustee, for he had no better right or title to the property than they, and he suffered no prejudice from the order of the court. Hewit v. Berlin Machine Works, 194 U. S. 296, 297, 303, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782.

The Great Western Company insists, however, that it was entitled to payment of the entire amount of its claim out of the proceeds of the trustee's sale of the mill and machinery, because the proportion of those proceeds which the value of the machinery and material bore to the value of the mill and its appurtenances was but one-third, and under the order of the court it will sustain a heavy loss, and because it had a mortgage upon the entire property given in execution of an agreement made more than four months before the petition in bankruptcy was filed. The vendor had the right to take the machinery and material out of the mill and dispose of it as it saw fit. If it had applied to the court to do so and its application had been denied, it would have been entitled to recover of the trustee the value of its right. But it presented no such claim and made no application of that nature. The proceedings in bankruptcy were pending from January

6, 1905, until May 25, 1905, before the sale was made. It was ordered on May 12, 1905, and the first act of the Great Western Company was the filing of a claim for a preference in payment out of the proceeds after the sale had been made. Its acquiescence in the sale of its property in the mill with that of the bankrupt estopped it from receiving out of the proceeds of the sale of the entire lot any larger proportion than the value of its property bore to the value of the entire property sold.

The mortgage was executed and recorded on October 10, 1904, within the four months prior to the filing of the petition in bankruptcy. The mortgagor was then hopelessly insolvent. The effect of the enforcement of the mortgage will be to enable the mortgagee to obtain a greater percentage of its debt than any of the bankrupt's other creditors of the same class can obtain, and the referee and the court were of the opinion, in which we concur, that the mortgagee had reasonable cause to believe when the mortgage was made that it was intended to give a preference thereby. But counsel persuasively argue that this mortgage escapes the ban of section 60 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), because it was made in the performance of the provision of the agreement of conditional sale that the notes of the vendee should "be secured by first mortgage on said premises and appurtenances (the mill site and mill), or equivalent security, at the first party's (the vendor's) election," and the question arises, is a mortgage or other transfer of an insolvent's property within the four months which is otherwise voidable as a preference protected by an agreement to make it executed prior to the four months? The statutes regarding the filing and recording of mortgages and transfers do not condition this issue in the case before us, and their effect will not be farther noticed, because the statutes of Nebraska do not avoid mortgages as against the mortgagors and their ordinary creditors for failure to file or record them. They make them voidable against attaching and judgment creditors only. Comp. St. Neb. 1901, c. 32, § 14; Forrester v. Bank, 49 Neb. 655, 68 N. W. 1059; Lancaster County Bank v. Gillilan, 49 Neb. 165, 68 N. W. 352.

Argument by analogy in support of an affirmative answer to the question here at issue may well be drawn from In re J. F. Grandy & Son (D. C.) 146 Fed. 318, Wilder v. Watts (D. C.) 138 Fed. 426, McDonald v. Daskam, 53 C. C. A. 554, 116 Fed. 276, and In re Wittenberg Veneer & Panel Co. (D. C.) 108 Fed. 593, 595, in which assignments of policies of insurance within the four months pursuant to agreements to make them, executed prior to the four months, were sustained under peculiar circumstances; and from Sabin v. Camp (C. C.) 98 Fed. 974, in which a conveyance within the four months upon a payment of the balance of the purchase price was sustained where it had been made in performance of a contract executed prior to the four months to the effect that the creditor should advance money to purchase the property, should have a lien upon it, and the option, which he exercised, to buy it at a specified price for the amount of the money he had advanced and the cash balance requisite to aggregate the required amount.

But the theory and purpose of the bankruptcy act were to distribute the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors of the same class. To this end every judgment procured or suffered against him, every transfer by an insolvent of any of his property, every conceivable way of depleting it after the commencement of the four months the effect of which is "to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class," is declared to be a voidable preference if the creditor has reason to believe that a preference is intended thereby. Act July 1, 1898, c. 541, and Act Feb. 5, 1903, c. 487, 30 Stat. 562, 32 Stat. 799 [U. S. Comp. St. 1901, p. 3445; U. S. Comp. St. Supp. 1905, p. 689]; Swarts v. Fourth National Bank, 54 C. C. A. 387, 389, 117 Fed. 1, 3. An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors pro rata. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors, and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him. Any other course of decision opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutary provisions of the bankruptcy law, and our conclusion is:

A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in perform-

ance of a contract to do so made more than four months before the filing of the petition. Wilson v. Nelson, 183 U. S. 191, 198, 22 Sup. Ct. 74, 46 L. Ed. 147; In re Sheridan (D. C.) 98 Fed. 406; In re Dismal Swamp Co. (D. C.) 135 Fed. 415, 417, 418; In re Ronk (D. C.) 111 Fed. 154; Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555; Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.) 125 Fed. 974; Johnston v. Huff, Andrews & Moyler Co., 133 Fed. 704, 66 C. C. A. 534; In re Mandel (D. C.) 127 Fed. 863. In Wilson v. Nelson, 183 U. S. 191, 198, 22 Sup. Ct. 74, 46 L. Ed. 147, the debtor had given an irrevocable power of attorney to the creditor to confess judgment many years before. Judgment was confessed under it within the four months, and the Supreme Court held it to be a voidable preference. In Re Sheridan (D. C.) 98 Fed. 406, in Re Ronk (D. C.) 111 Fed. 154, and in Re Dismal Swamp Co. (D. C.) 135 Fed. 415, 417, 418, mortgages executed within the four months in performance of agreements to give them made more than four months before the filing of the petitions in bankruptcy were held to be voidable preferences, and this view seems to be sustained by the terms of the bankruptcy act, by the more cogent reasons, and by the weight of authority. There was therefore no error in the decision below that the mortgage constituted a voidable preference, and that the limit of the vendor's preferential right was to receive the proportion of the proceeds of the sale justly attributable to the machinery and the material the ownership of which it retained.

The motion to dismiss the petition because it is alleged that it was filed too late, and because the questions in issue are not reviewable under a petition to revise, have not been considered or decided, because the same result follows from this decision upon the merits that would be reached by granting the motion. The petition must be dismissed in any event, and it is so ordered.

J. W. BISHOP CO. v. DODSON.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1907.)

No. 668.

1. TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUES.

A request to charge that defendant was answerable only for negligence occurring prior to the accident, and not afterwards, was properly refused as not within the issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587–595.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—ISSUES.

Where, in an action for injuries to a servant, the jury were to determine whether or not defendant had failed either to furnish proper materials for the construction of a walkway, or to provide a competent foreman, to the injury of plaintiff, a request to charge that if the jury were satisfied that the accident happened either from the incompetency of the foreman or from defendant's failure to provide proper materials with which to construct the walkway, and were unable to decide from which cause the accident happened, then they should find for defendant, was

properly refused as restricting the jury too narrowly in its determination of the issues of fact.

3. SAME—CONCURRING CAUSES.

Where a servant's injury resulted both from the neglect of the master to provide proper materials and also from negligence of the foreman acting as a fellow servant, so that the two causes were commingled, the servant was still entitled to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 515–534.

Concurrent negligence of master and fellow servant, see note to Maupin v. Texas & P. Ry. Co., 40 C. C. A. 236.]

In Error to the Circuit Court of the United States for the Western District of Virginia, at Danville.

Eugene Withers (Green, Withers & Green, on the brief), for plaintiff in error.

B. H. Custer, for defendant in error.

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

MORRIS, District Judge. On July 20, 1903, William Dodson, the plaintiff below, an employé of the J. W. Bishop Company, the plaintiff in error in this court, while carrying two pails of cement across a walkway consisting of 2 planks 10 inches wide, placed for the purpose between two parallel piers about 13½ feet apart, fell to the ground below, a distance of 25 or 30 feet. He was seriously and permanently injured. He brought suit against the J. W. Bishop Company, and by the verdict of the jury was awarded $3,200. Judgment was entered against the defendant corporation for that amount, and it has brought the case to this court by writ of error.

The J. W. Bishop Company was engaged in constructing a concrete dam across the Dan river, and Dodson was one of its employés. He had been working for the company five or six weeks at work on the ground in the channel of the river, under a gang foreman named Aubin. The day of the accident a foreman named Monahan, who had charge of mixing the cement, took Dodson from where he was working and directed him to carry cement across the walkway to near where it was to be used. He had been carrying cement in two pails, one in each hand, across the walkway for about an hour, when, according to his testimony and that of other witnesses, one of the two planks broke under his weight, and he was precipitated to the ground some 25 or 30 feet below. There was evidence tending to show that the man whose place Monahan called Dodson to take had refused to work and complained to Monahan that the planks of the walk were unsafe, and that others had also complained of the unsafety of the walkway. There was evidence tending to show that Monahan was, to the knowledge of Craib, who was the general superintendent of the defendant company and in general charge of the construction of the dam, a reckless and incompetent man, unfit to act as foreman. There was evidence tending to show that the planks used for the walkway had been used in constructing the forms in which to mold the concrete in building the dam, and were weakened by nails, cuts, and knots, and were

covered with cement which concealed the defects. A witness, Brown, a carpenter, testified that under the direction of Washburn, a foreman of the carpenters, and under the observation of Craib, the general superintendent, he built the runway of the old secondhand lumber with nail holes in it, and that it was made of two such planks, not cleated together.

The case was tried on the issues raised by the first and third counts of the plaintiff's second amended declaration. The first count alleged that the runway was constructed of planks which were weak, unsafe, and unsuitable, containing knots and cracks, which was known to the defendant company, or could have been known to it by the exercise of reasonable care and diligence, and that by reason of the said insufficiency the runway suddenly broke under the plaintiff, without any fault on his part. The third count alleged that the defendant placed over the plaintiff an incompetent, careless, and inefficient foreman, one John Monahan, as the defendant knew, or by the exercise of ordinary care could have known, and by the said foreman the plaintiff was directed to carry cement over a walkway known to said foreman to be of improper construction and dangerous, and, obeying said foreman, the plaintiff went upon the walkway, and it suddenly broke, carrying him with it to the bottom of the channel, to the injury of the plaintiff, without any fault on his part, and that said injury to the plaintiff resulted from incompetency of said foreman, which was known to the defendant company. These two counts very fully set out the plaintiff's cause of action, and specified explicitly the particulars in which the plaintiff alleged that the defendant had failed in its legal obligations, viz., that it had caused to be constructed a runway for which it had provided lumber of a weak and unsuitable kind, and had put over the plaintiff an incompetent and reckless foreman, who was known to the defendant to be so.

There was evidence which, if believed by the jury, fully sustained both these counts, and in the matter of pleading we find nothing assigned as error which calls for comment. A very similar case against the same defendant, arising out of a quite similar injury, tried by the same learned judge and by the same counsel, came before this court in J. W. Bishop & Co. v. Shelhorse, reported in 141 Fed. 643, 72 C. C. A. 337, in which similar questions of pleading were ruled upon.

In its defense in the present case the defendant corporation offered evidence tending to prove that the walkway was well made, of good material, and did not break, but that the plaintiff by reason of his own want of care fell off the walkway.

The court instructed the jury at the request of the plaintiff: (1) That in furnishing materials for the construction of the walkway the defendant company was bound to use reasonable ordinary care to provide reasonably safe and suitable material for the purpose, and that if the jury believed that the material furnished was not sufficient in quantity or reasonably safe, and that such unsafeness and insufficiency was known, or by reasonable care should have been known, to the defendant, and that by reason of such unsafeness or insufficiency the walkway collapsed while the plaintiff was on it in the performance of his duty, and without fault on his part threw the plaintiff to the bottom

of the wheel pit and injured him, then they should find for the plaintiff. At the instance of the plaintiff the court also instructed the jury that if they found that Monahan was the foreman or boss in charge of plaintiff at the time he was injured, and that said Monahan was incompetent or unreasonably reckless and negligent, and that such fact was known, or should by ordinary care have been known, to the defendant company prior to the injury, and that such incompetence or unreasonable recklessness and negligence was the proximate cause of the injury to the plaintiff, they should find for the plaintiff.

At the request of the defendant company the court instructed the jury:

"That if they believe from the evidence in this case that the platform or walkway in question did not break, but that the plaintiff, Dodson, fell therefrom by reason of failure on his part to exercise ordinary care and caution while crossing the same in the performance of the ordinary duties of his employment, then they must find for the defendant."

The court at the request of the defendant further instructed the jury that the employer is not a guarantor of the safety of his employé, and is required to exercise only reasonable or ordinary care and diligence in providing safe and suitable materials for the construction of and erection of platforms and other instrumentalities with and upon which his employé is to work, and is required to exercise only reasonable or ordinary care and diligence in inspecting such instrumentalities, and is required to exercise only reasonable or ordinary care and diligence in providing reasonably safe, competent, and efficient foremen and co-employés with whom his employé is to work. And at the request of the defendant further instructed the jury that if the jury believed from the evidence: (1) That the defendant exercised reasonable and ordinary care and diligence in the ordering, selecting, and providing materials necessary for the walkway, and ordinary care and diligence in erecting and constructing it, and in examining the same after it had been constructed, so as to reasonably provide for the safety of the plaintiff; and if the jury further believe from the evidence that the defendant company exercised ordinary or reasonable care and diligence in providing safe, competent, and efficient bosses or foremen under whom the plaintiff was put to work, and in providing reasonably safe, competent, and efficient co-employés with whom to work—then the jury must find for the defendant company, even though they believe from the evidence that the said walkway broke from some hidden, concealed, or latent defect in the materials supplied for its construction, which said defendant company did not know, or could not have ascertained by the exercise of reasonable or ordinary care and diligence The court at the request of the defendant company further instructed the jury that the defendant was not the guarantor of the safety of Dodson, the plaintiff, and was not bound to provide only the best and safest instrumentalities, structures, and platforms, nor to exercise the highest skill and care in inspecting the same, nor to use the best method for their construction, nor to provide the best and safest place in which the plaintiff was to work, nor to provide the best and most efficient bosses and foremen, nor the best, most competent, and most efficient co-employés with whom to work, but only to exercise reasonable or

ordinary care to furnish such structures and platforms as were reasonably safe, and to exercise only reasonable or ordinary care in inspecting the same, and in providing a reasonably safe place and competent and efficient bosses and foremen and co-employés under whom and with whom to work, and that the plaintiff, Dodson, must have also used reasonable or ordinary care to protect and save himself from injury; and that, to entitle the plaintiff to recover, the burden of proof was on the plaintiff to show (1) that the walkway was defective, or that the material therein was defective; or (2) that the erecting and constructing of it was not done with reasonable or ordinary care; (3) or that reasonable or ordinary care was not used in providing reasonably safe, competent, or efficient bosses and foremen under whom to work, or reasonably safe, competent, and efficient co-employés with whom to work; and (4) that the plaintiff did not know that such ordinary care had not been exercised by the defendant company, and that the injury complained of happened in spite of ordinary care on Dodson's part. At the defendant company's request the court further instructed the jury that an employer is presumed to have performed all his duties to his employé, and that the negligence of the employer cannot be inferred from the mere occurrence of the accident, such as the fall of the walkway, and that fact alone did not raise even a prima facie presumption that the defendant company had been guilty of negligence or guilty of a breach of duty to the plaintiff, and it was incumbent on the plaintiff to show how and why the accident occurred, or some fact from which the jury could determine how and why the accident occurred. And the court at the request of the defendant further instructed the jury that if they believed from the evidence that the plaintiff had gone upon the projecting end of the plank forming the first walkway, and by its tilting the plaintiff lost his balance and fell, they must find for the defendant company although they believed from the evidence that the defendant failed to use ordinary or reasonable care in furnishing reasonably safe materials in sufficient quantities out of which to construct said walkway. And the court, of its own motion, instructed the jury:

"You cannot find for the plaintiff merely on the supposition that two planks, (if sound), made an insufficient structure, that is, on the idea that the walkway should have been broader or should have had hand railing. If the only defect was the want of greater width or want of a hand rail the defect was open and obvious and defendant is not liable for such defect."

We have recited the instructions given by the court with unusual fullness, that it may appear how explicitly the law favorable to the defendant was explained to the jury, and how carefully, by the granting of the instructions asked for by the defendant, the law protecting its rights was given to the jury. Other instructions asked for by defendant's counsel, but which were not given by the court, related in part to matters not in issue in the case, as that the defendant was answerable only for negligence occurring prior to the accident, and not afterwards. There was no basis in the case for a contention of that sort. That the defendant could not be held answerable in respect to a defect which was open and obvious; this, although it was not an issue made on the pleadings or the evidence, was given by the court in its own instruction in the form most pertinent to the case. The defend-

ant contended that the walkway was made of plank which was sound and without discoverable defect. The plaintiff's witnesses asserted that it was old, weak, and unsuitable, and by prior use had been covered with cement so that the defects were hidden at the time the plaintiff was injured. The foundation fact first to be found by the jury was, did the walkway break under the plaintiff's weight and let him fall, or did he fall off without its breaking? The jury were plainly told that, if they found that he fell off, the plaintiff could not recover.

Another instruction asked by the defendant, but not given by the court, was to the effect that if the jury were satisfied that the accident happened either from the incompetency of the foreman, Monahan, or from the failure of the defendant to provide proper materials with which to construct the walkway, and the jury were unable to decide from which cause the accident happened, then they should find for the defendant. It seems to us that this instruction as asked for by the defendant limited the jury in its determination of the issues of fact too narrowly. The jury were to determine under the instructions given them whether or not the defendant had failed in its duty, either to furnish proper material or to provide a competent foreman, to the injury of the plaintiff. Their verdict was to be a general one. They had no specific questions propounded to them for their answer. There was an abundance of testimony adduced by the plaintiff to support a finding in his favor on both the issues. If the jury, while obeying the instructions given by the court, arrived at a verdict, they could not be restricted to arriving at the result by each agreeing to the same view of each item of testimony. Moreover, if the plaintiff's injury resulted both from the neglect of the defendant to furnish proper materials and from some negligence of Monahan as a fellow servant, so that the two causes were commingled, then still the plaintiff was entitled to recover, for the reason that where the negligence of the master in not supplying proper material has a share in causing injuries to an employé, the master is liable notwithstanding the negligence of a fellow servant may have contributed to the accident. Gila Valley R. R. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. ——.

There were exceptions by the defendants to the admission of certain questions and answers tending to show that the foreman, Monahan, was known to the defendant to be an unsafe, reckless foreman. We have examined them with care without finding in them any reversible error.

The law of the case appears to have been very carefully given to the jury, and the distinction observed that as to temporary structures and appliances constructed by the workmen themselves for use during the progress of the work the rule of safe place does not apply. This distinction was pointed out in a recent case in this court, Phœnix Bridge Co. v. Castleberry, reported in 131 Fed. 175, 65 C. C. A. 481, in which the opinion was written by the learned judge who tried the present case below.

We find no error prejudicial to the defendant, and the judgment is affirmed.

LACEY v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1907.)

No. 1,611.

1. RAILROADS — DEATH AT CROSSING — WANTONNESS — CONTRIBUTORY NEGLIGENCE.

Contributory negligence is no defense to an action against a railroad company for the willful or wanton killing of plaintiff's intestate at a railroad crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1085.]

2. SAME—WILLFULNESS—EVIDENCE—QUESTION FOR JURY.

Where defendant railroad company kicked certain freight cars across a public crossing likely to be used by pedestrians or vehicles at any time, without any one to control their movements or to give warning of their approach, and such cars came in contact with plaintiff's intestate as he was about to cross, whether the railroad company's act was willful or wanton was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1192.]

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

The plaintiff in error, and plaintiff below, brought her action in the circuit court of Conecuh county, Ala., against the Louisville & Nashville Railroad Company for the homicide of her husband on a public crossing over the track of the defendant railroad at Sparta, in Conecuh county, Ala. On motion of defendant the cause was removed to the Circuit Court of the United States for the Southern District of Alabama.

The facts connected with the occurrence resulting in the death of plaintiff's intestate and her husband were as follows: The railroad tracks at the point in question run nearly north and south, and the public crossing nearly east and west. The post office, depot, and the depot platform were on the east side of the crossing, and deceased lived on the west side of the railroad track about 40 or 50 yards from the public road. On the 21st of April, 1905, at about 2 o'clock in the afternoon, the deceased started over the crossing on his way to the post office. A slag train had been standing for some time on the side track north of the crossing. As deceased started across he was followed by his two daughters, who were some few feet behind him. Just at that time a freight train was coming up approaching the crossing from the south, and apparently very near the crossing. The deceased crossed swiftly in front of it and approached the side track, which was some eight or nine feet from the main line on which the freight train came from the south. As deceased stepped upon the side track he was struck by some cars detached from the slag train, consisting of a caboose and one or two slag cars which were being "kicked" over the crossing. Deceased was struck, knocked down, dragged for some distance, and killed.

All the evidence seems to show that the deceased did not see the approaching loose cars before they struck him. So far as the evidence shows, there was no one upon the detached cars which were being "kicked" over the crossing to control their movements, or to give warning of their approach, and the evidence in the record all tends to show that no warning of any kind was given. The evidence shows that the day on which this homicide occurred was strawberry shipping day at Sparta, and that quite a number of people were there on that business; in some parts of the evidence it is said from 25 to 30, and some other witnesses put the number at from 25 to 50. The evidence also shows that the crossing was used that day to an unusual extent. The train on which the strawberries were to be shipped was due to arrive at Sparta about 3 o'clock in the afternoon, a short time after the homicide occurred.

There was an amendment to plaintiff's declaration which alleged that the defendant's agents and servants "wantonly ran one of said cars against plaintiff's intestate and thereby caused his death." The defendant pleaded contributory negligence in several forms, some of the pleas being upon the ground that the deceased was standing on the track at the crossing at the time he was stricken. There was a demurrer to the plea of contributory negligence on the ground that it was no answer to paragraph C of the amended declaration, which charged wantonness, and the demurrer was sustained. The case went to the jury, and upon the conclusion of plaintiff's evidence, embodying substantially what has been briefly stated above, the court directed a verdict in favor of the defendant, and this action of the court is assigned as error.

D. M. Powell, Edward M. Robinson, and John W. McAlpine, for plaintiff in error.

Gregory L. Smith and Harry T. Smith, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge, after stating the facts, delivered the opinion of the court, as follows:

We think that this cause should have been submitted to the jury. We are not sure, under all the facts and circumstances connected with the case as brought out by the plaintiff's evidence, that it should not have gone to the jury upon the question of negligence and contributory negligence, without reference to a further view of it, which is thought to be controlling. The learned judge who tried this case in the Circuit Court had sustained a demurrer to the pleas of contributory negligence in so far as these pleas operated against paragraph C of the amended declaration, which charged that the act of the defendant's servants and agents in kicking the cars over a public crossing without any one to control their movements or to give warning of their approach was wanton. The effect of this was to hold that contributory negligence —that is, ordinary negligence—was no bar to wanton or willful misconduct. We agree with this view of the law, and we think it also required the submission of the case to the jury upon the question as to whether the acts of defendant's employés, in sending these cars over the crossing in the way they did, was wanton and willful, in that it was done in total disregard of the safety of persons using the crossing.

The law with reference to wanton and willful misconduct on the part of a defendant, and contributory negligence on the part of the plaintiff, was stated by this court (Judge Pardee dissenting), in McGhee v. Campbell, 42 C. C. A. 94, 101 Fed. 936, as follows:

"There is another view of this case that shows the court did not err in refusing to direct a verdict for the defendants. The chief reason urged why the case should have been taken from the jury is that the plaintiff's intestate was guilty of contributory negligence. This reason, if well founded on fact, does not meet the entire case on trial, because in some of the counts the defendants were charged with committing the act complained of wantonly, recklessly, and negligently. To these counts the defense of contributory negligence was not good. They were at issue only on the plea of not guilty. In cases where the injury is wanton or willful, the doctrine of contributory negligence has no application. A demurrer was properly sustained to such plea to these counts. Now, if there was evidence before the jury tending to prove the allegation of these counts, and to show that the acts complained of were committed wan-

tonly and recklessly, then the case could not properly be taken from the jury, even if the evidence, admitted under the pleas to the other counts charging simple negligence, as matter of law had shown contributory negligence. It is clear that one who commits a wrong willfully cannot defend by saying that the injured person was guilty of negligence. Cooley, Torts (2d Ed.) p. 810; Beach, Contrib. Neg. (2d Ed.) § 64; Railroad Co. v. Markee, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21. The evidence, we think, to say the least, tended to show wanton negligence, or reckless indifference to the probable consequences of the acts complained of, which is construed to be the equivalent of intentional or willful."

Judge Shelby, delivering the opinion of the court in that case, also quotes from Electric Co. v. Bowers, 110 Ala. 328, 331, 20 South. 345, 346, this language:

"To constitute a willful injury, there must be a design, purpose, intent to do wrong and inflict injury. Then there is that reckless indifference or disregard of the natural or probable consequences of doing an act, or omission of an act, designated, whether accurately or not, in our decisions, as 'wanton negligence,' to which is imputed the same degree of culpability, and held to be equivalent to willful injury. A purpose or intent to injure is not an ingredient of wanton negligence. Where either of those exist, if damage ensues, the injury is willful. In wanton negligence, the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury. These are the distinctions between simple negligence, willful injury, and that wanton negligence which is the equivalent of willful injury, drawn and applied in our decisions."

He also quotes from Railroad Co. v. Hill, 90 Ala. 71, 80, 8 South. 90, 92, 9 L. R. A. 442, 24 Am. St. Rep. 764, to this effect:

"We are satisfied that it tended to show a condition of the track not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness; such indifference to the probable consequences of its continual use as is the equivalent of intentional wrong, or a willingness to inflict the injuries complained of."

He also cites to the same effect from Railroad Co. v. Markee, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21, and Railroad Co. v. Orr, 121 Ala. 499, 26 South. 35.

These Alabama decisions, if based on a statute of Alabama, would be controlling; and even if not based on a statute, would be highly persuasive authority in any United States court held in that state. The cases hold substantially on the question involved here that reckless disregard of what may be the probable consequences of an act calculated to cause injury is wanton negligence, and is the equivalent of willful misconduct. This doctrine seems to us to be entirely sound. To throw cars over a public crossing likely to be used by pedestrians or vehicles at any time, without any one to control their movements or to give warning of their approach, is certainly reprehensible, and might, or might not, be found by the jury, according to the circumstances surrounding the particular case, such a total disregard of the safety of others as that it would amount to wanton and willful misconduct.

The practice of making flying switches, which we understand embraces what is here called "kicking" cars over public crossings, is discussed by Beach on Contributory Negligence (3d Ed.) § 217, citing a large number of authorities supporting the text, as follows:

"The method of switching known as making a 'running' or 'flying' switch is constantly a fruitful source of accident to persons walking or being upon the tracks. It consists in detaching the portion of the train to be switched off while the cars are in motion, the forepart of the train advancing with increased speed, while the rear portion, proceeding more slowly, is, at the proper time, switched off upon the desired track; or the engine may push forward a car or part of a train with considerable speed, and then, giving it a strong propulsion, send it off alone on the desired switch. This practice, in many courts, is condemned as negligent, even towards trespassers. And when the cars are suffered to run over a crossing, after being detached from the train, in making a flying switch, whereby travelers are injured, it is held negligence of an aggravated nature, and the practice is not unfrequently sharply denounced by the judges."

As there must be another trial of this case, it would be improper for the court to express any further opinion of the facts than is necessary to state the views entertained on the questions controlling it. The defendant's evidence may change materially the aspect of the case, but in our opinion the plaintiff's evidence, as shown by this record, entitled her to go to the jury.

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

PARDEE, Circuit Judge, does not concur.

In re A. B. BAXTER & CO.

In re BLITCH (two cases).

(Circuit Court of Appeals, Second Circuit. January 9, 1907.)

Nos. 104, 107, 242.

1. GAMING—WAGERING TRANSACTIONS—SALES FOR FUTURE DELIVERY.
   A transaction by which property is bought and sold for future delivery, and which is legitimate on its face, cannot be held void as a wagering contract because one of the parties understood and meant it to be so, but the proof must go further and show that such understanding was mutual.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 22.]

2. SAME—TRANSACTIONS WITH BUCKET SHOP—UNDERSTANDING OF PARTIES.
   The probability that an intelligent and experienced business man who enters upon a course of speculative dealings with a bucket shop does so with the understanding that the purchases or sales are to be merely colorable is so strong as to amount to a presumption of fact, which is not overcome by his testimony to the contrary given in his own interest, nor by a recital in confirmation slips given on receipt of the orders that actual delivery was in all cases understood, which in itself indicated that it was inserted for some ulterior purpose.

Petition to Review Order of, and Appeal from, the District Court of the United States for the Southern District of New York.

F. M. Czaki and Fried & Czaki, for petitioner.
J. J. Adams, for bankrupt.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The executors of Blitch and the alleged bankrupt have each appealed from an order of the court below allowing the claim of Blitch as a creditor, and adjudging the amount at $11,346. It is insisted on the part of the alleged bankrupt that the claim should have been disallowed in its entirety, and in behalf of the executors that a considerably larger sum should have been adjudged owing. The District Court referred it to a special commissioner to take the evidence in respect to the claim and report to the court with his opinion. The case presented is this:

Baxter & Co. was a New York corporation having its principal place of business in New York City, and having also branch offices in various parts of the country, including one at Savannah, Ga. Its ostensible business was that of a broker in the business of buying and selling securities and produce, but its real business was that of a "bucket shop," dealing with customers who deposited small margins and speculated upon the fluctations in the market prices. It received orders and purported to execute them at the market price, and credited or charged the account of the customer accordingly; but it executed the orders only upon its books. These orders were sent by wire from the office at which they were received to the principal office, and a confirmation slip was delivered to the customer, signed by Baxter & Co. These slips contained this clause:

"We receive no orders except with the understanding that the actual delivery of property bought or sold is in all cases contemplated and understood. It is further understood and agreed that on all marginal business the right is reserved to close transactions when the market value indicates an insufficiency of margin in our hands to prevent loss to us, without notice and at public or private sale."

Blitch resided in Georgia, and in January, 1903, opened a speculative account with Gray, the agent of Baxter & Co., at its branch office in Savannah. For three years previously he had had a speculative account with Murphy & Co., a concern carrying on a bucket shop at Savannah. He was a merchant, doing a business of forty or fifty thousand dollars a year, and postmaster of the village in which he lived. Between January and August 7th, Blitch gave the Savannah office numerous orders to buy and sell cotton, and some to buy mining shares, and received for each order a confirmation slip such as has been referred to. On the 7th day of August, 1903, a number of these orders were outstanding. The value of the property, at the market prices represented by the orders to purchase, was nearly $120,000, and of the property represented by his orders to sell was about $40,000. At the market prices, on the opening of business of that day, there would have been a margin in his favor of about $1,000. There was much fluctuation in the cotton market, and his orders were most of them for the purchase or sale of cotton for future delivery. He was informed by Gray that his account needed additional margin by four or five hundred dollars, and thereupon he gave Gray a check, and a note payable in the future, amounting together to $476.81, and received a receipt therefor. August 10th he was notified by Gray that he could not use the note, and more margin must be put up at once "or he (Gray) should have

to hedge the trades in September cotton and in Amalgamated Copper." Blitch protested, but shortly after the market opened Baxter & Co. closed some of the orders by a nominal sale of the September cotton and the shares of Amalgamated Copper. August 18th it closed the rest of the orders except one for the purchase of 50,000 pounds of ribs, and on September 1st it closed the order for ribs. Baxter & Co. duly notified Blitch of the closing of his orders at the respective times thereof. The market advanced subsequently, so that within the next 30 days Blitch could have realized a large profit on his orders to purchase.

The special commissioner found as facts that Gray had received the note given by Blitch as so much cash, and that at the time Baxter & Co. closed the orders Blitch's customary margin was not exhausted. He also made the following findings:

"The evidence forces me to the conclusion that Mr. Blitch never expected to receive and pay for the merchandise that he purchased, or to deliver the merchandise he sold, but that his intention in each instance was to settle on differences. With much doubt I find as a fact that Baxter & Co. had represented to him that in every instance they actually executed each order he gave them, and that he supposed Baxter & Co. were doing a legitimate brokerage business and were actually carrying for him the merchandise he had directed them to purchase or to sell."

As matter of law the special commissioner found that the relations between Blitch and Baxter & Co. were the same as though the representations made by it to Blitch, and believed by him, had been true; that the acts of Baxter & Co. in closing the orders given by Blitch were equivalent to a conversion of the property represented by the orders to purchase; and that Blitch was entitled to recover as damages the highest value of the property intermediate the time of the conversion and a reasonable time after he had been notified thereof. He also found that as to the cotton and the copper stock 15 days was a reasonable time, and as to the ribs 30 days was a reasonable time.

It is contended for the alleged bankrupt that no recovery should have been allowed Blitch for the conversion of the property which he had ordered Baxter & Co. to purchase, because his claim is founded merely upon a breach of an agent's instructions in carrying out wagering contracts. If it was the understanding between Blitch and Baxter & Co. that their dealings would be those ordinarily carried on between a customer and a bucket shop, or that Baxter & Co. would not actually execute the orders according to the custom of brokers, so that there would be no future delivery of the property ordered to be purchased, the transactions between them were in furtherance of a mere gambling scheme, and a recovery could not be permitted.

It is too well settled to need any citation of authority that contracts for the purchase of property to be delivered at a future day are not void as wager contracts merely because the property is not in existence in the hands of the seller and is to be subsequently acquired by him. It is equally well settled that a transaction which is on its face legitimate cannot be held void as a wagering contract by showing that one of the parties to it understood and meant it to be so. "The proof must go further and show that this understanding was mutual—that both parties so understood the transaction." Irwin v. Williar, 110 U. S. 499,

508, 4 Sup. Ct. 160, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 481, 492, 13 Sup. Ct. 950, 37 L. Ed. 819. As a man cannot gamble with himself, and there must be two parties to a wager, it is not enough that Blitch never intended or expected that the property ordered should be delivered to him nor is it enough that Baxter & Co. never expected or intended to secure such a delivery by executing the orders to purchase. In Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473, the court used this language:

"At common law, in order to render a contract void as a wagering contract, it must appear that both parties understood and agreed, expressly or impliedly, to the things which constituted it as matter of law a wagering contract. This does no rest on grounds peculiar to wagering contracts. The unexpressed or uncommunicated intention of one party to a contract is not binding upon the other party to the contract. In order to be binding, the intention must be common to both."

That this is the law of Georgia sufficiently appears by Forsyth Mfg. Co. v. Castelin, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28, where in an action by brokers it was contended that the transactions involved were dealings in fictitious "futures." The court held that transactions of that kind were not invalid unless it appeared "that neither of the parties contemplated an actual delivery of the goods, and that it was the intention of both that there should be no actual delivery, but on the day fixed for delivery there should be a settlement of their differences, based on the market value of the goods on that day."

This is a case where each party intended to engage in a series of wagering transactions, and where it is sufficiently plain that Baxter & Co. understood the intentions of Blitch. The real inquiry consequently is whether Blitch understood the intentions of Baxter & Co. The finding of the special commissioner, that Baxter & Co. had represented to Blitch that in every instance they actually executed the orders given them, was based upon the recital contained in the confirmation slips. But if Blitch did not rely upon these representations, the fact that they were made is not important. Blitch was examined as a witness before the special commissioner, and his testimony indicates that he was a man of keen intelligence and extensive business experience. We are unable to accept the conclusion of the court below, reached with "much doubt," that Blitch believed these representations. He was an experienced business man, and familiar with the business of speculating in futures. It is almost incredible that such a man should not have known that he was dealing with a bucket shop, or that he was not aware of the ordinary business methods of such a concern. According to common understanding the bucket shop "uses the terms and outward forms of the exchanges, but differs from the exchanges in that there is no delivery, and no expectation or intention to deliver or receive securities or commodities said to be sold or purchased." (See Standard Dictionary.) Blitch not only testified that he was not aware that Baxter & Co. was operating a bucket shop, but he testified that he supposed that it was actually carrying the property covered by his orders. It is impossible to contradict the testimony of a witness as to his state of mind by direct evidence, unless he has made impeaching state-

ments, and such testimony, where it is that of an interested party, is entitled to but little weight if it is inconsistent with the reasonable presumptions arising from circumstantial evidence. The probability that an intelligent man who enters upon a course of speculative dealings with a bucket shop does so with the understanding that the purchases or sales are to be merely colorable is so strong as to amount to a presumption of fact. It is quite incredible that Blitch should have believed that Baxter & Co. were "carrying," for the purposes of his speculation, $140,000 worth of property, or the evidence of title thereto, on the trifling margin of 1 per cent. The recital in the confirmation slips, upon which it is said he relied, was pregnant with information to an alert business man that Baxter & Co. was not doing business legitimately. It was such an unnecessary and unusual statement as to suggest at once that it was a precaution adopted by Baxter & Co. for its own protection in case the validity or legality of its transactions should be questioned. Its presence indicated that it was inserted for some ulterior purpose. Central Stock & Grain Exchange v. Board of Trade, 196 Ill. 396, 63 N. E. 740; Weare Commission Co. v. The People, 209 Ill. 528, 70 N. E. 1076. "Here are the very clausulæ inconsuetæ pointed out in Twyne's Case as the sure badges of that which they are intended to hide." Taylor v. Taylor, 8 How. (U. S.) 205, 12 L. Ed. 1040.

We are unable to doubt that each party understood the other, and that the implied understanding between them was, at the inception of and throughout their dealings, that their transactions should be those of the ordinary kind between customer and bucket shop proprietor. The courts ought not to indulge in any violent or improbable inferences from the facts to assist either of the parties to such dealings, or to differentiate their dealings from ordinary gambling transactions.

These conclusions render it unnecessary to consider any of the questions as to the amount of the recovery presented by the appeal of either party.

The order is reversed, with instructions to the court below to disallow the claim.

In re A. B. BAXTER & CO. (two cases). In re WHITTAKER. In re JOSEPH.

(Circuit Court of Appeals, Second Circuit. January 7, 1907.)

Nos. 106, 240, 108, 241.

PRINCIPAL AND AGENT—EVIDENCE TO ESTABLISH RELATION—TRANSACTIONS BETWEEN BUCKET SHOPS.

The transactions between two concerns engaged in business as brokers or bucket shops, one located in New York and the other in Atlanta, Ga., *held* not such as to create the relation of principal and agent between them, but merely that of correspondents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 41.]

Petition to Review Order of, and Appeal from, the District Court of the United States for the Southern District of New York.

J. J. Adams, for petitioner. F. M. Czaki and Fried & Czaki, for respondent.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The appeal in this case presents the question whether the firm of Houser & Co. was the agent of the alleged bankrupt at Atlanta in soliciting orders to be executed by Baxter & Co. at New York for the purchase and sale of stocks and products. Upon a state of facts similar in all essential particulars, it was decided in Municipal Telegraph & Stock Co. v. Ward, 138 Fed. 1006, 70 C. C. A. 284, that the relation of principal and agent did not exist. That decision is controlling in this court as an authority, and an independent examination of the question is unnecessary. It is proper to say, however, that there are two cases to the same effect decided in the appellate branch of the New York Supreme Court, viz.: Holman v. Goslin, 103 App. Div. 606, 93 N. Y. Supp. 126, and Willard v. White, 56 Hun, 581, 10 N. Y. Supp. 170. Smith v. New York Stock & Clearing House Co., 25 N. Y. Supp. 261, relied on as a decision to the contrary, is differentiated from the other decisions in the very important fact that the "correspondent" deposited all moneys received by him as margins and commissions in the bank account of the corporation, and also in the fact that the corporation had arranged directly to protect the customers of the correspondent from loss of margin or profits in their dealings with him.

It follows that the court below erred in allowing the claim of Whittaker.

The order is reversed, with costs.

UNITED STATES v. PARK & TILFORD.

(Circuit Court of Appeals, Second Circuit. January 7, 1907.)

No. 83 (4,075).

CUSTOMS DUTIES—UNUSUAL COVERINGS—ADDITIONAL DUTY.

Under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], the "additional duty" provided therein for unusual coverings used "otherwise than in the bona fide transportation" of their contents to the United States, is not a substitute for the usual duty on coverings which accrues by including their cost in the dutiable value of their contents, as also provided in said section; but both duties should be imposed, the latter because the coverings subserve a use in transportation, and the former because they subserve an additional use after transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 20.]

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

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (142 Fed. 202), affirming a

decision of the Board of General Appraisers (G. A. 6,111 [T. D. 26,-608]), which reversed the action of the Collector of the Port of New York in assessing certain imported merchandise under the Tariff Act of 1897. Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626].

J. Osgood Nichols and Henry A. Wise, Asst. U. S. Attys.

Edward Hartley (B. A. Levett, of counsel), for importers.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question are wooden boxes or cabinets containing cigars. They are more elaborate and ornamental than the ordinary cigar box of commerce, and it is undisputed that they are unusual coverings, designed, not only for the transportation of the cigars packed in them, but also for the purpose of enhancing their attractiveness when exposed for sale, and supplying a pleasing receptacle to contain them. The appraised value of the cabinets was $5 each, and they were invoiced as "sample cases" containing cigars. The customs officers included the value of the cabinets in determining the actual market value of the cigars, upon which the ad valorem duty of 25 per cent. on cigars was assessed and paid. The collector also imposed an additional duty upon the cabinets at 35 per cent. ad valorem, as manufactures of wood, under paragraph 208. Act July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1646]. It is conceded that, if imported empty, the latter rate of duty would be the proper one; but it is contended that the collector was not warranted in imposing a double duty on the cabinets. His action was taken under section 19 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]), which reads as follows:

"Sec. 19. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported. That the words 'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale price as defined in this section."

The language of this section is certainly plain and unambiguous. It provides, first, that, whenever imported merchandise is subject to an ad valorem duty, the value upon which that duty is to be assessed shall include the value of all cases, crates, boxes, and coverings of any

kind. This is a requirement applicable to all importations of ad valorem goods. There is nothing in this part of the section to indicate that, under any contingency, a different rule shall be applied in assessing the valuation of any importation of such goods.

The section next provides that, if there be used for holding the merchandise, whether dutiable or free, any unusual covering, additional duty shall be levied upon such covering at the rate to which the same would be subject if separately imported. If this duty is to be "additional," it would seem to be the plain intent of the act that the aritcle which pays the "additional" duty shall also pay an initial duty. If it were intended that, in the event of an unusual covering, it should pay duty only at the rate to which it would be subject if imported separately, there would be no need to use the word "additional" at all. It is true that, when the imported merchandise is free, the duty on the unusual covering is not properly an "additional" one, but the word exactly covers a case like the present, and, unless it is to be wholly disregarded, should require the levy of two duties on the covering; one on such article as subserving a use in transportation, and the other on such article as subserving an additional use after the transportation.

In the majority opinion filed by the Board of General Appraisers, it is not disputed that such is the literal construction of the section; but they reach the conclusion that it was not the intent of Congress to exact a double duty. They suggest that the literal construction would produce a condition repugnant to fair dealing in the administration of customs laws; that it has been the policy of Congress so to frame these laws as to render them the least possible burden to the citizen and uniform in their administration; and that such construction is in conflict with the report of the committee of Congress in presenting to the House of Representatives the bill which upon its enactment by Congress became this act.

It is no uncommon occurrence, however, to find in tariff acts provisions expressly devised to accomplish some purpose other than the mere collection of duty. Some articles are exposed to such a rate of duty as will practically prohibit their importation. In some cases cumulative duties are provided for. Paragraph 313, Act 1897. Duty so high as to be characterized as penal is sometimes exacted to put a stop to some undesirable practice. Thus, when imported merchandise was inclosed in coverings designed for use otherwise than in the bona fide transportation of the merchandise, a duty of 100 per cent. was imposed by the tariff act of 1883. Act March 3, 1883, c. 116, § 7, 22 Stat. 486 [U. S. Comp. St. 1901, p. 750]. It is a fact of which the courts which hear customs causes will take notice that there has been much litigation as to the question of the usualness or bona fides of various "coverings," and that Congress has enacted many provisions to prevent the government from suffering loss of revenue by reason of the adoption of some unusual covering, designed to subserve a double purpose. It certainly would not be surprising to find that Congress had at last decided to accomplish this by prescribing a double duty, and we find nothing repugnant to fair dealing in such an enactment. In the case at bar, the cabinets, at 25 per cent. plus 35 per cent. pay only a little more than half what they would have paid under the act of 1883.

It appears, moreover, from the references to the Congressional Record set forth in the government's brief, that the report of the House committee upon which the Board of General Appraisers relied was made at a time when the bill did not contain any provision for "additional" duty. It was amended to its present shape subsequently, in the Senate (Cong. Rec. vol. 21, pt. 4, p. 3973), and the insertion of this word "additional" during the progress of the bill through the legislative body fairly indicates an intention to subject coverings like these to a double duty.

The decision of the Circuit Court is reversed.

ALASKA EXPLORATION CO. v. NORTHERN MINING & TRADING CO.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1907.)

No. 1,349.

VENDOR AND PURCHASER—DEEDS—RECORD—NOTICE.

Where a deed to an undivided interest in an Alaska mining claim was neither witnessed by two witnesses nor acknowledged, as required by B. & C. Comp. Or. §§ 5342, 5350, 5354, 5355, made applicable to Alaska by Act Cong. May 17, 1884, c. 53, § 7, 23 Stat. 24, such deed was not entitled to record, and hence the record thereof was not constructive notice to a subsequent purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 538.]

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

S. T. Jeffreys and W. S. Wood, for plaintiff in error.

Ira D. Morton, J. C. Campbell, W. H. Metson, Frank C. Drew, C. H. Oatman, and J. A. Mackenzie, for defendant in error.

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

ROSS, Circuit Judge. The defendant in error sued the plaintiff in error and another corporation to recover possession of an undivided three-sixteenths of a certain mining claim in Alaska. The bill of exceptions shows that on the trial the plaintiff introduced evidence going to show that the claim was located by one Pierce Thomas, who, on the 4th day of October, 1902, executed to the plaintiff a deed for a three-sixteenths interest in the claim. The plaintiff in error sought to overcome that conveyance by showing that Thomas had made a previous conveyance of the entire claim to one Kimber, under whom the plaintiff in error claims.

It is not pretended that the defendant in error had any actual notice of such prior conveyance, but it was sought by the plaintiff in error to show constructive notice to it by the introduction of a certified copy of the record in the office of the recorder of the mining district in which the claim is situated of a deed from Thomas to Kimber of the entire claim; it being provided, by the Alaskan statute of June 6, 1900, that all records theretofore made in good faith in any regularly organized

mining districts shall be public records. Carter's Ann. Codes Alaska, § 16, pt. 3. The certified copy of the instrument so offered in evidence bears date October 7, 1898, expresses a consideration of $100, purports to have been signed by Thomas, to have been witnessed by one Libby, and was recorded by the recorder of the mining district in the records of his office. The court below refused to admit in evidence the certified copy of this instrument, to which ruling the plaintiff in error reserved an exception.

We think the ruling clearly right. Conceding for the purposes of the case, but without holding, that, under the statutes of Alaska, the proper office for the recording of deeds of mining claims is that of the recorder of the mining district in which the claim is situated, the difficulty in the way of the plaintiff in error is that, in order for such a record to impart constructive notice to any one, it is essential that the instrument be entitled, under the law, to such recordation. 13 Cyc. p. 600; Alabama Marble & S. Co. v. Chattanooga Marble & S. Co. (Tenn. Ch. App.) 37 S. W. 1009; Edwards v. Thom, 5 South. 707, 25 Fla. 222; Keech v. Enriquez, 10 South. 91, 28 Fla. 597.

On October 7, 1898, when it is said by the plaintiff in error Thomas deeded the mining claim in question to Kimber, the statute of Alaska contained this provision:

"That the general laws of the state of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." Act May 17, 1884, c. 53, § 7, 23 Stat. 24.

Section 5342 of the Oregon Codes (B. & C. Comp.) provides:

"Deeds * * * of lands or any interest therein shall be executed in the presence of two witnesses, who shall subscribe their names as such, and the persons executing such deeds may acknowledge the execution thereof before any judge," etc.

Sections 5350 and 5354 of the same Codes make provision for the proving and certifying of a conveyance in the absence of an acknowledgment, and by section 5355 it is provided that:

"Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named, may be read in evidence without further proof, and shall be entitled to be recorded in the county in which the lands lie."

Sections 82, 83, 93, and 94 of part 5, c. 11, Carter's Annotated Codes of Alaska, are as follows:

"Sec. 82. Execution and Acknowledgment of Deeds. Deeds executed within the district, of lands or any interest in lands therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; and the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the district court, notary public, or commissioner within the district, and the officer taking such acknowledgment shall endorse thereon a certificate of the acknowledgment thereof and the true date of making the same under his hand.

"Sec. 83. Same in States. If any deed shall be executed in any state, territory, or district of the United States, such deed may be executed according to the laws of such state, territory, or district, and the execution thereof may be acknowledged before any judge of a court of record, justice of the peace, or notary public, or other officer authorized by the laws of such state, ter-

ritory, or district to take the acknowledgment of deeds therein, or before any commissioner appointed for such purpose."

"Sec. 93. Certificate of proof to be endorsed on deed. Every officer who shall take the proof of any conveyance shall endorse his certificate thereon, signed by himself on the conveyance, and in such certificate shall set forth the things hereinbefore required to be done, known, or proved, together with the names of the witnesses examined before such officer, and their places of residence, and the substance of the evidence by them given.

"Sec. 94. Deed proved may be read in evidence. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie."

It is clear that the certified copy of the record of the recorder of the mining district offered in evidence by the plaintiff in error did not meet these statutory requirements, for it showed upon its face that the deed that was recorded was without acknowledgment or other proof of its execution, and without the signature of subscribing witnesses. It was therefore not entitled under the law to be recorded anywhere, and the mere transcription of the unauthorized paper in the record of the mining district was not constructive notice to any one. As has already been said, there was no offer of any proof to show that the defendant in error had at the time of its purchase any actual notice of any prior conveyance of the property by Thomas. For the reasons stated, there was no error in the rulings complained of.

The judgment is accordingly affirmed.

MOONEY v. CARTER.

(Circuit Court of Appeals, Fifth Circuit. March 12, 1907. On Rehearing April 17, 1907.)

No. 1,528.

DEATH—ACTION FOR WRONGFUL DEATH—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate and another were fishing from a rowboat anchored in the Tennessee river at night without having the white light displayed above the stem, as required by the rules of the supervising inspector, when the boat was run down by defendant's steamer which was pushing a barge in front. The occupants of the boat after trying to attract the attention of those on the steamer jumped from the boat, and plaintiff's intestate was drowned. The steamer did not have a proper lookout, but the master, as soon as the boat was discovered, stopped his vessel, but not in time to prevent striking the boat. *Held*, that both the steamer and the deceased were in fault for violating the navigation rules, and that the death being the result of the combined negligence, there could be no recovery therefor under Code Ala. 1896, § 27, giving a right of action for death caused by the wrongful act or negligence of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 25.]

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

This is an action to recover damages for the death of one Charles J. Smith, under section 27 of the Code of Alabama of 1896, which provides an action for wrongful act, omission, or negligence causing death.

The plaintiff below presented his cause of action in five several counts, each setting forth a different theory.

Each count states that on the night of June 18, 1904, Charles J. Smith, the intestate of defendant in error, and one Wissinger, were sitting in a small skiff at anchor in the Tennessee river, opposite the city of Decatur, Ala., and that said Smith and Wissinger were engaged in manipulating a trot line, and while so situated and engaged they were approached by a steamboat of the said James E. Mooney, and that said steamer was pushing a barge; that said steamer was under the control of one William Sellars as master thereof: that said steamer ran straight toward said skiff, and, notwithstanding said Charles J. Smith and his companion displayed signals of their whereabouts and danger by swinging a lighted lantern and giving loud cries of distress, said steamer ran straight at the skiff without giving any answer or response; and that said Charles J. Smith and his companion, being unable to change the location of their skiff or to lift the anchor, were forced to jump into the water, and that said Smith was drowned. This statement of alleged facts is common to all the counts of the complaint. Each count goes further and alleges different causes for the injury. The first count charges that the death of Smith resulted from the negligence of Sellars, as master of the steamer, in failing to have a proper person stationed as a lookout in a suitable position on either the boat or barge. The second count was abandoned during the progress of the trial. The third count charges the negligence of Sellars after he discovered the peril of said Smith, in that he saw the signals of distress displayed by said Smith and his companion, but negligently and wrongfully persisted in holding the steamer to the course until it struck the skiff out of which said Smith and his companion had just sprung. In the fourth count it is charged that the death of Smith was caused by the wantonness and willfullness of said Sellars as master, in that he saw the signals of distress displayed from the skiff, and knew that human beings were in the skiff, and could have changed his course, and yet he willfully and wantonly kept the steamer in a straight course on to the skiff, necessitating the jumping therefrom of said Smith. The last count charges the wrong and negligence of the lookout on said steamer who saw the signals in time to have had the steamer stopped had he heeded said signals, yet he ignored said signals, and allowed the steamer to proceed until too late to prevent a collision.

The defendant below pleaded the general issue to all the counts—the contributory negligence of Smith, in that after seeing the approaching steamer he took no steps to lift or loosen the anchor of his skiff until it was too late, averring that he could have done so and have gotten out of the path of the steamer if he had tried when he first saw her approach; also the contributory negligence of Smith in being seated in a small skiff or rowboat in the Tennessee river on a dark night, without having a white light stationed two feet above the stem of the boat in which he was sitting, in violation of the rule of the supervising inspector of steamboats, approved February 8, 1899, which requires rowboats to carry a white light two feet above the stem of the boat; and, also, the contributory negligence of Smith in jumping out of the skiff into the river when, if he had remained in the skiff, he would not have been injured.

On the trial and in due season, the defendant below requested the court to give numerous instructions to the jury covering all phases of the case, which instructions were all refused, and exceptions were duly taken. The assignments of error present them seriatim.

W. W. Callahan, for plaintiff in error.

S. S. Pleasants and E. W. Godbey, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PARDEE, Circuit Judge (after stating the facts). From the view we take of the case, we find it only necessary to consider one assignment, to wit, the court erred in refusing the following instruction: "If the jury believe the evidence they will find for the defendant."

Counsel for defendant in error, after a short statement, begin their brief with the proposition: "We submit that on the undisputed evidence the defendant in error was entitled to the general affirmative charge." As the defendant below requested the affirmative charge for the defendant, and the counsel for the plaintiff below insist in this court that the affirmative charge should have been given for the plaintiff below, it seems that there cannot be much dispute of fact in the case "to deflect or control the questions of law." See Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654.

We have carefully read the evidence all brought up in the transcript, and we conclude that the steamer was guilty of negligence in not having a proper and sufficient lookout. The Ottawa, 3 Wall. 268, 18 L. Ed. 165; The Genesee Chief, 12 How. 443, 13 L. Ed. 1058; St. John v. Paine, 10 How. 567, 13 L. Ed. 537; Manhasset (D. C.) 34 Fed. 408; St. Nicholas (D. C.) 49 Fed. 679; Geo. W. Childs (D. C.) 67 Fed. 270. We also conclude that the failure of Smith and his companion, when on a dark night in a rowboat anchored in the channel of the Tennessee river, to carry a white light two feet above the stem of the boat, as required by the rules of the supervising inspector of steamboats, approved February 8, 1899, was negligence. Belden v. Chase, 150 U. S. 698, 14 Sup. Ct. 264, 37 L. Ed. 1218.

It is possible that if the steamer had had a vigilant and sufficient lookout, the location of Smith and his companion in the rowboat might have been discovered in time to have prevented injury. It is equally possible that if Smith and his companion had carried the regulation light two feet above the stem of the rowboat the inefficient lookout on the steamer would have seen the same in time to have avoided the injury. But these are conjectures. The actual case is that both the steamer and Smtih were in fault, and the death of Smith was the result of the combined negligence.

There is no sufficient evidence to support the specific allegation of the third count that after Sellars had discovered the peril of Smith and saw signals of distress displayed, he negligently persisted in holding the steamer to her course. The proof is undisputed that as soon as Sellars was warned of the position of the skiff, he stopped the steamer, and to such purpose that the life of Smith's companion was saved, he being picked up by the steamer. Nor is there sufficient evidence to warrant any finding that the master of the steamer was guilty of any willfullness or wantonness in sailing his vessel, or in failing to stop and change his course, when he saw or heard the signals of distress displayed from the skiff.

Reversed and remanded.

On Rehearing.

PER CURIAM. No one of the judges who participated in the decision of this case desiring a reargument or rehearing, the petition for rehearing is denied.

BARTLETT et al. v. FARRELL.

(Circuit Court of Appeals, Second Circuit. February 26, 1907.)

No. 147.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence, in an action for injury to an employé engaged in erecting a gas tank, caused by the scaffold on which he was at work being tipped by the raising of the tank, which could have been done only by the expansion of the gas from the heat of the sun, or by the pumping of compressed air into the tank, *held* sufficient to go to the jury on the questions whether it was raised by the pumping of compressed air, and, if so, whether it was negligence to do so without warning.

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

Error to the Circuit Court of the United States for the Eastern District of New York to review a judgment entered on the verdict of a jury in favor of the plaintiff, for $4,600, for injuries received by him while in the employ of the defendants.

J. N. Tuttle and Frederick W. Catlin, for plaintiff in error.

M. J. France and George V. S. Williams, for defendants in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The plaintiff, while in the employ of the defendants, received injuries by falling from a scaffold while at work as a riveter on the frame work of a large gas tank which he, with other workmen, was engaged in erecting. The scaffold was constructed in the usual manner, but the plaintiff contends that the defendants were negligent in causing the tank to be raised, while the men were at work, without warning or opportunity to escape. The raising of the tank lifted the ends of the timbers on which the scaffold rested, causing it to tip so that one of the planks on which the plaintiff stood slipped off.

The case was sent to the jury to say whether the defendants were guilty of negligence in causing the tank to be raised without warning to the plaintiff. The defendants contended that the court should have directed a verdict in their favor.

The following propositions are established by the proof:

First. The plaintiff was injured by reason of the tipping of the scaffold.

Second. The scaffold could be tipped, in the manner described, only by raising the tank.

Third. The tank could be raised either by the natural heat of the sun or by pumping compressed air in, and in no other way.

Which of the two caused the tank to rise?

This was a question of fact, and, although the testimony was circumstantial in character and depended largely upon presumptions, we think sufficient was shown to justify its submission to the jury.

The plaintiff, who had been working on the tank for ten days prior to the accident, testified that he never knew the tank to be raised or lowered before, except after notice given to the workmen to take in

their scaffolds. No notice was given on this occasion and he did not know that the tank was rising. He was stepping from the left side of the scaffold facing outward to the right when it fell. The planks were not nailed but were simply laid one on another.

Struck, a witness who was present at the time, noticed that the scaffold was in good condition fifteen or twenty minutes before the accident and was in disorder afterwards. On one side there were two, or more, planks missing. The tank had risen at least a foot and it seemed to the witness to be rising at the time. One end of the rear plank had been forced back.

When the sun is hot in the middle of the day the tank will rise several inches because of the expansion of the heated air inside, but not as much as a foot.

The accident happened about 4 o'clock in the afternoon of the 14th of May, and, although the temperature on that day was not given, the witness testified that it was not a very warm day. It is a fair presumption that as the afternoon progressed the effect of the heat on the tank must have decreased.

About fifteen minutes before the accident the witness noticed an upward movement of the tank. He said:

"You can feel it with your foot; a kind of buzzing; feel it coming up a bit, by my feet. It was going very slowly, you could see it with the naked eye by watching the goose-neck. You could tell by reference to a mark that it would go about as fast as the long hand of a clock."

Another witness, Hickey, who went to the scaffold immediately after the accident, says:

"I saw the scaffolds on an incline from the tank, but some were high and some low. That is the part next to the tank was high. And then they all inclined out. * * * I saw the scaffold that Farrell fell from. There was two or three planks missing from it and it looked a regular wreck."

Hickey also testified that the tank had risen from a foot to eighteen inches from the time he had been there before. He was away about an hour and twenty minutes.

On a very warm day, if they pumped no air into the tank, it might rise, by the ordinary heat, three, or four, or five inches, "but in the afternoon, after the heat of the day had passed, it would be lowering naturally."

There was other testimony to the same effect. No proof was offered by the defendants.

The court instructed the jury that if they found that the accident was caused by the ordinary daily rise and fall of the tank the verdict must be for the defendants, the risk being one which was assumed by the plaintiff. If, on the contrary, the tank was raised up beyond the natural daily rise and fall, then it was for the jury to say whether the defendants were negligent in not giving the plaintiff warning.

The question is not whether the testimony is sufficient to convince us of the defendants' fault, but whether the trial court would have been justified in saying that there was no evidence to be submitted to the jury. It cannot be denied that the proof of negligence was meager, unsatisfactory and circumstantial, and yet, we are unable to say that

the jury might not properly draw therefrom the inference that the defendants were at fault. The testimony leaves little doubt that the accident was caused by the raising of the tank. As before stated it could have been raised in one of two ways only; either by the heat of the sun or the pumping in of compressed air. The proof that the natural heat would cause a rise not to exceed five inches and that at four o'clock the tank would naturally be sinking instead of rising, in connection with the testimony that it actually rose from a foot to eighteen inches may, very properly, have induced the jury to eliminate the natural heat theory from their calculations. This being so, the raising of the tank could be accounted for only upon the theory that air was pumped in. If air were pumped in without warning, and it is undisputed that no warning was given, the jury might legitimately have reached the conclusion, especially in the absence of any denial or explanation, that the defendants were negligent.

The judgment is affirmed.

In re BROADWAY SAVINGS TRUST CO.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1907.)

No. 78.

1. BANKRUPTCY—JURISDICTIONAL FACT—PURSUIT IN WHICH CORPORATION IS ENGAGED IS NOT.

   Neither the allegation nor the fact that a corporation is engaged principally in manufacturing, trading, printing, publishing, mining or, mercantile pursuits is jurisdictional in a proceeding in bankruptcy.

2. SAME—AMENDED PETITION—DEFAULTING CREDITOR NOT ENTITLED TO ANSWER.

   A creditor, who fails to appear or answer a petition in bankruptcy within the time limited therefor by the bankruptcy law, thereby waives all objections to subsequent amendments thereof which do not change the substance of the cause of action there stated nor the extent of the relief there sought, and renounces his right to contest the cause of action of which the original petition gives fair notice.

(Syllabus by the Court.)

On Petition for Review.

S. W. Fordyce Jr., and Tyrrell Williams, for petitioner.

Stanley D. Pearce (Lee W. Grant, on the brief), for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On July 27, 1906, three creditors filed a petition in the court below for the adjudication of the St. Louis Safe & Desk Company a bankrupt, but failed to allege that it was engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits. Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683]. On August 20, 1906, they filed an amended petition which remedied this defect, the desk company filed an answer which admitted the averments of the latter petition, and the desk company was adjudged a

bankrupt. The last day for filing pleadings in response to the original petition was August 16, 1906, and on the next day the clerk made the formal order of reference of the petition to the referee, who took no action upon it. On August 23, 1906, the court adjourned and did not sit again until September 10, 1906, when the Broadway Savings Trust Company, a creditor of the desk company, which had not before appeared in the proceeding, filed a petition in the court below for the vacation of the adjudication and for leave to answer the amended petition, on the ground that the adjudication was made on the same day that the amended petition was filed, so that the Broadway Company and the other creditors of the desk company had no opportunity to appear and plead to it. On September 17, 1906, this petition was denied, and on October 1, 1906, the Broadway Company filed a petition to revise this order.

The original petition was demurrable and amendable. 1 Stat. 91, c. 20, § 32 [U. S. Comp. St. 1901, p. 696, § 954]; In re Plymouth Cordage Co., 135 Fed. 1000, 1003, 68 C. C. A. 434, 437.

The contention of counsel for the petitioner that the omitted allegation, or the fact that the desk company was engaged principally in one of the pursuits which subjected it to the adjudication, was jurisdictional, has received deliberate and studious consideration, and our conclusion, the reasons for it, and authorities in support of it may be found in our opinion in Re First National Bank of Belle Fourche, which is filed herewith.[1] Our judgment is that neither the allegation nor the fact was jurisdictional, because neither conditioned the power of the court to hear the cause and decide every issue in it between the parties. It had the same jurisdiction of the cause and of the parties, and the same power to determine the issues between them, whether the desk company was or was not engaged in one of the pursuits mentioned in section 4b of the bankruptcy law. The only difference the decision of that issue made was that if it was so engaged the court should have given judgment for the petitioners, and if it was not so occupied it should have refused to adjudicate the desk company a bankrupt.

The only remaining question is, was it error for the court below to adjudge the desk company a bankrupt upon the amended petition without notice to or time for creditors who had defaulted to appear or answer it? A proceeding in bankruptcy is a proceeding in equity, and the rules and practice in equity prevail in its conduct as far as they are consonant with the speedy administration of justice which it prescribes. Parties who have appeared in a suit in equity or in bankruptcy are entitled to a reasonable time to demur or answer an amended pleading of their adversary. Lockman v. Lang, 132 Fed. 1, 6, 65 C. C. A. 621, 626; Files v. Brown, 124 Fed. 133, 142, 59 C. C. A. 403, 412; Nelson v. Eaton, 13 C. C. A. 523, 525, 66 Fed. 376, 378; Davis v. Davis, 62 Miss. 818; Fisher v. Simon, 14 C. C. A. 443, 67 Fed. 387; French v. Hay, 89 U. S. 238, 246, 22 L. Ed. 799; Blythe v. Hinckley (C. C.) 84 Fed. 228, 242. But the filing of an amended petition is not the commencement of a new suit, unless it states a new cause of action or seeks more extensive relief or brings in new parties. It is the continuance of the same suit, and it does not necessitate the issue of a new subpœna to parties already before the court in equity. Cun-

[1] 152 Fed. 64.

ningham v. Pell, 6 Paige (N. Y.) 657. The federal courts sitting in equity always have the power to permit amendments of the pleadings to conform them to the proof, even after the hearing. The Tremolo Patent, 90 U. S. 518, 527, 23 L. Ed. 97; Neale v. Neale, 9 Wall. 1, 9, 19 L. Ed. 590.

If the Broadway Company had appeared or answered the original petition, it would have preserved its right to notice of subsequent proceedings and to answer any amended petition that might have been subsequently filed. But it was not the defendant in this suit. It was not required to be, and was not subpœnaed to answer the petition. The bankruptcy law gave it and all other creditors in its situation the option to appear and answer the petition during a time limited, or to refuse to do so. It elected to renounce this privilege, to waive this right. It made no appearance and filed no answer. Nevertheless, if the substance of the cause of action stated in the original petition had been radically changed by the subsequent amended petition, if more extensive relief had been sought and secured thereby, so that the original petition failed to constitute fair notice of the adjudication actually obtained, the Broadway Company and other creditors might have had the right in equity to an opportunity to answer the second petition. McClenny v. Ward, 80 Ala. 243; Fogg v. Merrill, 74 Me. 523, 526. But the adjudication rendered was the exact relief sought in the original petition, and it was founded upon the cause of action substantially, but defectively, there stated. The Broadway Company had as complete a notice by the original petition of the cause of action which the petitioners presented and of the relief which they sought as it could have received from the amended petition. It was not ignorant of the law, and it knew that the original petition was amendable. By its failure to appear or answer, it waived its right to contest the cause of action there substantially stated, and all objections to subsequent amendments of that statement which did not change its character nor the extent of the relief it sought. Our conclusion is that a creditor who fails to appear or answer a petition in bankruptcy within the time limited therefor by the bankruptcy law thereby waives all objections to subsequent amendments thereto which do not change the substance of the cause of action there stated nor the extent of the relief there sought, and renounces his right to contest the cause of action of which the original petition gives him fair notice.

The court below committed no error either in its adjudication of the desk company a bankrupt immediately upon the filing of the amended petition, or in its subsequent refusal to vacate that adjudication. The petition is accordingly dismissed upon the merits.

No opinion has been formed or is intimated upon the questions presented by the motion to dismiss on the ground that the petition was not filed in time, because our opinion upon the merits has rendered it unnecessary to decide these questions.

FRANCIS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 12, 1907.)

No. 49.

1. POST OFFICE—WRONGFUL USE—SCHEME TO DEFRAUD—SEPARATE DEFENSES.
Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], provides that if any person having devised or intended to devise any scheme or artifice to defraud, to be effected by correspondence, shall in and for executing such scheme or artifice, or attempting to do so, place or cause to be placed any letter in any post office, or shall take or receive any such therefrom, he shall, on conviction, be punished, etc. *Held*, that each mailing or taking from the post office of a letter pursuant to a scheme to defraud constituted a separate offense under such section.

2. CONSPIRACY—SEPARATE OFFENSES.
Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], prohibits the mailing or taking from the post office of a letter pursuant to a scheme to defraud, and section 5440 [U. S. Comp. St. 1901, p. 3676] declares that if two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of such conspiracy, all the parties to the conspiracy shall be liable, etc. *Held*, that where accused and others conspired to further a scheme to defraud through the Post Office Department, each overt act of mailing a letter pursuant to such scheme or withdrawing a letter from the post office warranted a charge of conspiracy to commit such offense, so that an indictment therefor would not shield from a subsequent indictment for another conspiracy of the same person to commit another and additional offense, though of the same kind.

3. CRIMINAL LAW—EVIDENCE—WITHDRAWAL.
Where the court in its charge directed the jury to leave out of all consideration a certain conversation admitted in evidence, such direction was equivalent to striking out the testimony, and cured any error in its admission.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2122.]

4. SAME—SENTENCE—PLACE OF INCARCERATION.
Where accused was sentenced to one year only on one of the counts of an indictment for conspiracy, the court had no power to direct that such sentence be served in a penitentiary.

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

For opinion below, see 144 Fed. 520.

Henry J. Scott, for plaintiff in error.

J. W. Thompson, U. S. Atty.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error sued out by Stanley Francis to the District Court for the Eastern District of Pennsylvania. In that court Francis was indicted with others under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], on three indictments, each containing three counts, for conspiracy to commit an offense against the United States prohibited by Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], as amended. The allegation in substance was that Francis and others, composing the Storey Cotton Company, conspired to de-

vise a scheme to defraud persons by correspondence by inducing them to remit funds to invest in supposed cotton speculations, which speculations had in fact no existence. Section 5480 provides:

"If any person having devised or intending to devise any scheme or artifice to defraud * * * to be effected either by opening or intending to open correspondence * * * shall, in and for executing such scheme or artifice or attempting to do so, place or cause to be placed any letter * * * in any post office * * * or shall take or receive any such therefrom * * * such person so misusing the Post Office Establishment, shall, on conviction, be punishable," etc.

And section 5440:

"If two or more persons conspire either to commit any offense against the United States or * * * and one or more of such persons do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable," etc.

On the trial the government withdrew two counts, and Francis was convicted on the remaining seven. The court imposed sentences upon him, aggregating five years, divided as follows: Under indictment 44, two years; on the first count of No. 46, two years, to commence at the expiration of sentence at No. 44; on the second count of No. 46, one year, to commence at the expiration of the sentence on the first count at No. 46. The sentence was to the Eastern Penitentiary. Thereupon Francis sued out this writ. The questions raised under the various assignments may be considered under four heads, viz.: First, the legality of the counts under which sentence was imposed; second, the application of the statute of limitations; third, the testimony of one Quinlan; fourth, the legality of the sentences.

With reference to the first question, it will be noted that in Re Henry, 123 U. S. 373, 8 Sup. Ct. 142, 31 L. Ed. 174, followed in Re De Bara, 179 U. S. 320, 21 Sup. Ct. 112 (45 L. Ed. 207), it was held:

"The act (section 5480) forbids, not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of such a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act."

Now the counts here in question are each based on a letter mailed to a different person. Such mailing is a separate act, and, being done in pursuance of a scheme to defraud, constitutes an offense under section 5480. Such being the fact, it follows that a conspiracy to do that act was a conspiracy to commit an offense against the United States. This brings the case within the letter and spirit of section 5440, and warrants a charge of conspiracy to commit that particular offense. That act and offense constituting the basis of a conspiracy to commit it, it follows that an indictment therefor will not shield from indictment a conspiracy of the same person to commit another additional and separate offense, although of a like general kind, against the United States. The wording and spirit of section 5440 require such construction to fulfill its intent. We hold, therefore, that each of the counts before us covers a conspiracy indictable under section 5440.

We are also of opinion the defendant was not entitled to an acquittal

by virtue of the statute of limitations. No such question was raised on the trial, and where, as here, there was a general verdict, presumably that question was, on the evidence, decided against the defendant. United States v. White, 5 Cranch, 73, Fed. Cas. No. 16,676. But apart from that we have, this being a criminal case, searched the testimony, and there is no evidence to support the contention now made. It is true the date of the letter of a third person, which is alleged to constitute an overt act starting the running of the statute, was more than three years before indictment found, but it will be noted the only thing to connect the defendant with that letter and make it an overt act was testimony that certain pencil memoranda thereon were alleged to be in his handwriting. There is, however, no testimony to show when these memoranda were made, and especially that they were in time to make the statute a bar. Moreover, the testimony is clear and uncontroverted that the defendant's connection with the alleged conspiracy began within a time when the statute would not avail.

We find also no ground for reversal in the testimony of Quinlan as to a conversation with Bradley. In its charge the court said:

"I might right here say to you, you should leave out of any consideration whatever the conversation related by Senator Bradley with Mr. Quinlan on the 16th day of March, after the receiver was appointed, because it now appears there were no letters mailed after that conversation, so that you will not take that into consideration at all."

This direction was equivalent to striking out the testimony. Penna Co. v. Roy, 102 U. S. 452, 26 L. Ed. 141.

Having disposed of these questions, the court was warranted in imposing sentence. In view, however, of the decision of the Supreme Court in Re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107, we are of opinion the sentence of one year to the penitentiary on the second count of No. 46 was illegal. With that exception the judgment will be affirmed, and in pursuance of power vested in this court (Ballew v. United States, 160 U. S. 200, 16 Sup. Ct. 263, 40 L. Ed. 388), the record will be remitted with directions to the court to enforce sentence on indictment No. 44 and the first count of No. 46.

UNITED STATES v. YEE GEE YOU, alias YEE JIM.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1907.)

No. 661.

1. ALIENS—DEPORTATION OF CHINESE—EVIDENCE—CERTIFICATE OF RESIDENCE—WHITE WITNESS.

Under Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], entitled "An act to prohibit the coming of Chinese persons into the United States," as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321], in deportation cases the only permissible evidence of a Chinese laborer's right to be in the United States is the certificate of residence mentioned in such legislation, or, in lieu thereof, testimony showing that by reason of accident, sickness, or other unavoidable cause he was unable to procure such certificate, and the testimony of at

least one white witness that he was a resident of the United States prior to the registration period.

[Ed. Note.—Citizenship of the Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212, and Lee Sing Far v. United States, 35 C. C. A. 332.]

2. SAME—BURDEN OF PROOF—MERCHANTS.

In a proceeding to deport a Chinaman as a Chinese laborer unlawfully in the United States, he has the burden of proving that he is a merchant, privileged to remain in the United States.

3. SAME—CHINESE LABORERS.

Act Cong. Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321], amending Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], "to prohibit the coming of Chinese persons into the United States," does not restrict the meaning of the word "laborers" as used in the prior acts, so as to enlarge the privileged classes.

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling.

E. M. Showalter, Asst. U. S. Atty.

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

GOFF, Circuit Judge. The appellee was arrested on the charge of being a Chinese laborer found unlawfully within the jurisdiction of the United States, in violation of the act of Congress approved May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], entitled "An act to prohibit the coming of Chinese persons into the United States," as amended by the act of November 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321], without having the certificate of residence required by said act. He was given a hearing on said charge before a United States commissioner, and was adjudged to be unlawfully in the United States, and ordered to be deported in accordance with the provisions of said legislation. From such order of deportation he appealed to the District Court of the United States for the Northern District of West Virginia, and that court on hearing of said matter adjudged the appellee to have been a resident of the United States prior to the enactment of the legislation referred to, engaged in business as a merchant, and therefore lawfully entitled to be in the United States. Wherefore said court discharged the appellee from custody. From such order of discharge the United States sued out this writ of error.

Several assignments of error were filed, a number of which are immaterial and will have our consideration only as they are involved in others. The evidence submitted to the court by the United States tended to prove that Yee Gee You is of the Chinese race; that he was conducting a laundry business in Wheeling, W. Va., in said Northern District; that he did not have in his possession the certificate of residence as a Chinese laborer required by law. The evidence offered by appellee was, first, his personal testimony that he was born in Canton, China, in 1865, and came to San Francisco, Cal., in 1880; that he worked as clerk in a store in San Francisco for 10 years; that he went to Boston, Mass., in 1890, and was there employed by Sam Sing, Lee Kee & Co., dealers in Chinese groceries, and that he purchased for $500 an interest in said firm, the capital of which was

$27,500, held by 55 different partners; that in 1898 he made an affidavit before a United States commissioner in Boston that he was a domiciled merchant, in order to enable him to visit China and then return to this country; that he received such certificate from the commissioner, and went to China, returning in about one year; that since then he withdrew from said firm a part of his investment with it, still retaining therein an interest valued at about $900; that for the three or four years prior to his arrest he had resided in Wheeling, where he had been engaged in the laundry business, owning his own laundry, and a portion of the time a part owner of a Chinese restaurant. The appellee then introduced the testimony of two Chinese witnesses, who stated that they were naturalized citizens of the United States, and that they had known the appellee in Boston from 1890 to 1898, and that he was a member of the firm of Sam Sing, Lee Kee & Co., because they saw him at work in that store. Such was the evidence submitted to the court below.

We note from this evidence that no certificate of residence was tendered by the appellee, and that no excuse for such failure was offered as the statute permits to be done, and also that he relied solely upon two witnesses to prove his residence. That the Congress has the power to exclude aliens from the United States will not be questioned, and that it also has the right to prescribe the method of procedure and the rules of evidence in deportation cases is clear. Under the act of May 5, 1892, as amended by section 1 of the act of November 3, 1893, in deportation cases the only evidence of a Chinese laborer's right to be in the United States is the certificate of residence mentioned in such legislation, or, in lieu thereof, testimony showing that by reason of accident, sickness, or other unavoidable cause he was unable to procure such certificate. The legislation mentioned, in direct terms, requires the testimony of at least one creditable white witness to prove the residence of a Chinese person in the United States prior to the registration period. In deportation cases it is error to ignore this provision of the law. In the court below the appellee failed to offer the testimony of any white witness to prove his residence. Appellee's failure in the particulars mentioned is conclusive against his right to remain in the United States, and compels his deportation.

The appellant insists that the court below erred in holding that the appellee was shown by the evidence offered to properly belong to one of the privileged classes mentioned in the statute, namely, teachers, students, merchants, and traders—the finding of the court being that he was a merchant. The burden of proof was upon the appellee to show that he was a merchant within the meaning of that avocation as described in such statutes. It has been held that a Chinese person engaged in keeping a restaurant and lodging house is a laborer (United States v. Chung Ki Foon [D. C.] 83 Fed. 143); that a Chinese person whose occupation was that of a laundryman is a laborer within the meaning of the law (In re Leung, 86 Fed. 303, 30 C. C. A. 69); that a Chinese person owning an interest in a mercantile firm, but not engaged in conducting it, who is also a cook in a restaurant of which he is part owner, is a laborer, and not a merchant under the acts we are now considering (Mar Bing Guey v. United States [D. C.] 97 Fed.

576); that a Chinese person who from the date of his landing in this country, although he has an interest in a mercantile business, is a laborer (United States v. Yong Yew [D. C.] 83 Fed. 832).

We quote with approval from the case of Lee Ah Yin v. United States, 116 Fed. 614, 54 C. C. A. 70, as follows:

"We do not think it was the purpose of this amendatory act to enlarge the limits of the privileged classes, or to restrict the meaning of the term 'laborers' as it had been used in the treaty and in the prior acts. We think its purpose was not to remove any of the bars against Chinese immigration, but to remove doubt, and make definite and certain, as included within the designation 'laborers,' certain occupations which were upon the border line between the occupation of laborer and that of merchant, and which in some aspects might be regarded as belonging to the merchant class. The occupation of mining, taking fish for the purpose of selling the same, peddling, operating a laundry, etc., partake of some of the characteristics of the occupation of the merchant, and those engaged therein might in a sense be deemed merchants. Evidently it was to define these specific occupations, and to declare that persons engaged therein are not merchants, that the act was adopted. We find in it no evidence of an intention to enact that the word 'laborers,' as used comprehensively in the treaty and in the prior acts, was thereafter to be confined solely to manual laborers and to those who follow the specific occupations enumerated. It is not declared that such and none other are to be deemed laborers. It is significant that the next clause of the same section of the amendment defines the term 'merchant,' and provides that the term as employed therein and in the acts of which it is amendatory shall have that 'meaning and none other.'"

There is error in the judgment complained of, and the same will be reversed.

CAMP BIRD, Limited, v. LARSON.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1907.)

No. 2,482.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE OF CHANGE AFTER ACCIDENT INADMISSIBLE TO PROVE.

Evidence that after the accident the master repaired his machinery or building, or adopted a different method of conducting his business, is inadmissible to prove his negligence at the time of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 918.]

(Syllabus by the Court.)

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

L. F. Twitchell (Frank C. Goudy and Story & Story, on the brief), for plaintiff in error.

John C. Bell (F. D. Catlin and C. L. Blake, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff below, a servant of the Camp Bird, Limited, a mining corporation, was injured by the fall of rock from a bucket which was ascending through a runway as he was

mucking in the bottom of a shaft. The bucket was drawn up through a runway in the corner of the shaft which was lined with plank. At the tunnel level, which was 220 feet above the bottom of the shaft, one side of this runway was open for a height of 16 feet to permit the introduction of timber, pipes, and other materials. Across the upper end of this opening there was a timber, termed a "strut," the inner face of which was four inches farther from the center of the runway than its lining below the opening, so that the runway was four inches wider opposite this strut than it was below the opening. The plaintiff was at work at the foot of this runway, and as the bucket, which had been filled with stone, was drawn up, it caught on this timber and spilled some of its contents upon him. The first witness called on his behalf was the superintendent of the mine, and his examination proceeded in this way:

"Q. Did you ever see the arm of that bare timber where the bucket caught on the 13th of April? A. No, I didn't.

"Q. Didn't see the arm? A. No, sir.

"Q. Why did you have the opening so high? A. To swing in timber, rail, pipe, tools of all kinds, I suppose, going into the bottom.

"Q. It wasn't necessary to have it that high? A. Yes, should have been higher.

"Q. Haven't you shortened it materially? A. No.

"Q. Is it in the same condition now that it was at the time of the accident?

"Mr. Twitchell: We object, as we don't see why that has any bearing in the case as to condition then.

"Mr. Bell: We don't wish to show it as an admission of the defect, or to show it for any other illegitimate purposes. What we desire is to show that they have not only changed or shortened it materially, but put in different timber, etc.

"The Court: I think you can ask that question.

"To which ruling of the court, the defendant by its counsel, then and there duly excepted.

"A. No, sir.

"Q. How has it been changed? A. I put in some short planking from the lower side of that timber, probably 18 inches long.

"Q. Doesn't that go practically 18 inches lower? A. No, not on the line of the timber.

"Mr. Bell: This is a small model made by the plaintiff himself. Now, this is what he calls the platform. Now, at the time the accident occurred, that timber was square there, wasn't it, about 18 feet above? A. Yes, sir.

"Q. Now it comes in that shape?

"Defendant objects, if court please.

"The Court: Counsel disclaims any purpose—

"Mr. Bell: But we do claim that by this very door they ran their timber up there, and that they come in on the inside and have taken 18-inch boards and have brought it that way to have no difficulty at all, and have improved the shaft very much.

"Mr. Twitchell: Upon that part, your honor, he states that it is sought to show that they improved the shaft, and no negligence of that sort is alleged. The only negligence that is alleged is the existence of this cross-piece in the original condition of the shaft.

"The Court: You have asked about a special condition. You may ask that.

"Mr. Bell: I will pass that.

"Q. Now, give its present condition. A. We put in timber here on the outside.

"Q. Back from a line of the shaft, outside the shaft entirely? A. Yes, sir.

"Q. Then you took boards and you boarded from the inside of the two? A. No.

"Q. How did you board it? A. Boarded it from the inside face of that particular timber. It came against the other timber."

Evidence that after the accident the master repaired his building or his machinery, or adopted a different method of conducting his business, is inadmissible to prove his negligence at the time of the accident, because a rule that such evidence is competent would impose a penalty upon the master for making such repairs and changes, would make them a confession on his part of a prior wrong, and would in that way deter him from improving his property and his ways. Evidence of this nature is always inadmissible because it has no legitimate tendency to prove that the building, the machinery, or the methods were not reasonably safe and suitable for the use to which they were applied at the time of the injury. Railroad Co. v. Hawthorne, 144 U. S. 202, 208, 12 Sup. Ct. 591, 36 L. Ed. 405; Motey v. Pickle Marble & Granite Co., 20 C. C. A. 366, 371, 74 Fed. 155, 159; Railway Co. v. Parker, 5 C. C. A. 220, 222, 55 Fed. 595, 597. The reception of the evidence that after this accident the defendant put in short planking probably 18 inches long from the lower inside face of the timber, which caught the bucket so that the upper end of the opening took the form of an inclined plane, instead of a horizontal timber, as before the accident, was a clear violation of this rule of evidence which necessitates a new trial of this action.

The error of the admission of this testimony was not extracted by the charge of the court, which does not refer to it, nor by the statement of counsel for the plaintiff that they did not wish to introduce it as an admission of defect or for any other illegitimate purpose, especially in view of their declaration at the same time that they did claim to establish by virtue of it the fact that the defendant had taken 18-inch boards and had improved the shaft very much. Notwithstanding this statement of counsel, the fact remained that the evidence had a tendency to lead the jury to believe that the defendant was negligent before the accident, because after the accident it changed the form of the portion of the shaft upon which the bucket caught so that it would not catch it.

Upon this ground alone, the judgment is reversed.

The majority of the court are of the opinion that the evidence was sufficient to require a submission to the jury of the issue as to the negligence of the company, and that it was insufficient to show as a matter of law that Larson either assumed the risk or was guilty of contributory negligence, while the writer is convinced that there was no substantial evidence of any negligence on the part of the company.

HILLHOUSE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 7, 1907.)

Nos. 90, 3,751.

1. CUSTOMS DUTIES—CLASSIFICATION—HOUSEHOLD EFFECTS—AUTOMOBILE.
The provision for "household effects" in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 504, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1683], includes automobiles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 28.]

2. SAME—USE ABROAD ONE YEAR—CONTINUITY OF USE.
The provision for household effects "used abroad * * * not less than one year," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 504, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1683], is satisfied if the periods of such use aggregate one year, even though not continuous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 28.]

3. SAME—REPAIRS—DUTIABILITY.
Held that an automobile should not be excluded from importation free of duty as household effects used abroad more than one year, under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 504, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1683], by reason of having been extensively repaired shortly before importation. So much of the machine as is a new manufacture may be assessed with duty; but the rest, including the cost of overhauling, oiling, cleaning, readjusting, and regulating, is free under said paragraph.

4. SAME—ENTIRETY—CONSTRUCTIVE SEPARATION.
In applying a tariff law, a single article may be constructively separated into parts subject to different classifications.

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

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York, 142 Fed. 303, affirming a decision of the Board of General Appraisers, G. A. 5,849, T. D. 25,768, which sustained the collector of the port of New York, in assessing duty on an automobile of foreign manufacture under the tariff act of 1897.

Walden & Webster (Howard T. Walden, of counsel), for importer.
D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. Duty was assessed under paragraph 193, as an article wholly or in part of iron or steel or other metal, at 45 per cent. ad valorem. It is not disputed that, if dutiable at all, it should be under this paragraph. The only claim made here—the importer has abandoned others which were set forth in the protest and discussed by the board—is that the automobile is entitled to free entry under—

"Par. 504. Books, libraries, usual and reasonable furniture, and similar household effects of persons or families from foreign countries, all the foregoing if actually used abroad by them not less than one year, and not intended for any other person or persons, nor for sale." Act July 24, 1897, c. 11, § 2, Free List, par. 504, 30 Stat. 196 [U. S. Comp. St. Supp. 1901, p. 1683].

The Supreme Court, in Arthur v. Morgan, 112 U. S. 495, 5 Sup. Ct. 241, 28 L. Ed. 825, held that carriages were properly classified as household effects, and we see no reason why automobiles should not be similarly disposed of. The Board of General Appraisers disposed of this claim by finding that there was no satisfactory proof that the machine had been used abroad for a year. This defect of proof was supplied in the circuit; and it now appears that after its purchase in October, 1901, it was used abroad for four months, was then brought here (duty being paid on it) and used until August, 1903, and then taken abroad and used more than nine months in Europe. The act does not require continuous use abroad; and it was conceded in the Circuit Court (and is conceded here) that the automobile was actually used abroad by the owner for more than one year, and was not intended for any other person or for sale. It appears, however, that extensive repairs were made upon it shortly before its second shipment to this country. The judge at circuit found that "the motor had been overhauled, new parts substituted in place of old, and the body had been repaired and newly upholstered." He held:

"A new manufacture, in part at least, would seem to have been the result. If the repairing had consisted simply of painting and adjusting parts of the machine which had become impaired and defective by reason of its ordinary use, a more liberal construction of the provision of the tariff act would be justified."

And he affirmed the board, which had sustained an assessment on the full value of the machine, 10,000 francs.

We concur in part only in this conclusion. As to so much of the machine as was a new manufacture which had not been used abroad for a year, duty was properly exacted; but when the value of such new manufacture is easily determinable there seems no good reason for requiring so much of it as has been used abroad for the requisite time to pay duty also. In the case at bar it appears that the total cost of the overhauling and repairs was 2,989.55 francs, of which 489.55 francs was paid for such work as overhauling, oiling, cleaning, readjusting, and regulating. Upon the balance only, 2,500 francs, should duty as "manufactures of metal," etc., be assessed.

The decision is reversed.

UNITED STATES v. J. S. JOHNSON & CO.

(Circuit Court of Appeals, Second Circuit. January 8, 1907.)

No. 91 (3,398).

CUSTOMS DUTIES—CLASSIFICATION—PRESERVED PINEAPPLES.

Pineapples preserved in cans in their own juice, with 3 per cent. of sugar added for flavoring, and not aiding substantially in the preservation, which is accomplished by the canning process, *held* dutiable as "pineapples preserved in their own juice," and not as fruit preserved in sugar, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

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

For decision below, see 143 Fed. 915, reversing a decision of the Board of United States General Appraisers, G. A. 5,352 (T. D. 24,494), which had affirmed the assessment of duty by the collector of customs at the port of New York.

The merchandise consists of pineapples in tin cans. The question at issue is whether it is dutiable under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], for "fruits preserved in sugar," as held by the collector and the Board of General Appraisers, or under the further provision in the same paragraph for "pineapples preserved in their own juice," as held in the court below. It appears from the opinion by Judge Platt in the Circuit Court that the pineapples as found in the cans contained nearly 14 per cent. of sugar, a little over 3 per cent. of which consisted of cane sugar extrinsically added in the process of preparation, that this sugar seemed to have been introduced rather in the way of flavoring than as aiding substantially in the preservation of the fruit, and that the preservation was principally accomplished by the juice of the fruit together with the boiling and other canning processes. The court expressed the view that, "when Congress referred to fruits preserved in sugar, it meant fruits in which sugar plays a prominent and important part," and that therefore the pineapples in dispute were more properly classed as preserved in their own juice.

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

Walden & Webster (Howard T. Walden, of counsel), for importers.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We concur fully in Judge Platt's opinion. Incidentally reference may be made to our recent decision in A. L. Causse Co. v. U. S., 151 Fed. 4 (Dec. 4, 1906), where we held that certain cherries were not "preserved in their own juice" when the juices which were retained in them only tended to produce their decay. In the case at bar the preservative qualities are found in the juice itself, the boiling of the pineapple in the juice and the hermetically sealing of the contents in the tin cans.

The decision is affirmed.

FULD & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 11, 1907.)

Nos. 117, 4,038.

CUSTOMS DUTIES—PROTEST—SUFFICIENCY.

An importer's protest read: "Protest is hereby made against * * * your decision assessing duty at 35 per cent. ad valorem, or other rate or rates, on lithographic prints, krippen, mechanical cards, etc., covered by entries below named. * * * This protest is intended to apply separately and collectively to every part of goods assessed under paragraph 418, as well as to all other goods assessed at 35 per cent. ad valorem." *Held*, that the protest was not insufficient because no part of the importation in question was assessed at the rate of 35 per cent. under paragraph 418 (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1674]), or elsewhere, but should be construed as relating to lithographic prints and booklets assessed at other rates and under another paragraph than were mentioned in the protest.

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

For decision below, see 143 Fed. 920, which affirmed a decision of the Board of United States General Appraisers, which had overruled a protest against the assessment of duty by the collector of customs at the port of New York.

The pertinent part of said protest reads as follows: "Protest is hereby made against your ascertainment and liquidation of duties and your decision assessing duty at 35 per cent. ad valorem, or other rate or rates, on lithographic prints, krippen, mechanical cards, etc., covered by entries below named. The reasons for objection under the tariff act of July 24, 1897, are as follows: Said merchandise is lithographic prints. It is covered by paragraph 400, and is dutiable thereunder at five cents per pound, or six cents per pound, or other rate or rates, according to thickness, cutting size, etc. If not as aforesaid, it is printed matter or otherwise covered by paragraph 403. and is dutiable thereunder at only 25 per cent. ad valorem. This protest is intended to apply separately and collectively to every part of goods assessed under paragraph 418, as well as to all other goods assessed at 35 per cent. ad valorem."

It appeared that the merchandise covered by the entry mentioned in the protest consisted of lithographic prints and booklets, assessed at the rate of 20 cents per pound and 8 cents per pound, respectively, under Tariff Act 1897 (Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), and that no part of the importation was classified at 35 per cent. or under paragraph 418. The board held that the protest was insufficient on the ground that it was in terms confined to merchandise assessed at 35 per cent. and therefore could not be construed as covering the articles classified at a different rate. This ruling was affirmed by the circuit court in the decision above cited, but on different grounds from those stated by the board.

Comstock & Washburn (Albert H. Washburn, of counsel), for the importers.

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

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decision reversed, for reasons orally stated at the close of the argument, and protest held to be a sufficient compliance under Customs Administrative Act June 10, 1890, § 14, par. 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

STANDARD OIL CO. v. ANDERSON.

(Circuit Court of Appeals, Second Circuit. February 26, 1907.)

No. 162.

MASTER AND SERVANT—FELLOW SERVANTS—SERVANTS OF SEPARATE MASTERS IN SAME WORK.

Plaintiff, a longshoreman, engaged in loading a vessel as an employé of a master stevedore, who had contracted to do such loading, and who had contracted with defendant for the steam power, is not a fellow servant of the employé of defendant, who worked the steam winch, and through whose negligence plaintiff was injured; the winch man being hired and paid by defendant, and the master stevedore having no power to discharge him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 485.

Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

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

This cause comes here upon appeal from a judgment of the Circuit Court, in favor of defendant in error who was plaintiff below. The action is to recover damages for personal injuries, and the jury brought in a verdict for the plaintiff.

J. W. Fuller, for plaintiff in error.

B. L. Pettigrew, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff, who was in the employ of one Terence, a master stevedore, was engaged with others in loading the steamship Susquehanna with case oil at the dock of the Standard Oil Company, in Bayonne, N. J. A foreman and a gang of men hired by Terence were located at different stations about the ship or on the dock, each engaged in performing his respective duty. The plaintiff was in the hold, and was struck by a draft of cases which was lowered at a time when he was not expecting it to descend. The hoisting from the dock and lowering into the hold was accomplished by the use of a steam winch located on the dock some 50 feet distant from the hatch. A gangwayman, one of Terence's employés, gave signals by whistle to the winchman, thus advising him when to run the winch forward or back, and when to stop. The evidence shows that the accident happened because the winchman reversed the winch (so as to lower the draft) before signal to do so was given him. The jury found that he was at fault, and that the plaintiff was free from any contributory negligence. There was evidence to warrant both these findings, and their verdict thereon is to be taken as conclusive. Some argument is presented here as to the plaintiff's alleged carelessness, and as to the negligence of some others of his gang; but the only point seriously urged is that plaintiff and the winchman were fellow servants. If they were not, the judgment must stand, because the verdict has eliminated all other questions from the case. If the gangwayman or the man who hooked the slings were also negligent, plaintiff, if not a fellow servant with the winchman, could recover, if the latter's negligence was a proximate cause of the accident.

The master stevedore hired the longshoremen, and contracted with the defendant for the steam power, agreeing to pay "$1.50 a thousand for hoisting." The winch was the property of defendant, standing on its dock, and it selected, hired, and paid the winchman who ran it. The master stevedore did not pay the winchman, nor hire him, and could not discharge him if he did not suit; in the latter event he would complain to the defendant company. This case is therefore on all fours with The Slingsby, 120 Fed. 748, 57 C. C. A. 52, where we held that a sailor operating a ship's winch by order of her captain to assist a gang of longshoremen in discharging cargo was not their fellow servant, although he received the signals to run the winch forward or to reverse from their foreman. Our attention has been called to The Elton, 142 Fed. 367, 73 C. C. A. 467, in which the Circuit Court of Appeals in the Third Circuit reached a different conclusion upon a similar state of facts. We

regret that we are not able to agree with the conclusions of law reached by that eminent court, but we see no reason to change the opinion heretofore expressed in The Slingsby, which was reached after a careful examination of the authorities cited in The Elton.

The judgment is affirmed.

SOUTHERN PAC. CO. v. BURCH.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1907.)

No. 1,345.

REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—NONRESIDENCE OF PARTIES.

A federal court cannot acquire jurisdiction by removal of a suit in which such jurisdiction is dependent on diversity of citizenship, where neither of the parties is a resident of the district, and the plaintiff does not consent to such jurisdiction or waive his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 32, 33.]

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

See 145 Fed. 443.

S. Summerfield and P. F. Dunne, for plaintiff in error.

Herbert R. Macmillan and H. H. Henderson, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was originally brought in one of the courts of the state of Nevada by the defendant in error as plaintiff, against the plaintiff in error as defendant, to recover damages for personal injuries alleged to have been sustained by the plaintiff to the action by reason of the negligence of the defendant thereto. The plaintiff being a resident and citizen of the state of Utah, and the defendant to the action being a corporation of the state of Kentucky, and therefore a resident and citizen of that state, upon the defendant's motion, and the filing of a petition and bond, the case was removed from the state court of Nevada to the United States Circuit Court for the District of Nevada, where the plaintiff to the action, defendant in error here, moved the court below to remand the case to the state court for lack of jurisdiction in the federal court over it, which motion the court below denied, and a trial thereof having been subsequently had, resulting in a verdict and judgment for the plaintiff, the case was brought here by the defendant thereto by writ of error.

Neither party to the suit being a citizen or resident of the state of Nevada at the time of its commencement, we must, without reference to the merits of the controversy, upon the authority of the case of Ex parte Abram C. Wisner (decided by the Supreme Court December 10, 1906) 27 Sup. Ct. Rep. 150, 51 L. Ed. ——, reverse the judgment, with costs to the defendant in error, and with directions to the court below to remand the case to the state court from whence it came, for lack of jurisdiction of the federal court over it.

In re CRAWFORD.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1907.)

No. 68.

BANKRUPTCY—JURISDICTION—INDIAN TERRITORY—JURISDICTION TO REVISE ORDERS.

The United States Circuit Court of Appeals of the Eighth Circuit has no jurisdiction to revise in matter of law, under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [3 U. S. Comp. St. 1901, p. 3432]), the orders of the courts of original jurisdiction of the Indian Territory sitting in bankruptcy.

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

(Syllabus by the Court.)

Petition to Revise Order of the United States Court for the Southern District of the Indian Territory, in Bankruptcy.

Clinton A. Galbraith, Thomas D. McKeown, and Joseph B. Thompson, for petitioner.

James T. Blanton, Leonidas C. Andrews, and Alvin F. Pyeatt, for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. John P. Crawford has presented his petition to revise in matter of law, under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [3 U. S. Comp. St. 1901, p. 3432]), an order of the United States Court for the Southern District of the Indian Territory, sitting as a court of bankruptcy, to the effect that he pay over to R. C. Fleming, the trustee of the estate of one Gibson, a bankrupt, $1,300, and that his exceptions to the report and order of the referee to the same effect be overruled.

The Indian Territory has never been assigned to this circuit, as have the territories of New Mexico and Oklahoma, under section 15 of the act to establish the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 830 [1 U. S. Comp. St. 1901, p. 554]; 139 U. S. 707, 11 Sup. Ct. iv); and for that reason, as was decided in Re Blair, 106 Fed. 662, 664, 45 C. C. A. 530, 532, upon a review of the acts of Congress, the Court of Appeals of this circuit is without jurisdiction to entertain petitions to revise, in matters of law, the orders of the courts of original jurisdiction of the Indian Territory sitting in bankruptcy.

The petition is therefore dismissed for want of jurisdiction.

VENUS SHIPPING CO. v. WILSON.

(Circuit Court of Appeals, Second Circuit. January 31, 1907.)

No. 99.

1. SHIPPING—NONFULFILLMENT OF CHARTER—DAMAGES.
The question of the damages to a shipowner arising from a loss of earnings under a charter which was abandoned by the charterer depends upon contingencies of navigation more or less speculative and incapable of being precisely ascertained, and in such case approximate accuracy is all that can be reasonably expected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 213.]

2. SAME—MEASURE OF DAMAGES.
Defendant chartered libelant's vessel to carry a full cargo of cotton from Savannah to Bremen, agreeing to pay a specified sum per ton for the vessel's registered net tonnage. Subsequently he refused to fulfill the charter, and after some days of negotiation a new charter was made to take a cargo of cotton from Galveston to Bremen, but without waiver of libelant's right to recover damages for breach of the first charter. *Held*, that in estimating such damages the court was justified in assuming that the time taken in loading and discharging would have been the same under the first charter as was actually taken under the second, and in taking as the measure of damages the average daily earnings made under the second charter as compared with the average which would have been made each day under the first if the voyage had been made in the time estimated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 213.]

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

Frederick M. Brown and Butler, Notman & Mynderse, for appellant.

George M. Clarke, Henry G. Ward, and Robinson, Biddle & Ward, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The decree appealed from awarded damages to the libelant, the owner of the steamship Neptune, for the nonfulfillment of a charter party. The case involves the question of the probable loss sustained by a shipowner through losing the net earnings of a vessel upon a voyage which was abandoned, an inquiry which generally presents difficulties, because its solution depends upon various contingencies of navigation more or less speculative and incapable of being accurately ascertained. In such cases approximate accuracy is all that can be reasonably expected.

By the charter between the parties, made September 27th, the full cargo capacity of the steamship was let for a cotton cargo upon a voyage from New York to Savannah, and thence to Bremen, including the period contemplated for loading the cargo at Savannah and discharging it at Bremen; and the charterer was to pay freight at the rate of a specified sum per ton for the net tonnage of the vessel. The voyage under that charter would have begun October 24th, but several days previously the charterer notified the libelant that owing to conditions in the cotton market it would be impracticable for him to obtain a cargo at Savannah, and suggested the substitution of Galveston as the load-

ing port. Negotiations by cable and otherwise, as to substituting Galveston for Savannah, continued until nearly the end of the month, the respondent offering the then prevailing freight rates for a voyage via Galveston, and the libelant insisting upon the fulfillment of the first charter, or a freight rate which would requite the loss arising from the breach. October 31st the parties made a new charter for a voyage via Galveston upon such terms as had been previously offered by the charterer and refused by the libelant; but this was made upon the understanding that the libelant was not to waive any claim of damage arising from the nonfulfillment of the first charter. Under the second charter the vessel was employed 64 days, beginning November 2d and ending January 5th, and her earnings above the expenses of her navigation and other disbursements, which were to be borne by the libelant, averaged £42 5s. 10d per day.

The court below, approving a very careful and thorough report made by the commissioner to whom the question of damages had been referred, found that under the first charter the vessel would have been employed 55 days, beginning October 24th and ending December 18th, and that her earnings above the expenses and disbursements which the libelant would have incurred would have averaged about £59 per day. Damages were awarded by the court below upon the basis of the difference between the net earnings for the period of 55 days actually realized under the second charter, and those which would have been realized under the first charter. This was equivalent to allowing the whole of the average daily net earnings under the first charter between October 24th and November 2d, the period during which the vessel was out of employment, and the partial loss of daily net earnings from that time until December 18th, when she should have completed her employment under the first charter.

The appellant insists that the court below erred in several particulars in reaching its conclusions of fact in respect to the probable duration of the employment of the vessel if the first charter had been fulfilled, and in respect to the net earnings she would have made. We have carefully examined the proofs in order to ascertain whether the award was excessive. We are satisfied that the findings of the commissioner in respect to the first charter are fairly sanctioned by the proofs in all important particulars. We see no reason why the average daily time made by the vessel on the voyage to Galveston and thence to Bremen should not be accepted as the average daily time she would have made in proceeding to Savannah and thence to Bremen, or why the time occupied in loading and unloading at Galveston and Bremen should not be accepted as sufficient data for showing what time would probably have been occupied in loading at Savannah and unloading at Bremen. Upon the other facts that enter into the question of duration and expense, although doubtless as to some of them there is room for a difference of opinion, we cannot find that any mistake has been made, except in a minor particular. That error arose in treating October as a month of 30 days instead of 31. Criticism is made of the item of brokerage on freight which enters into the estimate of expenses. But this item was not specifically challenged in the 25 exceptions to the commissioner's report, or in the 30 assignments of error in this court;

and, in view of the number of errors assigned which have no other support than the ingenious arguments of counsel, we are not disposed to search for errors not assigned.

Inasmuch as under either charter the vessel would have been at Bremen at the expiration of her term of employment, we are unable to appreciate the contention based upon the difference in freight earnings upon eastward and westward voyages across the Atlantic. The contention that the libelant's damages are in some way limited by the offers made by the charterer during the negotiations preceding the new charter is without any merit. If on the 24th of October, or any later day, the charterer had offered to enter into a new charter, leaving the rights of the parties under the existing charter untouched, and the libelant had refused such an offer, it would be unjust to charge the charterer with the difference between the daily net earnings from that time until the vessel entered upon her new employment. In that case the libelant would have refused an opportunity to mitigate the damages. But the libelant was within its legal rights so long as it did not refuse an offer which it ought to have accepted in order to mitigate the loss. If the libelant had accepted these offers, it would in effect have consented to substitute a new charter, and thereby would have waived its right to enforce the earlier one. The freight rate offered by the respondent, although it was the prevailing rate at the time, was a lower rate than the libelant was entitled to receive under the earlier charter, as rates on cotton cargoes had fallen materially since the making of that charter. The result proves that the offers made by the charterer would not, if they had been accepted, have covered libelant's loss.

Criticism has been made of the allowance by the court below of the cable messages between the libelant and its agents, Wright & Son, the brokers who negotiated the charter for the libelant. It is apparent that the messages from Wright & Son were sent in the interests of the charterer, and upon his application to have them intercede with the libelant for a modification of the original charter or for the acceptance of offers for its cancellation; and the messages from the libelant were in response to those from Wright & Son.

The decree should be modified by deducting the daily loss in net earnings for a single day, with interest thereon, and, as thus modified, is affirmed, with interest and costs of this appeal.

GOLDSMITH v. KOOPMAN.

REIZENSTEIN v. SAME.

(Circuit Court of Appeals, Second Circuit. January 7, 1907. On Rehearing February 28, 1907.)

Nos. 51, 52.

1. PARTNERSHIP—RELATION BETWEEN PARTNERS—PURCHASE OF INTEREST OF COPARTNER.

A purchase by one partner of the interest of a copartner in the partnership will be sustained only when it is made for a fair consideration and upon a full disclosure of all important information as to value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 142.

Purchase of copartner's interest, see note to Towle v. Hammond, 40 C. C. A. 508.]

2. SAME—FRAUD—CONCEALMENT OF FACTS.

Complainant obtained United States and foreign patents for an invention, and a partnership was formed between complainant, defendants, and others to handle the patent and the invention abroad; a fund being contributed for the purpose by the partners, all of whom were to share in the profits. One of the defendants went to England, and there made license contracts, from which he received considerable sums in cash and was to receive more. He cabled information of such transactions to a codefendant, who, by withholding the same from complainant and another partner, owning together a half interest, and by representing that the partnership was in debt and that more money would have to be contributed, secured from them an assignment of all their interest in the partnership and patents for a consideration much less than their share of the profits already made. *Held*, that such assignment was voidable for fraud, and complainant was entitled to its cancellation, and to recover his share of the profits realized by the assignees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 142.]

3. FRAUD—LIABILITY—RATIFICATION OF FRAUD OF ANOTHER.

One who knowingly accepts the benefit of a contract procured by another by fraud, in part in his interest, ratifies the transaction, and is equally liable for the fraud.

4. PARTNERSHIP—BREACH OF TRUST BY PARTNERS—JOINT AND SEVERAL LIABILITY.

The right of action against quasi trustees, as partners, who have been guilty of a fraudulent breach of their duty toward copartners, is ex delicto, and the tort may be treated as several or joint, and the defendants have no right of contribution as between themselves.

5. APPEAL—PRESENTATION OF OBJECTION BELOW—EQUITY—JURISDICTION.

The objection to the jurisdiction of a court of equity on the ground that complainant has an adequate remedy at law cannot be raised for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1180.]

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

For opinion below, see 140 Fed. 616.

F. T. Hovey and Herman Aaron, for appellant.

Eugene Treadwell, Isaac Hassler, and Harrison B. Weil, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree canceling, as obtained by fraud, an assignment executed by complainant October 2, 1891, by which complainant and one Reizenstein transferred to the defendant and others all their interest in certain patented inventions and in the profits arising from a license agreement which they had made with John H. Brigham.

The undisputed facts of the case as disclosed by the proofs are these: Prior to April, 1891, the complainant Goldsmith had made an invention relating to coin holders or pocket banks, for which he had obtained letters patent in England and other foreign countries, and had transferred a half interest therein to one Reizenstein. April 14, 1891, Goldsmith and Reizenstein made an agreement with the defendant, Willard Upton, Henry M. Brigham, and John H. Brigham, whereby the parties thereto agreed to become copartners in manufacturing and selling the patented invention abroad, and to contribute $2,000 as capital; each advancing his ratable proportion, and each to share ratably in the profits. By this agreement the partnership shares of the complainant, Reizenstein, and the defendant were to be one-fourth part each, Henry M. Brigham's share was to be one-eighth part, and the shares of John H. Brigham and Upton were to be one-sixteenth part each. This agreement also provided that all matters relating to the partnership were to be "determined by a majority vote of all the parties interested," and that each party "should be entitled to one vote for each one-sixteenth interest in the copartnership." The capital was duly contributed, and Reizenstein and John H. Brigham went to England to negotiate licenses and sales. Subsequently all the parties comprising the copartnership entered into an agreement, bearing date May 5, 1891, by which John H. Brigham was made the sole licensee of the foreign patents, with the exclusive right to grant sublicenses and make and sell the patented articles during the life of the patents. By this agreement Brigham undertook to pay half-yearly a royalty of one cent each on all of the patented articles sold, and guarantied that no less than $4,000 should be paid over by him upon sales to be made within three years from the date of the agreement. This agreement had been prepared by Reizenstein and Brigham in England, and was not signed by the other parties thereto until they had returned from England, which was about June 1st, when all the parties met at New York City. While Brigham was in England he had negotiated a sublicense agreement with Wright & Butler, of Birmingham, and had begun negotiations for a similar agreement with Rollins & Co., of London. After the agreement dated May 5, 1891, making Brigham sole licensee, had been signed by all the parties, in August, 1891, the defendant Koopman went to England in the interests of a pool or subpartnership, called in the evidence "Pool No. 2," which had been formed between Koopman, Upton, and the two Brighams. Under this pool these four associates were to share all profits which might result from the license to Brigham. Neither Reizenstein nor the complainant were taken into this pool. After the defendant reached England he succeeded in making new arrangements with

Wright & Butler and with Rollins & Co., culminating in formal contracts by which these concerns undertook to pay John H. Brigham large sums by way of royalties as sublicensees, including payments in hand from one of them alone for sales of 1,200,000 of the patented articles. When these arrangements had been definitely agreed to, Koopman advised Upton of their purport by cable, and thereupon Upton promptly proceeded to procure from the complainant and Reizenstein the assignment of October 2d.

The principal controversy in the court below was whether this assignment was induced by fraud, and whether the defendant was a party to the fraud; and the principal assignments of error present the question whether the proofs justified the court below in finding against the defendant upon these issues.

We shall not undertake to recapitulate the evidence contained in the record bearing upon these questions, as the facts established by documentary evidence and by the testimony of the defendant and his own witnesses supply, with but little assistance from the other testimony, enough to call for the cancellation of the assignment. The proofs satisfactorily support the findings of the court below to the effect that the assignment was obtained from complainant and Reizenstein upon false statements made to them by Upton; that these statements were that the copartnership was in debt, that little or no business had been done abroad, and that $5,000 of new capital was needed to pay the debts and keep up the foreign business; and that when these representations were made Upton knew of the successful negotiations of Koopman in England, and that large sums of money were about to be realized for the benefit of the partnership. The assignment was induced, not only by these untrue representations, but by the concealment from the complainant and Reizenstein by Koopman and Upton of all that had lately occurred in England. Its consideration was the sum of $1,750, and for this sum the complainant and Reizenstein parted with all their interests in the partnership property at a time when these interests were worth at least five times that sum, and were worth prospectively much more.

Koopman insists that he was innocent of participation in this fraud, and that he had no knowledge of the assignment until he returned from England, shortly after it had been procured. If Upton had been the sole perpetrator of the fraud, it is unlikely that he would have spontaneously divided the benefits of it with the defendant. The assignment ran by its terms to Koopman and Upton. Both of them signed it, though Koopman signed by Kronheimer, as his attorney. In fact it was procured for the benefit of the associates in pool No. 2, and Kronheimer was a silent partner with Koopman in that pool. Defendant had advised Upton of the altered situation in England, whereby large payments would be derived from Wright & Butler and Rollins & Co. The day of his arrival he was informed about the transaction by Kronheimer. When he learned the small consideration which had been paid, he was put upon inquiry as to the honesty of the transaction. Instead of interviewing the victims he preferred to share the fruits of the purchase. He was a party to the transaction by ratification, if not originally by a previous understanding with Upton.

The assignment was a fraud in the view of a court of equity, irrespective of any direct misrepresentations. When Koopman informed Upton of the changed situation in England, without informing complainant and Reizenstein of the facts which had largely enhanced the value of their interests, he was guilty of a breach of the fiduciary duties owing by him to them as copartners. A sale by one partner to another of his partnership interest will be sustained only when it is made for a fair consideration and upon a full disclosure of all important information as to value. The concealment by Koopman of material facts, which it was his duty to disclose, was a fraud which invalidated the assignment. Story on Partnership, § 172; Brooks v. Martin, 2 Wall. 70, 85, 17 L. Ed. 732; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764.

We differ from the court below in the conclusion that the license to Brigham was inoperative. It would have been an operative instrument if Koopman had not signed it before the parties separated after their interview in New York in early June. It had been signed by the majority provided for in the partnership articles, and Koopman, as well as all the other members of the copartnership, was therefore precluded from challenging its validity as a transfer of the whole partnership interests. We cannot accept the theory that the complainant or Reizenstein supposed that it was inoperative. It was explicitly recited in the assignment as in existence, and was explicitly transferred by the assignment to Upton and Koopman; and the assertion of the complainant and Reizenstein that this was done merely as a matter of form cannot be allowed to prevail against their deliberate act. But it matters not what their suppositions may have been, so long as it was a valid and binding instrument. Its effect was to divest them and all the partners of any rights or interest in the copartnership property, except to share the royalty which might accrue from the Brigham license.

The conclusion that the license to Brigham constituted the only property of the partnership after it was executed requires a modification of the decree. The complainant was not entitled to any profits realized by Brigham under his license, or derived by the defendant and Upton through the assignment to them. He was only entitled to his fourth of the royalties which Brigham undertook to account for by the license agreement, including, by necessary implication from the terms of the license, the royalty on sales made by Brigham's sublicensees. Any profits above the royalty which might accrue to Brigham from sales by himself or by his arrangements with sublicensees became his. The negotiations by Koopman in England, which culminated in the agreements with Wright & Butler and Rollins & Co., resulted in large profits to Brigham, and incidentally to the associates in the subpool. By the agreement with Wright & Butler that concern undertook to pay Brigham $20,000 cash down, in consideration of the abrogation of certain conditions of a previous sublicense; "such sum being computed at the rate of 2½ cents United States currency upon the sale of 800,000 banks guarantied to be sold by the party of the first part (Wright & Butler) from and after the date hereof." Under that provision he or the pool received $20,000; whereas, the royalty for which Brig-

ham was to account under his license would have been $8,000. By that agreement Wright & Butler also undertook to take over orders for sales which Brigham had on hand for 400,000 banks and pay therefor $10,000. Under that provision of the agreement Brigham became accountable for royalty under his own license to the extent of $4,000. The decree awarded a recovery to the complainant upon the basis of the payments received by Brigham from his sublicensees; whereas, it should have been upon the basis of the royalties due from him under his license. No accounting was ordered, and the decree adjudged a recovery of one-fourth of the sums of money which it affirmatively appeared had been received by the subpool. We observe, also, that the decree did not provide for the restitution by the complainant of his half of the $1,750 received as the consideration for the assignment. Upon the cancellation of the assignment he was bound to restore what he had received, and the decree should have provided for the deduction of the amount from the amount otherwise recoverable against the defendant.

By the assignment to Upton and the defendant, the complainant and Reizenstein were wrongfully deprived of the share of the royalties which would otherwise have accrued to them under the license to Brigham. Upton and the defendant are jointly and severally liable for the loss induced by their fraudulent conduct. The right of action against quasi trustees who have been guilty of a fraudulent breach of their trust is ex delicto, and the tort may be treated as several or joint, and the trustees have no right of contribution as between themselves. Ervin v. Oregon Ry. & Navigation Co. (C. C.) 20 Fed. 577, 582; Peck v. Ellis, 2 Johns. Ch. (N. Y.) 131; Miller v. Fenton, 11 Paige (N. Y.) 18; Heath v. Erie Ry. Co., 8 Blatchf. 347, Fed. Cas. No. 6,306; Wilkinson v. Parry, 4 Russ. 272; Franco v. Franco, 3 Ves. 75.

We have not overlooked the contention for the appellant that the complainant had a complete and adequate remedy at law, and therefore could not resort to a court of equity. That this position is untenable sufficiently appears by reference to Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005, without the citation of other authorities.

The decree is modified, so as to direct an accounting and a recovery in conformity with this opinion, and in other respects is affirmed, with out costs to either party.

On Rehearing.

PER CURIAM. We have considered the application by the appellee for a reargument, and think it should be denied, as we did not overlook the various contentions of the appellee respecting the validity and effect of the license agreement with Brigham. Nor did we overlook the consideration, though we did not refer to it in our opinion, that it does not appear to have occurred to the appellee's counsel that the court could not have adjudged that agreement to be inoperative, void for fraud, or otherwise invalid. Brigham was not a party to the suit, and no decree could have been made in his absence adjudging his license void.

CANDA BROS. v. MICHIGAN MALLEABLE IRON CO.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,615.

1. PATENTS—JOINT SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.
In a suit by joint owners of a patent for its infringement, profits cannot be recovered which accrued from infringements prior to the date of the joint ownership, and when the patent was the sole property of one of the complainants.

2. SAME—ACCOUNTING FOR PROFITS—DEDUCTION FOR LOSSES.
On an accounting for profits for infringement of a patent, the infringer is not entitled to deduct from the profits made during a certain period of time a loss subsequently incurred in a separate transaction. On such an accounting only losses occurring concurrently with the making of profits and directly resulting from the particular transactions on which the profits are allowed may be considered in diminution of profits.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 576.]

3. SAME.
Where infringement of one claim only of a patent is adjudged, the infringer cannot be held to account for profits arising from the sale of a part of the device which was not an element of such claim, although it may have been an element of other claims.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 572.]

4. SAME—SEPARATION OF PROFITS.
It is the settled rule that, where the infringed device was a portion only of defendant's machine, which embraced inventions covered by other patents, it is incumbent on complainant to show how much of the profit made was due to such other patented parts, and how much to those of his own invention; but, before such rule is applicable, the burden rests upon the defendant to show the existence of such extraneous elements and the probability that they affected the price of the machine, and this is not done by showing that elements of the combination of complainant's patent and of the infringing machine were also elements of prior patented combinations where they were not separately patented, and were therefore open to use by complainant as parts of his own combination and invention.

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

James C. Chapin, for Canda Bros.

James Whittemore, for Michigan Malleable Iron Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This cause was here in 1903 on appeal from a decree of the Circuit Court dismissing the bill. The suit was for the infringement of a patent granted to Canda, September 29, 1891, for the invention of a draw-bar attachment for connecting railroad cars. The number of the patent was 460,426. Being of opinion that the first claim of the patent was valid, and finding that the defendant infringed it, we reversed the decree, and directed the Circuit Court to enter a decree in favor of the complainants in respect of said first claim, and thereupon to proceed to ascertain the profits and damages and to grant the usual relief. The case is reported in 124 Fed. 486, 61 C. C. A. 194. On entering the proper decree in the court below, a reference to a master was ordered to take proof and state an account

of the profits and damages, and report the same to the court. On coming before the master, the complainants renounced their claim for damages, and the parties went into proof in respect to the profits. It was shown that on October 3, 1899, Ferdinand E. Canda, the patentee, assigned a one-half interest in his patent to the co-complainant, Charles J. Canda, and it came to be owned by them as a partnership. The complainants offered proof to show infringement and damages occurring before the assignment as well as subsequent thereto. Objection was made by the defendant to the proof concerning the period before the assignment. The master in his report divided the whole period of infringement covered by the evidence into three parts; First, that before the assignment; second, that directly following and continuing until the end of the time during which sales were made and profits realized; and, third, a subsequent space of time during which the defendants manufactured casing for a customer who never paid for them, and from whom the debt is uncollectible. For the first period the master found the profits to be $6,905.41, for the second $11,659.50, and the losses from the manufacture in the third to be $6,634.56. The master reported against the allowance of a recovery for the profits accruing during the first period, and in favor of their allowance for the second period; and he also reported in favor of a contention for the defendant that the losses of the third period should be deducted from the profits allowed for the second period. The result was a balance in favor of the complainant of $5,024.94. Exceptions to the report were filed by each party. So far as some of these are material, they will be mentioned later on; but for our immediate purposes it should be stated that the court sustained the complainants' exception to the master's disallowance of the profits for the first period, but overruled the complainant's exception to the master's deduction of the losses of the third period. Having also overruled exceptions to the allowance of the profits for the second period, the court rendered a decree upon this adjustment in favor of the complainant for the sum of $11,930.35. Both parties have appealed.

1. The first question in its order to be considered is whether the complainants were entitled to recover the profits made during the period of infringement while Frederick J. Canda was the sole owner of the patent. The master was of opinion that they could not be recovered in this suit because the other complainant had no interest in them; but the court held otherwise, and allowed them, and we think that in this the court was in error. The general rule is that all the parties suing must have an interest in the recovery in order to warrant a judgment therefor in their favor. Even if that were permissible, the bill did not seek to recover a several decree in favor of one of the complainants for one part of the profits, and a joint decree for another. On the contrary, the complaint was of infringement after the date of the assignment. In support of the ruling of the court in this particular, the learned judge cited Moore v. Marsh, 7 Wall. 515, 19 L. Ed. 37; but that case is not in point for the complainants. The patentee, some time after getting his patent, assigned a one-half interest therein to another party. Subsequently the patentee brought a suit to recover damages for infringement committed before the assignment.

The defendant pleaded the assignment, and insisted that, as at the bringing of the suit another party had become interested in the patent, such other party should have been joined as plaintiff. But the Supreme Court held otherwise, and Mr. Justice Clifford, at page 522 of 7 Wall. (19 L. Ed. 37), said:

"It is clear that unless the plaintiff can maintain the action there can be no redress, as it is too plain for argument that a subsequent assignee or grantee can neither maintain an action in his own name, or be joined with the patentee in maintaining it for any infringement of the exclusive right committed before he became interested in the patent. Undoubtedly the assignee thereafter stands in the place of the patentee, both as to right under the patent and future responsibility; but it is a great mistake to suppose that the assignment of a patent carries with it a transfer of the right to damages for an infringement committed before such assignment."

In the case of Adams v. Bellaire Stamping Co. (C. C.) 25 Fed. 270, cited by counsel for complainants, the suit was brought by a single plaintiff, who was assignee of the patentee, and was also assignee of the damages for prior infringements. The question was whether he could recover for prior and for subsequent infringements and Judge Sage held that he could. This was because he was the assignee of the patentee's damages. The court below erred in including the profits for this period in the recovery, and the decree must be corrected accordingly.

2. The court below also erred in sustaining the defendant's claim of a deduction for the losses incurred by said defendant during the third period of the reckoning, and in deducting those losses from the profits which the complainants were otherwise entitled to recover. In the opinion of the court, the cases of the Cawood Patent, 94 U. S. 710, 24 L. Ed. 238, and Rubber Company v. Goodyear, 9 Wall. 788, 19 L. Ed. 566, are cited as authority for the ruling; but these cases only hold that losses occurring concurrently with the gaining of profits may be taken into account—that is to say, if they are losses directly resulting from the particular transaction on which the profits are allowed. Though called losses, they are really diminutions which are taken into account in reaching the resultant profits of the sales on which profits were made. The general statements made by the justices who delivered the opinions in the cases last cited, and which are here relied on as authority for the claim that all the transactions running through several years are to be looked to, and the profits and losses of a continuous business are to be balanced for a result, do not sustain such a contention. The meaning and authority of such general statements should be limited by the facts of the case in which they were expressed. And it is necessary to impose such limitations in order to make the statements consistent with the law as since declared by the same court. Callaghan v. Myers, 128 U. S. 617, 664, 9 Sup. Ct. 177, 32 L. Ed. 547; Crosby Valve Co. v. Safety Valve Co., 141 U. S. 453, 12 Sup. Ct. 49, 35 L. Ed. 809; Walker on Patents (4th Ed.) § 713.

3. It appears that the proofs before the master included the profits on the bottom plate of the casing, and the report of the master included them. To this the defendant filed an exception, which was overruled by the court. The second claim of the patent included the bottom plate in the combination. The first did not. By reference to our former

opinion, it is shown that we sustained the first claim; but, as to the second, we affirmed the decree of the Circuit Court dismissing the bill upon the ground solely that infringement was not proven. We did not pass upon the validity of the second claim. The decree entered below in conformity with our mandate directed that the accounting should be for the infringement of said first claim. The contention of the complainant that the profits on the bottom plate should be included rests upon the ground that the making and selling of it was a contributory infringement of the first claim. Assuming it to be so, it does not follow that the defendant should be charged with the profits on the manufacture and sale of it. The infringement was of the invention of the principal member of the entire casing, and only of that member. It might well be that the supplying of the bottom plate would be contributory to the infringement and render the contributor liable for the trespass of the principal infringer. But infringement by the latter, if not of the whole thing, is only of some part, and it is the infringing of that part which the contributor helps the principal to do. As we pointed out in our former opinion, patentable invention may be of some member of a combination or thing which, when associated with other elements, either such as are known to the art or such as are suggested but not claimed by the inventor, is new and useful. But that gives him no proprietary interest in the things thus associated. So here, Canda having invented certain new and useful parts of a draw-bar casing, though he might have omitted to mention any bottom plate, if the state of the art would indicate to the builder that a bottom plate should be added, did nevertheless specify that a bottom plate would be needed, and proceeded further to describe a good form for one. The result reached by the court below upon this part of the accounting confounds claims 1 and 2, and extends the recovery to all the elements of the second claim. This we think was erroneous; but, as the master took care to distinguish that part of the profits which accrued on account of the bottom plate, the decree may and should be modified by deducting that part, which the master reports as amounting to $1,532.

4. Another exception of the defendant rests upon the facts that certain earlier patents, two in particular, one to Cushing and another to Thornburgh, had been taken out for "draw-bar stops for railroad cars" and "draft apparatus" for the same, which the defendant says indicate certain features of construction which are embodied in the infringing castings made and sold by the defendant, and which augment the profits wherewith the defendant is charged. The principle upon which this exception is grounded is well settled; but, before it can be applied, it is incumbent on the defendant to prove that the peculiar characteristic features or some substantial part of such peculiarities of the former patents were embodied in the patented articles sold, and that they were of such a character that they probably contributed to the profits. Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000. On this being shown, the burden of proof is devolved on the party seeking to recover the profits to prove what part of the entire profits are due to the use of his own invention. He must make the separation of values and show to the court how much is his rightful

proportion. Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371.

Here is the rock on which many patent causes have been stranded at the end of their course, for, though it can sometimes be done, it is generally next to impossible to distinguish the profit due to one rather than another of the characteristics of the article sold, or manufactured to be sold. The price is single, and it would rarely happen that either the buyer or the seller would contemplate the price as made up of components grounded on such a distinction. The facts are similar to those which in other cases would condemn the guilty party to suffer the consequences of his mingling indistinguishably the property of an innocent party with his own or that of another. Counsel for defendant has argued this question upon the theory that the rule laid down in the case of Elizabeth v. Pavement Co. was an exception merely to that stated in Garretson v. Clark, and seems to suppose that, in every case where some element or elements of a combination found in a former patent is found also in the infringing article, the burden is cast upon the plaintiff to prove either that it did not affect the selling price of the article, or, if it did, to show what part of the price was due to his own invention. But such a rule would be inconsistent with the decision in Elizabeth v. Pavement Co. We think the two cases above mentioned are not inconsistent, and that they are easily reconciled upon the assumption that the rule of the first case is applicable to the question of the burden of proof of showing the presence of the extraneous element and the probability that it has affected the price, and that the rule in the second case relates to the burden of proof after those facts are established. Thus, in the later case of Keystone Mfg. Co. v. Adams, 151 U. S. 145, 148, 14 Sup. Ct. 295, 38 L. Ed. 103, in summing up the conclusions reached thereon, one was stated to be "that where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the complainant is entitled to nominal damages only," from which it seems that the conditions stated must have been made to appear before the rule stated could be applied.

Where the extraneous matter is another invention which is the subject of a monopoly in some other person, the reasons for the rule requiring a distinguishing of profits becomes clearer because of the necessity of preventing a double liability on the part of the defendant; but the reasons for its application to any other case are vague, and the practice difficult. In the present cause the court below held that it was not proven that the inventions of the Cushing and Thornburgh patents, or either of them, were embodied in the casings on which the profits were calculated, or contributed thereto, and in this we entirely agree. An examination of the testimony in the record shows that some of the forms of parts of the combinations of those patents are to be found in the Canda patent, but nothing which represents any patented device of Cushing or of Thornburgh. Nor do we find any substantial thing deserving of being reckoned as a factor to which a portion of the price was due. It was settled as between these parties by the former decree

that there was nothing in the prior art which anticipated the invention of the patent in suit, and that conclusion cannot now be disputed. The unpatented elements of the Cushing and Thornburgh patents (and they were all singly unpatented) were common property. Any other inventor might take them, if he did not take an entire combination, and use them as parts of his own structure, and, if they were a fit embodiment of his own ideas, they, in his combination, represented parts of his invention, and the invention pervaded the whole structure. We therefore conclude that there was no error in disallowing this exception.

There are no other questions of sufficient importance to require discussion. There is a question of costs, but they were in the discretion of the court, and not the subject of appeal.

The decree of the Circuit Court will be reversed, and the cause remanded, with instructions to modify it in accordance with this opinion, and, as thus modified, re-enter it as the final decree of the court.

TYDEN v. OHIO TABLE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 18, 1907.)

No. 1,598.

1. PATENTS—INFRINGEMENT—LOCKING DEVICE FOR TABLES.

The Tyden patent, No. 675,577, for a locking device for pedestal tables, claim 1, is void as too broad and substantially for a function. The remaining claims, while disclosing invention and valid as improvement claims, are of narrow scope and limited to the specific device shown. As so construed, *held* not infringed.

2. SAME.

The Wilhelm patent, No. 736,327, for a locking device for pedestal tables, *held* not infringed.

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

C. S. Burton, for appellant.

H. Frease, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a suit for alleged infringement of two patents, one issued to C. Wilhelm, August 11, 1903, and the other to E. Tyden, June 4, 1901. The Wilhelm patent has been assigned to Tyden. Both patents are for improvements in locking device for "pedestal tables." It is averred that the claims sued upon, being claims 1 and 2 of the Wilhelm patent, and 1, 2, 3, 4, 14, 15, and 16 of the Tyden patent, are capable of conjoint use, and that same have been so conjointly used by the defendants, who are operating under two later patents, one of October 16, 1904, to J. F. Arnold for an extension table lock, and one of December 27, 1904, to same party for an extension table. The defense was invalidity of complainant's patents and noninfringement. The court below sustained the patents, but held that they had not been infringed. A pedestal extension table was old. Tyden describes such a table as "a table which, when closed up without the ex-

tension leaves, have a support consisting of a central pedestal with spreading feet at the base, the pedestal being vertically divided, and one part pertaining to each of the two parts of the table top, and having rigid with it two of the feet." He then says that in such tables a center leg, attached to a crossbar connecting opposite slides pertaining to the extension devices, is inclosed within the two parts of the pedestal, which is hollow for the purpose. The difficulty which he set himself to remedy in these well-known tables was, that the pedestals when closed did not close tightly so as to present a solid and workmanlike appearance. "My invention," says the patentee, "consists of means for locking the two parts of the pedestal together in such manner as to close them up from top to bottom. * * *" His first claim is an exceedingly broad one, claiming, as it does, every means which involve an element on each part and below the top of the pedestal. It is in these words:

"A pedestal extension table, in combination with a vertically-divided pedestal and the two separate parts of the table top attached to the respective parts of the pedestal, means for binding the pedestal parts together, comprising an element on each part at a substantial distance below the top of the pedestal, and means whereby they are adapted to be connected when the pedestal parts approach; means for operating on said elements after they are connected to cause them to bind the pedestal parts together, extending from said elements upward, and thence under the table top toward the margin thereof."

The second claim is for specific means for accomplishing this end. It is in these words:

"In a pedestal extension table, in combination with a vertically-divided pedestal and the two separate parts of the table top rigid with the parts of the pedestal respectively, a locking device for connecting the two parts of the pedestal together, comprising two mutually engaging elements, one on each part of the divided pedestal, said elements being adapted to become engaged before the pedestal parts are fully closed together; one of the said locking elements being movable on the part of the pedestal to which it pertains, and operating connections by which it may be moved in direction to draw the parts of the pedestal together."

The other claims in issue cover slight differences in means described, and need not be set out.

A vertically-divided pedestal, hollow and inclosing a central leg when closed, this center leg being the support for the center of the table when extended, one-half of the pedestal being rigidly attached to each of the movable members of such a table, was old. Means intended to draw these two parts of the pedestal together and hold them in contact were well known. That they did not do this in such manner as to make a tight joint and prevent an unfinished appearance is shown. That Tyden has provided a locking device which is an improvement upon the old devices for the purpose, and with better results, is the best which can be said for him. Examples of the devices of the old art used to accomplish the same purpose are to be seen in the old Briggs patent of 1843 and the Thorn patent of 1851, also the Hoffmeier patent of 1881. Devices in analogous arts performing the same function of drawing two parts closely together and holding them so were very common. For furniture locks, see patent No. 22,456, to Robinson; No. 139,844, to

Wolf; No. 475,581, to Liebe; and that to Wilen, 552,026. For sash locks or fasteners, see patent to Christie, 160,509; No. 162,614, to Breckenridge; patent to Ives, No. 317,540. A sash fastener made by Hastings is admitted to be substantially identical with sash-fastener devices employed before Tyden's invention as a means for holding together the lower ends of divided pedestals on extension tables. The lever, C, of the Tyden device is identical with the lever or brake bar in the patent to Jones, 608,865, for a vehicle brake. What Tyden did was to combine old and well-known means for locking two parts and holding them tightly together and adapt them to the ornamental pedestals of tables. The field was a narrow one, and his device is not generic. Confined to the specific means he has shown for doing the thing he set out to do, his patent covers a step which is but an improvement, but a patentable one. This does not apply to claim 1. That is not limited. It claims all means for locking and holding such pedestals, and is substantially a claim for a function. It cannot be upheld, and must be held void. We agree with the court below in holding that, thus limited, the other claims are not infringed. We also agree in the conclusion that the claims of the Wilhelm patent are not infringed.

Modified so as to hold claim 1 of the Tyden patent void, as too broad, and for a function rather than a device, the decree of the Circuit Court will be affirmed.

GENERAL ELECTRIC CO. v. BULLOCK ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,567.

PATENTS—INVENTION—FIELD-MAGNET POLES.

The Reist patent, No. 573,107, for means of securing field-magnet poles, is void for lack of patentable invention.

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

W. K. Richardson, for appellant.

Thomas F. Sheridan and Clifton V. Edwards, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit in equity brought by the General Electric Company against the Bullock Electric Manufacturing Company and others, for an injunction, with the usual prayer for an accounting, for the infringement of letters patent No. 573,107, issued December 15, 1896, to Henry G. Reist, the assignor of the complainant, for securing field magnet poles. In the specification, the invention is described as follows:

"My invention relates to securing pole-pieces to revolving field-magnet structures, particularly in alternating-current dynamos, where the field-magnet poles are made of assembled laminations of sheet iron. To this end I make the laminations with a dovetailed tenon upon the ends, so that when they are assembled the pole-piece may be slipped sidewise into the field-magnet structure. I then insert keys, so as to take up any lost motion between the pole-piece and the field-magnet, the end plates of the poles being provided with

overhanging lips or flanges which serve to retain the field-magnet coils in place. I may then remove any field-magnet coil or any pole-piece without removing the field-magnet structure as a whole."

It is stated in the specification that it is manifest that the invention may take a number of forms, and four of these forms are illustrated in the drawings. The claims are as follows:

"(1) The combination with a revolving field-magnet structure, of pole-pieces separated from each other, and arranged on the periphery of said field-magnet structure, said pole-pieces being composed of laminated material, and being dovetailed into the periphery of said revolving structure, and means for taking up the play of the parts.

"(2) The combination with a revolving field-magnet structure, of pole-pieces projecting from the periphery of said field-magnet structure and separated from each other, said pole-pieces being each composed of a bundle of laminæ, and outside clamping-plates, the several parts being bolted together, the pole-pieces being dovetailed to the periphery of said revolving structure, and keys for taking up the play of the parts, as herein set forth."

The defense made in the court below was "lack of invention," and, in disposing of it, Judge Thompson said (146 Fed. 551):

"The use of larger machines, in the course of the development of the art, called for stronger means for fastening the pole-pieces to the yoke, but which would be consistent with the maintenance of the magnetic, and electric conditions and the advantages secured by such structures as that of the Parcelle patent, No. 463,704. The problem was purely a mechanical one, and the mechanic arts afforded a broad field for the selection of such means, and Reist chose therefrom a well-known method, that of the dovetail and key, which permits the use of many different forms, 'all embodying the same general characteristics,' four of which he employs, and, in addition, claims the exclusive right to employ the one used by the defendant and necessarily all forms thereof used for the same purpose.

"Upon his own showing, the invention claimed lies in the adaption of the dovetail and key method to the fastening of the pole-piece to the yoke. The selection of this well-known method did not require the exercise of the inventive faculty, and no more difficulties attended its adaption than usually follow its employment in numerous devices of the mechanic arts. When the conditions are known, the adaption, usually, may safely be intrusted to the skilled mechanic. It is a problem for the electrical engineer and the skilled mechanic, and not for the inventor.

"Patentable invention is not shown and the bill will be dismissed."

While we failed to agree with Judge Thompson in his holding that no invention was shown in the Parcelle patent, we cannot withhold our approval of the conclusion of a similar nature which he reached in the present case. The Reist patent involves nothing more than the application of the well-known dovetail and key method to the fastening of the laminated pole-pieces of a field magnet to the yoke thereof. This method of fastening has been used time out of mind in all kinds of purely mechanical devices, and recently also in dynamos and other electric machinery, so there is no question in this case, as in the Parcelle, of the transfer of a well-known device from a remote art to one in which it had not then been used. The invention does not present any result, whether mechanical, magnetic, or electric, which was new. They were all old. Nor was there any combination produced which had the merit of novelty or invention.

The judgment is affirmed.

BALL & SOCKET FASTENER CO. v. PATENT BUTTON CO

(Circuit Court, D. Connecticut. March 13, 1907.)

No. 1,169.

PATENTS—CONTRACTS—CONSTRUCTION—SALE OF PATENTS AND INVENTIONS.

A contract by which defendant transferred to complainant all of its rights in certain patents and in inventions for "separable fasteners of the kind hereinafter defined but no others" construed, and *held* to cover only separable fasteners of the snap variety, in which the resiliency is in the socket and not in the stud or post; it being shown that there are two distinct types, of which that is the distinguishing feature, and that all of those covered by the patents or identified by the contract were of the former type.

In Equity. Bill demanding specific performance of certain portions of a contract, and, that having been granted, for further relief.

Donald Campbell, for complainant.

Bristol, Stoddard, Beach & Fisher (John K. Beach and Samuel H. Fisher, of counsel), for defendant.

PLATT, District Judge. The preamble of the agreement in suit shows that the Patent Button Company had certain rights under the Shorey patents and in any "improvements upon the inventions described in said patents," and that said inventions for separable fasteners had no relation to the "fixed buttons made and sold by the Patent Button Company," but did relate to the "separable fasteners made and sold by the Ball & Socket Fastener Company." The agreement then turns over to the present complainant all rights in the Shorey patents (paragraph 1), waives all rights to the present or future inventions by Shorey (paragraph 2), and all rights in inventions for "separable fasteners of the kind hereinafter defined but no others" (paragraph 3). Going to paragraph 10, we find the "kind" defined in these words:

"The said term 'separable fasteners' is now intended, and shall always be understood, to mean separable fasteners and no others that are now made and sold by the Ball & Socket Fastener Company, and * * * described in the aforesaid Shorey patents now existing, viz., Nos. 345,930 and 352,271, and also * * * described in letters patent to Clark M. Platt and numbered 181,979, and also such * * * as may hereafter be assigned * * *."

None having been assigned, the last clause of the definition is immaterial.

It is obvious that the agreement has to do exclusively with separable fasteners of the snap variety, because fixed buttons of defendant's manufacture are referred to in the preamble, and the parties could not have imagined that the term "separable fasteners," especially when connected with the Shorey and Platt patents, could be construed as referring to fixed buttons, hooks and eyes, corset clasps, or any other article not endowed with the peculiar function discovered in the patented structures. The evidence shows that separable fasteners of the snap variety were, at the time the agreement was made, divided patentably and mechanically into two plainly distinguished kinds or classes. One kind had as a distinguishing feature a resiliency in the cup or socket; the other kind was equally distinguishable by a resiliency in the stud or ball. The

trade, with the brevity and terseness which a business life enforces, divided them into those with "spring posts" and those with "solid posts." The two varieties were being produced in large quantities, but some makers brought out one kind, and other makers the other kind. Separable fasteners which got the snap from a spring post or stud were much more expensive than those which obtained it from a spring socket. No concern was then making both kinds, and the complainant had confined itself absolutely to resilient socket fasteners, although it controlled a patent relating to the other kind.

The agreement in suit is also confined, specifically and categorically, to turning over only the patents in which the Patent Button Company had rights, and which related to the kind the complainant was then making, and any later patents relating to the same kind, and to clench the matter and make assurance doubly sure, added words which are especially adapted to emphasize the purpose in mind. It almost seems as if "coming events" must have "cast their shadow before" at the moment when the defendant insisted upon the insertion, and reinsertion, and insertion again, of those words of exclusion—"but no others," "and no others," "no others."

Complainant says that because the parties to the agreement were in distinctly different commercial channels it is probable that defendant intended to give up all it had and all which might come to it in the general art which complainant's manufacture covered. That argument might have appealed to the defendant when the contract was under discussion, but the contract as written shows that it was either not presented at all or was ineffective. The patentable and mechanical distinction between the spring post and rigid post fasteners is a strongly marked and important one. It was in the minds of the parties when the agreement was made, and obviously the White patents, Nos. 691,222 and 692,953, belong to the kind where the resiliency resides in the stud, and are thereby distinguished from the kind referred to in the contract, where the resiliency resides in the post. Infinite variations might be applied to either type, but the central controlling mechanical distinction would remain.

Let the bill be dismissed.

CLANCY v. TROY BELTING & SUPPLY CO.

(Circuit Court, N. D. New York. March 19, 1907.)

1. PATENTS—ASSIGNMENT—VALIDITY.

It is not essential to the validity of an assignment of a patent that it should be acknowledged, where the genuineness of the assignor's signature is proved.

2. SAME—LICENSE.

An oral agreement by the owner of a patent, made without consideration, that he would not trouble an infringer so long as the latter confined himself to the use of a certain metal in making the infringing device, affords no protection to the infringer after he has commenced to use a different metal.

3. SAME—INFRINGEMENT—HOSE CLAMP.

The Redfield patent, No. 480,515, for a hose clamp, construed, and *held* infringed.

In Equity. Suit to restrain alleged infringement of United States letters patent to Lewis H. Redfield, assignor of one-half thereof to John R. Clancy, No. 480,515, dated August 9, 1892, for "hose clamp," and for an accounting.

Alfred Wilkinson, for complainant.

Alexander & Dowell (Arthur E. Dowell, of counsel), for defendant.

RAY, District Judge. The complainant is a manufacturer of hose clamps; the defendant, a corporation of the state of New York. The defendant sells the alleged infringing devices. Defendant says it has five defenses, all complete: First, complainant has not shown complete title to the patent in suit and cannot alone maintain the action; second, if he has become such owner of the patent, he has shown no infringing act by defendant since he became such owner; third, the manufacturer of the alleged infringing devices was authorized and licensed by complainant to make and sell them, and that, as defendant is a mere seller, it is protected by such license consent and authority; fourth, that the alleged infringing devices are made under another patent, not owned by complainant, which is valid, and there is no infringement by defendant; fifth, the complainant is equitably estopped to maintain this suit by reason of the consent and agreement aforesaid and by reason of laches.

The defendant in open court on the argument concedes the validity of complainant's patent, but says it must be given a narrow construction. The claims, two in number, read as follows:

"(1) As an improved article of manufacture, a hose-clamp band formed in one piece of sheet metal, perforated in its ends, and having longitudinal slits extending from a point some distance from the end of the band toward the center of its length and meeting in a transverse slit; the main portion of said band being bent circular shape, the perforated end portions being bent radially outward, and the free end of the slitted portion being bent back and lapped onto the inner side of the opposite end of the main portion, substantially as described and shown.

"(2) The band, C, composed of sheet metal and having the finger, c, formed integral therewith and bent into the outwardly-projecting loop, c', and folded with its free end back onto the inner side of the band and lapped onto the opposite end of the main portion of the band, substantially as described and shown."

This improved article of manufacture consists, when complete and bent into shape, of a band of circular sheet metal in one piece, which may be of any suitable size, but which circular band is not integral; that is, it has two ends each of which is perforated. This band has in the making longitudinal slits, each extending from a point some distance from the end towards the center of its length, where it meets a transverse or cross slit. This portion produced by the slits forms a sort of tongue or finger, which is bent back and towards the mouth or opening of the circular band, and spans or bridges it, and the free end, the end not attached to the band, is lapped onto the inner side of the opposite end of the main portion; that is, lapped onto the inner side of the end of the band to which it is not attached, or, more properly speaking, perhaps, the end of which it is not an integral part. This slitting and bending away of the tongue leaves slots, one

or more, as the case may be, in the band, which take hold of or bite the hose, when in actual use and closed down, and prevent slipping, and make its grip of the hose more firm and secure. This particular feature is covered by Redfield's prior patents. There may be one or more fingers or tongues formed in the same way; one or two on each side, depending on the size of the clamp. The perforated ends of the clamp are bent upwardly or outwardly to form ears or flanges. The perforations therein receive a bolt with a head and nut. This head engages with one ear, the nut with the other, and the nut is prevented from turning and coming off by means of flanges on the ear which bear on it. By turning the bolt in the nut the two ears are drawn towards each other, and the diameter of the space within the band lessened, so that it is tightened around the hose; and as the opening between the ears is spanned by the tongue or "finger," the pressure on the hose is uniform its entire circumference, and there is no buckling of any part of the hose, and no leak or cutting into the hose. This tongue or finger in such a device or clamp, formed in one piece (aside from the bolt and nut), is new and novel in the art, and durable, and has great practical utility. It is used by thousands and has met with large sales. It cheapened production. It discloses patentable novelty.

The infringing device is an exact duplication, a Chinese copy, except it has more elaborate ears, but no elaboration that adds to the utility of the device, and is so bent as to form, at the place where the end of the tongue or finger is "lapped onto the inner side of the solid portions of the opposite end of the band," a sort of depression, described in a subsequent patent (Sherman, No. 499,760, dated June 20, 1893), as "channels located in its solid portion at the ends of said opening." The only possible office or function of this channel is to allow the tongue or finger to lie therein and make the grasp of the clamp more perfect and uniform. It would occur to any one to provide this, and adding it did not constitute patentable invention; nor does its addition to defendant's device avoid infringement. The infringing device would have anticipated if earlier, and it infringes being later. The device of Sherman patent is much better described than that of the patent in suit; but the invention of the patent in suit is so described, illustrated, and claimed that it is easily understood and can readily be made. Being made of sheet metal, it is tough, not liable to break, and possesses resiliency. The specifications say:

"My present invention relates specially to the formation of the fingers which span the space between the coupling-ears of the clamp to prevent the hose from being buckled or crimped up and caught between said ears in the operation of tightening the clamp on the hose.

"The object of this invention is to form said fingers on the band in a simple and inexpensive manner and with a minimum consumption of material; and to that end the invention consists in the improved construction of the hose-clamp band, as hereinafter fully described and specifically set forth in claims."

In the prior art we find certain cast-iron clamps, with similar tongues or fingers, having similar ears; but these were more cumbersome, and did not have the slits or the slots. They were more expensive, and were not made from or formed in "one piece, stamped out of suitable

sheet metal by means of suitable dies," as is the device of the patent in suit. This device combines great strength with little weight and great elasticity, ease and simplicity of construction, and saving of material.

As to title, and the right of the complainant to maintain this action, the facts are as follows: (1) The complainant owned one-half the patent when it issued. (2) Redfield, who owned the other half, September 27, 1892, mortgaged it to Clancy, and this was recorded in the Patent Office, and there is no proof it was ever paid. It has not been satisfied or canceled. Thereafter Redfield assigned his one-half interest, which was subject to the mortgage held by Clancy, to one Burke. Burke died, and then his interest was duly transferred to one Truesdell, and by him to complainant. Complainant paid nearly $4,000 to perfect his title. However, prior to perfecting his title, Clancy brought suit for the infringement against this defendant; but the defect of title, if it was, being pleaded, he discontinued the suit on his own motion, and then perfected his title and brought this action.

It is said by defendant that the execution of the assignment made by Redfield is not duly proved; it not being acknowledged. But the signature of Redfield thereto was duly proved by the witness Truesdell, who said he was familiar with Redfield's signature, and in his opinion the signatures of Redfield to Exhibits D, E, F, and G are his genuine signatures. These are the exhibits alleged to be not proved. No objection was made to this proof. Perfect title in complainant prior to the bringing of this suit is shown. That the suits referred to were not dismissed on the merits, but on complainant's own motion, appears from the record and other oral evidence not objected to.

The defense of an oral license agreement and consent rests on the following evidence given by the complainant:

"A. In 1896 Mr. Redfield and myself commenced a suit for infringement of this patent against the H. B. Sherman Manufacturing Company, of Battle Creek, Mich. Mr. Harrison Hoyt was our attorney. Mr. Sherman and Mr. Cox came on here to Syracuse to see us, and discussed at some length entering into an agreement. There was an agreement drawn, but upon further consideration we considered it unwise to sign it. Some time after Mr. Sherman called to see me, and, as I thought, we had made our position pretty clear by bringing suit on this patent, and considered that he, by his position, had recognized the validity of our patent. I wasn't very anxious for litigation or trouble, preferring to get along peacefully with our competitors if we could. I told Mr. Sherman that, as long as he confined himself to brass clamps, I would not bother him, believing that I could do pretty well on steel, although at this time almost the entire demand was for a brass clamp; but I had a good deal of confidence that steel would win out in time. Sherman agreed to that; but he never gave me a cent, or any other consideration, and I considered that we merely had a gentlemen's understanding. We stuck at the steel clamps, but it was pretty up-hill work for several years; but about 1900 and 1901 we had worked up a very nice business. This was all new business, worked up at a great deal of trouble, labor, and expense, all based on the patent in suit. After we had demonstrated that there was a field for steel clamps, we understood that Mr. Sherman had gone back on his word and was selling a steel clamp. We first heard of this, I think, about 1903. My attorney, Mr. Hoyt, has been dead for several years."

Clancy strictly complied with this agreement, but defendant did not. After a time he commenced making and selling steel hose clamps,

and hence this suit. This is proved by ample evidence. Clearly this oral agreement not to bother Sherman so long as he confined himself to brass clamps (complainant's being of steel, sheet metal, not brass) did not bind Clancy after Sherman disregarded and violated it by making and selling steel clamps, or clamps made of sheet metal, not brass, as he did. Nor did it thereafter protect this defendant, or others who were selling the steel clamps made by Sherman in violation of such agreement. The defendant was not selling in reliance on such an agreement. There is no equitable estoppel; quite the contrary. Nor is there any laches. So long as Sherman observed the agreement, and abided by it, Clancy would have offended decency and good morals, had he repudiated it and sued for infringement. He did what good morals required him to do, and nothing more. The agreement had in its terms its own limitations. "So long as Sherman confined himself to brass clamps, he was not to be molested."

I should say here that defendant dumped into the record several patents, presumably to show the prior art and affect and limit the construction to be given complainant's patent. These are not accompanied by a word of explanation, and within the authorities will not be considered.

Complainant's patent was allowed as claimed, nothing being cited against it, and it was not limited by any action or concessions there. It is entitled to as broad a construction as the language of the claims and the specifications warrant. There is evidence that defendant has continued to infringe down to the commencement of this action. It was cataloguing and offering the offending clamps for sale.

I do not think any defense is made out, and there will be a decree for complainant, with costs.

AMOS-RICHIA v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court, E. D. Michigan, S. D.)

No. 8,473.

INSURANCE—ACTION ON LIFE POLICY—EVIDENCE OF DELIVERY.

After a man's death, a policy of insurance on his life, payable to his wife, was found among his papers. There were no canceled internal revenue stamps thereon as required by law at the time of its date, but attached thereto was an envelope containing the requisite stamps, and on the envelope were printed directions that such stamps were "to be attached to the second page of policy No. ——— when put in force," and also that, when affixed, they must be canceled, by the agent by writing the initials of the company and the date thereon, and that, if the policy should be returned to the company before delivery, the uncanceled stamps must accompany it. After the policy was found by the beneficiary, she procured the stamps to be affixed thereto and canceled by the collector of internal revenue, and brought suit thereon. It was not shown that the deceased ever disclosed his possession of the policy to any one, or claimed to have insurance in the company. *Held*, that such facts did not create such a conflict of evidence, as to the essential fact of the delivery of the policy as a completed contract of insurance, as to entitle the plaintiff to the submission of the case to the jury, as against the otherwise uncontradicted evidence on behalf of defendant that it was merely

delivered for examination and comparison with others, and that no premium was ever paid thereon.

In Equity. On motion to direct verdict for defendant.

T. A. E. Weadock, for the motion.
George Donaldson, opposed.

SWAN, District Judge (orally). The motion here has been ably argued on both sides, and I can conceive nothing which has not been presented that would affect the conclusion to which I have arrived that would be justified by the evidence. The motion is presented on two grounds: (1) That there is no evidence of the delivery of the policy sued upon. (2) There is no evidence of the payment of the first premium which the policy makes a condition precedent to its taking effect.

The facts are, briefly: That the policy of life insurance sued upon in which plaintiff is named as beneficiary, was found among papers of plaintiff's husband, the insured, after his death. There is no evidence that he claimed it as his property. Its possession alone is prima facie evidence, as argued by counsel, that it was rightly in his possession. "Prima facie evidence" means simply that evidence which is sufficient, in the absence of evidence to the contrary, to warrant a judgment, or the direction of the court for recovery in favor of a person having possession. The place where it was found is prima facie evidence that it was rightfully in the possession of the deceased. Of what had the insured possession? It was not, then, the completed instrument here sued upon; it was an imperfect, inchoate obligation. Speaking of it now apart from the testimony as to the purpose and the rightfulness of the possession, and speaking only with reference to the condition of the instrument, it had not the stamps affixed and canceled as required by law. If issued as a perfect obligation, the law required it to be stamped. The amount of stamps required is not in controversy. By section 7 of the Internal Revenue Act of June 13, 1898, c. 448, 30 Stat. 452 [U. S. Comp. St. 1901, p. 2292], sometimes called the "War Revenue Act," it is provided that:

"If any person or persons shall make, sign or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereon shall pay a fine, * * * and such instrument, document or paper shall not be evidence in any court."

Therefore, primarily, it is the duty of the party issuing such instrument to affix to it, in the manner provided by law, the stamps required by the internal revenue act. The further duty is imposed upon the party issuing the instrument to cancel such stamps. That duty is also imposed upon the party receiving the same—the duty of cancellation. The instrument, when found, had attached to it by an external fastening a stamped envelope, inclosing the stamps to be affixed and canceled. The original envelope inclosing the stamps ($2.40) stated in print upon its face that they were "to be attached to the second page of policy No. ——— when put in force," and that:

"The stamps so affixed must be canceled by the agent by writing in ink across the face the initials of the company, and the date. If the policy is returned to the company for any purpose before delivery, the uncanceled stamps must accompany them."

Then followed directions as to the manner of the cancellation of the stamps. Two things are observable about this direction: First, that the instructions that the stamps should be attached is qualified by the words "when put in force." Second, no policy is named. The number of the policy is not given. It is claimed by the defendant that the possession of this policy with the envelope inclosing the stamps was granted only for the purpose of the examination of the policy, and its comparison with that of another company; that it was not delivered absolutely as a complete contract, but was simply for the purpose stated, and none other. That testimony is not challenged by anything in the case, except, if it may be called an exception, the claim made in argument that there are certain discrepancies in the testimony of the witness Ellis, the agent of the company who intrusted the policy to Amos. There is no testimony in contradiction to that of Ellis, and the alleged discrepancies are not supported by the record.

Now, as I have said, prima facie evidence may be controverted, and, if it be successfully controverted, the presumption which attaches to it, of course, is displaced. If any witness here testified to the delivery of that policy as and for a contract, an agreement between the parties for the insurance upon the life of Mr. Amos, I should say that undoubtedly the case must go to the jury. It would be for them to determine between one witness and any number of witnesses to the contrary, because there would then be presented a clear issue of fact. While the law attaches to the possession some force, the question of the purpose, character, and quality of that possession is to be determined, and, while it is prima facie evidence of delivery, that is only a rebuttable presumption. It is not evidence when rebutted by uncontradicted credible testimony disproving the intent and authority to contract, and by facts and circumstances which clearly negative the execution of the alleged contract. There is no evidence that the party to whom it was delivered, Walter G. Amos, ever asserted any right under it. He never disclosed, so far as the testimony goes, to any person, the possession of this policy, nor made any claim that he had insurance in the defendant company. The right of the plaintiff to recover, so far as the question of delivery is concerned, rested solely upon the possession of the instrument. Nor is this all. The instrument, as I have said, being incomplete and imperfect at that time, the evidence shows that no act was subsequently done by the defendant company to give it status as a contract, or to make it evidence in the cause. Whatever compliance with the internal revenue act, to make the policy admissible in evidence, has been made, was not the act of, or known to, the defendant. If the instrument is now so far a completed instrument as to be admissible in evidence, it was made so, not by the defendant, but by the act of the person having it in possession after the death of Walter G. Amos, who had never acted upon it in his life. It was not a completed legal instrument while in his possession. It derived the color of validity under the war revenue act after his

death, from two acts: First, the plaintiff's application for leave to affix the stamps and cancel them made by the internal revenue collector at Detroit, under the provisions of law, and that officer's cancellation of the stamps. The collector of the "proper district" could affix and cancel the stamps, if the policy by delivery had become a contract, and the omission to affix the stamps arose from any of the causes which authorized the collector of internal revenue to affix and cancel the stamps, but not otherwise. The collector's act could not make a contract for the parties, but only made the instrument receivable in evidence, if otherwise competent.

Taking into consideration the undisputed facts that the policy was not stamped, and that the stamps were in a separate envelope, uncanceled, and the fact also that it was the legal duty of the defendant to affix and cancel them, if it were issued and delivered absolutely as a contract of insurance, and the presumption which must be indulged in towards the defendant company that it did not intend to violate the law, or incur its penalties by nonperformance of the duties it enjoined—for that presumption defendant is entitled to—and in view of the uncontradicted testimony of Ellis and Cole to the fact that the policy was left with Amos only for examination, and not otherwise, the slight discrepancies, which are alleged against the credibility of the testimony of the former, do not amount, as against these facts and circumstances, to that conflict of evidence upon the vital question of delivery of the policy which would sanction the submission of this case to the jury. Beyond that, the question arises whether there was any payment made. The policy provides that "this policy shall not take effect until the first premium shall have been actually paid while the insured is in good health." The purpose of that clause is obvious: That there should be no deferring of the payment—no right acquired under the policy, unless the stipulated first payment was made while the insured was what is regarded by the company an insurable risk. That requirement is made a condition precedent to the validity of the policy as an obligation on the part of the defendant. The character of defendant forbade it to insure without payment of the first premium. Now, upon that question alone the evidence is all one way. There is no evidence that defendant's agent was ever held out as authorized by the company to waive this payment. There were five witnesses who testified that that payment was not made. No witness testifies to the contrary. The only evidence appearing to the contrary is the recital of the payment of that premium in the printed part of the policy. The amount of the premium is stated in writing. Now, if there were no delivery of this policy, this recital is, of course, of no force or effect. The nondelivery of the policy as the contract of the parties disproves the acknowledgment of payment. In addition to the testimony of the witnesses Cole, Ellis, Skinner, Davison, and Fraher, there is considerable testimony that Mr. Amos had not the means to pay for this policy. It also appears in evidence that he had on the 30th of January a policy in another company upon which recovery was subsequently had. That policy, properly stamped, was found in his desk, in the same drawer with these two instruments. The stamps upon it were canceled. That, in connection with the fact that these stamps were uncanceled and unaffixed to the instrument sued

upon, lends support to the conclusion reached upon the question of delivery, tending to show that this policy was neither delivered to nor accepted by deceased as a contract. See Hartford Fire Insurance Company v. Wilson, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261.

For these reasons, a verdict is directed for defendant.

WRIGHT v. SAMPTER et al.

(District Court, S. D. New York. March 14, 1907.)

1. BANKRUPTCY—PREFERENCE—KNOWLEDGE OF CREDITOR.

Defendant, a young woman of no business experience, had had money on deposit with a bankrupt firm at 6 per cent. per annum; her uncle, of supposed large means, being the financial head of the firm. For several weeks prior to June 4, 1904, she had had no communication with any member of the firm nor with any employé thereof, and on that day she received, by mail, a letter inclosing a check for the full amount of her deposit and interest, with the statement that the firm could no longer use her money. At this time neither defendant nor her sister nor mother, who also used the firm as their bank of deposit and received similar checks, had any suspicion that it was embarrassed, but on June 13th, following, they learned through the newspapers that a petition in bankruptcy had been filed against the firm, which was, in fact, insolvent on the day the checks were received. *Held*, that such facts were insufficient to show that defendant had any reasonable cause to believe that the payment to her was intended to constitute a preference as defined by Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 257.]

2. SAME—CONSTRUCTION—PURCHASER.

Where defendant received payment of her debt from a bankrupt otherwise than by descent, she was a "purchaser" within Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], declaring that a preferential transfer to any one not a "purchaser in good faith and for a present, fair consideration" will be void.

3. SAME—FRAUDULENT TRANSFER.

Only such transfers by a bankrupt are fraudulent under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], invalidating preferential transfers to any one not a purchaser in good faith and for a present fair consideration, as were fraudulent at common law or constituted acts of bankruptcy as prescribed by section 3 (30 Stat. 546, c. 541 [U. S. Comp. St. 1901, p. 3423]), including those within the personal property laws of New York (Laws 1897, p. 511, c. 417, § 24) prohibiting transfers "with intent to hinder, delay or defraud creditors."

4. SAME—PARTICIPATION IN FRAUD—EVIDENCE.

Where defendant had no knowledge of her uncle's pending insolvency at the time she received a preferential payment of her debt from a firm of which he was the dominant member, and there was nothing to indicate that she participated in his fraud in making such payment, except the fact that she did not demand or exact payment, the transfer was not fraudulent within Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], prohibiting preferential transfers made with intent to hinder, delay, or defraud creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 257.]

In Equity. Hearing on bill, answer, and agreed statement of facts.

The material facts stipulated by the parties are as follows: The plaintiff is trustee in bankruptcy of the partners and partnership of M. Sampter, Sons & Co. The defendant Elvira Sampter is a niece of the individual bankrupts,

who are joined with her as defendants. On June 4, 1904, M. Sampter, Sons & Co. were insolvent, and Arnold Sampter, one of the firm, its financial head and a defendant herein, was well aware that the firm was "financially in a critical condition." For a long time prior to the date above given, the defendant Elvira Sampter had had money on deposit with the partnership. The evidence of deposit was a passbook similar to those used by savings banks, and she regularly received interest upon her deposit at the rate of 6 per cent. per annum. She was at liberty to increase or diminish her deposit when and as she chose. She resided with her sister and widowed mother, both of whom had similar deposit accounts with the bankrupts. Both mother and daughters were wholly unfamiliar with business matters, and for several weeks prior to June 4, 1904, had had no communication, either oral or written, with any member of the partnership or with any employé thereof. Neither the defendant Elvira Sampter nor her mother nor sister had urged requested or desired repayment of their deposit accounts, or any part thereof, when on or about said June 4th each of them received by mail a letter signed by the firm, per Arnold Sampter, or at his direction; which letters read: "We find that we can no longer use your money, and therefore ask you to accept enclosed check for (the amount of deposit with interest to date) in full for your account." When these letters were simultaneously received by the defendant, her sister and mother, none of them had the slightest suspicion that the family firm was either embarrassed or insolvent. They and each of them accepted the statement contained in the letters as true, took the checks inclosed with their several communications, and collected them in the usual manner. Although this simultaneous repayment of long-standing accounts was the subject of conversation between mother and daughters, none of them was aware that she was being preferred over other creditors. About 10 days later, and on or about June 13, 1904, they learned through the newspapers that a petition in bankruptcy had been filed against their late debtor. Mr. Arnold Sampter, when he caused these relatives to be paid, not only believed, as above stated, that his firm was "financially in a critical condition," but had been informed by a bank which held a large quantity of the firm paper that none of said paper would be renewed upon maturity. Between the 3d and 10th of June the bankrupt firm paid relatives, friends, and employés who were their lawful creditors, but had not requested payment, the sum of about $30,000, and when such payments were made it was known to Mr. Arnold Sampter that his firm would not after such large disbursements be able to meet its maturing obligations. He made these payments to relatives and friends "in order to prevent possible loss to them." The firm has paid a dividend in bankruptcy of about 40 per cent. with a small balance remaining in the trustee's hands. Prior to their failure M. Sampter, Sons & Co. had for many years enjoyed good reputation and credit, and been one of the leading wholesale clothing houses of this city.

James, Schell & Elkus and Mr. Rosenberg, for complainant.
Max J. Kohler, for defendants.

HOUGH, District Judge. The facts agreed upon in this cause present two oft-mooted questions in rather an extreme and unusual form. The trustee seeks to recover the sum paid Elvira Sampter on the eve of bankruptcy, (1) because it is a voidable preference within sections 60a and 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and (2) because the transfer was "with the intent" on the bankrupt's part to "hinder, delay or defraud" his creditors, and was not for "a present fair consideration" within section 67e (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449]); and should also be "held null and void as against the creditors" of the firm "by the laws of the state" of New York, pursuant to the same section.

First. It cannot be doubted that the payment in question was a preference, and that Miss Sampter is the person "benefited thereby," and the first question raised revolves around the inquiry whether she had "reasonable cause to believe that it was thereby (i. e., by the payment) intended to give (her) a preference." It has frequently been said, in actions turning upon the presence or absence of reasonable cause to believe a material or vital fact, that anything "sufficient to excite attention and put a party on inquiry is notice of everything to which inquiry would have led," and that known facts "calculated to awake suspicion" will justify an inference of actual and complete knowledge. In re Knopf, 16 Am. Bankr. Rep. 432, 144 Fed. 245; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178. But obviously facts, whether producing certainty or merely suspicion, must have a mind upon which to operate and affect, and the rule is equally well established that it is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of "an ordinarily intelligent man" (Grant v. Bank, 97 U. S. 80, 24 L. Ed. 971), "a prudent business man" (Bank v. Cook, 95 U. S. 343, 24 L. Ed. 412; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481), "a person of ordinary prudence and discretion" (Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504), "an ordinarily prudent man" (In re Eggert, 4 Am. Bankr. Rep. 449, 102 Fed. 735), "a prudent man" (Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130).

The peculiarity of this case is that the mind to be affected is that of a confiding niece, wholly unacquainted with business knowledge, and, however intelligent and prudent in matters within her own experience, incapable of comprehending the significance of business facts, which would have been more than enlightening to men of the business world. It is therefore urged by the defendants that Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478, justifies the proposition that not only must the facts exist and be sufficiently impressive to awake inquiry in such minds as are catalogued in the cases above cited, but they must be sufficient to impress their significance upon the mind of the person to be affected —in this case a woman leading a life apart from the world of business. It was indeed said in the case last cited (one inducing great sympathy for the preferred creditor) that it is "necessary to prove the existence of this reasonable cause of belief * * * in the mind of the preferred party." Page 296 of 103 U. S. (26 L. Ed. 478). But these words must be taken in conjunction with the whole opinion, which was written in express consonance with Grant v. Bank, supra, and the phrase quoted I take to assume in "the preferred party" the mind of "an ordinarily intelligent man." It would be intolerable that the voidability of a preference should depend not upon the effect of facts admittedly or by proof known to a defendant, but upon the degree of intelligence or experience which such defendant was capable of exercising in respect thereto; such a rule would put a premium upon ignorance, and encourage the assumption thereof. The rule here applicable is, therefore: Would an ordinarily intelligent and prudent business man have had reasonable cause to believe, upon any facts known to Miss Sampter, that her uncle intended to prefer herself, her sister and mother? I think not. All that she knew was entirely consistent with the busi-

ness conclusion that, inasmuch as 6 per cent. was a high rate of interest, it was no longer profitable for the firm to pay it, and wrong for them to keep the money in a mercantile venture at lower rates, which could be obtained with greater security elsewhere. She did not know that all friends and relatives were being paid off, nor was she aware of any embarrassment on the part of her long prosperous uncle. If all she knew had been known by a merchant, I see no reason why it should have produced any other feeling than that Sampter's Sons no longer felt like paying a high rate for the use of a small sum of money.

Second. This branch of complainant's contention assumes (and I think properly) that the payment to Miss Sampter was with the intent on Arnold Sampter's part prohibited by the statute, but admits (necessarily, in my opinion) that the defendant was wholly guiltless of any participation in the bankrupt's purpose or design. In the view contended for, the ignorance or innocence of the transferee is of no consequence, provided the bankrupt, with the "intent and purpose" prescribed in 67e, executes a preferential transfer to any one not a "purchaser in good faith and for a present fair consideration." Miss Sampter was a "purchaser," because she acquired the payment to her otherwise than by descent (McCartee v. Orphan Asylum Soc., 9 Cow. [N. Y.] 437, 18 Am. Dec. 516), and her "good faith" (as defined in Searle v. School District, 133 U. S., at page 563, 10 Sup. Ct. 377 [33 L. Ed. 740]) is unimpeachable; but inasmuch as she neither requested nor desired the payment that surprised her so much to her advantage, it is denied that she got the money "for a present fair consideration," and the payment must be regarded under the act as a voluntary dissipation of a fund properly to be regarded as a trust for all creditors alike. This view of the section under consideration assumes that the bankruptcy act has laid down a new rule in respect of the voidability of fraudulent conveyances by wholly sweeping away the requirement that the transferee or grantee, to merit condemnation, shall have either actual notice of the fraudulent intent, have participated in the fraud, or had notice of some fact calculated to put him on inquiry and leading to a discovery of such fraudulent intent. Undoubtedly this assumption finds support in Sherman v. Luckhardt, 11 Am. Bankr. Rep. 26, 74 Pac. 277, 67 Kan. 682, and possibly also in Re McLam, 3 Am. Bankr. Rep. 245, 97 Fed. 922. But it cannot prevail in this court, being clearly opposed to the ruling for this circuit made in Re Bloch, 142 Fed. 674, 15 Am. Bankr. Rep., at page 751, viz., that the transfers prohibited by 67e are only those fraudulent and therefore voidable at "common law," or, what is the same thing, such as constitute acts of bankruptcy under section 3. (30 Stat. 546, c. 541 [U. S. Comp. St. 1901, p. 3423]). By "common law" must be understood the rules of property growing out of 13 Eliz. c. 5, as affected by similar statutory enactments in force in the state wherein the transaction complained of took place.

It follows that the payment to Miss Sampter is voidable under this section of the act, only if in fraud of creditors according to the law of New York as contained in the decisions of the courts of that state and (at present) in the personal property law (Laws 1897, p. 511, c. 417, § 24), prohibiting transfers "with the intent to hinder, delay or defraud creditors," and no other or different tests are to be applied there-

to than have long been used in federal and state decisions without any reference to bankruptcy.

Further consideration would be superfluous, were it not for certain decisions in this state wherein the courts have pointed out as one of the badges of fraud that the creditors preferred "took no affirmative or independent action to collect their claim; they simply accepted the advantages which the fraudulent debtor voluntarily gave them for his own purpose and as a part of the fraudulent scheme." Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67. And compare First National Bank v. Miller, 163 N. Y. 164, 57 N. E. 308; Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678. From these authorities it is urged that while a creditor demanding payment in the way of business may lawfully obtain such payment even from a fraudulent insolvent intending to hinder and delay his creditors, provided that he himself does not participate in the fraud, a similar right does not attach to one who, without effort and without demand, merely receives payment of an unmatured debt from such fraudulent debtor. Undoubtedly as civilization, and with it business methods, become more complex, the badges of fraud increase with the opportunities for fraud; but the decisions above referred to have not changed, and do not purport to change, the rule of law. The court or jury must find participation in the fraud on the part of the payee or grantee as a matter of fact, and each case must stand upon its own facts. There is nothing in this cause, except the bare fact that Miss Sampter did not demand or expect payment, to indicate participation on her part in the fraud of her uncle, and that bare fact, even plus the relationship, is not enough to turn the scale against her; it is evidence, nothing more, and on the whole evidence she must be absolved.

The bill is dismissed

LEWIS 'PUB. CO. v. WYMAN et al.

(Circuit Court, E. D. Missouri, E. D. April 4, 1907.)

No. 5,437.

1. COURTS—JURISDICTION OF FEDERAL COURTS—NATURE AND SOURCE.

The courts of the United States inferior to the Supreme Court, being statutory courts created by Congress, possess only those powers which are expressly granted to them by statute, and until Congress confers upon them jurisdiction of a matter authorized by the Constitution of the United States they cannot exercise it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 792, 793.]

2. SAME—JURISDICTION OF STATE COURTS—NATURE AND SOURCE.

State courts of general jurisdiction, until divested by an act of Congress of jurisdiction in causes which, under the national Constitution, may be conferred upon the courts of the United States exclusively, may, so far as the Constitution and laws of the United States are concerned, exercise jurisdiction over them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1326.]

3. SAME—CONCURRENT JURISDICTION—STATE AND FEDERAL COURTS.

Subdivision 4 of section 629, Rev. St. [U. S. Comp. St. 1901, p. 503], does not confer exclusive jurisdiction on the courts of the United States

in controversies arising under the postal laws of the United States, but only concurrent with the courts of the states, and for this reason state courts may take cognizance of such causes.

4. REMOVAL OF CAUSES—SUBJECT OF CONTROVERSY—POSTAL LAWS.

Although Congress has not authorized by special act the removal of causes arising under the postal laws of the United States, if the bill on its face shows that the controversy is one arising under the postal laws of the United States, and the value of the matter in controversy exceeds $2,000, exclusive of interest and costs, such cause is removable from the state to a national court, under section 2 of the act of March 3, 1887, c. 373, 24 Stat. 553, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509].

(Syllabus by the Court.)

On Demurrer to the Jurisdiction and Motion to Remand.

Barclay & Fauntleroy and Carter, Collins & Jones, for complainant.
Chester H. Krum and H. H. Glassie, for defendants.

TRIEBER, District Judge. This action was originally commenced in the circuit court of the city of St. Louis, state of Missouri, and on petition of the defendants removed to this court. Defendants demurred to the jurisdiction of the state court, claiming that that court was wholly without jurisdiction to entertain the bill, the national courts having exclusive original jurisdiction of all controversies involving the actions of the executive department in postal matters.

The bill filed in the state court, in so far as it affects the jurisdictional question, may be briefly stated as follows: The complainant is the publisher of a monthly magazine which had theretofore, in conformity with the acts of Congress and the rules and regulations of the Post Office Department, been admitted to be sent through the mails at second-class rates; that it has a circulation exceeding 1,000,000 copies, and that the privilege of sending the magazine at these rates is a very valuable one; that on March 4, 1907, the Postmaster General, without any hearing or notice to complainant and in violation of the act of Congress approved March 3, 1901, c. 851, § 1, 31 Stat. 1107 [U. S. Comp. St. 1901, p. 2655], annulled this privilege, and the defendant, the postmaster at St. Louis, where said publication is mailed, has notified complainant that in conformity with the order of the Postmaster General the second-class privilege of complainant for his said magazine has been revoked, and that it will have to be sent as third-class matter, which will cause an increase in the postage to complainant of probably $20,000 a month, and practically destroy its business and cause irreparable damage. The prayer of the bill is for an injunction to prevent the enforcement of this order of the Postmaster General by the defendants, the postmaster and assistant postmaster at St. Louis.

The complainant also filed a motion to remand the cause to the state court, upon the ground that the action was not removable to this court. The fact that the defendants who now demur to the jurisdiction caused the removal of the cause to this court does not estop them from questioning the jurisdiction of the court from which it was removed. Cowley v. Northern Pacific R. R. Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263; Wabash Western Ry. Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; De Lima v. Bidwell, 182 U. S. 1, 21 Sup.

Ct. 743, 45 L. Ed. 1041; Tootle v. Coleman, 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120.

Are the courts of the states without jurisdiction to grant relief to a citizen who claims that by reason of some action of an official of the Post Office Department he has been greatly injured? Or, in other words, have the national courts exclusive jurisdiction of cases of that nature? In the view which this court takes it is unnecessary to determine whether an action of this nature may be maintained under section 3833, Rev. St. [U. S. Comp. St. 1901, p. 2610], or whether Teal v. Felton, 12 How. 284, 13 L. Ed. 990, is applicable. The law is well settled that the courts of the United States inferior to the Supreme Court are mere creatures of Congress, and possess no powers except those specifically granted to them by an act of Congress, and this limitation applies to all causes which, under the Constitution, Congress might have granted to the national courts jurisdiction to hear and determine. As early as 1799, in Turner v. Bank of North America, 4 Dall. 10, 1 L. Ed. 718, it was said:

"The political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress, and Congress is not bound to enlarge the jurisdiction of the federal courts to every subject in every form which the Constitution might warrant."

To the same effect are United States v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; Cary v. Curtis, 3 How. 245, 11 L. Ed. 576; Sheldon v. Sill, 8 How. 448, 12 L. Ed. 1147; Stevenson v. Fain, 195 U. S. 165, 25 Sup. Ct. 6. 49 L. Ed. 142; Ex parte Wisner, 203 U. S. 449, 455, 27 Sup. Ct. 150, 51 L. Ed. ——; Case Sewing Machine Companies, 18 Wall. 553, 577, 21 L. Ed. 914.

In the last-cited case the court say:

"Congress, it may be conceded, may confer such jurisdiction upon the circuit courts as it may see fit, within the scope of the judicial power of the Constitution not vested in the Supreme Court; but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that, inasmuch as they are created by an act of Congress, it is necessary in every attempt to define their power to look to that source as the means of accomplishing that end. Federal judicial power beyond all doubt has its origin in the Constitution; but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been and of right must be the work of the Congress."

Prior to the adoption of the Constitution no one will deny that the courts of the states had complete jurisdiction over all legal questions capable of judicial determination. Article 3 of the Constitution defines the powers which Congress may confer on the national courts. In the first judiciary act, that of September 24, 1789, c. 20, 1 Stat. 73, the act creating the national courts inferior to the Supreme Court and which but for the acts of Congress would not exist, the jurisdiction of the circuit courts in civil actions was limited to cases in which the United States were plaintiffs or petitioners and actions depending entirely on a diversity of citizenship. The first act conferring upon the courts of the United States original jurisdiction in cases other than that

of diversity of citizenship was the second act creating the bank of the United States, April 10, 1816, c. 44, 3 Stat. 266. Since then several other special acts conferring jurisdiction on the national courts in cases in which a federal question is involved have been passed—the act of February 25, 1863, c. 58, 12 Stat. 665, providing for the establishment of national banks, and the act of July 27, 1868, c. 255, § 2, 15 Stat. 226, authorizing corporations created by acts of Congress to remove causes from the state to the national courts, but the first general act which extended the jurisdiction of the national courts to cases involving a federal question was the judiciary act of March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]. Prior thereto the state courts had exclusive jurisdiction of causes of that nature, subject to review by the Supreme Court of the United States, under section 25 of the judiciary act of September 24, 1789. The serious objections made prior to the adoption of the Constitution of the United States, by reason of the fear that under article 3, § 2, of the Constitution the state courts would be deprived of a great deal of their jurisdiction, induced Mr. Hamilton to dispute that contention in The Federalist. In No. 82 of that publication he said:

"The principles established in a former paper teach us that the states will retain all the pre-existing authorities which may not be exclusively delegated to the federal head, and that this exclusive delegation can only exist in one of three cases—where an exclusive authority is in express terms granted to the Union, or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the states, or where an authority is granted to the Union with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judicial as to the legislative department, yet I am inclined to think that they are in the main just with respect to the former as well as to the latter, and under this impression I shall lay down as a rule that the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes. The only thing in the present Constitution which wears the appearance of confining the causes of the federal cognizance to the federal courts is contained in this passage, 'The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress shall from time to time ordain and establish.' This might either be construed to signify that the Supreme Court and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend, or simply to denote that the organs of the national judiciary should be one Supreme Court and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested through one supreme tribunal and a certain number of inferior ones to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals, and as the first would amount to an alienation of state power by implication, the last appears to me the most defensible construction. * * * I mean, therefore, to contend that the United States, in the course of legislation upon the objects entrusted to their direction, may not commit the decision of causes arising upon the particular regulation to the federal courts solely, if such a measure should be deemed expedient, but I hold that the state courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal, and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national Legislature they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws and in civil cases lays hold of all subjects of

litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe."

Oliver Ellsworth, a member of the convention which framed the Constitution and the reputed author of the judiciary act of 1789, in answer to George Mason (who was one of the members of that convention who refused to sign that instrument and opposed its adoption, and one whose objections was that the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states, thereby rendering law as tedious, intricate, and expensive, and justice as unattainable by a great part of the community as in England, and enable the rich to oppress and ruin the poor), said:

"It [the judicial power of the United States] extends only to the objects and cases specified, and wherein the national peace or rights, or the harmony of the states, is concerned, and not to controversies between citizens of the same state (except where they claim under grants of different states); and nothing hinders but the supreme federal court may be held in different districts, or in all the states, and that all the cases, except the few in which it has original and not appellate, jurisdiction, may, in the first instance, be had in the state courts, and those trials be final, except in cases of great magnitude." 2 Federalist and Other Constitutional Papers, Federalist Statesman Series, p. 578 (the original having been published in the Connecticut Courant of November 26, 1787, over the non de plume of "Landholder").

In Plaquemines Fruit Co. v. Henderson, 170 U. S. 511, 18 Sup. Ct. 685, 42 L. Ed. 1126, this question was again before the Supreme Court, and Mr. Justice Harlan, speaking for the court, after a very thorough review of all the authorities, epitomized the law to be:

"As under the long-settled interpretation of the Constitution the mere extension of the judicial power of the United States to suits brought by a state against citizens of other states did not, of itself, divest the state courts of jurisdiction to hear and determine such cases, and as Congress has not invested the national courts with exclusive jurisdiction in cases of that kind, it follows that the courts of a state may, so far as the Constitution and laws of the United States are concerned, take cognizance of a suit brought by the state in its own courts against citizens of other states, subject, of course, to the right of the defendant to have such suit removed to the proper Circuit Court of the United States, whenever the removal thereof is authorized by the acts of Congress, and subject, also, to the authority of this court to review the final judgment of the state court, if the case be one within our appellate jurisdiction." 170 U. S. 521, 18 Sup. Ct. 689, 42 L. Ed. 1126.

Whether Congress could, under the Constitution, confer such exclusive jurisdiction on the national courts in cases of this kind it is unnecessary to determine in this case, as it has never attempted to do so, so far as the research of the learned counsel or of the court has been able to find. The original jurisdiction of this court could only have been invoked upon the ground that the right claimed by complainant, and of which he charges defendants are about to deprive him, is one granted to him by the Constitution or laws of the United States or under subdivision 4, § 629, Rev. St. [U. S. Comp. St. 1901, p. 503]. This last section is as follows:

"Fourth. Of all suits at law or in equity arising under any act providing for revenue from imports or tonnage, except * * *; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws."

The beginning of the section is, "The Circuit Court shall have jurisdiction as follows."

It will thus be seen that there is nothing in that section which seeks to confer upon the courts of the United States exclusive jurisdiction. But as the right claimed by the complainant in his bill is one arising under the Constitution and laws of the United States, and the amount involved exceeds in value the sum of $2,000, exclusive of interest and costs, this court would clearly have original jurisdiction under the judiciary act of March 3, 1887, c. 373, 24 Stat. 553, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509].

The right to remove the cause must also be sustained under the latter act, as there is no other act of Congress which will permit the removal of a cause of this nature from a state court to this court. Although, as shown above, subdivision 4 of section 629, Rev. St., includes causes arising under any act of Congress providing for revenue from imports and tonnage, internal revenue and under the postal laws, section 643, Rev. St. [U. S. Comp. St. 1901, p. 521], only authorizes the removal of causes commenced against any officer appointed by or acting under authority of any revenue law of the United States, and does not include actions against officers acting under the postal laws. Whether this was a mere oversight on the part of Congress or intentional is immaterial, so far as the courts are concerned, for they are powerless to remedy the omissions of Congress.

It was also contended on behalf of the defense that, in view of the fact that actions of this nature are an interference with the proper discharge of the duties imposed upon one of the executive departments of the national government in pursuance of the Constitution, the wheels of the government may be stopped by improper injunctions granted by state courts all over the country, if permitted. It would be a sufficient answer to this contention that there is no reason to presume that the courts of the states will pervert the laws of the nation any more than would the national courts, and that Congress is of that opinion is conclusively evidenced by the fact that it has not seen proper to deprive the state courts of that jurisdiction by conferring exclusive jurisdiction on the courts of its own creation in cases of this nature, or even cases arising under the revenue laws. The reports of the Supreme Court of the United States are full of cases which were originally instituted against collectors of customs and internal revenue in the state courts and removed to the national courts, and in none of them has that high tribunal ever held that the state court in which the suit was originally instituted was without jurisdiction. In view of the well-known fact that the courts of the United States, including the Supreme Court, will raise jurisdictional questions of their own motion, as was evidenced in Minnesota v. Northern Securities Company, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870, and Cochran v. Montgomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, it is hardly reasonable to suppose that so important a question would have been overlooked. In the very important cases of De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, and Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088, which were actions arising under

the revenue laws of Congress against the collector of customs, the suits were originally instituted in the state courts and removed, under the provisions of section 643, Rev. St., to the national court.

From what has been said it follows as of course that the demurrer of defendants challenging the jurisdiction of the state court must be overruled, and as the bill of complaint on its face shows that complainant claims some right granted to him by the Constitution and laws of the United States and the value of the matter in controversy exceeds $2,000, the motion to remand the cause to the state court must also be overruled. New Orleans National Bank v. Merchant (C. C.) 18 Fed. 841.

PLUMMER v. NORTHERN PAC. RY. CO.

(Circuit Court, W. D. Washington, N. D. March 2, 1907.)

No. 1,430.

1. COMMERCE—CONSTITUTIONAL LAW—EMPLOYER'S LIABILITY ACT.
   Employer's Liability Act (Act June 11, 1906, c. 3073, 34 Stat. 232), making interstate carriers liable for injuries to employés, notwithstanding the latter's negligence, if the carrier's negligence was gross in comparison with that of the employé, is not unconstitutional as not within the power of Congress conferred by the commerce clause of the federal Constitution.

2. CONSTITUTIONAL LAW—RETROACTIVE STATUTES.
   A retroactive statute is not unconstitutional unless its effect would be a deprivation of life, liberty, or property, contrary to the fifth amendment of the federal Constitution.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 526.]

3. SAME—DEPRIVATION OF PROPERTY.
   The passage of a law taking away defenses to civil actions based on rules of law which are purely arbitrary does not constitute a deprivation of property without due process of law.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 925.]

4. STATUTES—EMPLOYER'S LIABILITY ACT—RETROACTIVE OPERATION.
   Employer's Liability Act (Act June 11, 1906, c. 3073, § 2, 34 Stat. 232) declares that in all actions subsequently brought against any common carrier, to recover damages for personal injuries to an employé, etc., the fact that the employé may have been guilty of contributory negligence shall not bar a recovery where his negligence was slight, and that of the employer was gross in comparison; but the damages shall be diminished in proportion to the amount of negligence attributable to such employé. *Held*, that such act created a new right and a new obligation, and did not merely deprive the employer of an arbitrary defense previously existing under rules of law, and therefore, should not be construed to operate retroactively.

At Law. Action to recover damages for a personal injury alleged to have been caused by negligence of the defendant in the operation of its railroad, the plaintiff being at the time of the injury in the service of the defendant as a brakeman. Heard on defendant's petition for a new trial, after a verdict in favor of the plaintiff for $5,000. Petition granted.

Elias A. Wright and Herbert E. Snook, for plaintiff.
Carroll B. Graves, for defendant.

HANFORD, District Judge. The plaintiff suffered a painful injury while working for the Northern Pacific Railway Company, as a brakeman on one of its trains, at Seattle, in the month of March, 1906. This action was commenced in August, 1906, to recover compensation for said injury, on the alleged ground that it was caused by the negligence of the defendant in failing to keep its track and railway in a condition to be reasonably safe for the employés of the company required to operate its trains. The effects of the injury are permanent; the plaintiff's left leg having been mangled and severed from his body by a car wheel passing over it. By his complaint and the arguments of his counsel upon the trial, the plaintiff claimed damages in the sum of $30,000. The jury awarded him $5,000, which sum is less than probably would have been awarded, if it had not been proved that his personal negligence was a contributing cause of the mishap; and a verdict for the defendant on the ground that plaintiff's contributory negligence had been clearly proved by all the evidence introduced, including his own testimony, would have been directed, if the court had not been influenced to refuse to so direct the jury, by consideration of the act of Congress of June 11, 1906, commonly called "The Employer's Liability Act" (Act June 11, 1906, c. 3073, 34 Stat. 232), which makes important changes in the law applicable to common carriers engaged in interstate and foreign commerce. The case was submitted to the jury under instructions which assumed that said act is valid, and applicable to the case.

A petition to set the verdict aside has been interposed, assigning numerous grounds, the most important of which are that said act is unconstitutional, and totally void, and that the court misconstrued the act in ruling that it is applicable to this case; the specifications of the latter ground being that the injury antedated the enactment of the statute referred to, and it should not have been held to be retroactive in effect, and the plaintiff did not by his complaint clearly set forth a cause of action based upon said statute, and it was not proved that the particular train upon which the plaintiff was employed, and by which he was injured, was in use at the time as a carrier of merchandise or commodities pertaining to interstate or foreign commerce, and that by the terms of said act the operation of a railway within a state is not subject to its provisions except when carrying on interstate and foreign traffic.

This petition having been presented and argued, the court is now required to review its rulings upon the trial, and the instructions given to the jury. After reflection and deliberation, with due respect to contrary decisions of other courts, I am convinced that the employer's liability act is not unconstitutional, nor in principle a departure from the legislative policy of the government. The substance and sum of the argument against the constitutionality of this statute is that the whole power of Congress to enact laws affecting the business of common carriers of freight and passengers, is conferred by the interstate and foreign commerce clause of the Constitution, and that the contracts of carriers with their employés and the duties and obligations of each to the other, are matters of purely local concern, and not comprehended within the constitutional grant of power "to regulate com-

merce with foreign nations, and among the several states, and with the Indian tribes." This view of the subject appears to me to be much too narrow to accord with the practical and judicial interpretation which has been given to this clause of the Constitution. Commerce has been defined to be traffic; that is, the buying, selling, and exchanging of commodities. This comprehends more than the mere contracts by which merchandise is bought, sold, and exchanged. The actual transfer of merchandise and delivery of the manual possession thereof, and its transportation from one place to another are included. Regulations of commerce are rules to be obeyed in carrying on the business of buying, selling, exchanging, transferring, and moving the property which is the subject of traffic, and to be effective such regulations must not only control the conduct of merchants, bankers, and others engaged as principals in the business, but their servants and agents, and the carriers who serve them in the transportation of property from one place to another, and those who furnish the facilities for communication between distant points which aid the business. Ships, vehicles, railways, telegraph lines, and cables are all necessary to traffic, and subjects of regulations of commerce, which may be prescribed by lawful authority. But merchants and merchandise, bankers and money, clerks, accountants, and agents, ships, vehicles, tracks, locomotives, cars, storehouses, wharves, telegraph lines, and cables, and the postal service all combined would be ineffectual to carry on foreign and interstate commerce without the skill and strength of captains, engineers, firemen, seamen, stevedores, trainmen, mechanics, and the host of laborers constituting the force necessary to operate and keep in repair the physical appliances of commerce. The employés who work for wages in every branch of the business, giving life and mobility to trade are equally subject to regulations of commerce as those whom they serve, and regulations prescribing their rights and obligations with respect to their employment not only affect commerce but regulate commerce.

By the statute under consideration the law of the country has been changed radically; but it is harmonious with, and not more radical than other laws enacted by Congress in the exercise of the power conferred by the interstate and foreign commerce clause of the Constitution which have been uniformly acquiesced in by the people and enforced by the national courts, since the first shipping law was enacted by the first Congress in the year 1790. Act July 20, 1790, c. 29, 1 Stat. 131. The scope of that law is indicated by its title, viz.: "An act for the government and regulation of seamen in the merchant service." Sixty-five pages of volume 3, United States Compiled Statutes, 1901 (pages 3061–3125) are required to set forth the statutes which have been enacted by Congress relating to seamen in the merchant service, prescribing regulations comprising almost every detail of "Sailor's Rights."

These statutes require contracts for the employment of seamen to be in writing, and signed before the departure of the ships on which they are to serve from the shipping port; they prescribe the minimum daily allowance of food, so that sailors shall not be subjected to hunger, and require warm rooms to be furnished on ships during cold weather, and

that medicine chests and slop chests shall be provided for the use and benefit of their crews; they prohibit the flogging and maltreatment of seamen; they subject shipowners and masters to liability for damages for wrongfully withholding wages, and prescribe rules for compelling sailors to perform the obligations of their contracts of employment, and authorize the forfeiture of wages for desertion. These and similar laws are firmly established in the jurisprudence of the country, and they regulate the business of carriers by water, which is an important part of foreign and interstate commerce. It is now too late to make the discovery that the constitutional power of Congress is not ample to authorize legislation on these subjects. The similarity of the statute under consideration to the laws affecting the rights of shipowners and mariners is obvious, and the Constitution contains no suggestion of a more extended grant of power to regulate the business of carriers by water than the power to regulate the business of carriers over land. In the argument in support of the defendant's petition, an attempt was made to differentiate maritime commerce from its other branches, by assuming that the admiralty jurisdiction of the federal courts, by a necessary implication, embraces legislative power, and the case of Butler v. Boston Steamship Company, 130 U. S. 527–558, 9 Sup. Ct. 612, 32 L. Ed. 1017, was cited, in which Mr. Justice Bradley said, in effect, that as exclusive jurisdiction of admiralty and maritime cases is vested in the national courts, the exclusive power to legislate on the same subject must be necessarily in the national legislature. Similar dictum may be found in the opinion by Mr. Justice Brown in the case of The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770. This, however, falls far short of being a determination by the Supreme Court that the power of Congress to enact shipping and navigation laws, steamboat inspection laws, and the laws relating to seamen is a mere incident or appendage of the judicial power of the government, and not within the scope of the powers granted directly to Congress in express terms. Whilst the three coordinate branches of our government are intimately connected, and in the performance of their functions interdependent, each is a check on the others, and to insure the independence of each, the Constitution, by separate articles, confers the executive power upon the President, the legislative power upon Congress, and the judicial power upon the courts. The regulation of commerce requires the exercise of legislative power, and as the power to regulate is expressly granted in broad terms, there can be no occasion for supplementing it or extending it by implications, to comprehend any particular branch of commerce. It is to be noted that the Employer's Liability Act is not limited to apply, only, to carriers over land, but applies as well to carriers engaged in maritime commerce.

As a regulation of the business of land carriers, this statute is not the first of its kind. The safety appliance law enacted by Congress in 1893 imposes a positive duty on carriers engaged in interstate commerce, to protect the lives and limbs of railroad employés and travelers, by equipping trains with air brakes, and automatic couplers, rendering it unnecessary for a man operating the coupler to go between the ends of the cars, and with secure grab irons or handholds in the ends and sides of

each car, for greater security to the men in coupling and uncoupling cars. It also provides for fixing a standard of the height of drawbars for freight cars, and it abolishes the "assumption of risk" rule, in all cases in which an employé may be injured by any locomotive, car, or train in use contrary to the provisions of the act. In the case of Johnson v. Southern Pacific Co., 196 U. S. 1–22, 25 Sup. Ct. 158, 49 L. Ed. 363, the Supreme Court of the United States reversed a decision of the Circuit Court of Appeals for the Eighth Circuit, denying to an injured employé the right to recover damages in an action based upon said act, and held that a reasonably liberal rule of interpretation should be applied to the act to give effect to the intention of Congress. In that case the constitutionality of the act does not appear to have been questioned, nevertheless the decision of the Supreme Court is necessarily an affirmance of its validity, for it is not presumable that in a contested case, admitted to be of such public importance as to justify the granting of a writ of certiorari to bring it before the Supreme Court for review, learned counsel and the court would have ignored a question of such paramount importance.

As I am constrained to grant the petition for a new trial of this case, for error in the instructions given to the jury to the effect that a verdict in favor of the plaintiff might be rendered, notwithstanding his contributory negligence, an expression of my opinion on the question as to the constitutionality of this statute might be evaded now. But the question has been argued fully by able counsel in this case, and it must be decided in disposing of other cases now pending in this district, therefore I have deemed the first opportunity to be the proper occasion for announcing my positive belief on the subject.

Section 2 of the act provides as follows:

"Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee 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 employee. All questions of negligence and contributory negligence shall be for the jury." 34 Stat. 232, c. 3073.

The phrase "all actions hereafter brought" is broad enough to include actions for injuries suffered prior to the enactment; but although within the letter of the law, such cases must be deemed to be not within its purview, if the retroactive effect would defeat the law by making it unconstitutional. I hold that a retroactive statute enacted by Congress is not unconstitutional, unless its effect would be a deprivation of life, liberty, or property, contrary to the fifth amendment, and that the taking away of defenses to civil actions based upon rules of law which are purely arbitrary, e. g., the statute of limitations, would not be such a deprivation. Campbell v. Holt, 115 U. S. 620–634, 6 Sup. Ct. 209, 29 L. Ed. 483. The plea of contributory negligence as a defense to an action to recover damages for an alleged tortious injury, is an affirmative traverse of the plaintiff's cause of action, similar to a plea of want of consideration as a defense to an action upon an alleged contract, for

if it can be established by evidence it disproves the plaintiff's case. Such a defense does not rest upon a mere arbitrary rule exempting a party from legal process to enforce an obligation, but its foundation is in reason and natural justice.

In the case of Little v. Hackett, 116 U. S. 371, 6 Sup. Ct. 393, 29 L. Ed. 652, Mr. Justice Field, in delivering the opinion of the court, said:

"That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. * * * If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy, against one also in the wrong."

This rule has been heretofore generally recognized as a part of the common law, in England and the United States, and the same rule is to be found in the Roman law. Wharton on the Law of Negligence (2d Ed.) § 300; 7 Amer. & Eng. Encyc. Law (2d Ed.) 371, 372.

Therefore this statute creates a new right and a new obligation. I do not question the justice of the rule of comparative negligence, as it may be applied in actions for injuries suffered after its legalization, but it cannot be applied to past occurrences without working a deprivation of property in a manner which the Constitution forbids; for if so applied, the statute, and not the injury, would fix the plaintiff's rights and the defendant's obligation, which are the important elements of the cause of action.

For this reason alone, the petition for a new trial will be granted.

KELLEY v. GREAT NORTHERN RY. CO.

(Circuit Court, D. Minnesota, Fifth Division. March 11, 1907.)

1. COMMERCE—POWER TO REGULATE—POWER OF CONGRESS—EMPLOYERS' LIABILITY ACT.

   The act of Congress of June 11, 1906, 34 Stat. 232, c. 3073, commonly called the "Federal Employers' Liability Act," is a regulation of commerce between the states or with foreign nations, within the meaning of the commerce clause of the Constitution, and hence within the power of Congress.

2. SAME—NATURE OF POWER.

   Decisions defining the meaning and scope of the commerce clause of the Constitution considered and discussed, the trend of all of them being to the effect that the commercial power conferred by the Constitution authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on, and as to such subjects is without limitation.

3. SAME.

   Decisions concerning the validity of state statutes, upon the questions involved here, considered and discussed, and from them the following general rules deduced: (1) That the liability of common carriers for injuries to their employés growing out of their negligence or the negligence of their other employés is a proper subject for governmental regulation, and Congress has the power, whenever it chooses to exercise it, to make regulations on that subject within its field of control, namely, interstate and foreign commerce, similar to those the state Legislatures may make in their field. (2) That such statutes are not, in themselves, regulations of interstate commerce, although they control, in some degree, the con-

duct and the liability of those engaged in such commerce, and a state may therefore, so long as Congress has not legislated upon the particular subject, enact them, in the rightful exercise of its police power to regulate the relative rights and duties of all persons and corporations within its limits, without invading the exclusive power of Congress. But Congress may also, under the power conferred by the commerce clause of the Constitution, enact such legislation as a regulation of interstate or foreign commerce. (3) That, while as a general rule the police power belongs to the states, yet Congress may, in the exercise of its power to regulate interstate commerce, impose upon such commerce regulations which are in their essential nature police regulations.

4. SAME.

If Congress, having for its object the protection of the lives and limbs of railroad employés, can make a specific regulation such as that embodied in the "Safety Appliance Act," as to which it would seem there can be no doubt (Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363), it can, with the same object in view, make a general regulation such as that embodied in this act. The object of the statute is plain upon its face. It is apparent that Congress had in contemplation much more than the mere creation and imposition of the liability mentioned. It had in contemplation the protection of the lives and persons of the employés of common carriers engaged in interstate or foreign commerce whose employment has any relation to such commerce. With that object in view, it enacted the statute, and by its provisions changed certain common-law rules determining liability in order to promote that object by securing, so far as the statute could compel it, a more careful selection of employés, a closer and more careful supervision of them, and a more rigid enforcement of their duties.

5. SAME.

It is the carrier engaged in interstate commerce that this act seeks to regulate in relation to its duties to its employés, and the power of Congress extends to, and the act was intended to cover, all the employés whose employment relates to such commerce; and if such common carrier is also at the same time engaged in intrastate commerce, using the same means and agencies for both, the power of Congress extends to, and the act was intended to cover, all the employés whose employment relates to such means and agencies.

6. SAME.

The fact that a common carrier engaged in interstate commerce may also be engaged in intrastate commerce, using therein in whole or in part the same means and agencies, cannot defeat the power of Congress to regulate such carrier. The regulation of intrastate commerce, which may result in such a case (if, indeed, in such case there could be said to be any regulation of intrastate commerce by such an act as this), is incidental, and due to the manner or method in which the carrier conducts its business, and to the fact that it thus combines or commingles its interstate with its intrastate commerce.

7. CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.

But this act is remedial and not penal, and would therefore not only permit, but, if necessary to sustain its validity, require a liberal construction. If, therefore, it were necessary to sustain its validity, there is ample authority for so construing it as to confine its operation to those whose injuries occur at a time when they are actually engaged upon interstate traffic; the facts and circumstances of each particular case determining whether or not the act is applicable. The Trade-Mark Cases and the McKendree Case distinguished.

8. MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—CONTRIBUTORY NEGLIGENCE.

The reasoning of the cases in which the fellow-servant rule has been laid down by the courts has, in view of modern methods and conditions, lost much, and in some cases all, of its force. The contributory negli-

gence rule as applied by the courts, in view of modern conditions surrounding those engaged in certain occupations, is harsh, cruel, and unjust, and ought long since in the furtherance of justice and in the interest of humanity to have been greatly modified. And there are substantial reasons why an employer engaged in certain occupations should not be permitted to relieve himself by contract with his employés from liability for injuries caused by his negligence or the negligence of his other employés.

9. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.
The contention that the act violates the fifth, seventh, tenth, and fourteenth amendments of the Constitution is without merit.

10. MASTER AND SERVANT—INJURIES TO SERVANT—STATUTORY PROVISIONS.
It appears that defendant is a railroad company engaged in interstate commerce; that plaintiff at the time of his injury, which was subsequent to the passage of the act, to wit, on the 1st day of November, 1906, was an employé of defendant, engaged in repairing its railroad track on which such commerce is carried on; and that plaintiff rested his complaint upon the provisions of the federal employers' liability act. *Held*, upon demurrer raising the point, that such act is constitutional and valid, and that the demurrer should be overruled.

(Syllabus by the Court.)

S. F. White and John H. Norton, for plaintiff.
W. A. Begg, J. A. Murphy, and Heber McHugh, for defendant.

MORRIS, District Judge. The defendant herein is a railroad company engaged in interstate commerce. The plaintiff at the time of the injury, to wit, on the 1st day of November, 1906, was an employé of the defendant, engaged in repairing its railroad track on which such commerce is carried on. The complaint rests upon two claims of negligence: The negligence of the defendant, and the negligence of its employés who were at the time of the accident the fellow servants of the plaintiff. The only ground on which the demurrer was seriously pressed was that the complaint does not state facts sufficient to constitute a cause of action. My view is that the allegations as to the negligence of the employés of defendant, who were fellow servants of plaintiff are sufficient, under the act of Congress approved June 11, 1906, entitled "An act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employés," if that act is valid. The defendant has attacked its validity on constitutional grounds, and to that question the argument of counsel was mainly directed, and upon it a decision invited. If the constitutionality of the act is sustained, as I think it must be, the demurrer must fail. I have therefore deemed it necessary to decide that question, and to that question only is this opinion directed. That act, after the title above quoted, is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, 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 employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

"Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee 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 employee. 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 employee, 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 employee: 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 employee, or, in case of his death, to his personal representative.

"Sec. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

"Sec. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees 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." 34 Stat. 232, c. 3073.

As I understood the argument of counsel for defendant, it was conceded that it might not be open to question that, just as the Legislatures of the states have the right to change the rules of law determining the liability of parties as administered in their courts in cases within their jurisdiction, so has Congress the right by appropriate legislation to change such rules of law as administered in the courts of the United States, and so as to control only cases pending therein, for the reason that as mere judicial rules founded on the common law or upon considerations of public policy, but having all the force of law, they are no more sacred than legislative enactments, which may be altered or repealed at the will of the legislative department of the Government. But they contend—and in that I think they are correct—that the scope of the act in question is much broader than that, and that Congress obviously intended it to be so; that it was intended that it should become the supreme law of the land of general application, and as such binding upon all courts, state and federal, and should fix imperative rules by which all of them must hereafter be governed; and that therefore, if valid at all, it can only be valid as a regulation of commerce under the power conferred upon Congress by section 8 of article 1 of the Constitution of the United States, which, for the purposes of this discussion, is as follows:

"The Congress shall have power," among other things, "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and "* * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Proceeding, then, upon that assumption, their contention is that the act is unconstitutional and invalid.

The first ground on which that contention is based is *that the subject-matter of the act is the creation and enforcement of liabilities growing out of the negligence of common carriers engaged in interstate or foreign commerce to their employés, and it is therefore not a regulation of commerce among the states or with foreign nations, within the meaning of that clause of the Constitution, and hence not within the power of Congress.*

As preliminary and leading up to a more direct consideration of the power of Congress in reference to such legislation as that embodied in this act, it may be well to call attention very briefly to some of the decisions, state and federal, as to the power of the state Legislatures in reference thereto, a proper understanding of which will prepare us to correctly apprehend the true doctrine in reference to the extent of the power reposed in Congress. It can no longer be questioned, in the face of these decisions, that the common-law rules which are affected by this act are simply rules of decision enunciated by the courts, according to their ideas of justice and public policy, and are necessarily subject to the control of the state Legislatures in the exercise of what is commonly termed the police power. But when the state legislation is directed to particular occupations, such, for instance, as that of railroad companies, it is subject to certain limitations growing out of the constitutional provisions of the fourteenth amendment, prohibiting the taking of property without due process of law, or the denying to any person the equal protection of the laws, or an interference with the liberty of contract. It seems that the contributory negligence rule has never been directly modified by state legislation; at least none such has been called to my attention. But the reasoning of the cases would apply with equal force to that rule.

These decisions were rendered in cases which arose under various state statutes:

In Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, under a Kansas statute, which provided that "every railroad company organized or doing business in this state, shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any person sustaining such damage"; in Minneapolis and St. Louis Ry. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109, under a statute of Iowa, providing that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they are employed, and no contract which restricts such liability shall be legal or binding"; in McGuire v. C. B. & Q. Ry. Co. (Iowa) 108 N. W. 902, under the Iowa statute, after it had been amended by adding a provision similar to that contained in section 3 of the act of Congress here in question, to the effect that no contract of relief benefit or indemnity entered into prior to the injury, between

the person so injured and such corporation, should constitute a bar or defense to an action under the statute; in Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, under a statute of Indiana, in reference to the liability of railroad and other corporations, for damages for personal injuries suffered by an employé while in its service; in Martin v. Pittsburg & Lake Erie R. Co., 27 Sup. Ct. Rep. 100, 203 U. S. 284, 51 L. Ed. ——, under a statute of Pennsylvania, which will be set forth hereafter. And many other cases under similar statutes might be cited.

All of these decisions are to the effect that it is competent for a state, in the exercise of the police power, to change or modify the rules of decision determining the liability of employers to their employés, as applied to particular pursuits or callings, and that legislation to that effect is not obnoxious to the fourteenth amendment to the Constitution, if all persons brought under its influence are treated alike under similar circumstances and conditions, and if, with a wide legislative discretion, the classification is practical and not palpably arbitrary. In other words, the liability of those in particular occupations, as, for instance, railroad companies, for injuries to their employés, is a proper subject for governmental regulation, and a state may make such reasonable regulations on the subject with respect to all within its territorial jurisdiction as the Legislature thereof may think that the public welfare demands, subject only to the limitations above indicated.

Counsel for defendant, as I have understood them, not only admit, but urge, that such is the well-established law; but they contend that such legislation is within the power of the state Legislatures only, and that it is not within the power of Congress under the commerce clause of the Constitution to enact such a statute as that here under consideration with reference to common carriers engaged in interstate commerce, because it merely changes or modifies the common-law rules determining the *liability*, and thus merely creates a *liability* of such carriers to their employés for their negligence or for the negligence of the fellow servants of the injured employé, and in no way prescribes rules for carrying on traffic or commerce among the states, and therefore in no way regulates such commerce.

As I have said above, I have referred to and given the effect of the foregoing decisions, because I think they prepare us to correctly apprehend the effect of those which more nearly touch the above contention, and from which the true doctrine in reference to the extent of the power of Congress may be ascertained. In this latter class are those decisions in which the Supreme Court of the United States has had under consideration state statutes whose validity was attacked on the ground that they affected interstate commerce, and were regulations of such commerce, and were therefore within the exclusive power of Congress. While it might be said that in none of these cases was the exact question raised which is here being considered, yet, as I think, they not only throw light upon it, but indicate beyond question the views entertained thereon by the justices of our highest court.

But, before proceeding to the consideration of these cases, let us first ascertain, as far as we can, from other decisions, the meaning and scope of the commerce clause of the Constitution.

In determining the meaning and scope of that clause the Supreme Court has, from the time of the delivery of the opinion of the great Chief Justice in Gibbons v. Ogden, until now, seemed to think it undesirable to give to the words therein any hard and fast definition, or to mark with absolute certainty the extent of the power thereby conferred. It has been declared that "interstate commerce" is a term of very large significance (Hopkins v. U. S., 171 U. S. 578, 597, 19 Sup. Ct. 40, 43 L. Ed. 290, citing many cases), and that the power conferred by the Constitution is, as to interstate and foreign commerce, one without limitation. "It authorizes legislation with respect to all the subjects of foreign and interstate commerce, *the persons engaged in it, and the instruments by which it is carried on.*" Sherlock v. Alling, *infra.*

In Telegraph Company v. Texas, 105 U. S. 460, 464, 26 L. Ed. 1067, the court says:

"In Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1, 24 L. Ed. 708, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. *Both companies are instruments of commerce, and their business is commerce itself.*"

In this opinion the italics in all quotations are my own.

In Lottery Cases, 188 U. S. 321, 346, 23 Sup. Ct. 321, 47 L. Ed. 492, Mr. Justice Harlan, delivering the opinion of the majority of the court, reviews at great length the cases in which the court has considered the meaning of the term "commerce among the several states" in the commerce clause of the Constitution, and the power of Congress thereunder, and very completely summarizes the effect of the decisions. I can only quote a small portion of what he says, but an examination of the case will show the very large significance of the term and the difficulty of giving it a precise definition and the wide scope of the power. He says:

"The leading case under the commerce clause of the Constitution is Gibbons v. Ogden, 9 Wheat. 1, 189, 194, 6 L. Ed. 23. Referring to that clause, Chief Justice Marshall said: 'The subject to be regulated is "commerce"; and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. "Commerce," undoubtedly, is traffic, but it is something more; it is intercourse. * * * It has been truly said that "commerce," as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its applications to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it. The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or af-

fect other states. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. * * * The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. * * *'

"Again: 'We are now arrived at the inquiry: What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is *complete in itself*, may be exercised *to its utmost extent*, and acknowledges *no limitations, other than are prescribed in the Constitution.* These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress *as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*' * * * * * * * * * * * *

"This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. *They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph.. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion such regulations may not be the best or most effective that could be employed.*"

Bearing in mind, then, the large significance given to the terms of the commerce clause and the wide scope of the power thereby conferred, let us consider some of those cases, wherein the validity of state statutes is concerned, to which I have referred as more nearly touching the question raised here.

Among them are the following: In Cooley v. Board of Wardens, 53 U. S. 298, 13 L. Ed. 996, under a Pennsylvania statute providing that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots, for the use of the Society for the Relief of Distressed and Decayed Pilots, their widows and children, one-half the regular amount of pilotage; in Morgan v. Louisiana, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 637, under statutes of Louisiana establishing a system of quarantine laws; in Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, under an Alabama statute requiring locomotive engineers to be examined and licensed by a board to be appointed for that purpose; in Nashville, Chattanooga & St. Louis Railway v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, under an Alabama statute requiring locomotive engineers and other persons employed by a railroad company in a capacity which calls for the ability to distinguish

and discriminate between color signals, to be examined, etc.; in Western Union Telegraph Company v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, under a Georgia statute requiring every telegraph company with a line of wires, wholly or partly within that state, to receive dispatches, and, on payment of the usual charges, to transmit and deliver them with due diligence, under a penalty of $100; in Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166, under a Georgia statute forbidding the running of freight trains on any railroad in the state on Sunday, and providing for the trial and punishment on conviction of a superintendent of a railroad company violating that provision; in New York, New Haven & Hartford R. R. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853, under a New York statute regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto; in Missouri, Kansas & Texas Ry. v. Haber, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878, under a Kansas statute relating to bringing into the state cattle liable to or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of the state; in Rasmussen v. Idaho, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820, under a Colorado statute relating to the introduction of infectious or contagious diseases among the cattle and horses of that state; in Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819, under a statute of Indiana giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another; in Peirce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705, under a statute of Ohio for the protection and relief of railroad employés, providing that railroad or railway corporations or companies shall not make certain contracts for exemption from liability to their employés, shall not use defective cars, etc., and to a certain extent abrogating in actions against such companies for personal injuries to employés the rule as to fellow servants; in Martin v. Pittsburg & Lake Erie Ry. Co., supra, under a statute of Pennsylvania providing that when any person should sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé, provided that this section shall not apply to passengers.

In all of these cases the state legislation has been sustained as a valid exercise of the police power of the state, although it may affect interstate commerce, against the contention that it was an invasion of the power given by the Constitution to Congress to regulate interstate commerce. But in all of them the court has been careful to indicate that, as to interstate commmerce, Congress also has the power to enact such legislation; that while the power of Congress to regulate such commerce is plenary, it is competent for the states to pass such legislation until Congress acts; and that such state legislation, in so far as it may conflict therewith, must yield to similar legislation by Congress, whenever it chooses to exercise its power.

In M., K. and T. Ry. v. Haber, at page 635 of 169 U. S., at page 496 of 18 Sup. Ct. (42 L. Ed. 878), the court says:

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state, belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected *until Congress intervenes.*"

In Cooley v. Board of Wardens, after holding that the power to regulate commerce includes the regulation of navigation, and that pilot laws are regulations of navigation, and therefore of commerce, within the grant to Congress of the commercial power, but that the mere grant of the commercial power to Congress does not forbid the states from passing laws to regulate pilotage, the court goes on to say, at page 318 of 53 U. S. (13 L. Ed. 996):

"The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. If it were conceded, on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress as effectually and perfectly excludes the states from all future legislation on the subject as if express words had been used to exclude them. And, on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, *but its exercise by Congress*, which may be incompatible with the exercise of the same power by the states, and that the states may legislate *in the absence of congressional regulations.*"

In Nashville, Chattanooga & St. L. Ry. v. Alabama, at page 99 of 128 U. S., at page 28 of 9 Sup. Ct. (32 L. Ed. 352), the court says:

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and *liabilities* of employés and others on railway trains engaged in that commerce, and that such legislation will supersede any state action on the subject. *But until such legislation is had* it is clearly within the competency of the states to provide against accidents on trains whilst within their limits."

In New York, New Haven & Hartford R. R. v. New York, the court said, at page 631 of 165 U. S., at page 419 of 17 Sup. Ct. (41 L. Ed. 853):

"According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of state regulations enacted under the police powers of the state, and which incidentally affected commerce among the states and with foreign nations, it was clearly competent for the state of New York, *in the absence of national legislation covering the subject*, to for-

bid, under penalties, the heating of passenger cars in that state, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution (Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. Ed. 23), the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not of itself *and without legislation by Congress*, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people."

It may be urged that the cases above quoted from, and some of the others cited, do not directly bear upon the question which we have here. But the cases of Sherlock v. Alling, Peirce v. Van Dusen, and Martin v. Pittsburg & Lake Erie R. R. Co., supra, do bear directly upon that question, and in my judgment completely decide it; each of them being a case in which the statute changed the common-law rule of liability.

It would seem to be a little remarkable that in these three cases, as well as in the others, all of which arose before Congress had seen fit to take any action on the subject, the validity of such legislation by the states, where it affected common carriers engaged in interstate commerce, was assailed on the ground that it did regulate interstate commerce, and was therefore an invasion of the power of Congress over that subject, while now, since Congress has acted, in a statute whose provisions apply only to those engaged in interstate commerce, the opposite contention is made. In Sherlock v. Alling it was contended, quoting from the opinion at the bottom of page 101 of 93 U. S. (23 L. Ed. 819):

"That the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce."

After referring to the cases in which state legislation had been held invalid because directly imposing a tax or burden upon interstate commerce, and after holding that no such operation could be ascribed to the Indiana statute, the court, speaking by Mr. Justice Field, at page 103 of 93 U. S. (23 L. Ed. 819), goes on to say:

"That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the *liability* of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind, prescribing the *liabilities* or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection, *because it may affect persons engaged in foreign or interstate commerce.* Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the

contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, *though the legislation might indirectly affect the commerce of the country.* Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

"*It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on.* And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation; prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; *and what provisions their owners shall make for the health, safety, and comfort of their crews.* Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

"The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. *Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority.* But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, *the laws of Congress are silent,* and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said generally that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. *Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies,* giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

In Peirce v. Van Dusen, the Circuit Court, composed of Mr. Justice Harlan and Judges Taft and Lurton, had under consideration the Ohio statute which changed or modified the fellow servant rule, thus, as is contended here, creating a liability which did not theretofore exist. It is true that the principal question before the court was whether the statute of Ohio was applicable to cases against a receiver of a railroad corporation, especially one acting under the orders of a federal court; but the court went on to consider its applicability to railroad companies doing business in Ohio and engaged in interstate commerce (the railroad company in that case being so engaged) and the question of its validity arising from the fact that it thus affected such commerce. Speaking by Mr. Justice Harlan, the court says, at page 698 of 78 Fed., at page 284 of 24 C. C. A. (69 L. R. A. 705):

"So much as to the scope and true meaning of the Ohio statute, without reference to the courts in which it may be enforced. If the statute means what we hold it to mean, must not full effect be given to it in actions for personal injuries brought against a receiver in a court of the United States? This question must be answered in the affirmative. Such legislation is not liable

to the objection that it encroaches upon federal authority, or upon the jurisdiction or power of the United States court. The statute does nothing more than to prescribe a rule of action to be observed by all within the state. The authority to enact it is derived from the general power of the state to regulate the exercise of the relative rights and duties, and to provide for the safety, of all persons within its territorial jurisdiction. It is the duty of the federal court sitting in this state to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that 'the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' Rev. St. § 721; Baltimore & O. R. Co. v. Camp, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952. Indeed, if Congress had not so declared, this court, upon principles of comity, and in support of the public policy of the state, might well recognize and enforce, in actions brought against receivers of railroads, any rules established by the state for like actions brought against railroad companies.

"The Ohio statute is not applicable alone to railroad corporations of Ohio engaged in the domestic commerce of this state. It is equally applicable to railroad corporations doing business in Ohio *and engaged in commerce among the states*, although the statute, in its operation, *may affect in some degree a subject over which Congress can exert full power*. The states may do many things affecting commerce with foreign nations and among the several states *until Congress covers the subject by national legislation*."

Then, after citing and commenting upon many of the cases which I have above cited, the court says, at page 700 of 78 Fed., at page 286 of 24 C. C. A. (69 L. R. A. 705):

"*Undoubtedly, the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states. But as Congress has not dealt with that subject*, it was competent for Ohio to declare that an employé of any railroad corporation doing business here, including those engaged in commerce among the states, shall be deemed, in respect to his acts within this state, the superior, not the fellow servant, of other employés placed under his control. If the effect of the Ohio statute be, as undoubtedly it is, to impose upon such corporations, in particular circumstances, a liability for injuries received by some of its employés which would not otherwise rest upon them according to the principles of general law, that fact does not release the federal court from its obligation to enforce the enactments of the state. Of the validity of such state legislation we entertain no doubt."

It is difficult to understand why, if Congress may regulate the liability of common carriers engaged in interstate commerce to strangers, it may not regulate their liability to their employés; the protection of interstate commerce and of the persons engaged therein being as much involved in the one case as in the other.

In the case of Martin v. Pittsburg & Lake Erie R. R. Co., the court had under consideration the Pennsylvania statute whose provisions have been given above. The plaintiff, Martin, was injured while he was on a train of the railroad company, in the employ of the United States as a railway postal clerk on a route extending from Cleveland, Ohio, to Pittsburg, Pa. The injuries arose from the derailing in Pennsylvania of the train by the negligence of the crew of a work train in permitting a switch leading to a side track to be open. The defendant, among other defenses, pleaded the law of Pennsylvania above referred to and alleged that it was applicable and relieved from

responsibility. In reply the plaintiff denied the existence and applicability of the statute, and further contended that the statute if existing and applicable was void, first, because contrary to the power delegated to Congress to establish post offices and post roads; second, because repugnant to the commerce clause of the Constitution; and, third, because in conflict with the equal protection and due process clauses of the fourteenth amendment, and also the clause prohibiting a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. On the trial before a jury the court held the statutes to be applicable and valid, and hence operative to defeat a recovery. There was a verdict and judgment in favor of the defendant, which was severally affirmed by the Circuit Court and by the Supreme Court of the state of Ohio. The Supreme Court of the United States also affirmed the judgment, holding the statute to be applicable and valid. After disposing of the first contention, the court went on to consider the second contention as to the repugnancy of the statute to the commerce clause of the Constitution, and, speaking by Mr. Justice White, said:

"This brings us to the second contention—the repugnancy of the Pennsylvania statute to the commerce clause of the Constitution. It is apparent from the decision in the Price Case, just previously referred to, that in deciding that question we must determine the application of the statute to the plaintiff in error, wholly irrespective of the fact that at the time he was injured he was a railway postal clerk. In other words, the validity or invalidity of the statute is to be adjudged precisely as if the plaintiff was, at the time of the injury, serving for hire in the employment of a private individual or corporation.

"Under the circumstances we have stated, the case of Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268, clearly establishes the unsoundness of the contention that the Pennsylvania statute in question was void because in conflict with the commerce clause. In that case a horse was shipped from a point in the state of New York to a point in the state of Pennsylvania, under a bill of lading which limited the right of recovery to not exceeding $100 for any injury which might be occasioned to the animal during the transit. The horse was hurt within the state of Pennsylvania through the negligence of a connecting carrier. In the courts of Pennsylvania, applying the Pennsylvania doctrine which denies the right of a common carrier to limit its liability for injuries resulting from negligence, a recovery was had in the sum of $10,000, the value of the animal. On writ of error from this court the judgment of the Supreme Court of Pennsylvania was affirmed: it being held that, at least, *in the absence of legislation by Congress on the subject*, the effect of the commerce clause of the Constitution was not to deprive the state of Pennsylvania of authority to legislate as to those within its jurisdiction concerning *the liability* of common carriers, *although such legislation might, to some extent, indirectly affect interstate commerce.* The ruling in the Hughes Case in effect but reiterated the principle adopted and applied in Chicago, M. & St. P. R. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, *where an Iowa statute forbidding a common carrier from contracting to exempt itself from liability was sustained as to a person who was injured during an interstate transportation.*

"The contention that because, in the cases referred to, the operation of the state laws which were sustained was to augment the liability of a carrier, therefore the rulings are inapposite here, where the consequence of the application of the state statute may be to lessen the carrier's liability, rests upon a distinction without a difference. The result of the previous rulings was to recognize, *in the absence of action by Congress*, the power of the states to legislate, and of course this power involved the authority to regulate as the state might deem best for the public good, without reference to whether the

effect of the legislation might be to limit or broaden the responsibility of the carrier. In other words, the assertion of federal rights is disposed of when we determine the question of power, and doing so does not involve considering the wisdom with which the lawful power may have been under stated conditions exerted. * * *

"The contention that because plaintiff in error, as a citizen of the United States, had a constitutional right to travel from one state to another, he was entitled, as the result of an accident happening in Pennsylvania, to a cause of action not allowed by the laws of the state, is in a different form to reiterate that the Pennsylvania statute was repugnant to the commerce clause of the Constitution of the United States. Conceding, if the accident had happened in Ohio, there would have been a right to recover, that fact did not deprive the state of Pennsylvania of its authority to legislate so as to affect persons and things within its borders. The commerce clause not being controlling *in the absence of legislation by Congress*, it follows, of necessity, that the plaintiff in error, as an incident of his right to travel from state to state, did not possess the privileges, as to an accident happening in Pennsylvania, to exert a cause of action not given by the laws of that state, and had no immunity exempting him from the control of the state legislation."

In the case of Pennsylvania R. R. Co. v. Hughes, referred to in the opinion of Mr. Justice White, above quoted, the court says, at page 491 of 191 U. S., at page 136 of 24 Sup. Ct. (48 L. Ed. 268):

"It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that, *in the absence of Congressional legislation upon the subject, a state may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.*

"*We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts.* The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held, *in the absence of Congressional action providing a different measure of liability* when contracts, such as the one now before us, are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary."

In C., M. & St. P. Ry. Co. v. Solan, 169 U. S. at page 137, 18 Sup. Ct. at page 291 (42 L. Ed. 688) the court says:

"They are not, *in themselves*, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. *So long as Congress has not legislated upon the particular subject*, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

The effect of these decisions and of all those cited above, as I understand them, is that such legislation as that considered and reviewed therein may not be, and is not necessarily and in and of itself, a regulation of commerce, but that it may be adopted as such, and that Congress can enact such legislation as a regulation of interstate commerce. And in the decisions from which I have so fully quoted the court recognizes and declares, if the language means anything, that Congress has power under the commerce clause of the Constitution

to enact such legislation as that here under consideration, changing as to common carriers engaged in interstate commerce common-law rules of liability, as a regulation of interstate commerce.

It is contended that the portions of the opinions which I have emphasized are obiter dicta. If they are, it is strange, indeed unfortunate, that the eminent judges of our highest court should so often fall into such dicta. But they are not obiter dicta. The question of the invasion by the state legislation of the power of Congress under the commerce clause of the Constitution was necessarily involved therein, and if such legislation was a mere creation of a liability, and was for that reason not a regulation of commerce, and therefore not within the power of Congress, as is contended here, it is difficult to understand why the court did not so declare, and thus dispose of the cases. If the power to enact such legislation is in the state Legislatures only, and not in Congress, the court had only to say so, and it was unnecessary to so elaborately discuss that question. By doing so, and by saying what they did, they recognized that the question of the power of Congress was involved in the cases, and they recognized and declared that such legislation is within the power conferred by the commerce clause.

Nor are these cases to the effect that the power of Congress can only be exerted by prescribing that some particular thing shall be done. And it would seem to be apparent that this act is none the less a rule or regulation under which the business of such carriers is to be conducted and by which it is to be governed, because it does not prescribe that some specific thing should be done or some specific appliance used.

In Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, the court had under consideration the act of Congress known as the "Safety Appliance Act" of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), requiring railroads engaged in interstate commerce to equip their locomotives, trains, and cars with air brakes, automatic couplers, etc. The plaintiff claimed that he was relieved of assumption of risk under common-law rules by section 8 of that act, which provided:

"That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

That this act was squarely within the power of Congress under the commerce clause of the Constitution was not questioned. And that, in connection with such a regulation as that requiring the use of such appliances, Congress had the power, under the commerce clause of the Constitution, to change the common-law rule as to the assumption of risk, seems to have been thought too clear for argument. In that case the court said:

"The object was to protect the lives and limbs of railroad employés by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other."

And again:

"The primary object of the act was to promote the public welfare by securing the safety of employés and travelers."

The court here recognizes that the public welfare, as involved in interstate commerce, may be promoted by legislation of Congress for the protection of persons employed in carrying it on.

While the act here under consideration does not state either in its title or body, as did that act, what the object of it is, it seems to me that such object is plain upon its face. It will be apparent, I think, from a mere reading of the statute, that Congress had in contemplation much more than the mere creation and imposition of the liability mentioned upon common carriers engaged in interstate commerce to their employés. It seems to me to be apparent that it had in contemplation the protection of the lives and persons of the employés of such carriers whose employment had any relation to such commerce, and that it enacted the statute for that purpose, and by its provisions changed certain common-law rules determining liability in order to promote that object by securing a more careful selection of employés, a closer and more careful supervision of them, and a more rigid enforcement of their duties, and thus to promote the public welfare.

In Mikkelson v. Truesdale, 65 N. W. 260, 63 Minn. 137, the Supreme Court of Minnesota had under consideration the state statute entitled "An act to define the liabilities of railroad companies in relation to damages sustained by their employés." Neither in the title nor in the body of the act was anything said as to its object, but the court said that it was—

"a police regulation intended to protect life, person, and property by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies, by making them pecuniarily responsible to those of their servants who are injured by the negligence of incompetent or careless fellow servants."

Now, if Congress has power, as a regulation of commerce, having in view the promotion of the public welfare by securing the safety of employés and travelers, to pass an act like the safety appliance act, requiring the use of specific appliances, and can in connection therewith and to promote the objects of the statute change the common-law rule as to the assumption of risk, has it not power as a regulation of commerce to pass such an act as the one we are here considering?

Must Congress be obliged, in order to bring its legislation within the commerce clause of the Constitution, to provide specifically and definitely for all the conditions that may exist and for all of the almost infinite situations and circumstances that may arise affecting the safety of employés in the conduct of the business of common carriers? Must it specifically and definitely provide what precautions should be taken for the safety of employés under all such conditions and in all these almost innumerable situations? Can it not say generally, as it has, in effect, said in this act: "We cannot anticipate all of these conditions and situations. We cannot provide for all the precautions which ought to be taken for the safety of employés by common carriers engaged in interstate commerce. But in order to secure, under all conditions and in all

situations, a more diligent and thorough performance of the duties of such carriers, and in order to compel and insure that every proper precaution shall be taken for the safety of their employés both as to the agencies and instrumentalities used and as to the selection and supervision of such employés, and in order to minimize as far as possible the dangers to such employés, we will not permit such carriers, in case of the death or injury of an employé resulting from their negligence or the negligence of any of their servants, to invoke certain common-law rules for the purpose of escaping liability, but they shall be governed by and their liability shall be ascertained by the rules herein land down." May not Congress say, as it has, in effect, said in this act, we declare that interstate commerce, including those engaged therein and the public to be served thereby, must be safe-guarded by the rules of liability herein prescribed and that such commerce must bear the burden hereby imposed? It seems to me there can be but one answer to these questions; and that is, that Congress need not provide specifically and definitely for all such conditions and situations, and that it has power under the commerce clause to pass such an act.

Undoubtedly, if Congress may prescribe specific rules, it may prescribe general rules, and may prescribe the consequences which shall follow in case of a violation of either. There is no suggestion in the Constitution or in reason to the contrary. The field belongs to Congress, and it may, if it sees fit, occupy all of it. Congress has by the statute here in question, in effect, said: "The employés of those engaged in interstate commerce are too frequently placed in peril of life and limb through the negligence of their employers and through the negligence of their own fellow servants. Such commerce itself is subject to unnecessary hazards for the same reason. This must be prevented, or at least reduced to a minimum. The negligence of fellow servants is in large measure under the control of the employers, if the latter but exercise proper care in the selection of such servants and in their supervision and require of them the performance of tasks only which will impose reasonable tests upon their skill or powers of endurance. Increasing the liability of the employer will tend to decrease those perils and hazards. The duties of such carriers as declared by the courts and as prescribed by particular statutes are well known and understood, and such duties must be more faithfully performed, and such carriers must see to it that greater precautions are taken to safeguard such commerce and to protect their employés engaged therein, and in order to secure this the rules of their liability shall be as herein provided."

If it be contended that the creation of such liabilities is an exercise of the police power, and that such power belongs to the states, the answer is that while, as a general rule, the police power belongs to the states, and was by the Constitution reserved to the states, yet Congress may, in the exercise of its power to regulate commerce, impose upon such commerce regulations which are in their essential nature police regulations. Upon no other theory can the decisions in Johnson v. Southern Pacific Co., supra, and in Lottery Cases, supra, be justified and sustained.

I am therefore of the opinion that the first ground on which the constitutionality of this act is denied is not well taken.

The second ground on which the constitutionality of the act is attacked is: *That, if it be admitted that the act does regulate interstate commerce, it also regulates commerce that is exclusively within the several states, and that the latter is so inseparably combined with the former as to condemn the whole act as unwarranted by the Constitution.* The contention, as I understand it, is that a common carrier engaged in interstate commerce may be engaged in intrastate commerce also, and the language of the act being so broad as to cover all the employés of such carrier, without reference to the nature of their employment, it is not only a regulation of interstate commerce, but also a regulation of intrastate commerce, and as it is impossible to so construe it as to separate the two it must be held invalid.

This contention is, I think, answered by what I have already said, and by the decisions to which I have referred, and others to which I shall call attention. It is well to recall the familiar rule that, while it is an imperative duty from which no court should shrink to declare void any statute the unconstitutionality of which is made apparent, due regard to the boundary between the legislative and the judicial departments of the government requires that this duty should be exercised with the greatest caution. Under this rule, where under one construction a statute may be invalid, if there is another reasonable construction which would sustain its validity, the latter should be adopted. Am. and Eng. Ency. of Law (Old Edition) vol. 3, p. 674, note and cases there cited. If, therefore, it were necessary to sustain its validity that this act should be so construed as to confine its operation to those whose injuries occurred at a time when they were actually engaged upon interstate traffic, I think that, having in view its object, there is ample authority for such construction. And the courts, giving it such construction, should determine from the facts and circumstances of each particular case whether or not it is applicable. Even in the Johnson Case, where the act under consideration was not wholly remedial, the Supreme Court refused to give it an absolutely strict construction, as had been done by the Circuit Court of Appeals. The act here under consideration is not penal, but may be regarded as wholly remedial, and as such would not only permit, but require, a wider latitude of construction. It would seem to be absurd to say that, where Congress has enacted a statute of a remedial nature, it must be held unconstitutional, because, while it might be construed to apply to a subject clearly within the control of Congress, it might also be construed to apply to something not within such control.

But it is not necessary to so narrowly construe the act in order to sustain its validity. It should be fairly and reasonably construed (Church of The Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226), having in view its object, and bearing in mind that it is *the carrier engaged in interstate commerce* which the act seeks to regulate in relation to its duty to its employés. From a mere reading of the act, it will be apparent that no argument is necessary to show that the expression "any common carriers," in the second section of the act, means "any common carriers engaged in interstate or foreign commerce."

Congress evidently intended that the act should embrace all the employés to whom its power under the commerce clause of the Constitution extends, and if the power of Congress over interstate commerce is one without limitation, plenary and complete in itself, and which may be exerted to its utmost extent, subject *only* to such limitations as the Constitution of the United States imposes, and if it authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on; and if under such power Congress can, for the purpose of promoting the safety of employés engaged therein, and of persons and property carried therein, enact legislation such as that contained in this act under which the liability of carriers engaged in such commerce to their employés shall be determined (and the cases cited fully sustain all the foregoing propositions), it would seem to be apparent that it can make such legislation applicable to all employés of such carriers whose employment relates to such commerce. And if such carrier is also engaged in intrastate commerce, using therein the same means and agencies, such as railroad tracks, switches, cars, etc., it would also seem to be apparent that Congress can make such legislation applicable to all employés of such carrier whose employment relates to such means and agencies. In such case it may be said that the employment of such employés relates to interstate commerce.

It seems to me that, as to a carrier engaged in both interstate and intrastate commerce, the act applies, and was intended to apply, where such carrier uses, in whole or in part, the same means and agencies in both, and where the employment of the injured employé has some relation to such interstate commerce or to such means and agencies.

If the carrier's business is carried on in such a way that the act must apply to *all* its employés for the reason that the employment of all of them relates to interstate commerce, it can make no difference, so far as the power of Congress to pass the act is concerned.

That it is within the power of Congress to regulate the liability of common carriers engaged at the same time in both interstate and intrastate commerce, and using the same means and agencies for both, to all their employés whose employment has some relation to such means and agencies, and that Congress so intended, would seem to be apparent when we reflect that the safety of interstate commerce, and the protection of the lives and persons of those engaged therein, and of the persons and property carried therein, may depend as much upon the taking of proper precautions for the safety of employés engaged upon intrastate traffic as upon the taking of such precautions for the safety of those engaged upon interstate traffic only.

Let us suppose that such carrier has commingled in a train, cars containing state traffic only with those containing interstate traffic, and that while engaged on such train a brakeman is injured while setting a brake on one of the cars containing only state traffic; or, again, that such carrier has a yard in which are handled both cars containing only state traffic and those containing interstate traffic, and that while handling a car containing only state traffic a switchman is injured; or, again, that such carrier is operating, on its line of road on which trains containing interstate traffic are operated, a train made up entirely of

cars containing only intrastate traffic, and that on such train a brakeman is injured. Could it be said, in either of such cases, that the employment of such brakeman or switchman had no relation to interstate commerce, and that he was not within the spirit and object and purpose of the statute? And could it be said that a careful selection of such employés, a close and careful supervision of them, and a rigid enforcement of their duties, and the taking of proper precautions for their safety were not of vital importance in securing the safety of life, person, and property in interstate commerce?

It may be well, in this connection, to call attention to what Mr. Justice Brewer, in Baltimore & Ohio Railroad v. Baugh, 149 U. S. 368, 378, 13 Sup. Ct. 914, 918 (37 L. Ed. 772) says. After referring to the authorities holding that the question of the liability of a railroad company for injuries to its servants is a matter of general and not of local law, which the court would, in the absence of express statute on the subject, determine for itself, he continues:

"* * * There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law. Further than that, it is a question in which the Nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. To-day the volume of interstate commerce far exceeds the anticipation of those who framed the Constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the interstate commerce act and its amendments (24 Stat. 379, c. 104 [U. S. Comp. St. 1901, p. 3154]), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars (Pub. Acts, 52d Cong., 2d Sess., c. 113). The lines of this very plaintiff in error extend into half a dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations, and duties subsisting between it and its employés change at every state line? If to a train running from Baltimore to Chicago it should, within the limits of the state of Ohio, attach a car for a distance only within that state, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company?"

It would seem to be clear that it is of the first importance that Congress should be able to regulate the liability of such common carrier to all such employés.

The fact that a common carrier engaged in interstate commerce may also be engaged in intrastate commerce, using therein in whole or in part the same means and agencies, cannot defeat the power of Congress to regulate such carrier. The regulation of intrastate commerce which may result in such a case (if, indeed, in such case there can be said to be any regulation of intrastate commerce by such an act as this) is due to the fact that the carrier is at the same time and with the same means and agencies engaged in both kinds of commerce; and it seems to me that it could not possibly be said that, because the legislation of Congress may operate upon intrastate commerce on account of the carrier being thus engaged in both kinds of commerce, it must be declared unconstitutional, and thus the power of Congress defeated. The cases

cited show that the states may enact legislation of the kind here in question when Congress has not already spoken, and that such legislation will be valid, although it may affect interstate commerce. Is it possible, then, if such legislation is within the power of Congress as a regulation of interstate commerce, that Congress cannot exercise that power as to those engaged in such commerce merely, because at the same time and with the same means and agencies they are engaged in intrastate commerce? The question, it seems to me, answers itself.

In considering what was said in Johnson v. Southern Pacific Company, supra, as to the character of the car being local only, and not actually engaged in interstate movement, it must be borne in mind that the act there being considered was that of March 2, 1893, which was by its terms restricted in its application to cars "used in moving interstate traffic"; but there are clauses and expressions in the opinion which might be interpreted to indicate that, if the act had been as broad as the one here under consideration, it would not have been necessary to consider that question at all, and that it would have made no difference as to whether the car was being used in moving interstate traffic or not.

The act was amended by the act of March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1905, p. 603]), which provided that the provisions of the former act should be held to apply to "all trains, locomotives, tenders, cars, and similar vehicles *used on any railroad engaged in interstate commerce.*"

In U. S. v. Great Northern Ry. Co., (D. C.) 145 Fed. 438, the court had under consideration the latter act, and Judge Whitson, in an opinion in which I entirely concur, held that it applied to all cars regularly used on any railroad engaged in interstate commerce, not only while actually in use in such commerce, but at all times when in use on such road. The court said:

"The allegations of the sixth cause of action are that the defendant used on its line of railroad in Hillyard, in the state of Washington, a locomotive engine in moving a car containing interstate traffic, consigned from St. Cloud, in the state of Minnesota, to Hillyard, in the state of Washington, when the coupling and uncoupling apparatus of the locomotive was out of repair and inoperative. The sufficiency of these several allegations is challenged upon the sole ground that it does not affirmatively appear that the cars and locomotive were being used in interstate traffic, for the reason that reliance must be made upon the allegations that they were used only in the state of Washington. Having reference to the constitutional powers of Congress, the argument is that a common carrier is not affected by the legislation which the plaintiff would invoke, because it does not apply to traffic within the states.

"The title of the act of 1893 fully reflects the legislative intent as expressed in the act, and it is manifest that the purpose in view was the regulation of commerce between the states by requiring common carriers to conform to certain requirements regarded as essential to the safety of employees and passengers. To sustain the demurrer would be to hold that it is beyond the power of Congress to control the instrumentalities through which interstate commerce may be carried on. But the prerogative necessarily carries with it the authority to prescribe the rules and regulations which shall apply to those engaged in it. Illustrations of the futility of any effort on the part of Congress to exercise its constitutional powers in this regard, if the contention made by the defendant can be sustained, are not far to seek. An interstate carrier might haul traffic from one state to another, there transfer it, and from thence transport it, without any of the safety appliances provided by law. If it be answered that this would be an evasion of the law, the result

is susceptible of further illustration. Cars containing state traffic could be commingled with those containing interstate traffic, and thus defeat the purposes of the legislation upon the subject. The effect of this would be to endanger the train engaged in interstate traffic. Again, a carrier could use trains engaged entirely in state traffic upon its lines, without the requisite equipment, which might result in injury to passengers by coming in collision with a train engaged in interstate traffic. *It is the carrier which the acts seek to regulate, and it is by this method that Congress has undertaken to bring the matter under control.*"

As said by Mr. Justice Harlan, in the Lottery Case, supra:

"It is to be remarked that the *Constitution does not define what is to be deemed a legitimate regulation of interstate commerce.* In Gibbons v. Ogden it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution. While our government must be acknowledged by all to be one of enumerated powers (McCulloch v. Maryland, 4 Wheat. 316, 405, 407, 4 L. Ed. 579), the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. 'The sound construction of the Constitution,' this court has said, 'must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.' 4 Wheat. 421."

In an able article on the act here in question in the Central Law Journal of October 12, 1906, vol. 63, p. 284, cited by counsel here, and very largely quoted from, the authors say:

"The general and sweeping terms 'every common carrier,' 'any of its employés,' 'any of its officers, agents, or employés,' 'all instrumentalities,' 'any common carriers,' and 'any employé,' must establish the proposition that there was but one idea in the mind of Congress, namely, that as to commerce there shall be no states."

To say that because Congress, as a regulation of interstate commerce, and for the purpose of promoting the public welfare by protecting life and person therein, has seen fit to abolish or modify certain rules of decision founded on the common law upon considerations of public policy, in reference to those engaged in such commerce, it has thereby in effect meant that as to commerce there shall be no states, seems to me to be very extreme, if not absurd. The plain answer to any such assertion is that a person or corporation engaged in both interstate commerce and intrastate commerce, and using therein the same means and agencies, and employing those whose employment relates to such interstate commerce or to such means and agencies, must submit to such conditions as that branch of the government to which plenary power over such commerce has been given by the Constitution may prescribe, even though such conditions may affect the intrastate commerce in which such person or corporation is engaged.

In the same article its authors seem to look upon the changes made by this act in the fellow servant rule, the contributory negligence rule, the rule as to the freedom of a carrier to contract with its em-

ployés concerning its liability for an injury to an employé, and the removal of the limit to the amount of recovery for an injury resulting in death, so often prescribed by state statutes, as startling and dangerous. They do not so impress me. I think it has come to be generally recognized that the reasoning of the cases in which the fellow servant rule has been laid down by the courts has, in view of modern methods and the many dangerous mechanical means and appliances used in almost every branch of modern industry, lost much, and in some cases all, of its force. I think it may be fairly asserted that the contributory negligence rule, as laid down and applied by the courts, is, in view of modern conditions, certainly as applied to those engaged in certain occupations, a harsh, cruel, and unjust rule, and ought long since in the furtherance of justice and in the interest of humanity to have been greatly modified.

It has never been the rule in admiralty, to which one of the textbooks on the Law of Negligence refers as being certainly nearer ideal justice, "if juries could be trusted to act upon it." This act at least leads in the direction of the admiralty law, and certainly, if a rule is an ideal one, its adoption should be striven for in any intelligent judicial system, and even if it were admitted that juries could not be trusted to act upon it, to which I do not at all agree, that would not be a condemnation of the rule, but of a part of that system of jurisprudence which has come down from our forefathers, and which is, and let us devoutly hope always will be, firmly rooted in our Constitution and laws. And is it not absurd that a common maximum standard should be established to measure the value of the lives of men to their families, especially when that standard is as low as some of the Legislatures have fixed it? It would seem that the value of the life of a man to his family, or to those dependent upon him, should be determined, as all other damages are determined, by the particular circumstances of each case. And there are substantial reasons why an employer, especially one engaged in certain occupations, should not be permitted to relieve himself by contract with his employés from liability for injuries caused by his negligence or the negligence of his other employés.

I do not think that the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, or Illinois Central Railroad Company v. McKendree, 27 Sup. Ct. Rep. 153, 203 U. S. 514, 51 L. Ed. ——, or any of that line of cases are applicable to the question now under consideration. This opinion is already too long, and I can therefore only review the Trade-Mark Case. A careful consideration of that case will, I think, not only not defeat the conclusion which I have reached, but will tend to strengthen it.

That decision was rendered in the consideration of indictments brought under the purely penal sections of the trade-mark statute. Congress passed that statute upon the manifest assumption that the whole subject of trade-marks was a matter of national control under that clause of the Constitution providing that Congress shall have power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." There was therefore no

possible room for the contention that Congress intended that the law should be applicable to those trade-marks only which were used in interstate commerce. And in the Sixth circuit the law was pronounced constitutional in a case on which the question was argued and decided upon that clause of the Constitution, and in which the opinion was advanced that it is the only provision by which the authority of Congress on the subject of trade-marks is conferred. That contention, however, was not insisted upon by the Attorney General in the Trade-Mark Cases. He based his main argument upon the commerce clause of the Constitution. The court, after considering the power of Congress to deal with the subject under the clause above quoted, and deciding adversely to such power, went on to consider the power of Congress to deal with the subject under the commerce clause of the Constitution.

The court refused to decide the question whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control. The decision was that, when Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law or from its essential nature that it is a regulation of commerce with foreign nations or among the several states or with the Indian tribes; that, if not so limited, it is in excess of the power of Congress; that the act there under consideration was not so limited; that if its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between the citizens of the same state, it is obviously the exercise of a power not confided to Congress; that, if there is no recognition of this principle, it is invalid; that it was manifest that no such distinction was to be found in that act, but that its broad purpose was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark or who wished to adopt one in the future, without regard to the character of the trade to which it must be applied or the residence of the owner; and that it was therefore invalid. The court says:

"The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, *when used or applied to the classes of commerce which fall within that control*, is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an act of Congress, or of any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty.

"In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand. That such has been the uniform course of this court in regard to statutes passed by Congress will readily appear to any one who will consider the vast amount of argument presented to us assailing them as unconstitutional, and he will count, as he may do on his fingers, the instances in which this court has declared an act of Congress void for want of constitutional power.

"Governed by this view of our duty, we proceed to remark that a glance at

the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the states, and commerce with the Indian tribes. While bearing in mind the liberal construction that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the states means commerce between the individual citizens of different states, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress.

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, *it is reasonable to expect to find on the face of the law*, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. *If not so limited*, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress.

"We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. *We would naturally look for this in the description of the class of persons who are entitled to register a trade-mark, or in reference to the goods to which it should be applied. If, for instance, the statute described persons engaged in a commerce between the different states, and related to the use of trade-marks in such commerce*, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the states. So if, when the trade-mark has been registered, Congress had protected its *use on goods sold by a citizen of one state to another, or by a citizen of a foreign state to a citizen of the United States*, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. *But no such idea is found or suggested in this statute.* Its language is: 'Any person or firm domiciled in the United States, and any corporation created by the United States, or of any state or territory thereof'—or any person residing in a foreign country which by treaty or convention affords similar privileges to our citizens, may by registration obtain protection for his trade-mark. *Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate.* It is a general declaration that *anybody in the United States*, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish 'a statement of the class, of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated,' *there is no hint that the goods are to be transported from one state to another, or between the United States and foreign countries.* Section 4939 is intended to impose some restriction upon the Commissioner of Patents in the matter of registration, *but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution.* The remedies provided by the act, when the right of the owner of the registered trade-mark is infringed, *are not confined to the case of a trade-mark used in foreign or interstate commerce.*

"It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, *without regard to the character of the trade to which it was to be applied or the residence of the owner*, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here."

The statute here under consideration discloses on its face that it is intended as a regulation of interstate and foreign commerce, being expressly confined to common carriers engaged in such commerce. The

purpose of the act is not to establish a regulation applicable to all trade, to commerce at all points, but simply to establish a regulation of interstate and foreign commerce. It is not designed to govern commerce wholly between citizens of the same state, but simply to protect interstate commerce. Local or intrastate commerce if affected at all by it, is only affected because the carrier may be at the same time and with the same means and agencies engaged in interstate commerce. If the act applied to all common carriers, irrespective of the character of commerce in which they might be engaged, it would come within the rule announced in the Trade-Mark Cases. But we find on the face of the law that it is expressly confined to common carriers engaged in interstate commerce, over which, under the authorities cited, Congress has paramount and exclusive control whenever it chooses to exercise its power. All these considerations distinguish and differentiate it from the act which was under consideration in the Trade-Mark Cases.

That Congress has since cured the defect in the former trade-mark laws, by providing that they shall apply to trade-marks used in commerce with foreign nations, or among the several states, or with Indian tribes (33 Stat. 724, c. 592 [U. S. Comp. St. Supp. 1905, p. 668]), would seem to indicate at least that the members of the judiciary committees in the two Houses of Congress, composed as they are of lawyers of great ability, have placed the same interpretation upon the decision in the Trade-Mark Cases as that indicated above.

As to the McKendree Case, it is to be observed that the order of the Secretary there being considered undertook "to make a stringent regulation with highly penal consequences," single in character, and including commerce wholly within the state. The order was not limited to interstate commerce. It was a regulation as to the transportation of cattle from one side of a line within a state to the other side of said line, and it applied "to all cattle transported from the south of this line to parts of the United States north thereof." "A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the state of Tennessee." It therefore included cattle transported wholly within the state of Tennessee from points south of the line to points north of it, as well as those which came from or were going to points outside of the state. It applied to all who might transport such cattle, whether engaged in interstate commerce or not. In other words, it was in no way limited to interstate commerce. What I have said, therefore, in relation to the Trade-Mark Cases is equally applicable to this case.

Again, let us remember that it is *the carrier,* one engaged in interstate commerce, which the act here in question regulates in relation to its duty to its employés, and that if it may be said (as I do not think it can be) to regulate intrastate commerce by reason of the fact that it may apply to an employé who at the time of his injury is engaged upon intrastate traffic, it is because of the manner or method in which the carrier conducts its business, combining or commingling its interstate with its intrastate commerce. The act here in question is directed to common carriers engaged in interstate or foreign commerce, and over such carriers Congress has plenary power.

In the construction of a statute the inquiry always is: What was the legislative intent? In the Trade-Mark Cases it was held that the act in question clearly indicated the legislative intent to embrace all trademarks without respect to the character of the commerce in which they were used. In the McKendree Case it was held, first, that the act, if otherwise valid, evidenced no intent on the part of Congress to authorize the Secretary to promulgate the rule there involved, and, second, that the rule on its face carried with it no suggestion that the secretary intended thereby anything other or different from the plain import of its terms; that he evidently intended it to apply to all commerce, and that it was therefore invalid.

This act on its face relates to carriers engaged in interstate commerce. It extends to all such carriers. It extends to no others. Its fair meaning and interpretation is that it applies to all those employés of such carriers, and to those only, who have some relation to such commerce or to the means and agencies employed therein. Cases may possibly arise where a carrier engaged to some limited extent in interstate commerce may not be an interstate carrier within the meaning of this act, as respects a particular employé, or as respects the circumstances of some particular case. That remains to be declared when the case arises. Extreme cases which may have no existence, and which may never exist, are not to be conjured up for the purpose of defeating the obvious intention of Congress. Extraordinary situations are usually not in the minds of the lawmakers, and legislation is not to be held bad with reference thereto. If the general purpose of the law, as fairly indicated by its terms, is within constitutional limits, it will not be defeated by applying to it the test of some extreme case, possibly within the literal provisions of the act, but entirely beyond its spirit and meaning as a whole.

In the foregoing discussion reference has been made principally, if not altogether, to railroads engaged in interstate commerce, but the same principles and the same reasoning would apply as well to other common carriers engaged in such commerce. I am therefore of the opinion that the second ground on which the objection to the constitutionality of this act is based is not well taken.

The contention that the act is void because it denies the equal protection of the laws is, I think, without merit. It is beyond question that a state Legislature can change the common-law rules determining the liability of employer to employé as to all employers within its jurisdiction, and that such legislation would not be contrary to the fourteenth amendment, because the danger to employés is greater in some occupations than in others, or because in the same occupation some of the employés may be exposed to greater danger than others. It was the evident intention of Congress that the act here in question should embrace all employers and all of their employés to whom its power under the commerce clause of the Constitution extends, and, considering the extent of that power, the fact that it applies to all such employés, irrespective of the danger of their particular employments, no more affects its constitutionality than would such fact affect the constitutionality of a similar state enactment whose provisions were made applicable to all employers under its jurisdiction.

But, if the foregoing position is unsound, and if this congressional enactment is subject to the equal-protection paragraph of the fourteenth amendment, I am still of the opinion that, bearing in mind the object of the statute, the peculiar character of the business of the carriers affected, and the public nature of their functions, and the fact that they are all treated alike under similar circumstances and conditions, it is valid, because the classification therein made is within the range of the legislative discretion, and is practical, and not palpably arbitrary. Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Tullis v. Lake Erie & Western R. R., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; St. L., I. M. & S. Ry. Co. v. Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746.

Nor can it be said that for this reason the law is harsh and inequitable, because where the danger is less the liability will less frequently arise, and, if there be practically no danger, there will be practically no liability. But, if it is, that would furnish no just cause for declaring it invalid. The remedy would lie not with the courts, but with Congress.

In Lottery Cases, supra, Mr. Justice Harlan says:

"But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall, in Gibbons v. Ogden, when he said: 'The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.'"

The contention that the act violates the tenth amendment of the Constitution is but another way of saying that it is not within the power of Congress under the commerce clause. And I think that no argument is necessary to refute the contention that it violates the fifth and seventh amendments.

I am therefore of the opinion that the act in question is constitutional and valid, and the demurrer must be overruled.

I am not unmindful of the fact that the foregoing opinion, in so far as it relates to the commerce clause of the Constitution, is in conflict with opinions already pronounced by other federal judges of the highest learning and ability, and I have approached and considered the questions involved with a just and real respect for decisions supported by such authority; but, feeling that I must exercise by own understanding and judgment with that independence which is expected from this department of the government, I find myself unable to reach any other conclusions than those above indicated.

HUNTINGTON NAT. BANK v. HUNTINGTON DISTILLING CO. et al.

(Circuit Court, S. D. West Virginia. March 5, 1907.)

1. LIMITATION OF ACTIONS—PLEADING BAR—EQUITY.

Not merely the defense of laches, but the bar of the statute against a suit for an accounting by an administratrix for money which went into the hands of intestate, R., is sufficiently pleaded by an answer alleging that if there had ever been any claim against R. in his lifetime by reason of the alleged transactions, which is denied, said claim is barred by the lapse of time and the neglect of plaintiff to have a settlement of the same in the lifetime of decedent, and defendant therefore pleads that any such claim is barred, as plaintiff allowed the claim to sleep till after the death of deceased; the same strictness of pleading the statute not being required in equity as at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 683-686.]

2. COURTS—FEDERAL COURTS—PROCEDURE IN STATE COURTS—WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Notwithstanding that under the state statute persons interested in the event of the suit, though not parties thereto, are incompetent to testify to transactions or communications with defendant's intestate, they may do so in a suit in a federal court, under Rev. St. U. S. § 858 [U. S. Comp. St. 1901, p. 659], providing that in the courts of the United States no witness shall be excluded because he is a party to or interested in the issue tried; provided, that in actions by or against administrators neither party shall be allowed to testify against the other, as to transactions with, or statements by, deceased, unless called to testify thereto by the opposite party, or required to testify thereto by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 925.]

3. TRUSTS—TRUSTEE DE SON TORT.

Where a company executed a paper whereby it assigned accounts and sold goods to a bank, providing that the bank should collect the one and sell the other and apply the proceeds to payment of the company's notes to the bank, and the president of the bank concealed from the bank such fact, and without authority of his co-directors took possession of the property and used the proceeds for other debts of the company, of which he was a stockholder, he constituted himself a trustee de son tort for the bank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 153-156.]

4. LIMITATION OF ACTIONS—RUNNING OF STATUTE—OBSTRUCTING PROSECUTION OF RIGHT.

Where a company assigned accounts and sold goods to a bank to apply the proceeds on the company's notes to the bank, and the bank's president concealed such facts from it, and took possession of the property and applied the proceeds to other debts of the company, of which he was a stockholder, the statute did not, during such concealment, run against the bank's right of action for an accounting, under Code 1906, § 3511, providing that where a debtor obstructs the prosecution of a right the time of such obstruction shall not be computed in the limitation period.

5. SAME—ENFORCEMENT OF TRUST—LACHES.

Where a bank's president concealed from it the facts giving it right to have him account as a trustee de son tort, but a year after his death and the discovery of the facts it commenced suit, the defense of laches is not available.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 568-573.]

In Equity.

Simms & Enslow, for plaintiff.

Vinson & Thompson, J. W. Caperton, and James R. Bush, for defendants.

DAYTON, District Judge (sitting specially). This suit was instituted in 1905, in the Circuit Court of Cabell county, West Virginia, for two purposes: First, to compel Minerva Phelps Russell administratrix of the estate of John Hooe Russell, to account for the proceeds of the property of the Huntington Distilling Company which are alleged to have gone into his hands under a certain written assignment made by said distilling company to the plaintiff bank to secure payment of something over $9,000 debt due from it to said bank; and, second, in case these proceeds were found insufficient to pay in full said debt, then to require certain stockholders to pay any balance of said debt out of alleged unpaid stock subscriptions of theirs. The administratrix of Russell, deceased, a citizen of Kentucky, although appointed in West Virginia, removed the cause to this court, and heretofore Keller, District Judge for this district, has overruled a motion to remand, and, upon demurrer, has held the bill multifarious, and for that reason dismissed it so far as the parties interested in the payment of the stock subscriptions are concerned, but entertaining it as to the controversy between the plaintiff and Russell's administratrix as to the proceeds of the distilling company alleged to have gone into his hands. The bill sets forth in detail certain facts as to this property which will be considered more fully later on, and to it an answer has been filed by the administratrix, denying in detail its allegations, and charging plaintiff's demand against decedent's estate to be barred by lapse of time and by neglect and negligence of plaintiff in asserting it. She has also tendered and asked leave to file an amendment to this answer, specifically pleading the bar of the West Virginia statute of limitations provided by section 12, c. 104, of the Code (1906) of the state. To the filing of this amendment the plaintiff has excepted, and by stipulation of counsel it has been agreed that I shall pass upon this exception, and, in case the amendment is permitted to be filed, then an amendment to the bill is tendered and asked by the plaintiff to be filed, and a general replication also tendered. Whatever determination I may reach as to this, it is further stipulated that the cause should be submitted to and determined by me without further delay upon its merits.

It seems to me the objection to the filing of this amendment to the answer can be speedily disposed of. In my opinion it is immaterial whether it be filed or not, for, as I construe the allegations of the original answer, it sufficiently pleads this statute. It distinctly says:

"* * * If there had ever at any time been any claim or demand against the said John Hooe Russell in his lifetime by reason of said transactions (which this respondent denies), then said claim is barred by the lapse of time and the neglect and negligence of the plaintiff, its officers and directors, to have a settlement of the same in the lifetime of the decedent; and she therefore pleads that any such claim, if any there be or was, is barred and cannot now be collected out of his estate, as said officers and directors of the plaintiff and managers thereof allowed this claim and transaction to sleep until after the death of said John Hooe Russell."

It seems to me clear that this language sets up the bar by statute, as well as the equitable defense of laches. "Anything in an answer which will apprise the plaintiff that the defendant relies on the statute of limitations is sufficient, if such facts are stated as are necessary to show that the statute is applicable." Tazewell's Ex'r v. Whittle's Adm'r, 13 Grat. (Va.) 329 (Syl., pt. 1).

Moncure, J., in this case further says, at page 344:

"The same strictness of pleading is not required in equity as at law. It is not common to plead the statute specially or formally in equity, but only to rely upon it, in general terms, in the answer."

This, in hæc verba, is reaffirmed in Cole's Ex'r v. Martin, 99 Va. 223, 37 S. E. 907.

In this state this freedom in practice has been greatly extended, and it is now held that it is the duty of the personal representative to rely upon the statute of limitations, and when not done in the answer, it may be relied on, and in effect pleaded, by such personal representative and by creditors as to each other's demands, by means of exception to a commissioner's report made to settle and ascertain the debts of a decedent. Woodyard v. Polsley, 14 W. Va. 211. If, therefore, as a matter of more formal pleading, the defendant desires to file this amendment to her answer, I can see no objection, and it may be filed.

Nor can I see any particular objection to the amendment of the bill asked for by the plaintiff to more fully set forth facts alleged to be sufficient to withdraw its demand without the bar of this statute, although what I have said above about the necessity for the amendment to the answer applies with equal force to the amendment asked of the bill. I regard both unnecessary, but unobjectionable.

Coming now to the merits of the case, I am met at the very threshold with a very interesting preliminary question which it seems to me should be first determined. A very large part of the testimony upon which the plaintiff rests its case has been given by officers, directors, and stockholders of the bank who are practically interested in the result of this suit, and their evidence substantially relates to transactions and communications had by them with the decedent, Russell. The counsel for defendant has in every instance, I think, and with the utmost care, preserved objection to this kind of testimony, entering objections thereto and motions to strike out, at the time when taken. Is such testimony competent? Section 23, c. 130 (section 3945) of the Code of 1906 of this state, provides:

"No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom, any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, or survivor of such person, or the assignee or committee of such insane person or lunatic."

Under this statute, the Supreme Court of Appeals of West Virginia, without discussion, and apparently, without much consideration, but rather as a matter of course, has held, in Carskadon v. Minke, 26 W. Va. 729, that:

"In a suit to settle the affairs of an unincorporated company or a partnership—one of the members being dead—the surviving members are not under the statute of 1882 competent to testify as witnesses in regard to such affairs."

And in Development Co. v. Thornburg, 46 W. Va. 99, 33 S. E. 108, relying for support on the preceding case, it is held:

"Persons who are directors and stockholders of a corporation are incompetent to testify against the administrator and heirs at law of a deceased person in favor of such corporation, as to any communication or transaction had with such deceased person in their official capacity as such directors, unless such administrator and heirs at law are examined as to such communication or transaction in their own behalf or the testimony of such deceased person touching the same is given in evidence."

It is not surprising that a very considerable direct conflict should arise in the decisions of the courts of last resort of the states touching this question. For example, the Supreme Court of Appeals of Virginia has, in construing the statute of that state, ruled exactly opposite to that of the Supreme Court of this state. See Bank v. Terry's Adm'r, 99 Va. 194, 37 S. E. 843; Insurance Co. v. Oliver, 95 Va. 445, 28 S. E. 594. In Georgia the rule first laid down was that such witnesses were incompetent. Banking Co. v. Papot, 59 Ga. 342; R. R. Co. v. Papot, 67 Ga. 675. But subsequently the rule seems to have been exactly reversed. Ullman v. Brunswick T. G. & L. Co., 96 Ga. 625, 24 S. E. 409. In Illinois, Indiana, Iowa, Minnesota, New York, and Pennsylvania such witnesses have been held incompetent. Ice Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; Modlin v. Turnpike Co., 48 Ind. 492; Bank v. Owen, 52 Iowa, 107, 2 N. W. 980; Elevator Co. v. Ins. Co., 40 Minn. 152, 41 N. W. 547; Keller v. Mfg. Co., 39 Hun (N. Y.) 348; Foster v. Collner, 107 Pa. 305. In Maryland, Michigan, Mississippi, New Jersey, and Tennessee the opposite rule prevails. Downes v. M. & D. R. Co., 37 Md. 100; Rust v. Bennett, 39 Mich. 521; Mitchell v. Sav. Inst., 56 Miss. 444; N. J. T. & S. D. Co. v. Camden S. D. & T. Co., 58 N. J. Law, 196, 33 Atl. 475; Grange Warehouse Ass'n v. Owen, 86 Tenn. 355, 7 S. W. 457. But since 1862 we have had federal legislation on this subject, which, as it remains to-day, is found in section 858 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 659], and is as follows:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

This statute has been held to be a remedial one, intended to remove technical disqualifications in the common-law rules of evidence and to promote the fair administration of justice, and to be liberally construed.

It is a complete abolition of the rule of exclusion under the common law in all of the courts of the United States. By it interested parties, except those named in the proviso, are placed upon a footing of equality with all other witnesses, so that they may testify for themselves and be compelled to testify for others. Goodwin v. Fox, 129 U. S. 601, 9 Sup. Ct. 367, 32 L. Ed. 805; Texas v. Chiles, 21 Wall. (U. S.) 488, 22 L. Ed. 650; U. S. v. Clark, 96 U. S. 37–42, 24 L. Ed. 696; R. R. Co. v. Pollard, 22 Wall. (U. S.) 341, 22 L. Ed. 877; Lowrey v. Kusworm (C. C.) 66 Fed. 539.

It has been further held that the competency of parties as witnesses in the federal courts depends upon the acts of Congress as codified in this section. It is not derived from the statutes of any state, and is not subject to the condition and qualifications imposed by the state laws, nor is it subject to other exceptions and qualifications imposed by such state laws. King v. Worthington, 104 U. S. 44, 26 L. Ed. 652; White v. Wansey, 53 C. C. A. 634, 116 Fed. 345; Travis v. Ins. Co., 43 C. C. A. 653, 104 Fed. 486.

Finally, the exact condition of facts existing here arose and was determined under this statute in the case of Potter v. National Bank, 102 U. S. 163, 26 L. Ed. 111. The case was appealed from the Northern District of Illinois, in which state, as we have heretofore noted, this kind of testimony by its Supreme Court was held, under state statute, incompetent. The action was one brought by the bank against Potter, executor of Ward. On the trial Sturgiss, not a party to the suit, but interested in the issues to be tried, was allowed to testify to a conversation had by him with decedent, against objection, and the Supreme Court affirmed the ruling and held he was not disqualified, but competent. It is therefore very clear that I must wholly disregard the ruling of the Supreme Court of Appeals of this state to the contrary, and hold the evidence of these bank officers, directors, and stockholders to be perfectly competent in this court. So holding, a careful analysis of the testimony has led me to believe the facts here to be substantially as follows:

Decedent Russell was, prior to the year 1892, up to the time of his death in January, 1903, president of the Bank of Huntington, and of the Huntington National Bank, its successor. He was the largest stockholder, and actively in charge and control of its affairs. In 1892 the Huntington Distilling Company was organized as a corporation by Russell and four others, and in the course of its operations became indebted to the Bank of Huntington in various sums now aggregating near, if not quite, $10,000. The Bank of Huntington, a state institution, was merged into the National Bank of Huntington, and this paper indebtedness was taken over by the latter. This merger was made in the fall of 1903, and some time prior thereto, likely in the early part of the same year, the Huntington Distilling Company, of which Russell at the time was treasurer, by its president and secretary, executed a paper writing, not dated, in which it set forth its indebtedness to the Bank of Huntington in various sums of money, its desire to provide payment thereof, its ownership of about 7,600 gallons of brandy in bond at Huntington, in consideration of all which it thereby did "sell, transfer and deliver over to said bank all the proceeds of said brandy

aforesaid, together with all the book accounts of said Huntington Distilling Company." And it was further provided that "said bank is to have said accounts collected, and apply the proceeds thereof to the payment of its notes as aforesaid. And to sell said brandy and apply the proceeds arising therefrom to the further payment of said indebtedness." There is no question of the execution of this paper, and there can be no doubt of its delivery to Russell; how it was found, and where, is not very material, for, certain it is, I think, that no stockholder, director, or officer of the bank other than Russell knew of its existence until after his death in 1903. I regard the explanation made that it was found in his private papers in his private box in the bank when appraisement of the estate was made as at least reasonable and probable, but of one thing there can be no doubt, to wit, that Russell concealed absolutely from his fellow directors and stockholders of the bank the existence of this paper, and the bank's rights and interests in this personal property under and by virtue of its terms and provisions. Nor can there be any doubt of the fact that Russell took charge of the brandy and of the accounts of the distilling company, disposing of the first and collecting the second. The proceeds were not, however, paid by him to the bank, but were deposited therein to the credit of the distilling company, and withdrawn from time to time and paid out upon checks of the distilling company drawn to some extent by Worden, manager and in control, under Russell, of the property, and subject to his order, but mostly by Russell himself. These facts, it seems to me, refute the position so strenuously urged by counsel for the defendant that this paper was not delivered to Russell, and was not found as testified to by Oney, the cashier. If such paper was executed—and its mere execution, as I have heretofore said, is not denied—it is both possible, but strongly to be presumed, that Russell would be consulted and be fully informed of it. There were but three persons substantially interested in the distilling company, each having equal interest, each having subscribed $8,000 to the capital stock; the other two clearly were but nominal shareholders, having but one share each, and doubtless holding these only in order that the law requiring five shareholders as a prerequisite to incorporation and its maintenance might be complied with. Russell was one of the three, and he was at the time treasurer of the company. Its management was not naturally under his control, but under that of its president; but immediately after the execution of this paper, Russell, the treasurer of the distilling company and president of the bank to whom the property was sold and assigned, naturally took sole charge of it. The president of the distilling company has testified:

"At the time this statement was made from the books and accounts both were then in the possession of Mr. Russell, and I had no right under our agreement to collect any of these accounts, nor no one else had but Mr. Russell."

The last of the brandy was disposed of by him in 1898. The other officers of the bank during these years, however, had not been unsolicitous about the bank debts owing by this company. The matter had been discussed in the directors' meetings. At the time of the merger of the old bank into the new one, Russell had assured them the notes of the distilling company were good, and upon, doubtless, this repre-

sentation, they were taken over as such. When the Ceredo National Bank sued the company, these directors of the plaintiff put out their notes for suit, and a race was made by the two banks to secure priority of judgment, one by the regular action of debt, the other by statutory notice. The judgments of these banks were taken at the same term, the plaintiff's a couple of days before the others, but the one of the Ceredo bank was held to relate back to the first day of the term, while those of the plaintiff, taken by notice were held not to, so the Ceredo bank got priority in lien upon the real estate of the distilling company, as fully shown by the opinion in the case by the Supreme Court of Appeals. First Nat. Bk. Ceredo v. Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878.

It further appears by the evidence in this case that a balance was realized from the sale of the company's real estate and was applied by the plaintiff bank to its judgments. While all this trouble, expense, and litigation was going on in the state court and the Supreme Court of Appeals, Russell remained silent and made no disclosure as to the assignment to the bank which he then held. All the satisfaction he gave his co-directors was the general statement to the effect that the property of the company was being disposed of and its accounts collected for the purpose of liquidating the debts due the bank. Why did he take this course? It seems to me that it is not necessary to harshly criticise his conduct under all the facts in the case. While I am constrained to hold that as a question of law his silence, his concealment of this paper, and his misdirection of the funds operate as a fraud upon the bank, yet his conduct, considered in the light of common experience, was not unnatural. The evidence discloses that he was a man of large means, with the very best reputation for honor and integrity; successful in business, and doubtless having the confidence of everybody. He was the largest stockholder and at the head of the oldest bank in his city. In this condition of life, and with a spotless reputation to maintain, he became interested in this unfortunate distilling company. He knew his connection with it had given it credit. He knew if it failed to pay its debts that, justly or unjustly, he must suffer in reputation and lose a measure of the public confidence which he then had. These considerations weigh heavily upon the minds of honest business men. He may have thought that it was absolutely necessary in order to make the most out of the property to get it out of the hands of his associates into his own, and this assignment to his bank may have been procured by him for this purpose. At the same time he may have felt that if it was revealed that he, while one of the three substantial stockholders and the treasurer of the company, had procured this assignment of all its property to the bank of which he was the largest stockholder and president, to the exclusion of other creditors, he must necessarily be charged with dishonesty and bad faith, and that litigation would doubtless ensue touching such assignment. These, I say, are plausible explanations for his silence and his manifest determination to take the whole matter into his own hands, work out the problem alone as best he could, and in the end personally protect his bank in any loss it might sustain. This, and this alone, it seems to me, can explain his remark to Enslow "that he supposed he was in such condition that he

would eventually have to pay the same" (these debts). In other words, he had failed, as successful business men even do sometimes, to straighten out the affairs of the distilling company and make its assets cover its liabilities, and as he had concealed the existence of the transfer of the brandy and accounts to the bank, had allowed, and even directed, the proceeds derived by him therefrom to be applied to the payment of other debts and obligations of the concern, he knew he was liable, and, like the inherently honest man that he was, he recognized his personal liability. He doubtless would have adjusted this matter with the bank sometime, had he lived. Nor is the administratrix, now that he is dead, to be criticised for making the vigorous defense she has to this action; for the law requires her, as a fiduciary, to plead these defenses of laches and limitation.

However, in charitably considering the conduct of Russell in this matter, we must not overlook the legal principles and deductions that must guide us in determining his liability for such conduct. Some of these deductions and principles may be thus stated:

First. This assignment, if it had been a general one on behalf of the distilling company to Russell to secure payment of its debts generally, would have justified his conduct in depositing the proceeds arising therefrom in his name as assignee of the distilling company, and, subject to the well-known limitations in regard to priority and equality, in checking out and paying said proceeds upon the expenses and debts generally. Under such conditions his co-directors of the bank would have been entitled to the same disclosure of the nature and terms of the assignment, of the progress made in carrying out its terms, no less, no more, than any other of the creditors, and would have had no other or different right than any other creditor to call him to a legal accounting for his acts.

Second. If, however, this assignment was not made to Russell himself but directly to the bank, and by its terms sold, transferred, and delivered over to said bank this brandy and the proceeds of these accounts, as it appears to me it clearly does, there can be no question that it was the plain duty of Russell, the moment the paper came to his hands, to call together the board of the directors of the bank and submit it to their consideration. This is true, I am confident, for several reasons: (a) Because it was their right to determine whether such assignment should be accepted by the bank, and the obligation assumed of defending it against legal assaults that might be made upon its integrity. (b) If accepted, it was their clear right to determine what disposition should be made of the assigned property. It was their distinct province to say what agent should be selected to sell and dispose of it for and on behalf of the bank, for I do not think it came within the general duties of Russell as president of the bank to make such sale and disposition without being so authorized by the directorate, any more than it would have been his general duty as such president, without special authority, to have sold the real estate, fixtures, or other property of the bank.

Third. Having concealed the existence of this assignment from his co-directors, having without their authority taken possession of said property and disposed of it under such conditions and without such au-

thority, he constituted himself a trustee de son tort for the bank, and must have been held, and his estate must now be held, to strict account for his acts in such trust relation.

Fourth. Trusts of this character being solely subjects of equitable jurisdiction under the common law, statutes of limitation were not applicable. In modern practice, while courts of equity will apply the statute of limitation in administering trust estates, it will in doing so look to all the facts and circumstances to ascertain whether equitable grounds exist against its strict enforcement, and, when such grounds do exist, will not hesitate to construe the case outside the bar, under the exceptions provided for by the statute itself, and by the dictates of equity and good conscience. Weinrich v. Wolf, 24 W. Va. 303.

Fifth. Under section 18, c. 104, of the Code (section 3511) of 1906 of West Virginia, express exception to the statute of limitations is made where the debtor absconds or conceals himself, "or by any other indirect ways or means, obstructs the prosecution of such right." And in the cases of Reynold's Adm'rs v. Gawthrop's Heirs, 37 W. Va. 3, 16 S. E. 364, Vanbibber v. Beirne, 6 W. Va. 179, and Thompson v. Whittaker, 41 W. Va. 574, 23 S. E. 795, this section has been construed. In the first case it is held, where a person by any indirect way or means osbtructs the prosecution of a right, the time during which such obstruction continues shall not be computed in the limitation periods. In the second case it is held, where it properly appears by the pleadings that the facts on which the cause of action was founded were exclusively in the knowledge of defendant, that he fraudulently concealed the facts, and that by such ways and means he defeated and obstructed the plaintiff from bringing his action within the time limited, the effect of the statute may be avoided in actions at law as well as in suits in equity. In the third case it is held:

"Under this section it requires some positive, affirmative act by defendant to operate under the clause, or by any other indirect ways or means obstruct the prosecution of such right."

Mere silence will not do, but there must be some act designed to conceal the existence of its liability and operate in some way upon the plaintiff and prevent or delay suit for it.

Sixth. The defense of laches must necessarily be liberally upheld and applied by courts of equity, because its basic principle is to prevent oppression and injustice, so easy of perpetration where loss of written evidence, removal of witnesses, death of parties, and the numerous other like causes incident to life may wholly change conditions and render it impossible to know the right and truth of the matter. He who unreasonably delays his action until these conditions arise must lose his cause. In determining whether such delay is reasonable, the statute of limitations does not control, for a less period than the one provided by the statutory bar may, under given circumstances, be sufficient for this defense. While these principles are true, equity will allow no man, by his own fraudulent acts, by concealing paper contract or evidence necessary upon which to base an action against himself, to take advantage of delay occasioned by such conduct on his part. He who appeals to equity must come with pure heart and clean hands. It is true to-day,

as it was when Lord Loughborough decided Beaumont v. Boultbee, 5 Ves. 485, that no possible case can rightly stand under the beneficient administration of equity, wherein "a confidential agent and steward can impute neglect to his employer; for it is his duty to render an account and a fair account, to his principal and distinctly apprise him of the whole right he has. It is not for him to say that a person has been guilty of negligence whose negligence it was his duty to guard against with regard to his transactions with all persons, and particularly with himself."

Briefly applying these principles touching these two defenses relied on in this case, the one laches, the other of the bar of limitations, it is only necessary to say that it was Russell's clear duty as president of the bank, to see to it that the bank lost nothing by laches or limitation in bringing an action. He knew when he did not turn over the proceeds of this brandy and of these accounts to the bank that it had a cause of action against himself therefor, and it was his duty to do one of three things, either settle his liability, resign his directorship and presidency of the bank, or have himself at once sued by it. He did neither, but on the contrary he concealed the assignment, took possession of the property, and diverted to other uses its proceeds. The other bank officers learned this only after his death in 1903; they allowed his administratrix the year allowed by statute to settle the demand, and, when not settled, almost immediately brought this suit. Under such circumstances neither the statute of limitations nor the defense of laches can avail, but decedent's estate must be held liable for an accounting for the proceeds of the brandy and the accounts collected, less all necessary expenses incurred in the sale of the one and the collection of the other, and decree of reference to a master commissioner may be entered directing him to state this account.

KANSAS CITY v. HENNEGAN et al.

(Circuit Court, W. D. Missouri, W. D. March 11, 1907.)

No. 3,145.

1. REMOVAL OF CAUSES—CONDEMNATION PROCEEDINGS.

A proceeding by a municipality to condemn private property to its public use partakes of the character of a suit at law so far as to render it removable from the state to the proper federal court, where the conditions exist authorizing a removal as prescribed by the removal acts.

[Ed. Note.—Proceedings under power of eminent domain as civil suits under laws relating to removal of causes to federal courts, see note to South Dakota & C. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 73 C. C. A. 183.]

2. SAME—SEPARABLE CONTROVERSY.

Since a proceeding to condemn land by Kansas City under its city charter as construed by the Supreme Court of the state presents a case of an indivisible unit, to be tried to one and the same jury, unless a jury trial is waived, and the whole finding as against all the defendants must be embraced in one judgment, so that if reversed on appeal the entire case must be tried de novo, such a proceeding as against both residents and nonresidents did not present a separable controversy as between the city

and the nonresidents whose property was sought to be condemned, and was therefore not removable to the federal courts.

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

Condemnation.

E. C. Meservey and W. A. Knotts, for plaintiff.

A. S. Van Valkenburgh and Ritchie & Meyer, for defendants.

PHILIPS, District Judge. Kansas City desiring to extend what is known as its general "Market Square" for the purposes of a public market, its board of aldermen, by ordinance, approved by the mayor, in conformity with the provisions of its charter, designated a large quantity of land to be condemned for such use. This area embraces perhaps a block or more of ground, laid off into lots, with buildings thereon, owned in severalty by a large number of persons. The ordinance also, as in such case provided in the charter, designated what is known as a "benefit district," to be assessed, in connection with the city itself, to raise the necessary means for paying for the private property to be taken and appropriated for such use. This benefit district embraces, say, 8 or 10 blocks of ground. The property within this large benefit district, as is usual, is owned separately by a vast number of persons. After the preliminary inquest before the mayor, as provided under the charter, an appeal was taken from the findings of the jury to the circuit court of Jackson county. A given portion of the real estate to be taken and appropriated by the city belonged to Richard H. Hennegan and Richard B. Hall—said Hennegan owning a life estate therein, and the said Hall the estate in remainder. Hennegan and Hall being nonresident citizens of the state, in due time and form filed their petition in the state circuit court for removal of the case into this court, which was accordingly done. Kansas City has filed a motion to remand this cause, on the ground that the removing defendants did not have such a separable controversy as to entitle them to remove the whole cause into this jurisdiction. This motion has been heard and submitted.

The provisions of the charter of Kansas City in respect of condemnation proceedings are practically the same as stated in the Pacific Railroad Removal Cases, reported in 115 U. S. 3, 20, 21, 22, 5 Sup. Ct. 1113, 29 L. Ed. 319. That a proceeding instituted by a corporation or municipality to condemn private property to its public use so far partakes of the character of a suit at law as to render it removable from the state court into the proper federal court, where the conditions exist authorizing a removal as prescribed by the removal act of Congress, is no longer an open question in this jurisdiction. Union Terminal Railway Company v. C., B. & Q. R. Co. (C. C.) 119 Fed. 209; South Dakota Central Railway Company v. C., M. & St. P. Ry. Co., 141 Fed. 578, 73 C. C. A. 176; Traction Company v. Mining Company, 196 U. S. 240, 25 Sup. Ct. 251, 49 L. Ed. 462.

Most of the questions raised and discussed by counsel for Kansas City on the motion to remand were considered and ruled upon in the Pacific Railroad Removal Cases, 115 U. S., 5 Sup. Ct., 29 L. Ed.,

supra. That was a condemnation proceeding instituted by Kansas City under the same charter, in effect, as that here involved, to condemn to the city's use lands for the opening of Twelfth street in said city, extending through a large quantity of land belonging to separate owners. The decision in that case answers the suggestion of counsel for the city that the cases where it has been ruled that the nonresident citizen seeking the removal of the cause from the state to the federal court present the instance where the petitioner for removal was the sole defendant, and that the right of such nonresident property owner to remove the cause should be limited accordingly. The record in said Pacific Railroad Removal Cases, on file in the office of the clerk of this court, which is before me, shows that it was a proceeding by the city to condemn property, to the use of said street, owned in severalty by a great number of individuals and corporations, under an ordinance establishing a large benefit district wherein a vast number of persons owned in severalty tracts of land to be assessed for benefits to pay the damages for property taken. The Union Pacific Railroad Company owned a certain tract of land, part of which was sought to be condemned and appropriated absolutely for this street, and a part was within the benefit district designated to be assessed by way of benefits. A large body of defendants were citizens of the state of Missouri; yet the Union Pacific Railroad Company, as a nonresident corporation, was held to be entitled to remove the proceeding, on the ground that the controversy was wholly separable as between it and the city.

The case of Hennegan and Hall, the removing defendants in the case at bar, is stronger in favor of their right. The Union Pacific Railroad Company, in the Removal Cases, was concerned not only as to that portion of its land sought to be appropriated by the city, but also as to the portion within the district to be assessed for benefits. In the latter respect it was more or less directly interested with all the other similarly situated codefendants in the benefit district, whereas the whole property involved of Hennegan and Hall is sought to be taken. This being so, according to the opinion of Mr. Justice Bradley in said Removal Cases, the matter in which they are concerned is as to the amount of damages to be found in their favor, representing the value of their property, which, being separable from the other issues in the case, was therefore removable under the judiciary act. The defendants here raise no question of jurisdiction as to the right of the city to condemn this property. Whether or not any other person's land is to be taken, and the value thereof, Mr. Justice Bradley said, did not concern the removing defendant, as by express provision of the charter "each piece of property taken is valued by itself, 'without reference to the proposed improvement,' and the amount of benefit to each piece of property benefited is ascertained separately without reference to the other pieces benefited." And therefore he held that "this controversy involving these issues is a distinct controversy between the company and the city. It may be settled in the same trial with the other appeals, and by a single jury; but the controversy is a distinct and separate one, and is capable of being tried distinctly and separately from the others."

The doubt cast upon the decisiveness of that ruling in this case arises on the following statement in the opinion of Mr. Justice Bradley:

"We have not been furnished by the counsel on either side with reference to any decisions of the Missouri courts giving construction to this section. Whether the direction that the cause shall be tried de novo requires that all the valuations and assessments are to be retried, or only those affecting the appellants, is not expressly stated."

That opinion was filed in May, 1885. At the October term, 1884, of the Supreme Court of Missouri, the case of State ex rel. Holden v. Gill, 84 Mo. 248, was heard. When the opinion was filed does not appear; but from the condition of the docket of that court, known to the writer of this opinion then connected with the court, and the date of the publication of volume 84 of the Reports, it is altogether probable that this opinion had not been announced when Mr. Justice Bradley prepared the opinion in the Pacific Railroad Removal Cases.

The construction of section 3 of said charter was directly involved in the case before the Supreme Court of Missouri. The substantive effect of that construction was that the condemnation proceeding against the various defendants presented the case of an indivisible unit, to be tried to one and the same jury, unless trial by jury be waived, and the jury must pass upon and make awards as to the amount of damages for each and every separate piece of land taken or damaged, and determine the benefits to be assessed against each piece of property within the benefit district. The whole finding must be embraced in one judgment. So much so is the judgment a unit, it was held not only that in the event of an appeal by a single defendant from the award in the mayor's court the whole case, including each separate piece of property involved, must be gone over and tried de novo, but also that if any error be committed in the progress of the trial in the circuit court prejudicial to the interests of any one of the various defendants suing out a writ of error, for which the judgment should be reversed, the reversal operates as a vacation of the entire judgment, necessitating, on remand, a trial de novo of the whole case from beginning to end, both as to the reascertainment of the amount of damages sustained by each owner whose property is taken or damaged, and the reascertainment and readjustment of the benefits to be assessed against each tract or parcel of land within the benefit district.

The writ of error in that case was sued out by only a small per cent. of the defendants, who were interested only in the amount of benefits assessed against their property. The only error committed by the trial court was in an instruction given to the jury, authorizing them to predicate their judgment alone upon their personal view of the property, regardless of the other evidence in the case touching the same; under which instruction the finding of the jury, both as to the value of the property taken and the amount of benefits assessed, might have been erroneously influenced. It must be confessed that the broad terms of the opinion in that case could well operate as an oppressive injustice in the instance of a codefendant whose separate property is sought to be condemned. The only question involved between him, the city, and others is the value of his property sought to be taken or condemned; that is to be tried out as a single issue between them. His

lawyer tries his case cleanly and faultlessly; the court commits no error in its rulings or instructions to the jury on the issues; he and the city acquiesce in the findings of the jury, neither asking for a review thereof; but as to some question or matter respecting the trial of another condemnee, or assessee for benefits, error is committed, and either the city or the party immediately concerned sues out a writ of error. For that error the cause is reversed. Why should there be a trial de novo of the issue between the city and the owner whose property has been correctly valued in the first trial, in which issue no error was committed? He is not concerned in the valuation of any other defendant's property, or in the assessment to be made upon the property in the assessed district. The assessments upon the benefited district are only a means by which the city raises the necessary money to pay for the property taken. Until the property owner is paid the value of his property so found, the city under its charter cannot take possession of the property. All concerned have had their day in court on the trial of this cause. What becomes of the maxim that no person shall be twice vexed in a suit concerning the same cause? How inexpressibly hard and oppressive is it on him that he should be again burdened with the expenses of a rehearing by re-employing a lawyer, and attending perhaps with his witnesses through another tedious hearing, which, as the history of such inquest shows, may drag its weary length through weeks and months; and then again be exposed to a repetitious error of the court, to a reversal, and a trial de novo, ad infinitum! It would seem that, as to a defendant so situated, the court should give such a practical, sensible construction to the statute as to avoid such absurdity and gross injustice. The result of an error should never be visited upon the unoffending suitor.

The evident thought in the mind of Mr. Justice Bradley, in his opinion in the Removal Cases, was that, after the amount of damages found to be paid, the assessment pro rata against the benefited property would be a mere matter of "mathematical calculation." With this view in his mind, he suggested that, where the single issue of value of property was involved between the separate owner and the city, if the state court "had equity powers it might direct a separate issue for the trial of this controversy by itself. It might try the other appeals without a jury (the parties waiving a jury), and try this controversy by a jury." It must now be conceded that in such condemnation proceeding neither the state court nor this court can exercise equity powers, and so divide the method of assessment under this charter, for the palpable reason that it is a suit at law, triable as an entirety, to one and the same jury, or to the court if all the parties waive a jury. And each party to be assessed for benefits is interested and concerned in seeing that as little damages as possible are assessed for the property to be taken; for in the proportion of the diminution of the fund to be paid are the burdens of the subjects of assessment for benefits lessened.

The ruling in State ex rel. Holden v. Gill has not been overruled by the Supreme Court, as far as I am advised. The attention of the court has been directed by counsel for the removing defendants to the case of Kansas City v. Block, 175 Mo. 433, 443, 74 S. W. 993, 996, wherein

Judge Fox was discussing the question raised by those defendants, who alone had sued out a writ of error to have reviewed the judgment of the circuit court in the condemnation proceeding instituted by Kansas City. They raised the question that some of the parties named in the proceeding had not been duly notified, and had not appeared in the case below. It was of this contention that Judge Fox said:

"It is insisted that the judgment in this proceeding is erroneous because of the want of service of process upon some of the other parties in interest, and the insufficiency of the notice by publication. It is sufficient to say, as to this contention, that the parties who appellant claims are injured by this proceeding are not before the court. We will heed their grievances when our attention is directed to them in an appropriate proceeding for that purpose. This judgment is not an entirety; the interests of the parties are independent of each other; the property damaged or benefited is not located at the same place."

We may aptly apply to the foregoing language the sensible observation of Chief Justice Marshall, in his final summing up in the trial of Aaron Burr:

"Every opinion, to be correctly understood, ought to be considered with the view to the case in which it was delivered. * * * General expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect."

As the parties not appealing in the case considered by Judge Fox were not complaining of the judgment against them for the lack of sufficient notice, the cause was not to be reversed by the appellants for any error which did not prejudice them. In that sense the interests of the parties concerned in the error being separate, Judge Fox said that the judgment was not an entirety. The ruling in the Holden-Gill Case was not involved, and evidently was not in the mind of the learned judge. Without any direct reference to the Holden-Gill Case, it would be strained for this court to infer that it was the mind of the Supreme Court to overturn the deliberate ruling in that case.

In the recent case of Cincinnati, N. O. & T. P. Ry. Co. v. Bohon, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448, Mr. Justice Day, in discussing the question of the removability of a suit against a nonresident railroad company where it was joined with its servant as a codefendant, under a statute of Kentucky which authorized such joint action, said:

"A state has an unquestionable right by its Constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the state, we know of nothing in the federal removal statute which will convert such action into a separable controversy for the purpose of removal because of the presence of a nonresident defendant therein properly joined in the action under the Constitution and laws of the state wherein it is conducting its operations and is duly served with process."

In the case at bar, under the scheme of the charter of Kansas City, by legislative grant the state has seen fit, according to the ruling of the Supreme Court of the state, to require in condemnation proceedings by the city that it shall in one suit join all persons as defendants

whose property interests are to be affected thereby, whether as owners of parcels of land to be taken and appropriated to the use of the city, or as owners in the designated benefit district to be burdened with assessments to pay for the property so appropriated; that the whole case shall be tried to one jury, unless waived; and that there shall be but one judgment. The Supreme Court of the state has construed this charter to mean that although the estates and interests of the different defendants may be separate, yet the suit is an indivisible unit, with absolute interdependence between all the defendants, incapable of separation into parts so that one may be unaffected by the findings and judgment as it concerns another. The wisdom, justice, or sound policy of this legislation this court cannot revise or correct, as it is within the competency of the Legislature to direct how the sovereign power of eminent domain shall be exercised by the city, and the manner of procedure therein. If the method adopted be harsh and oppressive in the particular noted in this opinion, it is for the Legislature to correct the abuse, or for the Supreme Court of the state to so tone down, by reasonable construction in a revised opinion when confronted with such question, the apparent ruling in the Holden-Gill Case, as not to produce the absurd and harsh result indicated.

Since the decision of the Supreme Court was published in the Holden-Gill Case there has been no attempted removal of such condemnation proceedings instituted under the charter of Kansas City by a single nonresident defendant, to my knowledge, save that of Kansas City v. C., M. & St. P. Ry. Co. et al., for the extension of Wyandotte street, in 1894. There was a motion by the city to remand the cause. The record entry in that case is as follows:

"Motion to Remand. This cause having been heretofore submitted to the court, and now the court being fully advised in the premises, doth order that the same be sustained, and that this cause be remanded to the circuit court of Jackson county."

No opinion was filed by the court, and I am unable to recall whether or not it was a consent order or an expression of the opinion then entertained by the presiding judge.

Yielding to what I conceive to be the effect of the construction placed on this charter by the state court, the motion to remand must be sustained.

KIRKMAN v. McCLAUGHRY.

(Circuit Court, D. Kansas, First Division. March 13, 1907.)

No. 8,505.

1. CRIMINAL LAW—SENTENCE—DIFFERENT OFFENSES—CONSECUTIVE OPERATION.
Where sentence is passed against an offender in the civil courts, prescribing different terms of imprisonment on the same day, the terms will be construed to run concurrently, unless the sentence expressly indicates an intention that they shall be served consecutively.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3315.]

2. ARMY AND NAVY—WAR DEPARTMENT—RULINGS—EFFECT.
While the rulings of the War Department and its practice, as enunciated in adjudicated cases emanating therefrom, is not binding on the federal courts, such rulings will not be overthrown, except for the most cogent reasons.

3. SAME—ARMY REGULATIONS—CONSTRUCTION.
Army Regulations, par. 981, providing that, when "soldiers" either undergoing or awaiting sentence commit offenses for which they are tried and sentenced, the second sentence shall be executed on the expiration of the first, applies to officers as well as private soldiers.

4. SAME—SENTENCE—DIFFERENT OFFENSES—SERVICE.
Petitioner was tried for a military offense, and sentenced May 23, 1905, to dismissal and confinement in the penitentiary for two years. During the pendency of the proceedings, he was placed on trial for a second offense, and on April 6, 1905, was sentenced to be dismissed from the service and to be confined for a period of one year. Both proceedings were reviewed, and the sentence confirmed by the President on July 15, 1905, and the place of confinement designated by executive order. *Held*, that the sentences operated consecutively, and not concurrently, under Army Regulations, par. 981, providing that, when soldiers either undergoing or awaiting sentence commit offenses for which they are tried and sentenced, the second sentence shall be executed on the expiration of the first.

Habeas Corpus.

This is a petition for a writ of habeas corpus filed by George W. Kirkman, late captain Twenty-Fifth United States Infantry, against R. W. McClaughry, the warden of the United States penitentiary at Ft. Leavenworth, in which penal institution petitioner is confined by authority of sentences imposed by general courts-martial duly and regularly entered against him and properly approved in compliance with the articles of war. The facts necessary to an understanding and decision of the precise question presented by the petition for the writ and the return of the warden to the writ are these:

In pursuance of special order No. 9, dated Headquarters Department of Missouri, January 9, 1905, petitioner was regularly tried by a general court-martial, duly constituted and convened at Ft. Niobrara, Neb., on specifications and charges of violation of the provisions of the sixty-first and sixty-second articles of war. The trial resulted in a conviction of petitioner, and sentence was imposed May 23, 1905, as follows:

"And the court does therefore sentence him, Capt. George W. Kirkman, Twenty-Fifth United States Infantry, to be dismissed from the service of the United States and to be confined at hard labor in such penitentiary as the reviewing authority may direct, for the period of two (2) years."

The record of the proceedings of the court having been transmitted and submitted to the President for his approval before execution, in pursuance of the 106th article of war, the sentence pronounced was duly approved by the President, and the place of confinement under the sentence designated, in the following language:

"The White House, June 15, 1905.

"The sentence in the foregoing case of Captain Geo. W. Kirkman, 25th Regiment of Infantry, is approved and will be carried into execution.

"Theodore Roosevelt.

"The United States penitentiary at Fort Leavenworth, Kansas, is designated as the place for his confinement."

During the pendency of this proceeding against the petitioner, and its postponement awaiting the taking and arrival of proofs from the Philippines, petitioner committed other and further offenses, and was again, in pursuance of special order No. 47, dated Headquarters Department of the Missouri, March 13, 1905, regularly placed upon his second trial, and tried before a general court-martial, duly constituted and convened at Ft. Niobrara, Neb., on specifications and charges of violation of the provisions of the sixty-first and sixty-second articles of war, and was, on the 6th day of April, 1905, convicted and sentenced as follows:

"And the court does therefore sentence him, Capt. Geo. W. Kirkman, Twenty-Fifth Infantry, to be dismissed from the service of the United States and to be confined at hard labor at such place as the reviewing authority may direct for the period of one (1) year."

The record of this second proceeding against petitioner having been transmitted and submitted to the President, in pursuance of the articles of war, the same was duly approved by him and the place of confinement designated, in the following language:

"The White House, June 15, 1905.

"The sentence in the foregoing case of Captain Geo. W. Kirkman, 25th Regiment of Infantry, is approved and will be carried into execution.

"Theodore Roosevelt.

"Captain Kirkman ceases to be an officer of the army from June 17, 1905. The United States penitentiary at Fort Leavenworth, Kansas, is designated as the place for his confinement."

As shown by the record, these trials were had before separate courts-martial for distinct offenses included therein in each case, being such civil statutory offenses as justified the imposition of the sentence pronounced against petitioner, under the ninety-seventh article of war.

Under this state of facts, as shown by the petition for the writ, and the return made to the writ by the warden of the penitentiary, petitioner demands his release from custody, in the following language, as copied from his petition:

"Your petitioner further shows to your honorable court that a sentence of a court-martial becomes valid only when sanctioned by the reviewing authority; that the sentences of both the above-mentioned courts-martial were approved on the same day by the reviewing authority, namely, June 15, 1905; that both sentences began to run on said day; that on January 22, 1907, allowing for good behavior, a time equal to the longest sentence had been served; that both sentences ran concurrently, and therefore on said 22d day of January, 1907, both sentences had been served and suffered."

Wherefore petitioner prayed the issuance of the writ and his discharge thereunder.

Floyd E. Harper, for petitioner.

H. J. Bone, U. S. Atty., J. R. Wish, Asst. U. S. Atty., and Wm. G. Doane, Judge Advocate, for respondent.

POLLOCK, District Judge (after stating the facts). As the petition for the writ was filed in this court on February 8th of the present year, and the writ issued on the 4th day of this present month, and as the term of sentence as claimed by the petitioner began to run on the 15th of June, 1905, it is quite clear the sentence of two years, imposed under the proceedings first instituted against him, had expired neither at the date of the filing of the petition, nor at the date the writ was issued, nor even on this 7th day of March, 1907, when the case was submitted for decision upon the petition and the return to the writ, unless allowance of time for good behavior, as claimed by the petitioner, be made. But as the case has been submitted for decision on the return to the writ, the truth of which is admitted, on the theory that such return does not constitute a legal justification for the detention of the petitioner, admitted by the warden, and as no proofs have been offered in support of the claim made for good behavior in the petition, and as the return does not admit allowance to the petitioner of time for good behavior, it may well be doubted whether in the present state of the record the petitioner has shown himself entitled to his discharge, even though his contention that the sentences imposed run concurrently should be sustained. However, assuming for the purpose of this de-

cision petitioner is entitled to an allowance of time for good behavior, as claimed by him, is he then entitled to his discharge, under the facts above stated?

Beyond doubt, it is the settled rule in the civil courts of this nation (as the term "civil" is used in contradistinction of "military" courts), when engaged in the exercise of their criminal jurisdiction, and also the settled rule in most, if not all, of the states of this Union, by virtue of common-law principles, or in the exercise of express legislative authority, when imposing sentence upon an offender convicted on two or more counts in a criminal pleading charging separate and distinct offenses, or in imposing sentence after conviction against an offender in two or more cases in which distinct crimes are charged, that the terms of imprisonment imposed may run consecutively or cumulatively, instead of concurrently; that is, the second term to begin at the expiration of the first, etc. 1 Chitty on Criminal Law, 718; 12 Cyc. p. 962; Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Howard v. United States, 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509; In re Esmond (D. C.) 42 Fed. 827; Kite v. Commonwealth, 11 Metc. (Mass.) 581; Mims v. State, 26 Minn. 498, 5 N. W. 374; State v. Carlyle, 33 Kan. 716, 7 Pac. 623. However, conceding the power of the court in such case to impose sentence against an offender prescribing different terms of imprisonment to run consecutively, as a settled rule the sentence pronounced must clearly and definitely express the purpose and intent that the terms are to be served consecutively, or it will be held the terms run concurrently, and not cumulatively. U. S. v. Patterson (C. C.) 29 Fed. 775; Ex parte Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568; Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145; Wallace v. State, 41 Fla. 547, 26 South. 713; Larney v. Cleveland, 34 Ohio St. 599; In re Strickler, 51 Kan. 700, 33 Pac. 620.

In harmony with these principles, had the sentence of imprisonment imposed by the general courts-martial against petitioner been imposed by a civil court of the country for the infraction of a criminal statute of the land, they would of necessity have run concurrently, and not consecutively, and petitioner would in such case be entitled to his discharge as demanded by him, for the language employed evidences no intent to impose accumulative terms of imprisonment, and, although rendered by separate courts and on different days, yet from the nature of the punishment imposed they could not become operative or be executed until approved by the President and the place of imprisonment had been by him designated, in accordance with the 106th article of war. The question here raised for decision, however, is not the rule applied to sentences imposed by civil courts of this country, but the applicability or inapplicability of that rule to sentences imposed by the military courts of the country.

Are the rules of law applied to the judgments of such courts by reason of the law of their creation, the practice, and proceedings therein obtaining, or in the very nature of things, such as to preclude the giving of the same effect to their sentences imposed as would be given to judgments of conviction imposed by civil tribunals in the exercise of their criminal jurisdiction?

The constitutional power, authority, and jurisdiction of courts-martial is found in article 1, § 8, of the Constitution, which confers the power on Congress to "raise and support armies," to make rules for the government and regulation of land and naval forces, "to make all laws that shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." By Rev. St. § 1342 [U. S. Comp. St. 1901, p. 944], Congress enacted what is known as the "Articles of War" now in force for the government of the armies, and has, from time to time since the passage of the act, amended these articles of war and changed the procedure before courts-martial. The law administered by courts-martial consists of these articles of war and the regulations and instructions sanctioned by the President, as commander in chief of the army, for the government of the army under the Constitution. Cyc. vol. 3, p. 844; United States v. Freeman, 3 How. 556, 11 L. Ed. 724; Gratiot v. United States, 4 How. 80, 11 L. Ed. 884; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538. Courts-martial possess the same full, complete, and plenary jurisdiction over offenses committed against military law as have civil courts of the country over controversies within their cognizance, and while acting within the sphere of such exclusive jurisdiction they are supreme. Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861; In re Grimley, Petitioner, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

As no controversy is raised in this case as to the jurisdiction of the court over the person and offense charged, and as the power and jurisdiction to impose the separate punishments assessed against petitioner is unquestioned, and the law therein administered being ascertained, we come now to the question involved in this case, namely, the power to hold petitioner in imprisonment until the termination of both terms, notwithstanding the sentences imposed went into execution on the same day, are not in terms made to relate to each other, and are not in express words made to run consecutively. In considering this question, it may be observed, by the very contract of enlistment, a soldier in the service of his country waives many of his civil rights, and engages to be bound to implicit obedience of the orders of his superiors and to the rules and regulations of the service; to waive many of his constitutional rights obtaining in civil courts of justice when arraigned as a defendant for trial before a court-martial. As said by Mr. Justice Brown, when on the district bench, in United States v. Clark (C. C.) 31 Fed. 710:

"It would be extremely unwise for the civil courts to lay down general principles of law which would tend to impair that of the military arm, or which would seem to justify or commend conduct prejudicial to good order and military discipline. An army is a necessity—perhaps I ought to say an unfortunate necessity—under every system of government, and no civilized state in modern times has been able to dispense with one. To insure efficiency, an army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the terms of his en-

listment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offense."

In so far as I have been able to determine, the question here presented is not ruled by any adjudicated case, and its solution in reason must depend upon the law administered by courts-martial and the rules and precedents which govern and control in that department of the government. While it may be true the construction placed upon the articles of war and the rules and regulations for the government of the army promulgated by the executive through the Secretary of War by the commanding officer of a military department, though approved by the Secretary of War, are not binding upon the judicial department, yet they are entitled to great weight. It is not for the judicial department of the government to in any wise control or direct proceedings in the military courts of the country by such forms of procedure or methods of practice as they might approve. The same effect must be given to the judgments and sentences of courts-martial imposed by them against offenders in the exercise of their exclusive military jurisdiction under the Constitution, as would be given by such courts if the question arose in a matter over which such courts had cognizance, unless it may be said upon the record presented such judgment is void for want of jurisdiction, or because it was rendered under a law clearly unconstitutional, or for some other cause.

Coming, then, to a consideration of the precise question here involved, the legal effect of the sentences imposed upon petitioner as a justification to the warden for his admitted detention of petitioner, it is clear to my mind such legal intent must be founded in the law administered by courts-martial imposing the sentence against petitioner, as construed by those officers of the War Department of the government learned in military law and its practice as enunciated in the adjudicated cases emanating from that department, for, as has been said, while such rulings may not be binding upon this court, yet they are entitled to great weight and consideration, and should not be overthrown, except for the most cogent reasons and upon undoubted grounds. As said by the Supreme Court in United States v. Healey, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. Ed. 369:

"When the practice in a department in interpreting a statute is uniform, and the meaning of the statute, upon examination, is found to be doubtful or obscure, this court will accept the interpretation by the department as the true one."

As said by that court in Railroad v. Whitney, 132 U. S. 366, 10 Sup. Ct. 115 (33 L. Ed. 363):

"It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court."

And, again, as said by that court in United States v. Moore, 95 U. S. 760, 24 L. Ed. 588:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterward called upon to interpret."

What, therefore, are the regulations sanctioned and promulgated by the President for the government of the army which are administered as the law by courts-martial, and what are the rulings applicable to the sentences pronounced by such courts against offenders, as construed by men learned in military law charged with its enforcement, as applied to this particular case? The language of the return made by the warden, in response to the writ issued in this case, reads:

"That during arrest pending trial on charges above mentioned he, said Kirkman, upon further offenses charged as committed by him during said arrest was again duly arraigned before a general court-martial convened by special orders No. 47."

Paragraph 981 of the army regulations provide:

"When soldiers either undergoing or awaiting sentence commit offenses for which they are tried and sentenced the second sentence shall be executed upon the expiration of the first."

This regulation, as has been seen, is embodied in and forms a part of the law administered by courts-martial. Under the language of the return which is admitted by petitioner to be true, this regulation is directly applicable to and decisive of the question involved, had petitioner been a private soldier instead of an officer of the rank of captain; the insistence of petitioner being this regulation does not control here for that reason. Whatever may be the distinction in the service as the term "soldier" and "officer" are used in common parlance, I am inclined to the opinion the word "soldier," as employed in this regulation, is used in its general signification, and is applicable to petitioner. The regulation above quoted would seem from the authorities on the subject to be the outgrowth of a general rule of procedure obtaining in military law long prior to its announcement; that is to say, the regulation seems to have sprung from the law, and not the law from the regulation.

Winthrop, in his work on Military Law and Precedents (volume 1, p. 651), says:

"As has already been indicated in this chapter, a sentence of imprisonment duly adjudged a military person, who is at the time undergoing a sentence of the same character (or who has received such a sentence which, however, has not yet been approved or commenced to be enforced, but is duly approved presently), is cumulative upon the entire sentence and to be executed accordingly, i. e., its execution is to follow immediately, and to proceed in due course till itself completed. This principle is now incorporated in paragraph 1029, A. R. where it is declared, in general terms, when soldiers, either undergoing or awaiting sentences, commit offenses for which they are tried and sentenced, the second sentence will be executed upon the expiration of the first."

Mr. Davis, in his work on Military Law (page 161), says:

"Where, while an officer or soldier is undergoing a certain sentence, he is again brought to trial for a military offense, and a further sentence is adjudged him, imposing a punishment of the same species as that which is being executed, it is the general rule of the service that the second sentence is to be

regarded as cumulative upon the first, and that its execution is to commence when execution of the first is completed. This, whether or not the court in the second sentence may have in terms specified that the second punishment should be additional to the first; such second punishment being made cumulative by operation of law irrespective of any direction in the sentence."

In the year 1873, shortly after the adoption of the present articles of war by Congress, Judge Advocate General Holt submitted for the consideration of the Secretary of War the following opinion as to the method of procedure in the execution of separate sentences of imprisonment imposed by courts-martial, and the same was approved by the Secretary:

"This man, on his plea of guilty, was convicted of theft, and sentenced with dishonorable discharge, and loss of all pay and allowances, to be confined at hard labor for six months—which expired on the 29th of May last. While held in confinement on this charge, but before his trial, to wit, on the 7th day of October, 1872, he deserted, and for this offense was subsequently tried and sentenced with dishonorable discharge and loss of all pay and allowances, to be confined in some military prison for the period of three years. The orders promulgating the proceedings of the court in both cases bear the same date, November 29, 1873. Under these circumstances, the prisoner inquired whether he can be legally held under the second sentence after having been dishonorably discharged under the first. As the law takes no notice of the fractions of a day, both these sentences must be held to have gone into operation at the same moment, and the dishonorable discharge under them leave the prisoner, in character of convict, to serve out the longer sentence, after his confinement under the first has terminated. The continuance of his confinement under the second sentence is therefore regarded as strictly legal." Record Book No. 34, pp. 479–480.

In 1895 Judge Advocate General Leiber rendered the following opinion on the same subject:

"The warden of the Minnesota state prison asks, with reference to the case of a prisoner 'receiving sentences, one for four years, the other for one year, on the same day,' and the term of service of each sentence commences, 'Are they concurrent?' The inquiry relates to the sentences of Charles Douglass, promulgated in special orders No. 120, 1894. Department of Dakota. This man was tried August 15, 1894, and sentenced to four years' confinement, and while awaiting sentence was on August 20th tried for another offense and sentenced to one year's confinement. Paragraph 1029 of the Army Regulations is as follows: 'When soldiers, either undergoing or awaiting sentence, commit offenses for which they are tried and sentenced, the second sentence will be executed upon the expiration of the first.' Now paragraph 981 Army Regulations. Under this regulation, as well as the established practice of the service, the sentence of confinement for one year in this case takes effect upon the expiration of the four years' term. The sentences are cumulative and not concurrent." Record Card, 1609.

The above rulings formulate and contain what has been the settled practice of the War Department of our government on the subject now under investigation for more than one-third of a century, and these rulings are known and understood of all men learned in military affairs. Such being the settled and well-known practice of the War Department, and as petitioner is now held in confinement in conformity to such established practice in execution of the judgments imposed by courts-martial, while such practice is not in harmony with that which obtains in civil courts of this country, yet I am fully convinced, from the fact he became an officer of the army engaged in the service of his

country, he is not entitled to insist on the rules of law applicable to sentences imposed by the civil courts of his country, in the exercise of their criminal jurisdiction, being now employed to effectuate his release from confinement legally imposed under the known and well-established practice and procedure followed by military courts in the exercise of their exclusive jurisdiction, and in conformity with the articles of war and regulations promulgated by the President for the government of the service to which he was subject when he committed the offenses charged, and to the authority of which he must bow.

It follows the return made by the warden must be held to be a complete justification for the restraint of petitioner, and the petition be dismissed.

It is so ordered.

BLAKE v. SARGENT.

(District Court, D. Missouri, S. D. March 14, 1907.)

No. 62.

PARTNERSHIP—FIRM AND INDIVIDUAL CREDITORS—PAYMENT FROM FIRM ASSETS.

When a firm and the members thereof were insolvent one of them made a sale of his interest to the other for a nominal sum and the assumption by the purchaser of the firm debts. Thereupon the purchaser used funds so received to pay an individual creditor. *Held* that, the sale not being in good faith, the funds so paid could be recovered for the firm creditors.

In Equity.

Karnes, New & Krauthoff, for complainant.

A. E. Spencer and Willard P. Hall, for defendant.

PHILIPS, District Judge. In the early part of 1903 Samuel W. King and James E. Maxwell formed a partnership under the firm name of King & Maxwell Paint & Glass Company, and thereafter conducted such business at Kansas City, Mo., until June 11, 1904, at which time the concern was insolvent, owing debts to the amount of about $29,000. In Maxwell's testimony, on examination before the referee in bankruptcy, he said that the total amount of his assets was $13,000. He afterwards scheduled them at about $18,000. About the 20th day of June, 1904, on petition of creditors of the concern, a receiver was appointed to take charge of the assets in a proceeding instituted in the state circuit court. On the 23d day of June, 1904, a petition in involuntary bankruptcy was filed against them as partners and individuals in the United States District Court for the Western Division of the Western District of Missouri, on which they were, on the 1st day of August, 1904, adjudged bankrupts as partners and as individuals. Later, suit was brought against the defendant, Laura A. Sargent, in the United States District Court for the Southwestern Division, Judicial District of Missouri, by Daniel F. Blake, as trustee in bankruptcy of the estate, to recover from her the sum of $3,738, alleged to have been received by her as an individual creditor of said Maxwell, which he paid her out of the funds of the partnership estate without the knowledge of

the other partner, Samuel W. King. Evidence has been taken on the issues joined, and the cause has been argued and submitted to the court.

The law is well settled that one partner cannot appropriate partnership property to the payment of his individual debts without the direct consent of the other partner. This, for the reason that as between the partners the equity of the relation demands that the partnership assets shall be first applied to the payment of partnership liabilities, and the interest of a partner in the partnership estate only attaches after dissolution of the partnership in the residuum after the payment and satisfaction of partnership liabilities. One partner, therefore, has no authority, sua sponte, to dispose of partnership property for his individual benefit by way of paying his individual debts. Hilliker v. Francisco, 65 Mo. 598; Flanagan v. Alexander, 50 Mo. 50, 51; Caldwell v. Scott, 54 N. H. 414. Equally well settled is it that one partner cannot appropriate such property "without the consent of his copartner to the payment of his individual debts, either with or without the knowledge of the creditor that such property belonged to the partnership." Rogers v. Batchelor, 12 Pet. 221, 9 L. Ed. 1063; Caldwell v. Scott, supra; Ackley v. Staehlin, 56 Mo. 558, 561; Price v. Hunt, 59 Mo. 258, 263.

These general rules are not controverted by the learned counsel for the defendant, but their contention is that at the time of the payments made by Maxwell to Mrs. Sargent, who is his mother, the copartnership of King & Maxwell had been dissolved by mutual consent, and the entire interest of the partnership property of King had been transferred to Maxwell, whereby the latter became the sole owner of the partnership estate, and had the right to transfer the same to Mrs. Sargent in payment of his individual debt. The proof shows that on the 11th day of June, 1904, said King did, in form, make a bill of sale to all his interest in the partnership property to said Maxwell in consideration of $234.34, claimed to have been paid to him by said Maxwell with the understanding and agreement that said Maxwell assumed the payment of all outstanding debts and obligations of said partnership, and that he (Maxwell) should have the right to continue and operate said business under said firm name for one year thereafter. No public notice was given of this arrangement, and the business thereafter continued in the name of King & Maxwell Paint & Glass Company until the time of the appointment of a receiver as aforesaid by the state court. After that, on the 21st day of June, 1904, the attorney of said Maxwell, of his own motion, put said contract of sale to record. On the day of the execution of said contract of sale said Maxwell drew a check in the name of the firm in favor of the partnership on the First National Bank of Kansas City for the sum of $2,500, out of a fund theretofore deposited to the credit of the partnership in said bank, and sent the same to his mother, the defendant, Mrs. Sargent, as a part payment on a note for $3,500 then held by her against said Maxwell; and on the 14th day of June thereafter said Maxwell drew another check in the same way on said bank in favor of said concern for the sum of $1,231.90, and transmitted the same to his mother, the defendant, in satisfaction of said note.

The proposition of law asserted by defendant's counsel in the abstract is correct. But the effects of a partnership are vested, in solido, in the partnership, and not in the constituent members in severalty. The partnership property is primarily liable for the payment of partnership debts. While this preferential right of such creditors is recognized in the marshaling and distribution of the assets among the creditors it does not constitute a lien in law upon the assets; but it exists in equity, inter se the partners, which a court of equity works out through the partners in favor of the society creditors. Level v. Farris, 24 Mo. App. 461, approved in Hundley v. Farris, 103 Mo. 79, 86, 15 S. W. 312, 12 L. R. A. 254, 23 Am. St. Rep. 863.

So where the partnership ends by the retirement of a member and the transfer of his interest in the partnership property to the other partner, the latter becomes entitled, in his own right, to the entire estate, and may apply the same to the payment of his individual debts, to the exclusion of partnership creditors who have not theretofore fastened, by appropriate proceeding, their equitable preferential rights upon the property. Case v. Beauregard, 99 U. S. 100, 25 L. Ed. 370; Huiskamp v. Moline Wagon Company, 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; Seger v. Thomas Bros., 107 Mo. 635, 18 S W. 33; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350.

It is to be observed and kept in mind, however, in applying this general doctrine, that the text-writers and courts predicate it upon the condition that the dissolution and transfer between the partners must be bona fide as respects the partnership creditors whose preferential right is thus sought to be displaced and lost. Story on Partnership, § 361, says:

"The joint creditors of the partnership, while all the partners are living and solvent, can enforce no claim against the joint effects or the separate effects of the partners, except by a common action at law. It is only in cases where there is a dissolution by the death or bankruptcy of one partner that the right of the joint creditors can attach, as a quasi lien upon the partnership effects, as a derivative, subordinate right, under and through the lien and equity of the partners."

So in Huiskamp v. Moline Wagon Company, supra, the court said:

"It was only necessary that the disposition of the property should have been bona fide on the part of both parties, and without any intent to hinder or delay the plaintiff."

This exception is thus stated in Am. & Eng. Enc. Law, vol. 14, p. 238 (2d Ed.):

"The only limitation upon the partners' right to so deal with the property is that the right should be exercised bona fide and without any intent to defraud the creditors of the firm, or to deprive them of their legal or equitable claims upon the joint estate in case of insolvency.

"If one partner transfers his interest in the joint property to a copartner with intent to deprive the firm creditors of its proper application to the payment of the joint debts, such a conveyance is fraudulent and will not defeat the right of the joint creditors to follow the partnership effects and have them appropriated to the payment of the debts of the firm.

"If the firm and all its members are insolvent, and the insolvency is patent to all the members, a fraudulent intent will generally be presumed as a matter of law.

"But if the firm is solvent, the conveyance is not per se invalid, and can only be avoided by proof of the actual fraudulent design."

In Arnold v. Hagerman, 45 N. J. Eq. 186, 198, 199, 17 Atl. 93, 96, 14 Am. St. Rep. 712, Dixon, J., pertinently observed:

"The case would have been entirely different if copartners who were insolvent and unable to pay the debts of the firm, either out of their copartnership effects or of their individual property, had made an assignment of the property of both to pay the individual debts of one of the copartners only. For an insolvent copartner who was unable to pay the debts which the firm owed would be guilty of a fraud upon the joint creditors if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable, at law or in equity. So in Vandoren v. Stickle, 24 N. J. Eq. 331, it was declared that a voluntary transfer by a firm of notes owned by the partnership to the wife of one of the partners was fraudulent as to partnership creditors, and the notes in the hands of the wife were decreed to be partnership assets. * * * Partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or of all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent and had sufficient property remaining to pay the partnership debts."

Further on, quite pertinently to the case at bar, the court said:

"The consideration nominally given by Farr to Hagerman and Fielder was the surrender of their notes, and his covenant to indemnify them against firm creditors. * * * Farr's covenant to indemnify does not constitute a valuable consideration, since he may be relieved therefrom on the total failure of the transfer for which it was made."

See, also, Howe v. Lawrence, 9 Cush. 553, 57 Am. Dec. 68.

In Flack v. Charron, 29 Md. 311, it is said that:

"While the joint creditors have no right to impeach or call into question the bona fide sales or transfers of the partnership property, it has been uniformly held that it was necessary to the validity of such sales or transfers, as against the creditors, that they should be fair and bona fide; and, where they have been found otherwise, they have been declared inoperative as against creditors."

Judge Thompson, in Re Estate of Edwards & Wigginton, 47 Mo. App. 312, said:

"It is well settled that partners cannot defeat the operation of this salutary rule by making, while insolvent or in the preparation of insolvency, conveyances of their firm assets to secure individual creditors, although both the partners may concur in so doing."

In Earle v. Art Library Pub. Co. (C. C.) 95 Fed. 544, the syllabus is:

"After a firm is actually insolvent, a partner cannot, by a transfer of his interest to his copartner, constitute the assets of the firm the individual property of the latter as against the partnership creditors."

The rule in this respect is appositely stated in Darby & Co. v. Gilligan, 33 W. Va. 246, 249, 10 S. E. 400, 401, 6 L. R. A. 740, as follows:

"If the firm is insolvent, or on the eve of insolvency, and both of the partners are insolvent, a purchase by one partner of the interest of the other in consideration of the former's assumption of all the debts of the firm, will be regarded as a purchase upon a consideration which is of no value whatever, and, no equivalent having been given, the transfer is in effect voluntary, and

its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property as against the firm creditors."

See, also, Till's Case, 3 Neb. 261; Roop v. Herron, 15 Neb. 73, 78, 80, 81, 17 N. W. 353.

The mere dissolution of an insolvent partnership does not impair the right of the partnership creditors to have the assets accumulated by the society applied to the joint debts. Tenney v. Johnson, 43 N. H. 144; McDonald & Co. v. Cash & Hainds, 45 Mo. App. 77, 78.

Applying these salutary rules to the case under consideration, what do we find? On June 11, 1904, when the claimed retirement of King from the partnership occurred, the concern was hopelessly insolvent. The contribution made by each of these partners to the business was only $2,500. The evidence shows that both partners had drawn out of the funds of the estate more than they had put in. They owed debts to the amount of $29,000, and according to the result of the examination of their books by the expert, Mr. Peak, their assets were short over $10,000. Their business was falling behind, and each of them knew this fact. Their books and the assets on hand showed this. It excites impatience in the honest and impartial mind for either of them to pretend that they did not know the business of the concern was on its last legs and that bankruptcy was staring them in the face. Mere words are of little significance when the obvious truth contradicts them. After withdrawing from the concern more than they had put into it, with $29,000 of outstanding indebtedness, with known inability to meet it, King is permitted to thrust his hand into the community bag and take out $234, pocket it and walk away, leaving Maxwell to hold what was left in the bag, with apparent authority to apply it to his individual debts, which he proceeded forthwith to do by turning over $3,731.90 of the moneys in bank arising from the sale of partnership goods, for which they had obtained credit as partners and to which said creditors had a preferential right in equity over the individual creditors. Maxwell sent this money to his mother when the note she held against him had about a year and a half to run before its maturity. While it may be conceded for the purposes of this discussion that she did not know that he had taken the money sent her out of partnership funds, it is not unworthy of comment that the indorsements on the back of this note are a little remarkable. They are as follows:

"June 29, 1903, received interest for six months to June 10.
"February, 1904, received $23.85.
"May, 1904, received $25.
"June 19, balance back interest $91.15.
"Received interest due June 10, $140."

It is a little remarkable, if these indorsements were made in the regular course of business, that after the entry of June 19th—"balance back interest $91.15"—they should then go back and enter "Received interest due June 10, $140"; justifying the inference that there had been some posting out of the usual course. That it was Maxwell's scheme and purpose, by the simulated transfer to him, to assume an ostensible legal attitude in order to prefer his mother at the expense of the partnership creditors, is indisputably manifested by the imme-

diate relation between the mere semblance of a dissolution of the partnership and the transfer to his mother. The testimony of the expert witness, Mr. Peak, shows that between the 11th and the 18th days of June, 1904, exclusive of the $3,731.90 paid to Mrs. Sargent, the assets diminished nearly $1,000. The transaction was not bona fide; it was without the consideration the law exacts; it was done when the concern, and both parties, were insolvent; and it was in defiance of the spirit and purpose of the bankrupt law.

Judge Adams, in Re Jones et al. (D. C.) 100 Fed. 781, 783, comments upon the policy of the bankrupt act respecting the marshaling and appropriation of the partnership assets of a bankrupt estate, which is to be done so as to secure an equitable distribution of the property between the partnership and individual creditors according to their priorities; that the partnership property shall be appropriated to the payment of partnership debts. He then asserts:

"It is perfectly apparent what the general scheme of the bankruptcy act contemplates with regard to partnership assets, namely, that they shall be in good faith applied first to the payment of partnership debts; therefore any scheme or device resorted to, by persons in contemplation of bankruptcy, for the purpose of charging partnership assets with the individual liabilities of the partners, is, in substance and effect, violative of the provisions of the act, and, inasmuch as the court is required to so marshal partnership assets as to secure the equitable distribution of the property of the several estates, it is clear that the court must brush away all these attempts at evasion and hold the parties to the requirements of the bankruptcy act, administered broadly and equitably to accomplish the objects intended by it. The scheme resorted to, as shown in the statement of this case, by the bankrupts to foist upon the partnership assets the payment of their individual liabilities, was at least devised for an inequitable purpose within the purview of the bankruptcy act. The physical and undisputed facts surrounding the case are also, in my opinion, sufficient to stamp the transaction as fraudulent within the meaning of the bankruptcy act."

If on the 9th day of June, 1904, Maxwell had covertly withdrawn $3,731.90 of the funds of the concern from the bank and paid it over to his mother on his individual debt, it would have been a fraud on the other partner and the partnership creditors, and Mrs. Sargent would have been amendable therefor at the suit of the trustee in bankruptcy of the partnership estate. So say all the authorities. It would be a mockery of the bankrupt act, which compels the application of the assets of the estate earned and acquired by the partnership society to the benefit of the joint creditors as a preferential right over the individual creditors, to hold that a mala fides dissolution and transfer by King to Maxwell, without a valid consideration, when the concern and both parties were insolvent, could convert the favored individual creditor of Maxwell into a bona fide preferee. If this construction of the bankrupt act were to obtain, all that would be essential for copartners to defeat the equitable priority of partnership creditors in the distribution of the partnership assets by giving it all to the creditors of the individual partner would be, in the face of the known insolvency of the copartners, to go through a simulated dissolution and division among themselves of the joint assets and turning it over to their individual creditors, and the next day enter into voluntary bankruptcy or submit to involuntary bankruptcy and, when the transaction should

be assailed by their partnership creditors, answer that, having gone through the form of a dissolution and partition, the product of the goods obtained from the partnership creditors had been turned over to their individual creditors, who are entitled to hold because they did not know of the dissolution of the partnership or the insolvency of the concern. In other words, the attempted transfer by King to Maxwell was not bona fide; it was not based upon any valid consideration; it was done when the partners were insolvent, and in the teeth of the policy of the bankrupt act. Equity looks to substance, and not to mere form. So that the legal attitude of the defendant, Mrs. Sargent, is as if the simulated dissolution of partnership and the transfer by King to Maxwell had never been gone through with; and, with or without notice of how Maxwell got the money with which to pay her, she must make restitution for the benefit of the partnership creditors, represented by the trustee in bankruptcy.

Counsel for defendant are in error in the statement made in their brief herein that there was no adjudication in bankruptcy against King as an individual. The record before me shows that the adjudication went against the copartnership, as well as against each one of the individual members thereof; and they applied for and obtained their discharge both as partners and as individuals.

While the bill of complaint in this case does not, in its caption, recite that the complainant, Blake, sues as trustee of the individual estate of King, yet the suit is by Blake as trustee of the partnership estate; and, as the fund sued for is recoverable only for the benefit of the partnership estate, the omission of the name of King individually is quite immaterial.

Decree for complainant as prayed.

UNITED STATES v. DELAWARE, L. & W. R. CO.

(Circuit Court, S. D. New York. February 14, 1907.)

1. CARRIERS—INTERSTATE COMMERCE—REBATES.

A shipment from New York City to Buffalo, by way of New Jersey and Pennsylvania, is interstate commerce, and so is subject to the provisions of the Elkins law (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), as to rebates; the interstate commerce act (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), though providing that the provisions of the act shall apply to any carrier engaged in the transportation of passengers or property from one state to any other state, having a proviso that the provisions of this act shall not apply to the transportation of property "wholly" within one state.

2. SAME—INDICTMENT FOR GIVING REBATES.

An indictment against a carrier, alleging that P. was the duly authorized agent of the S. Company and vested by it with the sole and exclusive power and authority to determine over which line any shipment by it should be made; that defendant entered into an unlawful agreement with P. whereby it was agreed that P., as such agent, should cause S. to make large shipments over defendant's road, and S. should pay defendant the lawful rate for such shipments, and thereafter P. should present claims to defendant for a rebate on such shipments, under the guise of claims for services; and that such scheme was carried out, and defendant made payments to P. by way of rebate—charges a payment of rebates in viola-

tion of the Elkins law (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]); the fact that the rebate is paid to another than the shipper being immaterial, though a payment which is but a commission for obtaining business for the carrier is not within the statute.

3. INDICTMENT AND INFORMATION—DUPLICITY.

An indictment under the Elkins law (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), declaring it unlawful for a carrier to offer, grant, or give a rebate, alleging that defendant offered, granted, and gave a rebate, is not duplicitous, but charges but one offense.

4. CARRIERS—ACT AS TO REBATES—EFFECT OF REPEAL OF PRIOR STATUTES.

The provision of the Hepburn law (Act June 29, 1906, c. 3591, § 10, 34 Stat. 584), repealing laws in conflict with the act, that "the amendments herein provided for shall not affect causes now pending * * * but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," in view of Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], providing that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability," applies to rebate offenses committed before, but prosecution for which was commenced after, the passage of such act; so that an indictment in such a case alleging that a carrier "unlawfully and willfully" gave rebates, which would be enough under the Elkins law (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), is sufficient, though under the Hepburn law it would be necessary to allege that they were given "knowingly."

Henry L. Stimson, U. S. Dist. Atty. (Henry A. Wise, John W. H. Crim, and Francis W. Bird, of counsel).

John B. Stanchfield (Charles A. Collin, of counsel), for defendant.

HOLT, District Judge. This is a demurrer to an indictment charging the defendant with the offense of paying rebates, in violation of the interstate commerce act and the acts amending it, particularly the act of 1903 commonly called the "Elkins Act." The indictment contains ten counts. The first and second counts charge payments of rebates by the defendant in October, 1903; the third and fourth counts, in May, 1904; the fifth and sixth counts, in September, 1904; the seventh and eighth counts, in January, 1905; and the ninth and tenth counts, in February, 1905. The odd-numbered counts charge the payment of rebates on shipments of merchandise from New York to Buffalo; the even-numbered counts charge such payments on shipments from New York to points beyond Buffalo.

Various grounds of demurrer are relied on. In the first place, the odd-numbered counts are demurred to on the ground that a shipment from New York to Buffalo is not interstate commerce, and that a payment of a rebate on such a shipment is not prohibited by the interstate commerce act. Goods shipped from New York to Buffalo over the defendant's road are transported from New York City to and through New Jersey to Pennsylvania, thence through Pennsylvania to the state of New York again, and thence by rail to Buffalo. In other words, the goods are transported from a point in the state of New York, through two other states, to another point in the state of New York. The defendant claims that such transportation is not interstate commerce, and that Congress cannot constitutionally pass

an act imposing a criminal punishment for giving rebates upon such a shipment. It is also claimed that, even if such transportation is interstate commerce, the interstate commerce act does not in fact apply to such a case. But I think that the authorities, although not entirely consistent, support the claim of the government that such transportation is interstate commerce, and that it is covered by the first section of the interstate commerce act. Hanley v. Kansas, etc., Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333; Lord v. Steamship Co., 102 U. S. 541, 26 L. Ed. 224; Pacific Coast S. S. Co. v. Railroad Commissioners (C. C.) 9 Sawy. 253, 18 Fed. 10. The case of Lehigh Valley R. R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, upon the authority of which the case of U. S. ex rel. Kellogg v. Lehigh Valley R. R. Co. (D. C.) 115 Fed. 373, and similar cases have been decided, was a case of a tax imposed by a state upon receipts in the proportion of the amount of transportation within the state. The Supreme Court, in the case of Hanley v. Kansas City Southern Ry. Co., supra, distinguishes it upon this ground, and holds that those cases which, out of deference to the case of Lehigh Valley R. R. Co. v. Pennsylvania, have held that transportation of merchandise from one point in a state, through other states, to another point in the same state, was not interstate commerce, carried its conclusions too far. Moreover, aside from the authorities, it seems to me that, upon principle, the view that the transportation of merchandise over such a route constitutes interstate commerce is correct. The defendant's road passes through New Jersey, Pennsylvania, and New York. Neither of those states alone could regulate the transportation of merchandise over any part of the line except that which was situated within that state. Transportation upon such a road, therefore, cannot be efficiently regulated at all unless it is regulated by the United States. It is true that if the United States government has authority to regulate the transportation of merchandise between New York and Buffalo on the Lackawanna, the Erie, and the Lehigh Valley roads, and not upon the New York Central, there is a possibility that the New York Central road might obtain undue advantages in competition with the other three roads mentioned. On the other hand, if the government has not the power to regulate such transportation on the three roads first mentioned, and the state of New York should regulate transportation on the New York Central, between points in the state of New York, it would be possible for the three roads mentioned to obtain undue advantage over the Central to a still greater extent. There is a possibility of some discrimination under any theory, but I think that the simplest theory is that as soon as merchandise is carried from one state to another it becomes interstate commerce.

I do not think that too much weight should be given to a critical examination of the precise language of certain clauses in the first section of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). That section does provide that the provisions of the act shall apply to any common carrier engaged in the transportation of passengers or property from one state to any other state. This is the only language in the act applicable to transportation from one state to another, and undoubtedly the natural mean-

ing of this language would not include such a case of transportation of merchandise from New York to Buffalo. At the same time it is a perfectly correct statement to say that goods shipped from New York to Buffalo on the Lackawanna road are transported from one state to another. The act contains a clause applying to transportation from any place in the United States through a foreign country to any other place in the United States. It is argued that, if the act was meant to apply to transportation from any place in a state, through another state, to any other place in the same state, there would have been such a clause inserted as was inserted in the case of transportation through a foreign country. But I think that the proviso at the end of the section removes any doubt in the matter. That proviso declares that "the provisions of this act shall not apply to the transportation of property, or to the receiving, storage, delivery or handling of property wholly within one state. * * *" The word "wholly," as there used, imports, in my opinion, that such provisions shall apply to any transportation of property which is not wholly within one state.

Another ground of demurrer to the indictment is in substance that none of the counts allege facts constituting a crime, because they allege that the rebates were paid, not to the American Sugar Refining Companies, the shippers of the sugar, but to Lowell M. Palmer. Each count of the indictment alleges that Lowell M. Palmer was the duly authorized agent of the said sugar refining companies, and was vested by them with the sole and exclusive power and authority to determine over which of the lines of common carriers running west from New York any shipments of sugar of said sugar refining companies should be made; that the Lackawanna Railroad Company entered into an unlawful agreement with the said Palmer, whereby it was agreed that the said Palmer, as agent as aforesaid, should cause the said sugar refining companies to ship over the defendant's road large amounts of sugar; that the sugar refining companies should pay to the defendant the lawful rates for such shipments; that thereafter the said Palmer should present claims to the Lackawanna Railroad Company for a rebate upon such shipments, such claims to be in the guise of claims for extra lighterage; that thereupon said claims should be paid by the said Lackawanna Railroad Company, and that they should thereby give a rebate to the said Palmer of one cent for every hundred pounds of sugar shipped. It is then alleged that certain sugars were shipped from time to time, the transportation of which was paid for at the full tariff rates to the Lackawanna Railroad Company; that thereafter claims for rebate in the guise of claims for extra lighterage were presented by the said Palmer to the railroad company, and that thereafter the said railroad company paid to the said Palmer by way of rebate certain sums. The indictment further alleges that the said claims for extra lighterage and the payment thereof as aforesaid was a mere device agreed upon by the parties thereto to conceal the payment of such rebates, and that no services of lighterage or extra lighterage were at any times performed by the said Lowell M. Palmer or the said sugar refining companies in respect to the transportation of said sugars. The defendant's counsel argues that these allegations are consistent with the existence of a simple arrangement by which

the railroad company paid Palmer a commission for obtaining the business. But I do not think so. This indictment is substantially based upon the Elkins act. That act was intended, among other things, to cover the cases where the rebates are not paid directly to the shipper. It provides in substance that it shall be unlawful for any carrier to give any rebate in respect of the transportation of any property in interstate commerce whereby any such property shall be transported at a less rate than that named in the tariff filed by the carrier. The test by this statute is whether the carrier has transported the property at a less rate than that named in the tariff. In determining this question no legitimate expense of doing the business by the carrier should be deducted. The carrier has a right to employ persons to solicit business, just as it has a right to employ clerks and employés of all kinds to do the business, and any payments for such a purpose cannot constitute a rebate, concession, or discrimination within the meaning of the act; but the mere fact that a rebate is not paid to the shipper, but is paid to somebody else, is quite immaterial under the Elkins act. If it is in fact a rebate, concession, or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed. If upon the trial of this case it should appear from all the evidence that the payments charged were nothing but a payment to Palmer as a commission for obtaining business for the railroad, they would not be rebates within the meaning of the act. But the indictment alleges that they were. The allegations are that it was agreed that claims for rebates should be put in under the guise of a charge for extra lighterage, that no services for lighterage or extra lighterage were ever rendered, and that the amounts paid were in fact rebates. Moreover, upon the facts alleged, Palmer occupied such a relation to the sugar companies that it is impossible to regard him as an agent of the railroad company. He is alleged to be a duly authorized agent of the sugar companies, vested by them with the sole and exclusive power and authority to determine over which lines of common carriers any shipments of the sugar of said sugar refining companies should be made, and that it was agreed between the railroad company and Palmer that the said Palmer, as agent as aforesaid, should cause much larger amounts of shipments to be made over the defendant's line than had theretofore been made under the said arrangement for the payment of rebates.

Another ground of demurrer is the claim that each count of the indictment is void for duplicity. This objection is based on the fact that the Elkins act provided that it is unlawful for any corporation to offer, grant, or give a rebate, and that each count of the indictment alleges that the railroad company offered, granted, and gave a rebate. It is argued that as under the statute offering to give a rebate is a crime, and the actual giving of a rebate is a crime, two crimes are charged in each count of the indictment. But the general rule is well settled that in a criminal pleading, where a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable separately and as distinct crimes when committed by different persons or

at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense. U. S. v. Fero (D. C.) 18 Fed. 901, 903; Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. In a criminal pleading, if a statute makes each one of various acts criminal, and the indictment sets forth said acts coupled with the conjunctive "and" instead of the disjunctive "or," if such acts are shown to be merely different stages of the same transaction, the indictment is good. U. S. v. Janes (D. C.) 74 Fed. 545; Lehman v. U. S., 127 Fed. 41, 45, 61 C. C. A. 577; U. S. v. Nunnemacher, 7 Biss. 133, Fed. Cas. No. 15,903.

Another ground of demurrer to this indictment is that none of the counts alleged that the defendant knowingly gave any rebates. The allegations are in substance that the defendant unlawfully and willfully gave the rebates. The indictment admittedly would be sufficient in this respect under the Elkins act, but it is claimed that the so-called "Hepburn Act," passed in 1906, made it necessary in this case to allege that the defendant knowingly gave the rebates. All the acts alleged in this indictment, the making of the alleged agreement for a rebate, the transportation of the property, the payment of the tariff price, the presentment of claims for rebates, and the payment of the rebates, took place while the Elkins law was in effect. The indictment, however, was found in August, 1906, after the passage of the Hepburn bill. The Hepburn bill re-enacted the first section of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]) down to the end of its statement of what was unlawful. The following sentence in the original act made such acts a misdemeanor, and this sentence in the Hepburn act was amended by inserting the words which are underlined as follows:

"Every person or corporation, *whether carrier or shipper*, who shall, *knowingly*, offer, grant, or give, or solicit, accept, or receive any such rebates, concession or discrimination, shall be deemed guilty of a misdemeanor."

The Hepburn bill (Act June 29, 1906, c. 3591, 34 Stat. 584) contained a saving clause as follows:

"Sec. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

The defendant's counsel argues that as by section 10 all laws in conflict with the provisions of the Hepburn act are repealed by it, and as the amendments provided for in that act shall not affect causes "now pending" in the courts of the United States, therefore no prosecutions could be brought under the Elkins act after the Hepburn act was passed, that the saving clause only saved cases then pending, and that in any subsequent prosecutions the indictment must allege that the defendants did the acts alleged to be criminal knowingly. The thirteenth section of the United States Revised Statutes [U. S. Comp. St. 1901, p. 6] reads as follows:

"Sec. 13. Repeals not to affect liabilities unless, etc.

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the

repealing act shall so expressly provide. and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

This section changes the rule of the common law by providing that the repeal of any statute shall not have the effect to release or extinguish any liability incurred under such statute unless the repealing act shall so expressly provide. It is claimed that this provision is not applicable to this case, because the Hepburn act has a specific saving clause of its own, and, as by the tenth section of the Hepburn act causes now pending only are explicitly saved, it follows that that clause takes the place of the general provisions concerning repeal in section 13 of the United States Revised Statutes. The question whether it does or does not must be admitted to be a nice one, but in my opinion section 13 of the United States Revised Statutes applies. Its provisions are general, applying to all subsequent legislation of Congress. It provides that the repeal of any statute shall not extinguish any liability incurred under it unless the repealing act shall so expressly provide. Section 10 of the Hepburn act does not expressly provide that the repeal of the Elkins act shall release or extinguish criminal liability incurred under said statute, and therefore, in my opinion, section 13 of the Revised Statutes applies. This view has been reached by Judge Landis of Chicago in the case of U. S. v. Standard Oil Company (D. C.) 148 Fed. 719, decided January 3, 1907, and by Judge Morris in the case of United States v. Chicago, etc., Railway Company and others (D. C.) 151 Fed. 84, in an opinion handed down late in January, 1907. In this case Judge Lochren, who is stated in a memorandum at the end of the opinion to have sat with Judge Morris at the hearing of these demurrers, but to have taken no part in this decision, expresses a contrary view. In both of these decisions much reliance is placed upon the case of Lang v. U. S., 133 Fed. 201, 66 C. C. A. 255. This case arose under a different statute, but presented, it seems to me, the same identical question. In that case Judge Barker held that section 13 of the United States Revised Statutes applied notwithstanding a similar saving clause. Judge Grosscup concurred in his decision upon a different ground, while Judge Jenkins dissented. The questions involved are very elaborately argued in these opinions, and I shall simply say that, with great respect for the distinguished judges who differ from them, I concur with the views of Judges Landis, Morris, and Barker. I cannot believe that it was the intention of Congress that parties who had committed offenses under the Elkins act should be discharged from all liability because indictments had not been filed at the time the Hepburn act was passed, while others, no more morally guilty, should be continued to be prosecuted under indictments found before that act was passed. I think that if that was the intention of Congress it would have said so. Section 13 of the United States Revised Statutes provides that the repeal of any statute shall not release any penalty or liability incurred under it unless the repealing act shall expressly so provide. The repealing act in this case did not so expressly provide. The best argument that can be made in support of the repeal is that it impliedly so provided. But in my opinion, since

section 13 was adopted there can be no repeal by implication in such a case.

My conclusion is that the demurrer should be overruled.

WALSH et al. v. TWEEDIE TRADING CO.

THE HERM.

(District Court, S. D. New York. February 28, 1907.)

SHIPPING—CHARTER PARTY—OPTIONAL EMPLOYMENT OF VESSEL.

A charter for a steamship was for a voyage to the west coast of South America and return, but gave the charterer an option to employ the vessel in general trade for a period of about three months, but not exceeding five months. After employing the vessel between ports of the United States, the West Indies, and eastern South America for between two and three months, the charterer proposed to send her to the west coast of South America, and offered an increased hire, but the owners refused. Such voyage would have involved a considerable extension of time in excess of five months. *Held*, that the charterer had used the vessel under the option for general trading, and was not then entitled to make the west coast voyage under the charter without a further agreement for the additional time.

In Admiralty.

Convers & Kirlin and Russell T. Mount, for Walsh and others.
Wheeler, Cortis & Haight, for Tweedie Trading Company.

ADAMS, District Judge. The first of the above actions, William S. Walsh, et al., agents for owners, against the Tweedie Trading Company, was brought to recover from the latter, a balance of hire of the steamship Herm under charter dated New York, June 21, 1905. She went into service July 12th, 1905. The claim was for hire from November 3rd, 1905 to December 20th, 1905, at the rate of £1100 per month and from December 20th to January 4th, 1906, at the rate of £1500 per month. The total hire claimed was $9,573.64. Credits were allowed by reason of payments and other matters to the extent of $6,233.99, leaving a balance of hire due of $3,339.65, for which this action was brought.

It was alleged in the answer, with other things not necessary to consider here, that the libellants were not entitled to recover the said hire because they refused to send the steamer to the west coast of South America in accordance with the charterer's demand. The claim is set forth more in detail in the cross libel, the second action, wherein it was alleged:

"Fourth. Thereafter the steamship Herm was delivered to the libellant and in accordance with the provisions of the charter party aforementioned, the libellant notified the respondent that it was considering sending said steamship to the west coast of South America. Thereupon the respondent, in violation of the terms of the charter party, notified the libellant that it would not allow said steamship to proceed to the west coast of South America. By reason of the premises, and because no cargo could be received in Brazil, where the said steamship then was, the libellant was forced to bring her back from Brazil in ballast, to its damage in the sum of $7,500, and it also sustained other damages which, as nearly as can be estimated at present, amounts to

$20,000. Prior to said refusal by the respondent, the libellant had paid to the respondent under said charter party, the sum of $1,311.82 as hire, which sum has not been earned by reason of the premises."

The charter party provided, inter alia, as follows:

"Witnesseth, That the said owners agree to let, and the said charterers agree to hire the said steamship from the time of delivery, for one round trip to West Coast of South America * * * to be employed in carrying lawful merchandise, * * * between safe port and or ports in British North America, and or United States of America, and or West Indies, and or Central America, and or Carribbean Sea, and or Gulf of Mexico, and or South America, and or Europe, and or Africa, and or Asia, and or Australia, excluding River St. Lawrence from October 1st to May 1st (White Sea, Black Sea, and the Baltic out of season), Magdalena River, and all unsafe ports; as the Charterers or their Agents shall direct, on the following conditions:"

* * * * * * * * * *

"Charterers have the option of employing the steamer in general trade for the period of about three (3) months, up to five (5) months, but in any event time not to exceed 5 months, subject of course to stranding, sinking, stress of weather or other accidents."

The latter clause was added at the foot of the instrument in typewriting.

It has been agreed that the Herm was delivered to the charterer at New York on the 12th of July, 1905; she finished loading her New York cargo July 19th; sailed for Fernandina July 20th; arrived at Fernandina July 23rd; loaded at Fernandina and sailed July 30th for Pernambuco; arrived at Pernambuco August 18th; completed discharge of cargo intended for Pernambuco and sailed August 24th for Rio; arrived at Rio August 29th, completed discharge there of the Rio cargo September 13th and sailed the 14th for Santos; arrived at Santos the 15th and completed her discharge of cargo the 20th; she lay idle at Santos, with steam up ready to leave port at a moment's notice, until October 5th. She left Santos October 5th for Pernambuco, where she arrived the 6th; she left Pernambuco the 6th for Barbadoes stopping there practically only for orders; then proceeded on to New York, still in ballast, where she arrived November 1st, 1905. The loading in New York began November 2nd, was completed the 8th and she sailed for Baltimore on that day; she arrived in Baltimore the 10th and completed loading there the 24th; she sailed thence for Tampico November 25th, where she arrived December 6th; she completed her discharge there December 21st and sailed for Coatzacoalcos, where she arrived December 25th and completed her discharge the 31st; she sailed for Galveston the same day and arrived there for re-delivery January 4th, 1906.

When the steamer was at Santos, a dispute arose between the owners and the charterer with respect to the steamer's employment on the west coast, the charterer desiring an extension of time to enable it to make a voyage to the northern part of the coast, which the owners refused excepting upon a considerable advance in the rate of hire. No agreement being reached, the charterer ordered the steamer to New York and she was afterwards employed for a short time in making a trip to Tampico and Coatzacoalcos, thence to Galveston where she went out of the charterer's service.

This dispute arises entirely out of the provisions of the charter party above quoted. The vessel reached Santos in September. After discharging cargo there she remained idle for fifteen days until October 5th. During this time some cable correspondence took place as follows:

The charterer on the 3d of October, cabled to the owners:

"Herm will you allow 2 months continuation of present charter £100 extra per month failing this Tweedie considering West Coast South America voyage."

On the 4th of October the owners replied:

"Herm owners agree to not exceeding 2 months continuation £200 extra per month whole period present charter and continuation difference failing this they protest keeping Herm over 5 months as per charter party therefore West Coast South America voyage impossible."

The ship agents on the 5th of October cabled to the owners:

"SS 'Herm' charterers they reject your proposition no freight offering Santos-Rio Janeiro. West Coast voyage may occupy up to seven months from now. Charterers claim West Coast option is without time limit. As you say you will not allow over five months total from start, charterers have ordered ship to proceed in ballast to Louisberg seeking freight orders off Pernambuco. They have given us notice that they hold owners responsible. Can arrange it to satisfaction of all concerned if you can arrange ship to be redelivered to owners at Europe not later than January 31st, penalty—£500."

In reply to this the owners cabled:

"Herm Tweedie threats ineffective owners insist on fulfilment of charter party which is in any event time not to exceed 5 months."

On the same day, the respondent sent the steamer to Pernambuco, where she arrived October 6th. Stopping off Barbadoes, practically only for orders, she proceeded in ballast to New York where she arrived November 1st. By arrangement between the parties, without prejudice to their rights under the original contract, she did some further work for the charterer and was re-delivered to the owners at Galveston, January 4, 1906.

The charterer's claim is set forth in the 4th paragraph of the counterclaim, above quoted. Its points are: (1) The charter was primarily for a trip to the west coast; the alternative option was never exercised, and the charterer had a right to send the vessel to the west coast, and (2) the owners' refusal to send her to the west coast was an anticipatory breach of contract.

The owners claim (1) that the clause "but in any event not to exceed 5 months" is applicable to the entire contract and limits the round trip to the west coast option as well as to the general trading option; (2) that should this clause appear to the court as an ambiguity appearing on the face of the contract, it is clearly shown to have been understood as a general limitation, by the cable communications upon which the charter was framed; (3) that should it appear to the court that the 5 months' limitation applies only to the general trading clause, yet the libellants never refused to allow the steamer to proceed to the west coast, and it is therefore not guilty of the breach of contract claimed by the respondent.

The charterer contends also that the option was never declared nor resorted to by it and the whole matter is determinable under the first clause of the contract, providing for a round trip to the west coast, while the owners contend that the provision contained in the option clause "but in any event time not to exceed 5 months" was a general limitation of the entire charter.

It appears that a voyage to the west coast involved considerable time. A vessel of the capacity of this one would require 18 to 20 days to load at starting port and probably 30 for discharging; that would leave approximately 100 days for going and returning, a steaming distance one way of upwards of 10,000 miles. One of the witnesses said that it was practically impossible to make it within the limit, which seems to be true. It looks as though the charterer never really contemplated the west coast trip but intended that the steamer's time should be occupied in general trading, meaning to the eastern coast of South America, where its business was usually done. It seems that the charterer intended from the beginning to use the vessel in such trading and it was only when it found that businesss there would be slack, that it resorted to the west coast demand, for which it appeared an extension of time would be required. It then offered an advanced rate for an extended period but the owners demanded more than the charterer offered or was willing to pay and the vessel was sent north for re-delivery.

I find that the owners are entitled to their hire without any deduction, excepting $36.46 for a further allowance for bunker coal on arrival and $425.78 for disbursements made for the owners at Tampico.

There will be a decree for the libellants for $2,877.41, with interest. The cross-libel will be dismissed.

UNITED STATES v. POMEROY.

(Circuit Court, S. D. New York. February 27, 1907.)

1. FINES—DEATH OF PARTY—ABATEMENT.
   Where accused was convicted of giving rebates, in violation of the interstate commerce act and its amendments, and sentenced to pay a fine, but died after judgment before the fine was paid, the judgment and entire proceedings abated on his death, and it was not a claim enforceable against his personal representatives.

2. SAME—COURT'S JURISDICTION.
   Where decedent had been sentenced to pay a fine for giving rebates, in violation of the interstate commerce act, and judgment had been entered against him before he died, but had not been paid, the court in which the judgment was rendered had jurisdiction to abate the proceedings, on the motion of decedent's personal representatives, on notice to the government.

Albert H. Harris (Austin G. Fox and John D. Lindsay, of counsel), for the motion.

Henry L. Stimson, U. S. Atty.

HOLT, District Judge. This is a motion by the executrix of the will of Frederick L. Pomeroy that the entire proceedings and the judgment

heretofore rendered herein against Frederick L. Pomeroy be declared abated by reason of his death. Frederick L. Pomeroy was indicted and convicted of the offense of giving rebates, in violation of the interstate commerce act and the acts amending it. He was sentenced to pay a fine of $6,000, and judgment against him for that amount was entered. He afterwards died. This motion is made on the ground that the proceedings and the judgment abated upon his death.

It is well settled that all prosecutions for crimes before judgment are abated by the death of the party charged. When the punishment for a crime is imprisonment, the death of the convict, of course, puts an end to the punishment; but, upon the question whether a judgment in a criminal prosecution imposing a fine as a punishment is abrogated by the defendant's death, there appears to be very little authority. In actions of tort, it is well settled that the death of the defendant before a verdict or a decision of a court or referee terminates the liability. If death occurs after a verdict or decision, but before judgment, judgment can be entered on it nunc pro tunc; and, after a judgment is entered, the judgment becomes a debt, and is enforceable against the estate notwithstanding the defendant's death. But this rule of law in actions of tort, permitting judgments recovered before the defendant's death to be enforced against his estate after his death, is based on the idea of compensation to a particular plaintiff injured, while the imposition of a fine as a punishment for a crime is based on the idea of punishment for a public offense.

The district attorney, in his argument, lays considerable stress upon the effect of section 1041 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 724], which provides as follows:

"In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced."

I think that this provision is merely a re-enactment of the general rule of common law that a criminal sentence for a fine may be enforced by execution. This was clearly settled at common law. Rex v. Woolf, 1 Chitty, 401, 428, 583. But I infer from the report of this case that the defendant was living when the question arose. The real question was whether the payment of a fine imposed in a criminal case could be enforced by execution or only by imprisonment. I think that section 1041 of the United States Revised Statutes simply establishes the common-law rule in such a case in the federal courts. The execution to be issued is "against the property of the defendant." It does not in terms provide for proceedings against the estate of a deceased defendant.

The only direct authority cited by the district attorney is a quotation from Williams on Executors, as follows:

"An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased; and upon all inferior debts of record of the deceased, as fines imposed by the justices at Westminster, or at assizes or quarter sessions, or by commissioners of sewers or of bankrupts, by stewards in leets, or the like." 2 Williams on Executors (10th Ed.) p. 1367.

The note citing authorities in support of this passage is: "Went. Off. Ex. (14th Ed.) p. 243. But see Anon. Cro. Jac. 219." The book called "Wentworth on the Office of Executors" was first published in 1641. It purports to have been written by Sir Thomas Wentworth, but its authorship is generally ascribed to Justice Dodderidge. The passage cited is as follows:

"Now, touching debts of record, much need not be said (except of those by statute merchant), for to debts and damages already recovered against the testator, and to debts by recognizance, the executor's liableness is somewhat clear and conspicuous. Yet other inferior debts upon record may fitly be thought of as issues forfeited, fines imposed by justices at Westminster or at assizes, quarter sessions, commissioners of sewers or bankrupts, by stewards in leets, or the like; for all these are debts of record which executors stand charged withal."

The statement in Williams on Executors is obviously simply copied from this statement in Wentworth on the Office of Executors.

The anonymous case referred to in Sir George Croke's Reports of Cases in the time of James I, and commonly cited as "Cro. Jac.," is very brief. The following is the entire report:

"It was doubted in the Star Chamber, if costs and damages be recovered there of one in a riot, whether his executors and administrators shall be chargeable therewith.

"Walter said there were precedents in this court that he should be charged; and some of the clerks affirmed so much.

"Lord Coke held they were not chargeable for a riot; but if damages or costs were given by any statute there, upon recovery in that court it shall be otherwise."

By this report I understand that Lord Coke held that, if a criminal fine were imposed upon a defendant as a punishment for rioting, his executors were not chargeable with its payment; but that, if a statute gave costs or damages to anybody who had been injured by a riot, a judgment for that amount could be enforced against the executors. If that is the meaning, the case in Cro. Jac. is certainly entitled to more weight than the mere statement in a text-book written in the time of Charles I for which no authority is given. Moreover, at that time in England bills of attainder were common, and the idea of the corruption of blood and of estates in the hands of heirs being made liable for the crimes of their ancestors was regarded as a usual basis of criminal legislation.

The counsel for the executrix cites several western cases in which courts have held that an appeal from a judgment for a fine is abated by the death of the defendant: Herrington v. State, 53 Ga. 552; O'Sullivan v. People, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143; Town of Carrollton v. Rhomberg, 78 Mo. 547; State v. Perrine, 56 Mo. 602; March v. State, 5 Tex. App. 450; State v. Ellvin, 51 Kan. 784, 33 Pac. 547; Overland C. M. Co. v. People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74.

The district attorney argues that these cases are simply authorities for the proposition that, after the defendant's death, the proceedings on appeal abate, leaving the judgment appealed from in full force. If the only effect of the defendant's death is to abate the writ of error, it, of course, leaves the judgment in full force. No appeal in criminal

cases was allowed in the United States courts till 1879. It is obviously a kind of injustice that the representatives of a deceased defendant should lose the right of appeal by the defendant's death; but as a right of appeal in any case is a favor afforded by the government, it might be, if there were no other ground for abatement, that the death of the party appealing would simply deprive him of that right. In some of these western cases, however, it is clearly asserted that the defendant's death terminates the entire prosecution and the judgment entered imposing the fine. But those expressions may be claimed to be obiter. It is also urged by the district attorney that the entry of a formal judgment for a fine in favor of the United States against the defendant establishes the liability as a debt. It is true that a judgment is often in law regarded as creating a new and distinct liability. In suits for torts or for unliquidated damages, it is sometimes held that the judgment creates a debt in the place of what before was an unliquidated demand. But a judgment, after all, is nothing but a new form of an obligation. Its original essence remains unchanged. Courts, whenever necessary, look beneath the form of the judgment to see what was the original nature of the claim. For instance, the general rule is that the courts of no country enforce the penal laws of another country; and if a judgment is entered in one country to enforce its penal laws, and a suit is brought on the judgment in another state or country, the court in which such suit is brought will take notice of the fact that the original judgment was based on a penal law, and refuse to allow a recovery for that reason. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Black on Judgments, § 870.

Upon the whole there is in my opinion no satisfactory authority controlling this case. It must therefore be decided on fundamental principles. In my opinion the fundamental principle applicable to this case is that the object of criminal punishment is to punish the criminal, and not to punish his family. When A. recovers a judgment against B. for a tort, the recovery is undoubtedly based on the defendant's misconduct; but the fundamental principle upon which the action is maintained is the idea of compensating the injured party; but, when a court imposes a fine for the commission of a crime, there is no idea of compensation involved. In this case the defendant was fined $6,000. That money was not awarded as compensation to the United States. No harm had been done to the United States. It was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but, upon his death, there is no justice in punishing his family for his offense. It may be said, of course, that there is very little difference between the loss which his family would have sustained if the money had been collected before his death, and the loss which it will now sustain if it is collected from his estate. But if the money had been collected before his death, he would have been punished. If it is collected now, his family will be punished, and he will not be punished. In my opinion, therefore, this prosecution should be deemed ended and this judgment abated by the defendant's death.

I have had some doubt whether this court should make an order declaring the judgment and the proceedings abated, or whether it should leave the matter to be determined in some other court if an attempt should be made to collect the judgment. But it is certainly just to the representatives of the estate that the question should be determined, and I think it may as properly be determined by the court which rendered the judgment as by some other tribunal. The government has had notice of this motion, and has been heard upon it, and in my opinion this court has power to declare that all the proceedings in this case and the judgment entered therein against the defendant Pomeroy were abated by his death.

My conclusion is that an order should be entered declaring that the proceedings and the judgment have abated, and are no longer of any validity.

THE CUZCO.

(District Court, S. D. New York. March 8, 1907.)

COLLISION—JAMMING OF VESSEL AT PIER—BOTH VESSELS IN FAULT.

A steam lighter, jammed while discharging cargo at a wharf in the Erie Basin by a car float lying alongside a steamship fastened at an adjoining wharf, through the listing of the steamship when the tide ebbed, *held* in fault for going to and remaining in a dangerous position after being warned by the harbor master; and the steamship also *held* in fault for causing the float to be brought to her side, when she knew that she would list when the tide receded and push the float against the lighter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 102.]

In Admiralty.

James J. Macklin, for libellant.
Convers & Kirlin and John M. Woolsey, for the Cuzco.
De Forest Bros. and George Holmes, for the Railroad Company.

ADAMS, District Judge. This action was brought by the Delaware, Lackawanna & Western Railroad Company, the owner of the steam lighter Syracuse, to recover from the steamship Cuzco, the damages suffered on the 10th day of March, 1906, by reason of the lighter being squeezed between a car float and an adjoining pier, in the Elevator slip in Erie Basin, through the Cuzco's taking ground and listing over against the float and pressing her against the lighter. The Cuzco went to the opposite side of the slip on the day before the accident for the purpose of discharging and made fast on her port side. The Syracuse's pier was 120 feet to the eastward of the Elevator Pier. She was also bow in. The charge of fault against the Cuzco was that the stevedore employed in discharging her directed the car float to come alongside and in doing so improperly exposed the Syracuse to the danger of damage. The Cuzco brought the owner of the car float into the action by petition alleging that if there was any fault for which the Syracuse was not herself liable, caused by her act of stealing a berth in a space cleared of boats for the use of the car float, it was that of the Railroad Company in having its tug place the float in a position to do

the damage, well knowing that the Cuzco would necessarily list over with the fall of the tide.

The testimony shows that the Cuzco was 375 feet long and 50 feet beam. She had four hatches. Her mean draft was 20.9 feet. A part of her cargo was nitrate in bags which she expected to discharge from all of her hatches into cars on the float for transportation to its destination. It was expected, however, to commence with the No. 2 hatch and for that purpose it was necessary to get the forward car opposite that hatch, which was well toward the bow. The float was brought to the vicinity by the tug Red Ash on the morning of the 10th but the slip was then in such a congested condition that it became necessary to clear it to permit the float's approach to the steamer and the tug went to work removing the various barges and lighters which blocked it up. She succeeded in this work in a short time and went for the float, which was outside awaiting the completion of the clearing. In the meantime the lighter Syracuse, 110 feet long and 32 feet wide, which had a small quantity of cargo for the bark Thistle Bank, lying on the other side of the slip, nearer the bulkhead, and which had been awaiting an opportunity to deliver, went into the cleared space and made fast at about 9 o'clock to the wharf opposite the Cuzco, astern of the bark and a barge lying astern of her with some cargo for her. After the Syracuse had been made fast the float was also pushed into the cleared space and while she reached the side of the Cuzco, by reason of the presence of the lighter could not get into position to use No. 2 hatch. The tide was about high at 7:30 A. M. It was ebbing when the lighter took her position. There was not sufficient water for the Cuzco to lie afloat at low tide and it was well known to the officers and others in the vicinity that she would take ground during the morning and probably list over towards the opposite wharf. The water was 18 feet deep inside of the ship and 21 or 22 outside.

There was evident danger, to those familiar with the facts, to vessels between the Cuzco and the wharf on the other side of the slip, and it is claimed by the steamer that warning was given to the Syracuse before she made fast that she would incur risk if she attempted to occupy the berth she was about taking and that notwithstanding the warning she took the berth and persisted in remaining in it. Those on the Syracuse admitted that such warning was given but claimed it was after she was caught, when it was impossible to move, and too late to be of any use.

The master of the Syracuse was very emphatic in his assertion that he had no warning of the danger before his boat was caught and he was supported by the other members of his crew. The chief officer of the ship said he knew his vessel would take the ground with the recession of the tide and informed the receiving clerk of the cargo of the fact when he saw the Syracuse taking her position at the wharf. The Cuzco had listed before some 5 or 6 degrees in the same berth and it was expected she would on this occasion and actually did. The chief officer said it was not a bad list but enough to jam vessels lying there; that a tug had been squeezed on a previous occasion. The Cuzco had about 6,000 tons of cargo on and weighed some 2,000 tons in addition, a total weight of about 8,000 tons, which would make the listing dangerous to other vessels. The property belonged to the Beard estate,

which was represented at the place by a Mr. Lowery, who said he was on the Cuzco and saw the Syracuse coming in ahead of the float; that he beckoned to the master and told him to stay out as he wanted the place for the float alongside of the Cuzco; that in reply the master said he would not be in the way, was going far enough to clear the float and Mr. Lowery understood that he was going along side of the bark; that nothing further was said at the time but instead of going alongside of the bark, the Syracuse went to the wharf which brought her abreast of the Cuzco's No. 1 and No. 2 hatches; that then the float was pushed in and came to the corner of No. 2 hatch, lapping the stern of the Syracuse about 15 feet; that when he saw the Syracuse tie up in the position she did, he went aboard and told the master that he had better leave there; that at low water he would be jammed and unable to get out; that the master asked what could he do? said he had to discharge his freight, he had a little more work to do, he would see if he could not get more men; that the Syracuse was free then and could have gone alongside of the bark, or to a berth forward of the Cuzco; that the Cuzco began to list about 11 o'clock; that he was employed in the Erie Basin to regulate traffic there as harbor master and was continually ordering boats from one place to another and having them give way; that he had no way of enforcing his orders. This testimony is confirmed by other witnesses and I think it outweighs the testimony on behalf of the lighter.

It appears before the jamming took place that the Syracuse moved forward a few feet, close up under the stern of the barge ahead, and that the float was also moved some distance in an endeavor to reach No. 2 hatch but still without success. Then resort was attempted to be had to No. 3 hatch by getting the opening in the side of a car opposite or near that hatch but it was not successful by reason of the jamming and the consequence was that no nitrate was discharged that day, though the ship put some goods of a different nature on the wharf.

The value of the time of the Syracuse was more than double that of the car float. The value of the time of the Cuzco was three times as great as that of the Syracuse and the float combined.

It is claimed that by reason of the conduct of the master of the Syracuse in taking and persisting in remaining in a dangerous berth, after due warning, that the libellant is not entitled to recover any damages, but I think that is an extreme view. She certainly incurred the risk. Her conduct was undoubtedly reprehensible. While she paid wharfage for the place in which she was injured, she was not thereby exonerated from the result of her own obstinacy in going to and remaining in a dangerous place to the exclusion of the use of the basin by more valuable vessels. There were no absolute regulations about the matter. It was one of those cases where mutual care and accommodation are required, and, to the credit of those concerned, is usually accorded, notwithstanding the absence of power on the part of Mr. Lowery to enforce his orders.

I think the Syracuse was in fault for not obeying the orders of Mr. Lowery to go to some other berth, of which there were several in the vicinity, unoccupied or which could be made so by the power of the Syracuse. The question remains was she solely in fault. The float

was under the control of the Cuzco for the purposes of discharging and may be regarded as her instrument. The officers of the Cuzco knew well the danger that would be created to the Syracuse by bringing the float to her own side and forcing it in such close proximity to the stern of the Syracuse. The stevedore, the agent of the steamer for the purpose of discharging, knew it also and yet insisted upon leaving it in the dangerous position. Because the Syracuse was doing a wrong thing, it did not justify the ship in injuring her.

There will be a decree for the libellant for half damages against the Cuzco, with an order of reference. The petition against the Railroad Company will be dismissed.

THE FLORA RODGERS.

THE J. W. BELANO.

(District Court, D. South Carolina. March 2, 1907.)

1. SALVAGE—AMOUNT OF COMPENSATION—DERELICTS.

The amount to be awarded to a salvor is in all cases left to the discretion of the court, but that is not an unlimited discretion, being governed by principle and precedent. The rule that one-half should be awarded for the salvage of a derelict while not inflexible should not be departed from except under extraordinary circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 69.

Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

2. SAME.

The doctrine of compensation as upon a quantum meruit has little application in the maritime law of salvage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 55.]

3. SAME.

An Italian steamship worth with her cargo $233,000, while proceeding from Genoa via Baltimore to New Orleans, when some distance southwesterly of Cape Lookout lightship, and after a severe storm, discovered, one after the other, two schooners dismasted and abandoned. These were both taken in tow and towed to Charleston, 220 miles distant, which was the nearest port of which the master had a chart. The steamship was delayed by reason of the service something over 60 hours. The weather was good, and the towing, while requiring care and skill and constant attention day and night, owing to the disabled condition of the schooners, was not attended by any great risk except from the parting of the hawsers, by which the first mate was killed. The two vessels with their cargoes were of the value of $14,000. *Held*, that the usual rule in relation to the salvage of derelicts would be followed, and the ship awarded one-half the value saved, in addition to the expenses and losses incurred in the service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 69.]

In Admiralty. Suits to recover salvage.

Mitchell & Smith, for libelant.
Nathans & Sinkler, for respondents.

BRAWLEY, District Judge. A storm of unusual severity occurred on the South Atlantic coast September 17, 1906, causing great damage

to shipping, and on the morning of Wednesday, September 19th, the Italian steamship Fert, an iron steamer of 2,629 net tons, 340 feet long, 46 feet beam, 1883 horse power, of the value of about $200,000, laden with a cargo of the value of about $33,000, while proceeding on a voyage from Geona, via the port of Baltimore to New Orleans, sighted a vessel about 35 miles southwesterly of Cape Lookout lightship, about longitude 77 and latitude 34, and bearing down on her, sent a boat's crew aboard in charge of the first officer, found the vessel to be the schooner Flora Rodgers, dismasted, abandoned, and with no one on board. She was lying in the path of all coastwise navigation, and a great menace thereto, and in a position of great danger of drifting on Lookout or Frying Pan Shoals, or getting into the gulf stream and being irretrievably lost. The Fert made fast to her with two sisal hawsers of 14 inches in circumference, and about 11:30 proceeded on her way towards the port of Charleston. As there was some criticism of the master, Giannoni, for not making the port of Wilmington, the nearest port to the derelict, or the port of Georgetown, which was nearer than that of Charleston, it may be as well to say that the testimony of Giannoni was that he had no charts of the ports named, and that he did have a chart of the port of Charleston. As the Fert is a foreign ship, it cannot be imputed to her master as a fault that he did not proceed to the nearest port, and for reasons not necessary to be detailed Charleston seems to have been in the circumstances the nearest and most practicable port. Soon after getting under the way he sighted another object on the horizon, five or six miles inshore of his course and heading for the same found it to be the J. W. Belano, another schooner, lumber laden and dismasted, with the wreckage of her masts and bowsprit floating around her, and her cabin and forecastle full of water. Finding no one aboard, he determined also to take this vessel in tow, and sent a boat's crew aboard of her and fastened a wire hawser 4¼ inches in circumference to the port anchor chain of the Belano, so as to give some play to the steel hawser. In this operation the long boat of the Fert was crushed. He then proceeded, towing the Belano behind the Rodgers on the port side of the Fert, and the Rodgers on the starboard side. The steering gear of the schooners were not in good order, and with the vessels yawing and crossing, it required considerable care and skill to tow them safely to port. One of the sisal hawsers attached to the Rodgers parted twice, and the other once, necessitating the stopping and manœuvering of the steamship to avoid the two tows getting into collision, and the sending of new hawsers aboard, with the consequent trouble and risk. After the sisal ropes were used up a manila rope 9½ inches in circumference was made fast to the Rodgers. On the next day the wire cable used for towing the Belano parted and a second steel hawser was gotten out and made fast. The parting of the steel hawser on the Belano, owing to the breaking of the bit and the hawser swinging out of the chock, caused the death of the first mate, Dipino, who was overseeing this work; his leg having been completely cut off at the thigh. They finally came off Charleston lightship, about 9 o'clock Friday evening, September 21st, where the two vessels were anchored, and they were brought into Charleston the next day by the tug Protector.

The steamship was actively engaged in this salvage service from 8 a. m. September 19th, until 9 p. m. September 21st. The distance was about 220 miles. The course of the steamship Fert going to New Orleans would have ordinarily been about 60 miles off Charleston lightship, and would have taken about 18 or 20 hours, so the actual delay of the steamship on her voyage in reaching her destination was something over 60 hours. The value of the Flora Rodgers was $1,400, and of her cargo $2,125. The value of the J. W. Belano was $7,550, and of her cargo $3,000. There was no stress of weather during the operations described, but the duties demanded of the officers and crew of the Fert were extremely onerous and exacting. The testimony shows that neither officers or crew went to bed during the whole time engaged in the service, getting only snatches of sleep. No testimony was offered by either of the claimants as to the circumstances attending their abandonment by their respective crews. The case is clearly one of derelict, and the only question is as to the amount of salvage.

This court has lately, in the Myrtle Tunnel, 146 Fed. 324, stated the rule which, as the result of all the cases, seems to govern, and it has more recently examined all the cases cited in the note to the Lamington, 86 Fed. 685, 30 C. C. A. 281. The rule is to award one-half. More than that is given in extraordinary circumstances, where the service has been attended by great peril, and where the amount saved is so small that one-half is inadequate, and less than a moiety is given where the amount salved is very large and the services have been unattended by any circumstances of unusual danger or exertion. A moiety is the rule, and as Justice Story said in one of the cases cited:

"There is great wisdom in adhering to the rule and not to leave every case to mere exercise of unlimited discretion."

In the Myrtle Tunnel, supra, the value of the ship and cargo saved was $24,000, and one-half of it was awarded to the salvors. The services were unusually meritorious and rendered by steamtugs especially equipped for salvage operations, and in the line of their business. In this case, as the weather was good, there was no particular danger encountered, and the derelicts were picked up by the steamship while on her regular way; but there is always some danger attending the towing by a steamship of derelict vessels of having her propeller put out of order, and her machinery injured. These derelicts are a great menace to navigation, and it is a meritorious act in any steamship to remove them, and calls for commendation, and in all suitable cases for reward.

It is within the experience of this court that the regular coastwise steamships are reluctant to take hold of derelicts found in their path, and to bring them into port. It is a service always attended with inconvenience and delay and sometimes with risk to themselves, and the usual course is to pass them by and report them on arrival, leaving the task of removal either to the government, or to the adventurous speculation of private parties equipped for such service. This was the case with the Myrtle Tunnel, where the proofs showed that she was reported by several steamships, who passed by without going to her rescue. Meanwhile such derelicts, lying in the pathway of navigation,

are a serious danger to it, especially at night, when the absence of lights render them invisible. Courts therefore should and generally do recognize this as a proper element to be considered in making awards on grounds of public policy, and to encourage others to undertake like services. It may sometimes happen that the value of the vessel saved is so inconsiderable that the whole might not be proper compensation for the exertion and risk, if estimated upon the principle of a quantum meruit, but salvage does not rest upon the theory of compensation pro opere et labore. The service must be of some benefit to the owner of the property salved, and however much the interest of the public may require salvage services to be encouraged, the property is salved for him and not for the public, and his interest cannot be wholly excluded from consideration. So far as he is concerned, it might as well be lost entirely if the salvor is to get the whole. The salvor in all cases takes his chances, however meritorious his exertions, or great the hazard encountered, if he saves nothing, he has no claim against the owner as for services rendered; but courts cannot lose sight of the fact that the property saved is saved for the owner, and he is entitled to his fair share.

What shall be awarded to the salvor is in all cases left to the discretion of the court; but that is not an unlimited discretion. It is governed by principle and precedent. An almost unbroken line of cases shows that the rule is to award one-half. The rule is not inflexible, but it should not be swayed by slight circumstances, and there are no extraordinary circumstances here which seem to require a departure from a rule so well established that it has almost the effect of binding authority. On the part of libelant the court is asked to award more than a moiety in view of the small value of the property salved. On the part of the claimants, it is insisted that, in view of the small risk encountered and of other circumstances, less than a moiety would be fair compensation. The cases have been heard together, but separate decrees must be entered, as the claimants are not the same. If the Flora Rodgers stood alone it might be fairly argued that one-half of the small amount salved would be inadequate compensation, as with equal fairness it could be claimed that one-half of the larger amount derived from the Belano is more than adequate for the services rendered; but the doctrine of compensation as upon a quantum meruit has little application in the maritime law of salvage. The salvor takes all the risks. If by misfortune he fails to bring the derelict to a port of safety he gets nothing, however meritorious or laborious his service.

In the absence of extraordinary circumstances requiring a departure from the well-settled rule, it seems better to adhere to it, and a decree will therefore be entered in each case awarding one moiety to the libelant, after deducting the expenses. Among the expenses to be allowed are the pilotage bills, one-half of the extra coal consumed to be charged to each, the value of the hawsers lost or impaired on the respective vessels as proved, one-half of the bills of the Protector for services in the harbor, to be charged to each, and the customary charge for towage in bringing the vessels into port, to be charged to them, respectively; there being nothing in the testimony to differentiate this service from the ordinary case of towage.

UNITED STATES v. STANDARD OIL CO. OF NEW JERSEY et al.

(Circuit Court, E. D. Missouri, E. D. March 7, 1907.)

No. 5,371.

1. MONOPOLIES—ACT TO PROHIBIT CONSPIRACIES IN RESTRAINT OF TRADE—FEDERAL COURTS—CONGRESSIONAL POWER TO AUTHORIZE THEIR PROCESS TO RUN OUTSIDE THEIR DISTRICT.

In a case at law or in equity which arises under the Constitution or laws of the United States—and a suit by the United States under Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], "to protect trade and commerce against unlawful restraints and monopolies" presents such a case—Congress is authorized by article 3, §§ 1, 2, of the Constitution, to confer upon any national court jurisdiction to summon the proper parties to the suit to a hearing and decree, wherever they reside or are found within the dominion of the nation, although beyond the limits of the district of the court.

2. COURTS—FEDERAL COURTS—DISTRICT WHERE SUIT TO BE BROUGHT—RESTRICTION TO INHABITANTS OF DISTRICT INAPPLICABLE WHERE JURISDICTION CONFERRED BY SPECIAL ACTS.

The inhibition of section 1 of the judiciary acts of 1887 and 1888 (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. 508]), that "no suit shall be brought before either of said courts [the Circuit and District Courts] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," is ineffective and inapplicable in instances in which exclusive jurisdiction over particular cases or classes of cases has been conferred upon the federal courts by special acts of Congress.

3. MONOPOLIES—INJUNCTION—JURISDICTION TO BRING IN NONRESIDENT DEFENDANTS CONFERRED BY ACT JULY 2, 1890.

Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], "to protect trade and commerce against unlawful restraints and monopolies," by section 5 (26 Stat. 210 [U. S. Comp. St. 1901, p. 3201]) confers upon any court of the United States, in which a suit has been brought under it by the United States against a conspirator that is a resident of its district, jurisdiction to bring in nonresident co-conspirators by the service of its process upon them without its district.

4. SAME—ENDS OF JUSTICE REQUIRE NECESSARY PARTIES TO BE BROUGHT IN.

The ends of justice require, within the true meaning of Act July 2, 1890, c. 647, § 5, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3201], that every necessary party within reach of the process of the court, every party who has an interest in the controversy and who ought to be made a party to the suit in order that the court may finally adjudicate the whole matter, should be brought in.

5. SAME—PRACTICE UNDER SECTION 5.

The approved practice under Act July 2, 1890, c. 647, § 5, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3201], is to make all the conspirators, both resident and nonresident, parties defendant to the bill, to set forth therein the existence and history of the conspiracy and the connection of each defendant therewith, and immediately upon its filing to present a petition to the court in which the places where the nonresident defendants can be served with process are disclosed, and to pray therein that they be summoned. An order granting such a petition before service of process upon the resident conspirator and without notice to the nonresident conspirators is neither premature nor irregular.

6. SAME—CONSPIRACY IN RESTRAINT OF TRADE—PARTIES.

Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibits conspiracies in restraint of trade, and section 4 confers on the several federal Circuit Courts jurisdiction to restrain violations of its

provisions; section 5 providing that, whenever it shall appear to the court before which any proceeding under section 4 is pending that the ends of justice require that other parties should be brought in, the court may cause them to be summoned, whether they reside in the district in which the court is held or not. A bill alleged that the Standard Oil Company of New Jersey, a holding corporation, and 7 individual defendants, and about 70 other defendants, called "subsidiary corporations," had formed and were executing a conspiracy to restrain and monopolize commerce in petroleum and its products among the states and territories and with foreign nations; that, pursuant thereto, the individual defendants had caused the control of all the subsidiary corporations and the ownership of a majority of the stock of many of them to be vested in the Standard Oil Company of New Jersey, while the subsidiary corporations were the producers, refiners, traders, and operators, by means of which the restraint and monopoly was effected and the profits obtained; that the individual defendants owned a majority of the stock of and controlled the holding corporation, and through it the subsidiary corporations; that two of the subsidiary corporations, one a corporation of Missouri within the district, in combination with the other defendants, controlled and monopolized the railroad lubricating oil business of the United States; that the defendants had divided the territory of the United States into districts so that certain defendants only were permitted to sell therein; and that the Missouri corporation was a party to this conspiracy. *Held*, that the ends of justice required that all of the defendants, regardless of their residence, be made parties to such proceeding, though they were not necessary parties to a decree merely restraining the Missouri corporation from further continuing its wrongful acts.

On Motions to Vacate Order to Bring in Nonresident Defendants and to Quash the Service upon Them of Subpœnas.

John G. Johnson, John G. Milburn, W. I. Lewis, W. J. McKie, H. S. Priest, George G. Greer, and Motter, MacKenzie & Weadock, for the motions.

Frank B. Kellogg (The Attorney General, The Assistant Attorney General, Milton D. Purdy, C. B. Morrison, and C. A. Severance, on the brief), opposed.

Before SANBORN, VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The United States exhibited its bill in this court under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), in which it alleged the existence of this state of facts: The Standard Oil Company of New Jersey, a corporation, 7 individual defendants, and about 70 other defendants, called "subsidiary corporations," have formed and are engaged in executing a conspiracy to restrain and monopolize commerce in petroleum and its products among the states and territories and with foreign nations. Pursuant to, and in the execution of, the plan of this conspiracy, the individual defendants have caused the control of all the subsidiary corporations and the ownership of a majority of the stock of many of them to be vested in the Standard Oil Company of New Jersey, a holding corporation, while the subsidiary corporations are the producers, refiners, traders, and operators, by means of which the restraint and monopoly are intended to be and are effected, and the profits of the scheme are gathered. The individual defendants own a majority of the stock of

and control the holding corporation, and, through it, the subsidiary corporations. Two of these subsidiary corporations, the Waters-Pierce Oil Company, a corporation of the state of Missouri, whose principal place of business is in this district, and the Galena Signal Oil Company, in combination with the other defendants, restrain commerce throughout the United States in the lubricating oil used by railroad companies, whose value aggregates about $4,300,000 per annum, so that they control more than 90 per cent. thereof, and thus practically monopolize it. The defendants have divided the territory of the United States into districts, so that certain defendants only are permitted to sell the products of petroleum in specified districts, and all other defendants are restrained by the control of the holding company or by understandings or agreements from effecting sales in these districts. Such an understanding and agreement has been made, and is being carried out, between the Waters-Pierce Oil Company and the defendant the Standard Oil Company of Indiana, whereby the territory in the state of Missouri and other southwestern territory is divided between them, and neither corporation is permitted to market the products of petroleum in the district of the other. The defendants have conspired for the purpose of, and are engaged in, restraining and monopolizing commerce in the products of petroleum throughout the United States by these and other similar means, and the complainant prayed in its bill that they might be enjoined from continuing this restraint, and from maintaining this monopoly, and for other equitable relief.

Section 4 of the act of July 2, 1890, confers upon the several Circuit Courts of the United States jurisdiction to restrain violations of its provisions, and section 5 reads in this way:

"Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not: and subpœnas to that end may be served in any district by the marshal thereof."

The individual defendants, the Standard Oil Company of New Jersey, and nearly all the subsidiary corporations, except the Waters-Pierce Oil Company, were not inhabitants of, and could not be found in, this district. After the filing of the bill, and upon the presentation by the complainant of a petition which disclosed this fact, the court ordered that the nonresident defendants should be brought in, and that subpœnas should be served upon them in the districts in which they resided. Certain of these defendants have appeared specially, and moved the court to vacate this order and to quash the service of the subpœnas upon them, upon the grounds that the court was without jurisdiction to make the order, that it was prematurely and irregularly made, and that the ends of justice did not require that the nonresident defendants should be brought into this suit.

The judicial power of the United States is vested by the Constitution in the Supreme Court, "and in such inferior courts as the Congress may from time to time ordain and establish." This power extends "to all cases in law and equity arising under this Constitution and the laws of the United States,—to controversies to which the United States shall be

a party," and to other cases not material to the issues here presented. Article 3, §§ 1, 2. This is a case in equity arising under a law of the United States. The United States is a party to the controversy which it involves; and the Congress had ample authority, under these provisions of the Constitution, to confer upon this or upon any inferior court of the nation jurisdiction of this suit and power to summon the proper parties to it, wherever residing or found within the dominion of the nation, to a hearing and decree herein. U. S. v. Union Pac. R. Co., 98 U. S. 569, 604, 25 L. Ed. 143. As the Congress had the authority to enact that in this, and other cases of this class, any Circuit Court in which the United States might bring its suit might, by process served anywhere in the United States, lawfully bring into it all the parties necessary to the adjudication of the controversies it involved, they had authority to empower such a court to bring in these parties whenever in its opinion the ends of justice should require such action, because the whole is greater than any of its parts and includes them all.

The inhibition of section 1 of the judiciary acts of March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], that "no civil suit shall be brought before either of said courts [the Circuit and District Courts] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," does not restrict the jurisdiction of this court, nor its power to bring in parties without its district, in the case under consideration, because that provision is inapplicable to instances in which exclusive jurisdiction over particular cases, or classes of cases, is created and conferred upon the courts of the United States by special acts of Congress. U. S. v. Mooney, 116 U. S. 106, 6 Sup. Ct. 304, 29 L. Ed. 550; Van Patten v. Chicago, Milwaukee & St. Paul R. Co. (C. C.) 74 Fed. 981, 985–988; Atkins v. Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841; In re Louisville Underwriters, 134 U. S. 488, 493, 10 Sup. Ct. 587, 33 L. Ed. 991; In re Hohorst, 150 U. S. 653, 662, 14 Sup. Ct. 221, 37 L. Ed. 1211. There can therefore be no doubt that Congress had the authority to confer jurisdiction of this case upon this court, nor that they have lawfully exercised that authority; and the only question is whether or not this court exceeded the power thus conferred upon it when it summoned the nonresident defendants.

Counsel call attention to the fact that the complainant alleges in its bill that the seven individual defendants conceived and put into operation the plan whereby the Standard Oil Company of New Jersey, with a capital of $113,000,000, became the holding company, and whereby, through it, they direct and control the acts of the subsidiary corporations, and they contend that, if a Circuit Court, within whose district one of these eight principal defendants is a resident, would have the power in a suit of this nature to bring in nonresident parties necessary to a complete adjudication of the case, nevertheless, the subsidiary corporations are mere tools of the principal defendants, and the act was not intended to grant, and does not give, to a court within whose district a subsidiary corporation only resides, the power to summon the other conspirators who are not residents of that district. They argue that it is only where there is a resident defendant who is a participant in the whole length and breadth of the conspiracy that nonresident

conspirators may be lawfully subpœnaed; that the Waters-Pierce Oil Company, the resident defendant, has a capital of only $410,000, is but a puppet of the principal conspirators, is alleged to be effecting a mere local and limited restraint of trade, and is not made to appear to be taking any part in the main conspiracy. And they insist that, on account of its limited power and efficacy, this court is without jurisdiction to bring in the principal defendants or any defendants who would not be indispensable parties to a suit to enjoin the specific restraint which the resident defendant is engaged in effecting.

Repeated readings of the act under which this bill is brought disclose no such limitation or condition of the authority granted to the Circuit Courts to bring in nonresident parties. The power is given without restriction to every Circuit Court whenever it appears to it that the ends of justice require its exercise. The Congress has unlimited discretion here. It might have conditioned this authority by the rank, by the power, or by the degree of participation in the conspiracy of the resident defendant. The fact that it failed to do so raises a persuasive presumption that it never intended to impose any condition or limitation of this nature.

Again, the alleged conspiracy is one. Its scheme is single. It has but one object. Perhaps none of the alleged conspirators participates in every part of the conception and of the work of the combination, but every one of them takes his part in the plan or in its execution, a part promotive of its purpose, the restraint and monopolization of commerce in the products of petroleum among the states. To the Waters-Pierce Oil Company, the resident defendant, has been allotted no inconsiderable portion of the execution of this plan. Its part is, with the aid of the Galena Signal Oil Company, to restrain and monopolize the commerce throughout the United States in the lubricating oil used by railroad companies, and, with the aid of the Standard Oil Company of Indiana, to divide between them the territory in Missouri and the Southwest, and to restrain and monopolize the commerce in the products of petroleum in their respective districts. It has accepted its assignment and is engaged in the performance of this portion of the scheme of the conspiracy. It has been engaged in executing some part of its plan for many years. It is true that a majority of its stock is owned by the eight principal defendants, that they choose its officers, control its operation, and share its profits; but the Waters-Pierce Oil Company is still a distinct legal entity, a corporation of the state of Missouri. The knowledge of its officers and directors is its knowledge, and those officers and directors cannot have caused this corporation to act its important part in the accomplishment of the purpose of this conspiracy without knowledge of the conspiracy, its scheme, its object, and its effect. One who learns of a conspiracy after it is formed, and then joins it, or knowingly aids in the execution of its scheme, and shares in its profits, becomes from that time as much a co-conspirator as if he were one of those who originally designed it and put it in operation. Lincoln v. Claflin, 7 Wall. 132, 138, 19 L. Ed. 106; United States v. Babcock, Fed. Cas. No. 14,487; United States v. Cassidy (D. C.) 67 Fed. 698, 702; The Anarchists' Case, 12 N. E. 865, 976, 17 N. E. 898, 122 Ill. 1, 3 Am. St. Rep. 320; United

States v. Johnson (C. C.) 26 Fed. 682, 684. "If a series of acts are to be performed with a view to produce a particular result, he who aids in the performance of any one of these acts, in order to bring about the result, must have the intention to effectuate the end proposed, and if he operates with others, knowing them to have the same design, there is in fact an agreement between him and them. His criminal intent is not to be distinguished from the intent of those who first formed the plans of the conspiracy." People v. Mather, 4 Wend. (N. Y.) 230, 260, 21 Am. Dec. 122. The Waters-Pierce Oil Company, the resident defendant, was therefore a conscious and active party to the entire conspiracy, and the act of July 2, 1890, conferred ample power upon this court to bring in its nonresident co-conspirators whenever it was made to appear to it that the ends of justice required their presence.

Was the order irregular or premature? Immediately after the filing of the bill, and before a subpœna had been issued or served upon the resident defendant, the United States presented its petition that the nonresident defendants should be brought in, and it was granted. It is insisted that the order was premature, and that the court was without power to make it, until after the resident defendant had been served with process, and notice of the hearing upon the petition had been given to the defendants without the district. But the statute requires no notice of the application for the order, and there is no reason for it, because the order conclusively adjudicates nothing, and every question which conditions its validity or propriety is open to challenge, hearing, and decision as completely after, as before it was made, as in the case now under consideration. The act does not prescribe the time or the manner in which it shall be made to appear to the court that other parties should be brought before it, and, in the absence of any provision of this nature, the requisite appearance may be made at such a time and in such a way as the court, in the exercise of a sound judicial discretion, may direct or permit. The method suggested by counsel for the defendants is that the United States should first file its bill against the resident conspirators, and cause service of process to be made upon them, and that thereafter it should present a petition that the nonresident conspirators should be brought in and made parties to the suit. The method pursued was to make all the alleged conspirators defendants to the bill, to set forth therein the existence and history of the conspiracy and the connection of each defendant therewith, and immediately upon its filing to present a petition, in which the places where the nonresident defendants could be served with process were disclosed, and to pray therein that they be summoned. In the prosecution of each method, the question whether the nonresident conspirators are necessary or proper parties to the suit between the government and the resident conspirators equally conditions the duty of the court to bring them before it. In the prosecution of each method, that question may be well determined. No sound reason occurs to us why the former is preferable to the latter. On the other hand, the presentation of its entire cause of action in the original bill, in which all the alleged conspirators are named as defendants, and wherein their connection with the conspiracy is set forth, accom-

panied by a petition which discloses the places where nonresident defendants may be served, is the more concise, logical, and satisfactory manner of presenting the issue whether or not the conspirators without the district should be brought into the suit, and the presentation of this question in this way and the order in this case were neither irregular nor premature.

Finally, it is insisted that it did not appear to the court that the ends of justice required the nonresident defendants to be brought before it, because more of them and more of the original and chief conspirators resided in the Southern district of New York and in certain other districts than in the district in which this court sits, and it is contended that the ends of justice will be more completely served by the prosecution and adjudication of the controversy involved in this suit in the district of the inhabitancy of a larger number of the defendants. But that question is not open to the consideration or adjudication of this court. The Congress did not confer jurisdiction, in this class of cases, upon the Circuit Court in whose district the largest number of conspirators resided, but upon every Circuit Court in whose district a resident conspirator could be found and served with process. It did not grant to any of the Circuit Courts the power to select the court in which the United States should institute its suit. If it had done so, each court might have selected another. It left the complainant free to commence its suit in any Circuit Court in which it could find and serve a resident conspirator. It instituted its suit in this court and invoked its exercise of its power to acquire jurisdiction of the defendants by the issue and service of its process. The question presented by the petition for that purpose was, not in which court the ends of justice required the complainant to choose to institute its suit, but whether or not in this suit the ends of justice required that the nonresident defendants should be brought in.

The exercise of the power conferred upon the courts by the Constitution and the acts of Congress, to acquire jurisdiction of controversies and parties by the issue and service of their process, is not discretionary with the courts, when a complainant demands it. It is an imperative duty, which may not be renounced, and whose discharge may not be evaded. It is the duty of a court of equity to finally determine the entire controversy before it, and to do complete justice by adjusting all the rights involved therein. Hence, in every suit in which the power to acquire jurisdiction of the subject-matter and of the parties is conferred upon the court, the duty is imposed upon it, if its discharge is invoked by the complainant, to summon and hear, before decision, not only every indispensable party, but every necessary party within reach of its process, every party who has an interest in the controversy, and who ought to be made a party to the suit in order that the court may finally adjudicate the whole matter, although if he were not amenable to process, final justice might be administered between the other parties without his presence. Story's Eq. Pl.; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499.

The scope of the bill in this case is broad and comprehensive. It portrays an alleged conspiracy which extends throughout the nation.

Nothing less than a permanent injunction against the continuance of the operation of this conspiracy and the maintenance of the restraint and monopoly it effects will give adequate relief for the violation of the act of Congress averred in the bill. An injunction against the continuance of the acts of the Waters-Pierce Oil Company and of a few subsidiary corporations would be futile, because the remaining conspirators could assign the parts in the scheme of the conspirators enjoined to others, and continue the restraint. Even in the granting of the latter relief, however, the nonresident defendants are materially interested, because they are co-conspirators with the Waters-Pierce Company, and share in the benefit and profits derived from its operations. The ends of justice therefore required that the nonresident defendants should be brought into this suit, because the complainant was entitled to complete relief from the alleged violation of the statute disclosed by the bill, and the nonresident defendants were materially interested in the controversy involved and in the relief sought.

Our conclusions are these: Congress had the power, under the Constitution, to confer jurisdiction of suits of this nature upon this court, and to authorize it to bring into a suit against a resident conspirator nonresident co-conspirators by service of its process upon them anywhere within the dominion of the United States. It exercised this power by the act of July 2, 1890. The Waters-Pierce Oil Company was a resident of this district and a co-conspirator with the nonresident defendants. The fifth section of the act granted authority to bring in the nonresident co-conspirators by service of its subpœnas upon them without this district. The ends of justice required the court to bring them in. The proceedings for that purpose were regular, and the order was timely, and the motions to vacate it and to quash the service of the subpœnas issued under it must be denied.

Let an order be entered accordingly.

THE CZARINA.

(District Court, S. D. New York. March 16, 1907.)

SHIPPING—CONTRACT FOR REPAIR OF VESSEL—DOCK TRIAL OF BOILER.

An agreement to prepare a steam yacht for a dock trial does not mean that the repairer shall furnish a new boiler, if the dock trial develops leaks, and especially when it is subsequently shown that the boiler was so faulty in construction that it was necessary to replace it with one of a different type.

In Admiralty.

Hyland & Zabriskie, for libellant.

Nicoll, Anable & Lindsay and Archibald R. Watson, for claimant.

ADAMS, District Judge. This action was brought by the Tietjen & Lang Dry Dock Company to collect from the steam yacht Czarina the sum of $1,883.79 for making repairs upon the yacht in July and August, 1906. The yacht was claimed by the owner and an answer interposed denying that the repairs were properly made or the boat de-

livered according to agreement, in consequence of which the owner was unable to use the yacht or fulfil a contract he had made for her charter during the season to his damage in the sum of $1,500.

The controversy arose out of a contract made between the libellant and the owner, through his agents, Cox & Stevens, yacht brokers. The latter applied to the libellant to have some work done on the yacht, asking for a written proposition and when it was received, Mr. Cox told the libellant to go ahead and do the work. The written proposition was as follows:

"Hoboken, N. J., July 28th, 1906.

Specification for work on Yacht 'Czarina.'

Dock; clean bottom; paint bottom two (2) coats of approved anti-corrosive paint, one (1) coat of anti-fouling; paint top-sides two (2) coats White; chip and recement guard; inside bulwarks one (1) coat buff; gild scroll in bow and name in stern; scrape deck and deck-house seams and repay same where open, with marine glue; either paint or stain and varnish plank-sheer as directed; rub down and varnish outside of deck-house, hatches, sky-lights, and gratings:—Nine Hundred and Sixty-seven Dollars, ($967.00).

To prepare engine, boiler, and auxiliaries, except ice and electric light plants, for dock trial, doing only such work as is absolutely necessary, not to exceed the sum of Five Hundred and Seven Dollars, ($507.00), and to keep as much below this as possible.

To do such extra work as may be decided on at cost to be agreed.

To have the above work completed by noon, August 8th, 1906.

Yours respectfully, Tietjen & Lang Dry Dock Co.
Geo. G. Raymond, Superintendent.

To Messrs. Cox & Stevens, New York City."

It appears that several days before this letter was prepared and delivered, which was the day of its date, Mr. Raymond, who signed it on behalf of the libellant, visited the yacht at the request of Mr. Cox, where she was lying at Staten Island, probably the 24th of July, and made an examination of all her accessible parts. Mr. Cox then told Mr. Raymond that there was an opportunity to charter the yacht provided the necessary work for effecting that purpose could be done within a certain amount and in time for her delivery on the 10th of August. Mr. Cox said that Mr. Raymond told him that he saw nothing radically wrong in any department of the vessel, that the boilers appeared to be in good condition, as far as he could see, and he thought he could do the work within the time and for the money that Mr. Cox mentioned. The yacht was subsequently removed to the yard of the libellant and another examination of the boiler made by Mr. Lang and a boiler maker belonging to the yard, which seem to have been satisfactory and the contract was accordingly made as set forth in the above letter. During the last conversation, the specification of a dock trial, which was incorporated in the contract was first mentioned by Mr. Cox. The boiler was a pipe boiler.

Work was immediately commenced and continued from day to day. It was practically finished by noon of August 7th, when a hydrostatic test of the boiler was made about 11 o'clock A. M. by the United States Inspectors, who did not report any leak and passed the boiler. In the afternoon of the same day, a steam test was applied to the boiler and the next morning a leak developed in one tube and the libellant repaired it before 6 o'clock that evening. The steam test was continu-

ed and another leak in one tube developed, which was repaired by 11 o'clock the night of the 9th. The steam test was continued and another leak developed about 2 o'clock in the morning of the 11th. The owner took the boat away about 6 o'clock in the morning of the 11th without any request on his part that the libellant should repair this leak and the boat left the libellant's yard with one tube leaking. She was then taken up the Hudson River to the charterer's residence at Ardsley, the tube leaking considerably on the way. The charterer came aboard about 8 o'clock and notwithstanding the leak agreed to try the boat and they proceeded down the bay to adjust the compasses and then went to Newport, the boiler leaking badly on the way but not so excessively in Newport as en route there, as the steam pressure was down while in port. From Newport they went back to Ardsley, when the charterer threw up the contract on account of the condition of the boiler, having announced his intention to do so at Newport. The leaky tubes were then plugged up and about two weeks later the boat was again chartered for a term to go to Bar Harbor and she started. On the way there, the tubes became very leaky again and the boiler would not hold the fresh water required. Resort was had to salt water and the destination was reached. The new charterer came aboard and said he would like to lie there a couple of days and then take a trip further east. The master consulted with the engineer and then went ashore and ordered twenty-five new steel plugs for the boiler. They were not used, however, and it was determined that night it was not safe to go to sea with the boiler leaking the way it was but they tried it for a short trip the next morning at the charterer's request. They did not get far, however, on account of the condition of the boiler and the vessel was finally towed back to New York for the purpose of getting a new boiler. The boiler which is the subject of this dispute was new and in apparently good condition but of an improper construction for such use and was finally taken out of the yacht and a new boiler put in.

The principal dispute here arose out of the meaning of the words:

"To prepare engine, boiler, and auxiliaries * * * for dock trial, doing only such work as is absolutely necessary, not to exceed the sum of Five hundred and seven Dollars ($507.00) and to keep as much below this as possible."

The libellant contended that this was perfectly clear and needed no explanation and objected to any testimony as to the meaning of the language. The claimant, on the other hand, contended that it had a more extended meaning than the simple words would cover. After hearing the parties in court, I concluded to take the testimony.

Mr. Cox said:

"I understand that a dock trial of a vessel's boilers is a trial for the purpose of determining whether the boilers and the machinery connected therewith are in condition for actual service, and that the test or trial must be sufficiently rigorous to determine that point.

Q. Does it require as you understand the term a steam test—a test including steam pressure? A. You cannot test a boiler in any way that I know of for its working qualities without having steam in the boiler, steam pressure.

Q. How long should that pressure be sustained in order to complete the test of the trial, as you understand it? A. Judging from my experience I should say that a 24-hour test under good pressure would be required in an

average case to satisfy people who are responsible for the condition of the vessel that she is ready to go to sea.

Q. A sustained test of 24 hours of steam pressure? A. In my judgment, as an average."

* * * * * * * * * *

"Q. I desire to ask you Mr. Cox, what the phrase 'preparing for dock trial' means as used in contracts with reference to the fitting out of boats?

Ans. To put the boilers, engines and auxiliaries in such condition that they will stand a test at the dock.

Q. What sort of a test? A. I hadn't quite finished. A test at the dock, which test is to represent as nearly as possible the uses to which the engines, boilers and auxiliaries are put while the vessel is in service. And my understanding of the phrase 'to prepare' for such a trial is that the parts of the vessel shall be put in condition to stand such a trial."

Mr. Raymond said in substance:

A dock trial means a trial of the engines and boilers to determine if anything is wrong, and preparing for a dock trial means assembling the parts for a test.

Mr. Lang said:

"It is to prepare the engines and auxiliaries and boilers ready for trial, and then when they are prepared put water in the boiler, get up steam and try them, try every part of the machinery that is—auxiliaries and main engines and boilers."

Mr. Fletcher said:

"It means to assemble all the working parts, put them together so they can be tried with steam. 'Dock trial' means in the ordinary acceptation of the term, and does mean as matter of fact, trial by steam at the dock.

* * * * * * * * * *

It means what it says, 'To prepare the vessel for that trial.' It don't mean to conduct that dock trial but to prepare it for dock trial.

* * * * * * * * * *

Q. In case it develops on a dock trial such as you have testified to that there are some defective parts to the engine and boiler, such as a leaking tube, in your opinion is there anything in this contract requiring the contractor to repair those tubes as part of the agreement? A. Not in that contract.

* * * * * * * * * *

The object of the dock trial is to determine defects that may exist in either an old boat or a new one. That is the only object of the trial.

* * * * * * * * * *

A. They were to assemble the parts, put the vessel together, put her in shape so that a steam trial might be conducted, get her ready for steam trial.

Q. Then I ask you to go a little further and imagine a case where she wouldn't stand steam trial, where she showed leaks as soon as steam was gotten up. Would you say she had been made ready for dock trial? A. Yes, because the dock trial is to develop these leaks, that is what the dock trial is made for—and it does it in a new boat—invariably; that is the very object of the trial.

Q. You would say that, notwithstanding the fact that she could not stand the trial, could not stand the test, she was nevertheless prepared for it if her parts were assembled? A. For a dock trial, yes sir."

Captain Moulton said:

"'Dock trial,' as I have always supposed and looked at it, was to have everything ready and to try the vessel out well in every way, shape and form—all the auxiliaries, pumps, boilers, steam winches, steam steering gear, electric light plant and everything—without it was otherwise specifically stated; to try everything out good and hard, because when a ship has had a dock trial she is supposed to be ready to go to sea, and I have always made it a point

to put as hard a trial on the ship as I could before I went out of Sandy Hook.

Q. What do the words 'prepare for dock trial' mean? A. To put everything in first class shape without otherwise specified. That is what I would term it."

Mr. Dickey said:

"Q. I will ask you to state, Mr. Dickey, what the obligation imposed upon a contractor is who undertakes to prepare a steam vessel, her engines, boilers and auxiliaries, for dock trial? A. It means to put everything in shape—to put water in the boilers, get fire under it and turn the engines over.

Q. That implies steam pressure, does it not? A. Yes, sir.

Q. How long should that steam pressure be sustained? A. Oh, four hours is considered an ordinary dock trial. It takes sometimes much longer but four hours is a very usual time for a dock trial.

Q. How much pressure should be sustained for the four hours? A. Full working pressure, whatever the boiler is allowed.

* * * * * * * * * *

Then, Sir, if a contractor who undertakes to prepare a vessel for dock trial does not make her stand a dock trial she is not prepared, is that right? A. No sir.

Q. It is not right? A. No sir, she is not prepared for dock trial if she does not stand it."

On cross examination he said:

"Q. You don't mean that if the boiler explodes under the test he is to put a new boiler in? A. It all depends on the terms of the agreement.

Q. The words are that the Tietjen & Lang Company is 'To prepare the engine, boiler and auxiliaries' of this boat for dock trial? A. Yes, sir.

Q. What counsel has been asking you is what that means? A. He has got to put that machinery in condition to stand a dock trial.

Q. Do you mean if when pressure is applied to the boiler it explodes he has got to put in a new boiler? A. Yes, sir. I certainly think so.

Q. You think if I employ you to prepare my vessel for a dock trial and she is all ready for trial and when the test is applied the boiler explodes, you would have to put in a new boiler? A. I should think so, under the wording of that contract."

Mr. Bowers said:

"Ans. It means that all the parts mentioned shall be put in condition so they will stand successfully a trial at the dock which will approach, as near as possible, the conditions under which the ship will operate finally. It is taken as a precautionary measure, as any defects which develop can be remedied at the ship yard much better than at sea.

Q. State of what a dock trial consists? A. A dock trial consists in the operating of the machinery at their full power successfully.

Q. For how long? A. For such time as it shall be demonstrated to the satisfaction of all concerned that it is working successfully.

Q. What is considered the time for such a test, a sufficient time for such a test? A. Until it is demonstrated to all parties concerned that the machinery is capable of performing her functions properly. It might be two or three hours, four hours or all day.

Q. Then, Sir, if after two or three hours a boiler showed a leak and the fires were drawn and the tubes plugged and steam were gotten up again, and the same process gone through with two or three times and still showing a leak on the final attempt at a test, would you say that that vessel has stood a dock test or not? A. I should think she had had an unsuccessful trial, several of them; that she had had no dock trial, for the dock trial was started and never finished."

On cross examination he said:

"Q. I am going to ask you the same question that I asked of Mr. Cox, whether it is your opinion as an expert—referring to this clause in the contract—that if when the test is applied to the boiler it should explode and blow out a portion of the deck the contractor would be required to replace the boiler and a new deck? A. I should say most positively not only that but would be liable for damages for delay and show incompetency in putting steam on a boiler that would explode."

Some of these definitions have been subjected to a test by the questions quoted on cross examination and found to be obviously wanting in correctness as applied to this contract. Here was a vessel supposed to be in a seaworthy condition but needing some repairs and then to be subjected to a trial to ascertain her efficiency for service. There was no guaranty by the libellant that the results of the repairs or test would remove any inherent defects in the boiler, for example, but merely that if they existed they should be ascertained and repaired so far as discovered at a cost not to exceed a certain sum. To assume that this meant that the defects should be remedied by the libellant without regard to cost beyond a limited sum, specified in the contract, would be putting a construction on the language which would lead to absurd results. As it turned out, the defects in the boiler were such that they could not be cured by repairs, as the final result of the owner's attempts in that direction showed. It was necessary in the end that the boiler should be replaced with one of a different type. This trouble existed from the beginning and all attempts to remedy it, resulted in nothing excepting expense to the owner. The libellant examined the boiler but was not called upon to condemn it. Its duty was to make repairs and prepare for a dock trial. If a dock trial meant that the boiler should be made efficient for service, then evidently the language did not contemplate or cover a situation requiring the libellant to pay the expense and cannot be made to do so by any testimony of experts. The libellant examined the yacht before the contract was made and found nothing radically wrong in any department of the vessel and that the boiler seemed to be in good condition so far as its agent could see and then the contract was made for various repairs and a test of the boiler. Such test, repeated several times, showed that the boiler was defective in construction, and subsequent experiments conclusively indicated that though nearly new, it would have to be replaced, as was done before the yacht could be used.

I conclude that the libellant did the work as agreed and is entitled to a decree. I conclude also that the claimant has no offset. If necessary, a reference can be had to determine the amount of the libellant's recovery.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California, S. D. January 21, 1907.)

No. 1,114.

PUBLIC LANDS—RAILROAD GRANTS—CONFLICTING GRANTS.

It having been determined by the Supreme Court that under Act July 27, 1866, 14 Stat. 292, c. 278, containing grants of lands within the state of California to both the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company, each company took an undivided moiety of such lands as lay within the place limits of both grants, where they overlapped, and that the rights of the Southern Pacific Company under its grant were not affected by Act July 6, 1886, 24 Stat. 123, c. 637, forfeiting the grant to the Atlantic & Pacific Company, the right of the Southern Pacific Company to select lieu lands within the indemnity limits of its grant is not affected by the fact that such lands were within the primary limits of the grant to the Atlantic & Pacific Company and were restored to the public domain by said act of forfeiture.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 274, 275.]

In Equity. Suit for adjustment of land grant.

Stipulation as to Evidence.

It is stipulated and agreed by and between the parties to this case, subject to all valid objections as to competency and relevancy, as follows:

Subdivision 1.

Item 1. That all acts of Congress and laws of the state of California, whether of public or private, general or special, nature, and all official acts and decisions of the Commissioner of the General Land Office and Secretary of Interior relating to the Southern Pacific Railroad Company or to the Atlantic & Pacific Railroad Company, or affecting the rights of either of said companies or of the United States, and all decisions of the Supreme Court of the United States reported in the United States Reports relating to or affecting the rights of either of said companies, in so far as relevant and material to the issues and controversies in this case, shall be deemed before this court for judicial notice.

Subdivision 2.

Item 2. The act of Congress approved on July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the State of Missouri and Arkansas to the Pacific," is admitted in evidence, by reference to the same as printed in volume 14 of the United States Statutes at Large, pages 292 and following.

Item 3. Within due time, the Atlantic & Pacific Railroad Company, mentioned in the act of Congress referred to in item 2 hereof, assented to, and accepted the terms and conditions of, that act.

Item 4. The said Atlantic & Pacific Railroad Company filed maps designating its line of route with the Secretary of the Interior, which the Secretary of the Interior accepted as definitely locating the line of road, in sections and at dates as follows: From Springfield, Mo., to the west line of Missouri, on December 17, 1866; from the west line of Missouri to Kingfisher creek, I. T., on December 2, 1871; from Kingfisher creek to the eastern boundary of New Mexico on February 7, 1872; from the eastern boundary of New Mexico, to the western boundary of New Mexico on March 12, 1872; from the western boundary of New Mexico, through Arizona, to the east bank of Colorado river, near Needles, on March 12, 1872; from the last-mentioned point on the Colorado river to township 7 north, range 7 east, San Bernardino meridian, in California, on August 15, 1872; from the last-mentioned point (township 7 north, range 7 east) to the west line of Los Angeles county, in California, on

March 12, 1872; and from the last-mentioned point to the Pacific Coast, at San Buena Ventura, on August 15, 1872. As such maps were filed, as aforesaid, the Secretary of the Interior transmitted them to the Commissioner of the General Land Office, directing that they be given proper action, except that the said two maps filed on August 15, 1872, were transmitted by the Secretary of the Interior to the Commissioner on April 16, 1874, without express direction.

Item 5. Under direction of the Secretary of the Interior, the Commissioner of the General Land Office, on April 22, 1872, withdrew from pre-emption or homestead entry, private sale or location, all odd-numbered sections of public land in California lying within 20 miles and 30 miles on each side of the line of route designated upon the maps referred to in item 4 hereof as filed on March 12, 1872, which were not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption, or other claims or rights, on March 12, 1872; and on November 23, 1874, the said Commissioner, under direction of the Secretary of the Interior, withdrew from sale or entry all odd-numbered sections of public land in California lying within 20 miles and 30 miles on each side of the line of route designated upon the maps referred to in item 4 hereof as filed on August 15, 1872, saying in his said order of withdrawal of November 23, 1874, that the rights of the Atlantic & Pacific Railroad Company must attach to the lands so withdrawn as of August 15, 1872.

Item 6. The withdrawals referred to in the next preceding paragraph hereof were accompanied by plats showing the line of route in California designated by the maps referred to in item 4 hereof, with 20-mile limit lines and 30-mile limit lines parallel with and on each side of the said line, as such limit lines were established by the Commissioner of the General Land Office under direction of the Secretary of the Interior.

Item 7. The Atlantic & Pacific Railroad Company did not construct any railroad in California.

Item 8. The act of Congress approved on July 6, 1886, entitled "An act to forfeit the lands granted to the Atlantic & Pacific Railroad Company to aid in the construction of its road, and for other purposes," is admitted in evidence, by reference to the same as printed in volume 24 of the United States Statutes at Large, pages 123 and following.

Subdivision 3.

Item 9. The Southern Pacific Railroad Company, mentioned in the act of Congress referred to in item 2 hereof, was duly incorporated and organized as such under the laws of California on December 2, 1865, and the said company was thereby authorized and empowered to construct, own, maintain, and operate a railroad from the Bay of San Francisco, thence through the counties of San Francisco, Santa Clara, Monterey, San Luis Obispo, Tulare, and Los Angeles to the town of San Diego, thence easterly through San Diego county to the Colorado river.

Item 10. Within due time, the said Southern Pacific Railroad Company duly assented to, and accepted the terms and conditions of, the act of July 27, 1866, mentioned in item 2 hereof.

Item 11. On January 3, 1867, the said Southern Pacific Railroad Company filed with the Secretary of the Interior a map designating a line of general route of the railroad which it claimed the right and authority to construct under the provisions of the act of Congress of July 27, 1866, referred to in item 2 hereof; which line of route as designated on the said map commenced in the city of San Francisco and extended thence by way of San Jose, Gilroy, Tres Pinos, Alcalde, Huron, Goshen, and Mojave, to the Colorado river, at or near Needles.

Item 12. On January 3, 1867, the Secretary of the Interior received and filed the map referred to in item 11 hereof, and on that day delivered it to the Commissioner of the General Land Office, with directions that the said map be given appropriate official action.

Item 13. On March 22, 1867, the Commissioner of the General Land Office, acting under direction of the Secretary of the Interior's letter dated March 19, 1867, withdrew all odd-numbered sections of public land lying with-

in 20 miles and 30 miles on each side of the line of route shown on the map set forth in item 11 hereof from sale or location, pre e...ption, or homestead entry. The Secretary of the Interior in his above-mentioned letter of March 19, 1867, after directing the withdrawal, said: "I do not think it necessary at this time to pass upon the question as to whether this railroad company have adopted the route of any other railroad. Any indemnity of grant arising out of conflict of location under the first proviso in the third section of the Act, will be reserved for future consideration."

Item 14. The withdrawal referred to in the next preceding paragraph hereof was accompanied by a map showing the line of general route designated on the map set forth in item 11 hereof, with 20-mile limit lines and 30-mile limit lines parallel with and on each side of the said line of route, as such limit lines were established by the Commissioner of the General Land Office under direction of the Secretary of the Interior.

Item 15. On July 14, 1868, the Secretary of the Interior rendered a decision wherein he held that the Southern Pacific Railroad Company was not lawfully authorized to construct a railroad along the line of route designated upon the map of January 3, 1867, set forth in item 11 hereof, and ordered the withdrawals referred to in item 13 hereof set aside; on August 20, 1868, the Secretary of the Interior vacated the said order of July 14, 1868, as to all lands south of San José; on November 2, 1869, the Secretary of the Interior revoked the said order of August 20, 1868, and directed restoration of the lands withdrawn on March 22, 1867; on November 11, 1869, upon review, Secretary Cox affirmed his said order of November 2, 1869, and directed restoration of the said lands after 60 days' publication; on December 15, 1869, Secretary Cox suspended the said orders of restoration made on November 2, 1869, and November 11, 1869; and on July 26, 1870, the Secretary of the Interior directed that the original withdrawals of March, 1867, set forth in item 13 hereof, be respected.

Item. 16. The act of Congress, approved on June 25, 1868, entitled "An act relative to filing reports of railroad companies," is admitted in evidence, by reference to the same as printed in volume 15 of the United States Statutes at Large, page 79.

Item 17. The act of Congress, approved on July 25, 1868, entitled "An act to extend the time for the construction of the Southern Pacific Railroad in the state of California," is admitted in evidence, by reference to the same as printed in volume 15 of the United States Statutes at Large, page 187.

Item 18. Prior to the year 1869 the San Francisco & San José Railroad Company was duly incorporated and organized under the laws of California, and thereby authorized to construct a railway from San Francisco to San José.

Item 19. During the year 1869 the said San Francisco & San José Railroad Company constructed and fully equipped a railroad from San Francisco to San José; during the same year the said Southern Pacific Railroad Company constructed and fully equipped a continuation of the said railroad from San José to Gilroy, a distance of 30.26 miles; and during the years 1869 and 1870 the said Southern Pacific Railroad Company constructed and fully equipped a further continuation of the said railroad from Gilroy to Tres Pinos, a distance of more than 20 miles. All of the said railroad from San Francisco to Tres Pinos was constructed upon, or as nearly as practicable upon, the line designated on the map of January 3, 1867, set forth in item 11 of this statement.

Item 20. By an act, approved on March 1, 1870, entitled "An act relating to certificates of incorporation," the Legislature of California provides as follows:

"Section 1. Any corporation now or hereafter organized under the laws of this state may amend its articles of association, or certificate of incorporation, by a majority vote of the board of directors, or trustees, and by a vote of written assent of the stockholders representing at least two-thirds of the capital stock of such corporation; and a copy of the said articles of association or certificate of incorporation as thus amended, duly certified to be correct by the president and secretary of the board of directors, or trustees of such corporation, shall be filed in the same office, or offices, where the original articles or certificate are required by law to be filed; and from the time of filing such

copy of the amended articles or certificate, such corporation shall have the same powers, and it and the stockholders thereof shall be thereafter subject to the same liabilities as if such amendment had been embraced in the original articles or certificate; provided, that the time of the existence of such corporation shall not be thereby extended beyond the time fixed in the original articles or certificate; and provided, further, that such original and amended articles or certificate shall, together, contain all the matters and things required by the law under which the original articles of association or certificate of incorporation were executed and filed; and provided further, that nothing herein contained shall be construed to cure or amend any defect existing in any original certificate of incorporation heretofore filed, by reason of the failure of such certificate to set forth matters required by law to make the same valid as a certificate of incorporation at the time of the filing thereof; also provided, that unless the vote or written assent of all the stockholders has been obtained, then a notice of the intention to make such amendment shall first be advertised for sixty days, in some newspaper in the town or county in which the principal place of business of said company is located; and the written protest of any one of said stockholders, or his duly authorized agent or attorney, whose assent has not been obtained, filed with the secretary of the said company, shall, unless withdrawn, be effectual to prevent the adoption of such amendment; provided, that nothing in this act shall be construed to authorize any corporation to diminish its capital stock.

"Sec. 2. This act shall take effect and be in force after its passage."

Item 21. By an act approved on April 4, 1870, entitled "An act to aid in giving effect to an act of Congress relating to the Southern Pacific Railroad Company," the Legislature of California enacted as follows:

"Section 1. Whereas, by the provisions of a certain act of Congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California,' approved July twenty-seventh, eighteen hundred and sixty-six, certain grants were made to, and certain rights, privileges, powers and authorities were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said act of Congress, and all other acts of Congress now in force or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new amendatory articles of association; and the right, power and privilege is hereby granted to, conferred upon and vested in them, to construct, maintain and operate, by steam or other power, the said railroad and telegraph line mentioned in the said acts of Congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges, franchises, power and authority conferred upon, granted to or vested in said company by the act of Congress and any act of Congress which may be hereafter enacted.

"Sec. 2. This act shall take effect and be in force from and after its passage."

Item 22. The joint resolution of Congress, approved on July 28, 1870, entitled "Joint resolution concerning the Southern Pacific Railroad of California," is admitted in evidence, by reference to the same as printed in volume 16 of the United States Statutes at Large, page 382.

Item 23. On October 11, 1870, articles of association, amalgamation, and consolidation were made and entered into, in due conformity to and compliance with the laws of California, by and between the said Southern Pacific Railroad Company and San Francisco & San José Railroad Company whereby it was provided that the last-named company was amalgamated and consolidated with the said Southern Pacific Railroad Company, under the corporate name and style of "Southern Pacific Railroad Company," and that the said Southern Pacific Railroad Company thereby became the owner of all stock

and property of the said San Francisco & San José Railroad Company; and the said articles further provided that the Southern Pacific Railroad Company was authorized to purchase, construct, maintain, own, and operate a railroad from the city of San Francisco through the counties of San Francisco, San Mateo, Santa Clara, Monterey, Freno, Tulare, Kern, San Bernardino, and San Diego to the Colorado river, and such branch line railroads as its board of directors might deem advantageous.

Item 24. The said Southern Pacific Railroad Company never constructed any railroad between Tres Pinos and Alcalde, a distance of about 50 miles.

Item 25. The said Southern Pacific Railroad Company completed the construction of, and fully equipped, a continuous line of railroad from Tres Pinos, by way of Huron, Goshen, and Mojave, to junction with the Atlantic & Pacific Railroad, on the Colorado river, at Needles, in several sections, on or about the following dates: The seventeenth section, 20.559 miles, from Tres Pinos (in N. E. ¼ of section 23, township 21 south, range 14 east, M. D. M.) to a point in the N. W. ¼ of section 11, township 20 south, range 17 east, M. D. M., on July 16, 1888; the ninth section, 20 miles, from the last-mentioned point to the N. E. ¼ of section 2, township 19 south, range 20 east, M. D. M., on January 9, 1877; the eighth section, 20 miles, from the last-mentioned point to Goshen (in section 19, township 18 south, range 24 east, M. D. M.), on December 11, 1876; the third section, 20 miles, from Goshen to the N. W. ¼ of section 30, township 21 south, range 25 east, M. D. M., on June 30, 1872; the fourth section, 20 miles, from the last-mentioned point to the N. W. ¼ of section 2, in township 25 south, range 25 east, M. D. M., on June 30, 1873; the fifth section, 20 miles, from the last-mentioned point to the N. E. ¼ of section 9, township 28 south, range 26 east, M. D. M., on June 13, 1874; the sixth section, 20 miles, from the last-mentioned point to the N. E. ¼ of section 5, township 30 south, range 29 east, M. D. M., on June 10, 1875; the seventh section, 20 miles, from the last-mentioned point to the S. E. ¼ of section 33, township 30 south, range 31 east, M. D. M., on January 13, 1876; the tenth section, 41.66 miles, from the last-mentioned point to Mojave (in the N. E. ¼ of section 17, township 11 north, range 12 west, S. B. M.), on December 17, 1877; the eleventh section, twelfth section, thirteenth section, fourteenth section, fifteenth section, and sixteenth section, in all 242,507 miles, connecting with the tenth section at Mojave, and extending thence to the Colorado river, at or near Needles, all constructed prior to April 19, 1883.

Item 26. Commissioners, duly appointed for that purpose, examined all of the said railroad from San José to Tres Pinos, and from Alcalde to the Colorado river, at or near Needles, after construction, respectively, of each of the said several sections thereof, and duly reported to the Secretary of the Interior that each of said sections had been completed in a good, substantial, and workmanlike manner, as near as may be along the line indicated on the map of January 3, 1867, set forth in item 11 of this stipulation, in all respects as required by the said act of July 27, 1866, and recommended that the same be accepted and approved; each of which reports was accompanied by a map of the survey, location, and profile of the section of road as constructed and reported upon, duly verified by the proper officers of the said Southern Pacific Railroad Company as a map and profile of such railroad as finally located and constructed and as correctly showing the location thereof, with the approval of the said commissioners indorsed upon the maps; and each of said reports and maps were accepted and approved by the Secretary of the Interior. Such reports were made and maps approved by the commissioners, and said reports and maps were received, filed, and approved by the Secretary of the Interior, on the following dates: First section (San José to Gilroy), report made and maps approved by the commissioners on October 29, 1870, report and map approved by the Secretary on January 20, 1871; second section (Gilroy to Tres Pinos), report made and maps approved by the commissioners on September 12, 1871, report and map approved by the Secretary on October 13, 1871; third section, report made and map approved by the commissioners on September 14, 1872, report and map approved by the Secretary on September 28, 1872; fourth section, report made and map approved by the commissioners on July 23, 1873, report and map approved by the Secretary on August 5, 1873; fifth section, report made and map approved by the com-

missioners on September 19, 1874, report and map approved by the Secretary on October 9, 1874; sixth section, report made and map approved by the commissioners on August 3, 1875, report and map approved by the Secretary on August 21, 1875; seventh section, report made and map approved by the commissioners on May 27, 1876, report and map approved by the Secretary on June 14, 1876; eighth section, report made and map approved by the commissioners on January 2, 1877, report and map approved by the Secretary on January 22, 1877; ninth section, report made and map approved by the commissioners on February 9, 1877, report and map approved by the Secretary on February 20, 1877; tenth section, report made and map approved by the commissioners on January 30, 1878, report and map approved by the Secretary on February 11, 1878; eleventh section, twelfth section, thirteenth section, fourteenth section, fifteenth section, and sixteenth section, reports made and maps approved by the commissioners on December 27, 1884, reports and maps received and filed by the Secretary on January 7, 1885, and approved by the Secretary on September —, 1897; seventeenth section, report made and map approved by the commissioners on April 2, 1889, report and map approved by the Secretary on October 23, 1889.

Subdivision 4.

Item 27. The act of Congress approved on March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," is admitted in evidence by reference to the same as printed in volume 16 of the United States Statutes at Large, pages 573 and following.

Item 28. On May 16, 1871, the board of directors of the Southern Pacific Railroad Company adopted a resolution accepting the terms, conditions, and impositions of the act of Congress mentioned in the next preceding paragraph hereof, and directing that a copy thereof, certified under the seal of said company, be forwarded to and filed with the Secretary of the Interior; and on February 25, 1887, a copy of the said resolution, certified by the Secretary of the said company, under the corporate seal of the said company, was filed with the Secretary of the Interior.

Item 29. On April 3, 1871, the said Southern Pacific Railroad Company filed with the Secretary of the Interior a map designating the line of general route of the railroad which it claimed the right and authority to construct under the provisions of the said act of March 3, 1871; which map the Secretary of the Interior on that day received, filed, and delivered to the Commissioner of the General Land Office, with directions that the same be given appropriate action.

Item 30. On April 21, 1871, the Commissioner of the General Land Office, under direction of the Secretary of the Interior, withdrew all odd-numbered sections of public land lying within 20 miles and 30 miles on each side of the line of route shown on the map referred to in item 29 hereof from sale or location, pre-emption or homestead entry.

Item 31. The withdrawal referred to in item 30 hereof was accompanied by a plat showing the line of general route designated on the map set forth in item 29 of this stipulation, with 20-mile limit lines and 30-mile limit lines parallel with and on each side of the said line of route, as such limit lines were established by the Commissioner of the General Land Office under direction of the Secretary of the Interior.

Item 32. On April 15, 1871, the said Southern Pacific Railroad Company, duly conforming to and complying with the laws of California, amended its articles of incorporation as they then existed, so as to include therein a particular description of the line of route designated on the plat set forth in item 29 hereof.

Item 33. The said Southern Pacific Railroad Company completed the construction of, and fully equipped, a continuous railroad from Mojave, by way of Los Angeles, to the Colorado river, at or near Yuma, in several sections, along or near the line designated on the said general route map of April 3, 1871, all prior to December 6, 1877.

Item 34. Commissioners, duly appointed for that purpose, examined all of the said railroad after construction, respectively, of each of the several sec-

tions thereof, and duly reported to the Secretary of the Interior that each of said sections had been completed in a good, substantial, and workmanlike manner, in all respects as required by the said act of March 3, 1871, and recommended that the same be accepted and approved; each of which reports was accompanied by a map of the survey, location, and profile of the section of road as constructed and reported upon, duly verified by the proper officers of the said Southern Pacific Railroad Company as a map and profile of such railroad as finally located and constructed, and showing the correct location thereof, with the approval of the said commissioners indorsed upon the maps. The said reports were made and maps approved by the commissioners, and the said reports and maps were filed and approved by the Secretary of the Interior, and approved by the President of the United States, on the following dates: First section (from a point in the N. W. ¼ of section 3, township 2 north, range 15 west, S. B. M., to a point in the N. E. ¼ of section 27, township 1 south, range 9 west, S. B. M., a distance of 50 miles), report made and map approved by the commissioners on April 15, 1874, report and map filed and approved by the Secretary of the Interior on May 8, 1874, and report approved by the President of the United States on May 9, 1874; second section (from the said point in the N. E. ¼ of section 27, township 1 south, range 9 west, S. B. M., to a point in the S. W. ¼ of section 4, township 3 south, range 1 west, S. B. M., a distance of 50 miles), report made and map approved by the commissioners on October 21, 1875, report and map filed and approved by the Secretary on November 8, 1875, and report approved by the President on November 11, 1875; third section (from the said point in the S. W. ¼ of section 4, township 3 south, range 1 west, S. B. M., to a point in the S. W. ¼ of section 24, township 5 south, range 7 east, S. B. M., a distance of 50 miles), report made and map approved by the commissioners on June 22, 1876, report and map filed and approved by the Secretary on July 10, 1876, and report approved by the President on July 21, 1876; fourth section (from the said point in the N. W. ¼ of section 3, township 2 north, range 15 west, S. B. M., to a point in the N. E. ¼ of section 17, township 11 north, range 12 west, S. B. M., a distance of 78.59 miles), report made and map approved by the commissioners on February 17, 1877, report and map filed and approved by the Secretary on March 1, 1877, and report approved by the President on March 2, 1877; fifth section (from the said point in the S. W. ¼ of section 24, township 5 south, range 7 east, S. B. M., to a point in the S. E. ¼ of section 26, township 16 south, range 22 east, on the Colorado river, a distance of 118.37 miles), report made and map approved by the commissioners on December 6, 1877, report and map filed and approved by the Secretary on January 19, 1878, and report approved by the President on January 23, 1878.

Subdivision 5.

Item 35. The following lands described in Exhibit B attached to plaintiff's bill of complaint herein are within primary limits common to the land grants made by the said act of Congress of July 27, 1866, unto the Atlantic & Pacific Railroad Company and unto the Southern Pacific Railroad Company; for which reason the plaintiff's bill of complaint herein is dismissed, without prejudice, as to said lands, to wit, sections 1, 3, 5, N. ½ of N. E. ¼ of section 7, N. ½ of N. E. ¼, N. ½ of N. W. ¼ of section 9, N. ½, and N. ½ of S. ½ of section 11, all in township 6 north, range 10 west, San Bernardino base and meridian.

Item 36. All lands described in the bill of complaint herein other than the lands described in the next preceding paragraph hereof (item 35) are situated within primary limits of the land grant made unto the Atlantic & Pacific Railroad Company by the said act of Congress of July 27, 1866, and within indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the same act.

Item 37. All lands described in Exhibit A attached to the bill of complaint herein were patented to the Southern Pacific Railroad Company by patent dated June 30, 1903, pursuant to said company's indemnity selection thereof made by list No. 94, filed on November 10, 1903.

Item 38. Exhibit A to the defendants' answer herein contains full, true, and

correct statements of all sales made by the Southern Pacific Railroad Company of lands described in Exhibit A and Exhibit B attached to the plaintiff's bill of complaint herein, and of all material particulars thereof. Each and all of such purchases were made for full value of the lands at times of sale, without notice or knowledge of any claims or rights of the United States in or to the lands purchased, by persons who in good faith believed they were purchasing from the said company a good and sufficient title, except in so far as the purchasers had constructive notice that the lands purchased were granted by the said act of July 27, 1866, unto the Atlantic & Pacific Railroad Company, and were not granted to and did not belong to the said Southern Pacific Railroad Company; and the title of each of such purchasers to the land so purchased was confirmed by the act of Congress approved March 2, 1896, published in volume 14, United States Statutes at Large, page 42.

Item 39. The official "Land Office Report, 1875," at page 409, contains the following: "Statement Exhibiting Land Concessions by Acts of Congress to States and Corporations, &c.": Act March 3, 1871, 16 Stat. 579; Southern Pacific Railroad Company, estimated quantity embraced within the 20 and 30 mile limits of the grant, 3,520,000 acres; estimated quantity which the company will receive from the grant, within the 20 and 30 mile limits thereof, 3,000,000 acres.

Item 40. It appears from the records of the United States Land Office for the Los Angeles District of California that within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the act of Congress of March 3, 1871, there remains more than 50,000 acres of surveyed public land, vacant of record, embraced in odd-numbered sections, returned as agricultural in character, which have not been selected as indemnity by said company, not including any lands embraced within either the granted limits or indemnity limits of the grant to the Atlantic and Pacific Railroad Company made by the act of Congress of July 27, 1866, and not including any lands withdrawn for the Texas Pacific Railroad Company under the map of general route filed by said company in the year 1871 under said act of Congress of March 3, 1871.

Subdivision 6.

Item 41. Either party to this suit may introduce further and additional testimony or other evidence at any time within 90 days from this date.

Dated and signed on December 7, 1904.

Joseph H. Call.
Special Assistant U. S. Attorney.
Wm. Singer, Jr.,
Attorney for the Defendants.

Indorsed: No. 1,114. U. S. Circuit Court, Southern District of California, Southern Division. United States v. Southern Pacific Railroad Co. et al. Stipulation as to evidence. Filed Dec. 13, 1904. Wm. M. Van Dyke, Clerk; Chas. N. Williams, Deputy, Wm. Singer, Jr., No. 49 Second St., San Francisco, Cal., Atty. for Defendant.

The Attorney General and Joseph H. Call, U. S. Atty.
Wm. F. Herrin and Wm. Singer, Jr., for defendants.

ROSS, Circuit Judge. The facts of this case differ from those in the case of the United States v. Southern Pacific Railroad Company et al., numbered 1,196, just decided, 152 Fed. 314; for here the agreed statement of facts shows that all of the lands in controversy are within the primary limits of the grant made by Congress to the Atlantic & Pacific Railroad Company by its act of July 27, 1866, c. 278, 14 Stat. 292, and within the indemnity limits of the grant made to the defendant Southern Pacific Railroad Company by the same act. It is also stipulated by the respective parties that a certain portion of the lands described in Exhibit B. annexed to the bill were included in the final

decree entered in this court in the case between the same parties, here numbered 184, and which was affirmed by the Supreme Court in 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, and "that all acts of Congress and laws of the state of California, whether of public or private, general or special, nature, and all official acts and decisions of the Commissioner of the General Land Office and Secretary of the Interior, relating to the Southern Pacific Railroad Company or to the Atlantic & Pacific Railroad Company, or affecting the rights of either of said companies or of the United States, and all decisions of the Supreme Court of the United States reported in the United States Reports relating to or affecting the rights of either of said companies, in so far as relevant and material to the issues and controversies in this case, shall be deemed before this court for judicial decision."

In deciding the case entitled "United States v. Southern Pacific Railroad Company et al.," and here numbered 600, this court was of the opinion that the decision of the Supreme Court in the cases of United States v. Southern Pacific Railroad Company, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; United States v. Colton Marble & Lime Company, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104; United States v. Southern Pacific Railroad Company, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, and Southern Pacific Railroad Company v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, determined that the Southern Pacific Company never acquired any interest or right in or to any of the odd-numbered sections of land embraced within the granted or indemnity limits of the Atlantic & Pacific Railroad Company, either by the grant contained in the act of July 27, 1866, c. 278, 14 Stat. 292, or in the joint resolution of Congress of June 28, 1870, 16 Stat. 382, or in the act of March 3, 1871, c. 122, 16 Stat. 573. United States v. Southern Pac. R. Co. (C. C.) 86 Fed. 962, 963.

In affirming the judgment of this court in that case, the Circuit Court of Appeals for this circuit took the same view of those decisions of the Supreme Court, saying, in its opinion:

"The scope of these decisions of the Supreme Court cannot be mistaken. They were intended to dispose of all the questions in issue, and make it perfectly clear that all the lands embraced within the primary and indemnity limits of the Atlantic & Pacific grant, between the Colorado river and San Buena Ventura, had been forfeited to the United States, and restored to the public domain, free from any claim whatever on the part of the Southern Pacific Railroad Company; and these decisions have been placed upon grounds that leave no room for the consideration of a claim of title based upon the theory that the Southern Pacific Company had acquired a right to the lands contemporaneously with the Atlantic & Pacific Company under section 18 of the act of July 27, 1866, c. 278, 14 Stat. 299." United States v. Southern Pacific Railroad Company, 98 Fed. 27, 39, 38 C. C. A. 619, 631.

But on appeal to the Supreme Court, that tribunal took a different view of its former decisions from that taken by the Circuit Court of Appeals and by this court in the case cited, and declared that:

"It was not adjudged in those cases either that the Southern Pacific had no title to any real estate by virtue of the act of 1866, or that, if there was any real estate to which it held any claim or right by virtue of that act, such claim was not of equal force with that of the Atlantic & Pacific. The general statement at the close of the quotation from 146 U. S. 607, 13 Sup. Ct.

160, 36 L. Ed. 1101, 'that the latter company has no title of any kind to these lands,' and the similar statement in paragraph 3 of the quotation from 168 U. S. 61, 18 Sup. Ct. 32, 42 L. Ed. 381, are to be taken as applicable only to the facts presented, and cannot be construed as announcing any determination as to matters and questions not appearing in the records. Of course, the decrees that were rendered in those cases are conclusive of the title to the property involved in them, no matter what claims or rights either party may have had and failed to produce, but, as to property which was not involved in those suits, they are conclusive only as to the matters which were actually litigated and determined." 183 U. S. 519, 533, 22 Sup. Ct. 154, 160 (46 L. Ed. 307).

Accordingly, and inasmuch as Congress had, by its act of July 6, 1886, c. 637, 24 Stat. 123, declared forfeited the lands granted to the Atlantic & Pacific Railroad Company within the limits of California, the Supreme Court, in the case last cited, held that the United States held "an equal undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to the Atlantic & Pacific Company and of that made to the Southern Pacific Company by the act of July 27, 1866; and that the Southern Pacific Company holds the other undivided moiety thereof."

As it was thus authoritatively determined by the Supreme Court that the act of Congress forfeiting the lands granted to the Atlantic & Pacific Company did not affect the grant made by the act of July 27, 1866, to the Southern Pacific Company, in so far as it concerns the lands within the primary limits of that grant, I am unable to see any valid ground for holding that the forfeiture deprived the Southern Pacific Company of any indemnity lands covered by the same grant. There is but the one grant to the Southern Pacific Company made by the act of 1866, which embraces both classes of lands; that is to say, lands within its primary limits and lands within its indemnity limits. According to the decision of the Supreme Court in United States v. Southern Pacific Railroad Company, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, the act of July 27, 1866, gave to each of the railroad companies mentioned an undivided half of all of the odd-numbered sections falling within the primary limits of both grants, the half so granted to the Atlantic & Pacific Company afterwards reverting to the United States by virtue of the act of forfeiture. It is quite true, as suggested by counsel for the complainant, that, had the grant to the Atlantic & Pacific Company not been forfeited, it would have continued to hold its interest in the odd-numbered sections within its primary limits, and that, in that event, none of such odd-numbered sections would have been subject to selection by the Southern Pacific Company as indemnity lands; but, according to the ruling of the Supreme Court in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, that would only have been so for the reason that, in the event supposed, such odd-numbered sections would not have been public lands.

Applying the decision of the Supreme Court in the case last cited to the admitted facts in the present case, it seems to me to result, necessarily, that, except as to those of the lands in controversy that were covered by the final decree entered in the case numbered in this court 184, and affirmed by the Supreme Court in 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, there must be judgment for the defendants; for holding,

as the Supreme Court did in the case reported in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, that the act forfeiting the grant to the Atlantic & Pacific Company did not affect the grant made to the Southern Pacific Company by the act of July 27, 1866, in so far as concerns the lands within the primary limits of that grant, I do not think I would be justified in holding that the forfeiture deprived that company of any indemnity lands, covered by the same grant, not included in any judgment heretofore entered.

I see nothing in the decision of the Supreme Court in the case of Southern Pacific Railroad Company v. United States, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. Ed. 896, in conflict with this ruling. In that case it was held that the rights of the Southern Pacific Company under the act of March 3, 1871, c. 122, 16 Stat. 573, were subordinate to those granted by the same act to the Texas Pacific Railroad Company, the "plain intent" of which, said the court in its opinion, was "to except from the grant to the Southern Pacific the land that in the natural course of events would be covered by the location of the" road of the Texas Pacific Company. The court there further expressly declared that the act of March 3, 1871, "is not governed by the ordinary rule as to contemporaneous grants. The Southern Pacific was not intended or allowed to interfere with what the Texas Pacific might take." And having there determined that in respect to lands falling within the limits of both of those grants the Southern Pacific got no title by the act of March 3, 1871, to any of the land falling within its primary limits, it could not, for precisely the same reason, get any title to any land within the indemnity limits of that grant, for indemnity is allowed only to make good a loss or losses sustained by the grantee within the primary limits of its grant.

Counsel for the complainant is also mistaken in saying that the precise question presented in the present case was also decided by this court in case No. 878 (United States v. Southern Pac. R. Co. [C. C.] 117 Fed. 544). The facts upon which that case was decided were thus stated by the court:

"The agreed statement of facts shows that each of the separate and distinct tracts of the public lands forming the subject of the suit specifically described in Exhibit A annexed to the bill, and aggregating 30,067.79 acres, fell within the 30-mile limits of the Atlantic & Pacific grant, and, as I understand the evidence, none of them are embraced by the common-place limits of that grant and the grant made to the defendant railroad company by the same act of July 27, 1866, but do fall within the limits of the branch-line grant to that company. In the case of Southern Pac. R. Co. v. U. S., 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, it was held that the United States, having, by the forfeiture act of July 6, 1886, become possessed of all the rights and interest of the Atlantic & Pacific Railroad Company in the grant made to it by the act of July 27, 1866, within the limits of California, had an equal undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of that grant and of that made to the defendant Southern Pacific Railroad Company by the same act of July 27, 1866, by which the latter company acquired the other equal undivided moiety thereof. But that case left undisturbed the preceding decisions, by which it has been adjudged that none of the public lands within the 30-mile limits of the grant made by Congress on the 27th day of July, 1866, to the Atlantic & Pacific Railroad Company, ever passed to the defendant Southern Pacific Railroad Company by virtue of the grant made by Congress to that company by the joint resolution

of June 28, 1870, or by the act of March 3, 1871. U. S. v. Southern Pac. R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; U. S. v. Colton Marble & Lime Co., 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104; Southern Pac. R. Co. v. U. S., 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; U. S. v. Southern Pac. R. Co. (C. C.) 86 Fed. 962; Southern Pac. R. Co v. U. S., 38 C. C. A. 619, 98 Fed. 27."

It will be thus seen that in making that decision the court did not have before it a case similar to that now presented, for there the lands in controversy were not within the common limits of the grants made by the act of July 27, 1866, to the Atlantic & Pacific and Southern Pacific Companies, but were within the primary limits of the Atlantic & Pacific grant, and within the limits of the branch line grant of the Southern Pacific Company, to wit, that of March 3, 1871.

There will be judgment for the complainant in respect to such of the lands here in controversy as were included in the decree entered in case No. 184 in this court, and in respect to all other lands embraced by the bill herein there will be judgment for the defendants.

A decree to that effect will be prepared and submitted to opposite counsel, and then to the court for signature.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California, S. D. January 21, 1907.)

No. 1,196.

PUBLIC LANDS—RAILROAD GRANTS—CONFLICTING GRANTS.

None of the lands within either the primary or indemnity limits of the grant made to the Atlantic & Pacific Railroad Company in California by Act July 27, 1866, 14 Stat. 292, c. 278, passed to the Southern Pacific Railroad Company by virtue of the grant of March 3, 1871, 16 Stat. 573, c. 122.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 274, 275.]

In Equity. Suit to adjust land grant.

Stipulation as to Evidence.

Down to subdivision 5 this stipulation is the same as subdivisions 1, 2, 3, and 4 of the stipulation in case 1,114 (152 Fed. 303).

Subdivision 5.

Item 35. The northeast quarter of northeast quarter (N. E. ¼ of N. E. ¼) of section seven (7), in township six (6) north, range eight (8) west, San Bernardino base and meridian, is situated within primary limits of the land grant made unto the Atlantic & Pacific Railroad Company by the hereinbefore mentioned act of Congress of July 27, 1866, and within indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the hereinbefore mentioned act of Congress of March 3, 1871; but the said land is not within either primary or indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the said act of Congress of July 27, 1866.

Item 36. The west half (W. ½) of section thirty-one (31), in township nine (9) north, range fifteen (15) west, San Bernardino base and meridian, is situated within indemnity limits of the land grant made unto the Atlantic & Pacific Railroad Company by the hereinbefore mentioned act of Congress of July 27, 1866, and within indemnity limits of the land grant made unto the

Southern Pacific Railroad Company by the hereinbefore mentioned act of Congress of March 3, 1871; but the said land is not within either primary or indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the said act of Congress of July 27, 1866.

Item 37. The lands described in item 35 and item 36 of this stipulation as to evidence were patented by the United States unto the Southern Pacific Railroad Company by patent dated June 30, 1903, pursuant to said company's indemnity selection thereof as indemnity lands of its said March 3, 1871, land grant, by list No. 93, in due form, filed in the Los Angeles land office on November 10, 1902.

Item 38. It appears from the records of the United States Land Office for the Los Angeles District of California that within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the act of Congress of March 3, 1871, there remains more than 50,000 acres of surveyed public land, vacant of record, embraced in odd-numbered sections returned as agricultural in character, which have not been selected as indemnity by said company, not including any lands embraced within either the granted limits or indemnity limits of the grant to the Atlantic & Pacific Railroad Company made by the act of Congress of July 27, 1866.

Item 39. The official "Land Office Report, 1875," at page 409, contains the following: "Statement Exhibiting Land Concessions by Acts of Congress to States and Corporations, &c."; Act March 3, 1871, c. 122, 16 Stats. 579; Southern Pacific Railroad Company, estimated quantity embraced within the 20 and 30 mile limits of the grant, 3,520,000 acres; estimated quantity which the company will receive from the grant, within the 20 and 30 mile limits thereof, 3,000,000 acres.

Item 40. On July 23, 1885, the said Southern Pacific Railroad Company sold, under contract for deed No. 4,722, for the full sum of $308 cash in hand that day paid, all of the lands described in item 36 of this stipulation as to evidence, unto the Atlantic & Pacific Fibre Importing & Manufacturing Company, a foreign corporation; and by instrument in writing bearing date January 27, 1893, the said Atlantic & Pacific Fibre Importing & Manufacturing Company assigned the said contract, and its interest in the lands therein described, unto Jackson Alpheus Graves, a citizen of the United States.

Subdivision 6.

Item 41. Either party to this suit may introduce further and additional testimony or other evidence at any time within 90 days from this date.

Agreed to and signed on November 21, 1905.

Joseph H. Call,
Special Assistant U. S. Attorney.
Wm. Singer, Jr.
Attorney for the said Defendants.

Wm. F. Herrin,
Albert Rathbone,
Counsel for the Said Defendants.

Indorsed No. 1196. U. S. Circuit Court, Southern District of California, Southern Division. United States v. Southern Pacific Railroad Co. et al. Stipulation as to evidence. Filed November 24, 1905. Wm. M. Van Dyke, Clerk; Chas. N. Williams, Deputy. Wm. Singer, Jr., 1127 Merchants' Exchange, San Francisco, Cal., Atty. for Defendants.

The Attorney General and Joseph H. Call, U. S. Atty.

Wm. F. Herrin, Wm. Singer, Jr., and Albert Rathbone, for defendants.

ROSS, Circuit Judge. The agreed statement of facts shows that one of the two tracts of land involved in this suit is situated within the primary, and the other within the indemnity, limits of the grant made by Congress to the Atlantic & Pacific Railroad Company by Act July 27, 1866, c. 278, 14 Stat. 292. Neither of the tracts is within the

grant made by the same act to the Southern Pacific Railroad Company, but the latter company claimed them under the grant made to it by Act Cong. March 3, 1871, c. 122, 16 Stat. 573, under which it undertook to select them as indemnity land given it by that act, and which selections were allowed by the Land Department, followed by patents of the government.

Both of those acts of Congress, and the rights of the respective railroad companies thereunder, have heretofore been the subject of frequent consideration and adjudication by this court, as well as by the Supreme Court, so that it does not now seem necessary to do more than to cite the cases which, in my opinion, require a decree in this case in favor of the complainant. Accordingly, on the authority of Southern Pacific Railroad Company v. United States, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. Ed. 896; United States v. Southern Pacific Railroad Company, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; Southern Pacific Railroad Company v. United States, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307; Southern Pacific Railroad Company v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; United States v. Southern Pac. R. Co., 184 U. S. 49, 22 Sup. Ct. 285, 46 L. Ed. 425; United States v. Southern Pacific Railroad Company (C. C.) 117 Fed. 544; Southern Pac. R. Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507—judgment will be entered for the complainant.

In re HERSKOVITZ.

(District Court, E. D. New York. March 20, 1907.)

BANKRUPTCY—PETITION FOR ORDER ON BANKRUPT—AUTHORITY TO REFER.

A court of bankruptcy has authority to refer a petition for an order requiring a bankrupt to turn over money or property to a special master for hearing and an examination of the bankrupt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 235.]

In Bankruptcy. On petition for reference.

Charles Pechner, for bankrupt.

Oscar A. Lewis, for receiver and for petitioning creditors.

CHATFIELD, District Judge. The bankrupt herein was examined, upon the application of the receiver, before a special commissioner, under section 21a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), with reference to the discovery of certain moneys which he was said to have paid out within four months prior to the filing of the petition in bankruptcy, certain books of account, and also the stock of goods contained in his store before the appointment of a receiver. Subsequently a receiver was appointed, and on the 21st day of September, 1906, the receiver was appointed trustee and entered upon the performance of his duties. The examination of the bankrupt has continued before the referee in bankruptcy, and successive adjournments have been had; but the trustee claims that no satisfactory explanation has been given as to the sum of $900 paid in cash by the bankrupt to his nephew, that the bank-

rupt has not accounted for a large amount of stock which the trustee claims must have been in his store before the bankruptcy, that he has failed to account for a memorandum book claimed by the bankrupt to have been left in the store when the receiver took possession, and that three persons, the bankrupt's son, one Benny Winkler, alleged to be a brother-in-law of the bankrupt, and Sadie Klein, a sister-in-law of the bankrupt, both of whom were employed in the store, cannot be found for the purpose of examination, and the bankrupt and his witnesses deny knowledge of their whereabouts. Upon affidavits showing these statements the trustee obtained an order directing the bankrupt to show cause—

"why the matter of his being directed to turn over and deliver to his trustee herein certain goods, wares, and merchandise of the wholesale value of twenty-five hundred dollars ($2,500), certain moneys amounting to fourteen hundred dollars ($1,400), and a certain memorandum book, which goods, wares, and merchandise, moneys, and book are more specifically described and set forth in the annexed petition and affidavit, should not be referred to a special master, to take testimony and report thereon, and for such other and further relief in the premises as to the court may seem just and proper."

And upon a return of the order to show cause the bankrupt appeared in person and by attorney.

It is contended on behalf of the bankrupt that this court should deny the motion on the ground that the moving papers do not warrant any relief, that the testimony taken before the referee explains the matters in dispute in a satisfactory manner, and that the court has no jurisdiction to make the order requested. The bankrupt also claims that he had a good reputation, and that the frequent attendances here cause him hardship, from which he should be relieved.

In support of the application by the trustee a number of cases have been cited, and one recently decided in the Southern district of New York, at the February term, while referring to an examination before adjudication, sets forth at length the general authority of a court of bankruptcy in sending matters to a special commissioner for an examination of the bankrupt. This case is entitled "In the Matter of Fleischer, Alleged Bankrupt," and reported in 151 Fed. 81. A further case setting forth the authority of a court of bankruptcy to pass upon testimony taken before a referee, and to dispose of an application to punish for contempt in failing to carry out the orders of the referee, is that of In the Matter of Fellerman (D. C.) 149 Fed. 244.

Without reciting at length the opinions in these two cases, it is sufficient to say that the reasoning therein set forth furnishes abundant authority for the order to show cause upon which the present motion arises, and also for referring to a special master the subject of a direction to the bankrupt to turn over the property, money, and books specified, if that special master shall determine that they are in the possession of the bankrupt or that he has them in his control, or for alternative relief if he has concealed them from the trustee. A further case recognizing the authority of the court in such case is In the Matter of Walder (D. C.) 142 Fed. 784:

"The testimony upon which the order is based settles beyond a vestige of doubt that a large quantity of goods had been accumulated in the hands

of the bankrupt shortly before his adjudication. It is equally certain that a large part of them were not turned over to the trustee. Such a situation demands a satisfactory explanation from the bankrupt which accounts for their disappearance, and, if nothing of that kind appears, an order by the referee directing that the missing goods be turned over would be a proper order."

See, also, In re Levy, 142 Fed. 442, 73 C. C. A. 558; In re Frankfort (D. C.) 144 Fed. 721.

The motion, therefore, will be granted, and the matter referred to Arthur T. Stoutenburgh, Esq., as special master, to take testimony and report as to whether the bankrupt concealed and is concealing assets, books, and information, as alleged, and upon the question of directing the bankrupt to turn over and deliver to the trustee said goods, wares, and merchandise of the wholesale value of $2,500, said moneys amounting to $1,400, and a certain memorandum book, all specifically described and set forth in the moving papers.

From all the papers it would seem that an application could have been made to the referee, and he could have directed the bankrupt, if he saw fit, on the testimony before him, so to do, to turn over the property, money, and books referred to in this application. But, if the referee has authority to make such an order, the bankruptcy court certainly has, or it can refer the question, and allow broader and further examination than that already taken before the referee at the first meeting of creditors. While in many cases such an application should be made to the referee, this matter will be referred upon the present application, and an order may be entered accordingly.

G. W. SHELDON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1907.)

No. 4,162.

CUSTOMS DUTIES—CLASSIFICATION—SCRAP IRON—OLD CHAINS—JUNK.

Old iron chains are not "junk, old," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 588, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], but are dutiable as "scrap iron * * * fit only to be remanufactured," under section 1, Schedule C, par. 122, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1636].

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

For decision below, see G. A. 6,231 (T. D. 26,917), affirming the assessment of duty by the collector of customs at the port of New York.

The opinion filed by the Board of General Appraisers reads as follows:

FISCHER, General Appraiser. The merchandise consists of old, worn-out chains, upon which duty was assessed at the rate of $4 per ton, under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 122, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], as scrap iron. The importers claim that it is entitled to entry free of duty, under section 2, Free List, par. 588, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], as "junk."

At the hearing, counsel for the importers made the following stipulation on the record: "It is conceded by the importer that the merchandise the sub-

ject of the protest was old iron chains; that they were in small pieces; that they could not be sold again for use as chains; that they were fit only for remanufacture, and were designed to be, and were in fact, remanufactured." He relies in support of his contention (1) on commercial understanding of the word "junk," and (2) on his construction of paragraph 122. The testimony introduced fails, however, to substantiate the claim as to the existence of a definite and uniform trade recognition of the term "junk." Mr. Mahoney, one of the importers' witnesses, who has had an experience of 30 years in the junk business, admitted that there is no uniform understanding, each dealer having his own "ideas as to different articles," and he stated that "it is not a standard definition in our business." The testimony further showed that the terms "scrap iron" and "junk" are interchangeably used.

On the question of which is the more specific designation for the merchandise, we say without hesitation that scrap iron is, particularly in view of the express language of paragraph 122: "* * * Wrought and cast scrap iron, and scrap steel, four dollars per ton; but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel fit only to be remanufactured." In Carberry v. U. S. (C. C.) 116 Fed. 773, it was held that secondhand bottles, even if conceded to be junk, were more specifically provided for under the enumeration for bottles. The selection by Congress of the words, "scrap iron and scrap steel * * * fit only to be remanufactured," shows that it intended by specific terms to direct that that class of articles should be treated distinctly from waste or refuse of any other material; and this is the view that has always been held by both the government and the importers until this case arose.

As further showing the intention of the legislators to include in the provisions of paragraph 122 articles such as are here in question, a brief reference to the corresponding provision in earlier tariff acts will be useful. In the acts of 1870 and 1883, it was provided that: "Nothing shall be deemed scrap iron or scrap steel, except waste or refuse iron or steel that has been in actual use and is fit only to be remanufactured." In the acts of 1890, 1894, and 1897, the words "in actual use" were omitted, indicating clearly an intention to broaden the scope of the paragraph by letting in all iron or steel scrap, whether old or new, an incident surely not favorable to the claim of the importers herein that only waste of new metal is scrap within the meaning of paragraph 122.

In Schlesinger v. Beard, 120 U. S. 264, 7 Sup. Ct. 546, 30 L. Ed. 656, the court held that certain "punchings and clippings of wrought iron boiler plates and of wrought sheet iron, left after the completion of the process of the manufacture of the boiler plates into boilers," were dutiable as scrap iron, because the articles had been in actual use, emphasizing, what has already been stated herein, that Congress at that time made scrap iron only waste pieces of iron that were worn out, or at least had been actually in use, differing radically from the definition advanced by the importers in the case at bar. At page 267 of 120 U. S., at page 547 of 7 Sup. Ct. (30 L. Ed. 656), the court said: "It thus appears that in 1870 the form of the statutes on this subject was materially changed, and that now the duty is laid upon 'scrap iron,' without any reference to whether it is new or old, and that all waste or refuse iron is 'scrap iron,' if it has been in actual use, and is only fit for remanufacture."

One of the points urged by counsel for the importers was that the word "waste," in paragraph 122, should be construed to mean only the pieces of material that fall off in the process of manufacturing, and does not include old, worn-out goods; but this contention is effectively answered in the negative by the decisions in Re Salomon (C. C.) 47 Fed. 711, on old rubber shoes, and Train v. U. S., 113 Fed. 1020, 51 C. C. A. 623, on old gunny bags, both of which classes of articles were held therein to be dutiable as waste. It scarcely seems reasonable to argue that a statute which formerly limited scrap iron to waste pieces of iron that had been in actual use, having been amended by the elimination of the narrowing words, is now to be construed as excluding the very articles which, previous to the amendment, had been the sole subject-matter of the paragraph. In the case of Dwight v. Merritt, 140 U. S. 213, 218, 11 Sup. Ct. 768, 769, 35 L. Ed. 450, Mr. Justice Lamar said: "The

next question is: Was the merchandise in any sense dutiable under the 'scrap iron' schedule? * * * It is immaterial in this connection whether the terms 'waste' and 'refuse' be held to apply to two different classes of iron, as is claimed by the plaintiffs in error, or whether, as is most probably the case, they are used in the statute as synonymous terms to represent old iron generally."

Counsel for the United States has also invoked in his favor the doctrine of ejusdem generis; his contention being that Congress could not have intended to provide for old iron in the same paragraph with "iron in pigs, iron kentledges, spiegeleisen, ferromanganese and ferrosilicon." We think, however, that the declaration of the Supreme Court, quoted above, that "waste" or "refuse" iron means old iron generally, makes unnecessary any resort to this doctrine in connection with paragraph 122; and the great variety of articles provided for in said paragraph renders it improper as well. There can be no "waste" in the use of such articles as pig iron, which is simply thrown into a furnace and melted, or spiegeleisen, ferromanganese, and ferrosilicon, which are treated in a like manner in the production of steel for the purpose of hardening it. Against this contention of the importers, the cases of Robertson v. Edelhoff, 132 U. S. 614, 10 Sup. Ct. 186, 33 L. Ed. 477, and Ingersoll v. Magone, 53 Fed. 1008, 4 C. C. A. 150, are precisely in point.

In view of the explicit language of paragraph 122, and in the light of the decisions cited, we are of the opinion that the claim of the importers herein is utterly untenable.

The protest is overruled, and the decision of the collector affirmed.

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

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

HAZEL, District Judge. The single question presented is whether the importation of old iron chains is specifically included in paragraph 122 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 2, Free List, par. 588, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]), which provides for the payment of duty upon "wrought and cast scrap iron, * * * but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel fit only to be remanufactured." The petitioners claim that the articles are entitled to free entry, under paragraph 588, as "junk, old." As applied to the merchandise in controversy, paragraph 122 is thought to be more specific, and the collector rightly assessed the same thereunder. The Board of General Appraisers, in a careful and exhaustive decision, overruled the protest, and, replying to the arguments of the importers, cited precedents which justified the decision that Congress intended that old iron chains should be comprehended within the broad scope of paragraph 122, and therefore are not junk.

I concur in the reasoning upon which the decision is based, and it therefore follows that the decision of the Board must be affirmed.

McCONNELL v. CAMORS-McCONNELL CO.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1907. On Rehearing April 15, 1907.)

No. 1,612.

1. EVIDENCE—PAROL EVIDENCE—CONTRACTS.

Where a contract for the sale of a business sought to be enforced was only partially in writing, defendant was entitled to prove the balance by parol in order to establish that it was void as in restraint of trade.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1882, 2027.]

2. CONTRACTS—VALIDITY—RESTRAINT OF TRADE.

Where a contract for the sale of a business in which defendant was formerly a partner provided for the organization of complainant corporation in order that another corporation, which was practically a trust, organized to monopolize the business in which complainant was engaged, and declared that for a specified period defendant should not enter into a competing business, after which, and as a part of the arrangement, the trust corporation acquired a monopoly of the business in the United States and stifled competition, the contract was in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to prevent unlawful restraints and monopolies, and was therefore unenforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 547–555; vol. 27, Injunction, §§ 120–123.]

3. SAME—PARTIES.

Where a contract for the organization of plaintiff corporation was made for the purpose of enabling a trust organized to monopolize the business to control it, and the trust interest in the corporation was represented by P. in person, who was president of the trust, it was no answer, to an objection that the contract was void as in restraint of trade, that the trust corporation was not a formal party to the proceeding.

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

See 140 Fed. 412.

We find this case stated accurately in the printed brief filed by the solicitors for the appellant, from which it appears that:

This cause was commenced by a bill in chancery originally filed November 30, 1904, by Andrew W. Preston and Camors-McConnell Company against Herbert L. McConnell, seeking to enjoin the defendant from violating the fifth paragraph of what purports to be a contract made on the 8th day of December, 1899, between Andrew W. Preston, of the first part, J. B. Camors and Herbert L. McConnell, composing the firm of Camors, McConnell & Co., of the second part, and several other parties who were interested in the business of Camors, McConnell & Co., of the third and fourth parts. The alleged contract recites that Camors, McConnell & Co. were engaged in the business of growing, importing, and selling tropical fruits, and desired to transfer their business, good will, etc., to a corporation to be organized; that the other parties to the contract had some interest in the business of Camors, McConnell & Co., and Preston desired to obtain an interest in the new corporation; that in consideration of the premises, and the mutual agreements of the parties, and $1 paid, it was agreed:

(1) That Preston should cause a corporation to be formed under the laws of New Jersey, to be called the "Camors-McConnell Company," with a capital stock of $60,125, divided into shares of $100 each, with power to carry on the business of Camors-McConnell Company, and to be governed by a board of five directors.

(2) That Camors, McConnell & Co. should transfer to the new corporation all of their property, good will, etc., and receive therefor 321 shares of the capital stock of the new corporation. The property to be purchased was set out in the first schedule attached. The new corporation was to assume the debts and liabilities of Camors, McConnell & Co. specified in the second schedule attached.

(3) That Preston should buy and Camors, McConnell & Co. sell to him, or his assigns, 161 shares of the stock of the new corporation for $30,000 in cash; that in order that Preston should retain, as long as he desired, the power to elect three of the five directors of the new corporation, and the other stockholders should elect two, Preston should transfer and assign one share of his stock to a trustee, to be named by him, to be held in trust and to be voted in all elections of directors for such three directors as Preston or his assigns should nominate, and for such two directors as the owners of 160 shares of the capital stock should nominate, but that such one share should not be voted for any other purpose, and should not participate in the dividends of the company.

(4) That Preston should subscribe for 80 shares of the stock of the new corporation, and pay $10,000 therefor, and that the other parties should subscribe for 80 shares of such stock, and pay $10,000 therefor.

(5) "That said J. B. Camors and Herbert L. McConnell, Louis Weinberger, Jacob Weinberger, Rudolf Braden, J. W. Kroesmann, Ernst Braden and John C. Dehls, hereby jointly and severally covenant and agree that they will not, either individually or by or through a corporation, jointly or severally, directly or indirectly, engage in the growing or importing or selling of tropical fruits or any other business directly or indirectly in competition with the new corporation, or with the United Fruit Company, except through the new corporation, until after the said Camors-McConnell Company, the new corporation shall have ceased the active continuance and prosecution of the business of importing and selling such fruit, or shall have failed to have shown a profit for any calendar year after 1899. All profits earned by the new corporation shall be divided every three months by dividends declared. This provision shall not exclude any of the parties hereto from being concerned in the business or businesses of the Bluefields Steamship Company, Ltd., of the Camors-Weinberger Banana Company, Ltd., or the Orr-Laubenheimer Company, and provided further this provision shall not exclude Kroesmann, Braden & Co., J. W. Kroesmann, Ernst Braden, John C. Dehls or Rudolf Braden from engaging in a general mercantile business or from exporting cocoanuts or other produce, excepting tropical fruits."

(6) That the parties, other than Preston, should cause to be executed all conveyances and assignments necessary, in the opinion of H. Pillans, Esq., to carry out these agreements.

(7) That the parties, other than Preston, should make all such other covenants and conveyances as should be necessary and convenient to carry out the contract according to its true intent.

(8) That Preston should use his influence to retain McConnell as manager of the new corporation as long as he would act, provided, in Preston's opinion and that of a majority of the remaining stockholders, McConnell was a fit person therefor, and if he was deemed an unfit person, or was unwilling to longer serve, then that Preston should use his influence that the manager should be a person agreeable to the stockholders other than himself and assigns, provided he was, in Preston's opinion, a competent and fit person.

(9) That the new corporation should purchase from certain other persons certain property—set out in the third schedule.

(10) That the new corporation should buy certain other property therein named.

(11) That the new corporation should enter into certain agreements with Kroesmann, Braden & Co. for a period of 10 years, which should contain certain provisions similar to the provisions of another contract there referred to.

(12) That the directors of the new corporation should receive no compensation.

Attached to this contract was an extract from the additional contract provided by the eleventh paragraph of the contract, and also schedules there referred to.

The bill of complaint alleges that the Camors-McConnell Company (the new corporation) was engaged in the business of growing and purchasing tropical fruits in Central America and importing the same into the United States, through the Port of Mobile, and selling them throughout the United States, and in chartering and operating steamships between Panama and Mobile for that purpose. That, prior to the organization of the Camors-McConnell Company, the business conducted by it belonged to and was carried on by the copartnership known as Camors, McConnell & Co., composed of J. B. Camors and H. L. McConnell. That said copartnership had, prior to 1899, built up and was conducting a large and profitable business in the importation of tropical fruits from Colombia, through the Port of Mobile, and was widely known to the dealers in the United States and the planters in Central America, and had acquired an extensive good will. That their tangible assets did not exceed $30,000, but that their assets and good will was fully worth $50,000. That Preston, representing himself and associates, desired to purchase an interest in such partnership, and for that purpose entered into the written contract first hereinabove referred to. That this agreement was duly carried out, ratified, and approved by Camors, McConnell & Co.

That, pursuant to such agreement, the new corporation was, in the year 1899, organized under the name of "Camors-McConnell Company," in order to identify it in the public mind with said copartnership, whose business, property, and good will it was its purpose to exploit. That immediately after all the property, good will, and effects of said copartnership in said agreement described were transferred to it by said copartnership of Camors, McConnell, & Co., upon the terms specified and in the manner prescribed in said contract, and with the benefit of the provisions therein contained and hereinabove recited. That in payment therefor Camors-McConnell Company issue to the copartnership the number of shares of the capital stock agreed upon, and assumed and has since paid all the debts and obligations of said copartnership, as specified in the contract. That all of the obligations by said contract imposed upon complainants have been duly and completely performed, as by said contract required, and that said contract, as far as it relates to the provisions contained in the fifth article thereof, has always been held for the use, benefit, and protection of the Camors-McConnell Company. That the defendant was elected the president and general manager and a member of the board of directors of the Camors-McConnell Company, and occupied such position at a salary of $3,600 a year, until the 21st day of January, 1904, and still remains a member of the board of directors.

Defendant's position as president, general manager, and director gave him full opportunity to intimately acquaint himself with the business and affairs of the corporation, and of knowing all of the methods and secrets of its business and sources of profits, the names of its customers, the nature, scope, and duration of all of its contracts, and enabled him to enlarge his experience, knowledge, and skill in the conduct of the tropical fruit business, and that he took full advantage of these opportunities. That although the company has earned a profit every year since its organization, defendant, in violation of his contract, began some time in 1902 to secretly prepare to engage in business on his own account, or through a corporation to be controlled by him, in direct competition with the business of the Camors-McConnell Company. Without the knowledge of the other officers and directors, he acquired an alleged concession of the Republic of Colombia, which he claimed authorized him to improve rivers and harbors, and to acquire lands adjacent to the territory from which Camors-McConnell Company received its supplies of tropical fruits. That, at the expense of Camors-McConnell Company, he transported a party of surveyors and engineers to that country to lay out said lands and plan improvements of rivers and harbors to fit his property for the cultivation of bananas. That, at the expense of said company, he transported to Central America on ships of the company persons whom he was trying to induce to join him in such enterprise on inspection tours of said property. That, while

an officer of the Camors-McConnell Company, he took advantage of his access to the books and records of the company, and extracted therefrom the minutest details, facts, and figures, showing the results of its business, and printed and circulated the same among the public, to induce the public to join him in the organization of a corporation to engage in business in direct competition with the Camors-McConnell Company. That he surreptitiously made use of the funds, property, ships, and employés of the company in furtherance of said scheme, and also sold the better part of the loading plant at Bocas del Toro, consisting of steam launches, lighters, and boats, to persons whom he intended to have associated with him in the enterprise, or to have represent him in Panama as agents.

These facts coming to the knowledge of the company, it demanded of the defendant that he desist from the violation of the contract, but that he refused to do so, unless Camors-McConnell Company would take over the concession and lands upon unfair and oppressive conditions. That defendant organized a corporation styled the "American Banana Company," with a capital of $750,000, for the purpose of taking over and exploiting such concession and engaging in the business of importing bananas and other tropical fruits, and of operating steamships between Mobile and Panama, in competition with the business of Camors-McConnell Company. That he was elected president of the company, and will control and manage the business, in violation of said contract.

That the good will of Camors-McConnell Company was largely built up by the defendant, and its maintenance and enjoyment by Camors-McConnell Company depended on his not engaging in business in competition with it, and that the principal consideration of the purchase, at a large price, of the business and good will of said copartnership, was the covenant made by the defendant and others that they would not engage in a competitive business, and that such covenant was essential to secure to the Camors-McConnell Company the good will of their purchase, and that the business of Camors-McConnell Company extended throughout the greater portion of the United States, and said covenants were coextensive only with the interest transferred, and did not exceed in territory the extent of the business of said copartnership of Camors, McConnell & Co. That if defendant were permitted to be and remain an officer in the American Banana Company, or to direct the operations of it, the value of its good will and business purchased by the Camors-McConnell Company would be destroyed and great loss and damage inflicted upon complainants. That the complainants never consented to the defendant's engaging in such business, but protested against his doing so, and warned him that they would seek the enforcement of their rights under said contract. That, in so far as the provisions of the fifth article of the contract was concerned, they were made and have always been and still are held and exist for the use and protection of the Camors-McConnell Company, and that complainants both had a direct pecuniary interest in the enforcement of the contract.

On March 27, 1905, Andrew W. Preston obtained leave to dismiss the bill as far as concerned himself, without prejudice to himself. There were demurrers to the bill, but the action thereon need not be noted. The defendant answered. The answer admits many of the allegations of the bill, and denies others. The admissions are not material to a view of the case as it is considered by the court on this appeal, nor is it necessary to specify extendedly the denial. The answer does deny that Camors, McConnell & Co. had any good will of considerable magnitude, and explained the reasons therefor. He denied that said firm was, prior to the making of said agreement, doing a large and prosperous business, and showed that, on the contrary, owing to the active competition instituted by the United Fruit Company for the purpose of destroying their business, Camors, McConnell & Co. were not prosperous, but had sustained a continuous loss in their business, and that in October, 1899, said firm made an agreement with the United Fruit Company, the substance of which is set out in Exhibit A to the original bill, and in Exhibits I and II attached to the answer. The answer denies that Andrew W. Preston represented himself, and shows that he really represented the United Fruit Company, in making the contract sued upon. It admits that the United Fruit

Company, through Preston, desired to acquire a controlling interest in the business of Camors-McConnell Company, but denies that Preston individually desired to obtain any interest therein. It admits that the purpose of forming the new corporation was to combine the interest of several parties, but denies its purpose was to provide for the safe and proper management of the business, and shows that the real purpose of the corporation was to suppress the existing competition in the business of growing, importing, and selling tropical fruits, and to enable the United Fruit Company and others to monopolize and control said business of purchasing and importing tropical fruit and selling it in the several states of the United States, and to fix the quantity of such importation and the prices at which fruit should be sold. That the new corporation was formed so that the United Fruit Company, as a holder of a majority of the stock of said corporation, might control and dominate said business in harmony with said purpose. The answer denies that the contract was carried out as made, and shows that, when the Camors-McConnell Company was incorporated, it, on the 27th day of January, 1900, entered into an agreement directly between said corporation and the firm of Camors, McConnell & Co. for the purchase and transfer to said corporation of the property and business of said copartnership, and that the corporation purchased said property and business under said last-named contract, without reference to the provisions of the contract of December 8, 1899, and that the provisions of paragraph 5 of Exhibit A to the bill were wholly omitted from such agreement.

The answer further alleges as follows:

"Further answering the fourth paragraph of the bill of complaint, defendant shows to the court that the formation of said corporation and the sale of the business and property of Camors, McConnell & Co. arose and was brought about in this way: Prior to the year 1899, the entire business in the importation and sale of tropical fruit in the United States was conducted by a comparatively small number of firms and companies. The tropical fruit was obtained by the importers from the West Indies, Central and South America, by them imported into the United States, and sold in many of the states of the United States. There were probably less than 15 individuals, firms, and corporations engaged in importing into the United States fruits from the West Indies, and most of this fruit was sold in the Eastern states of the United States. There were less than a dozen individuals, firms, and corporations engaged in importing fruit from Central and South America. The fruit which was being imported from Central America and South America was principally sold in the Southern, Western and Middle states, and those handling said business had comparatively small capitals. The names of said several companies, to the best of defendant's information, knowledge, and belief, and upon such information, knowledge, and belief, he states to have been as follows, viz. [Here both of these classes are named.]

"The method of conducting this business was to obtain cargoes from places where fruit was raised, partly from plantations belonging to those engaged in importing, but largely by purchasing the fruit from persons resident at the point where the fruit was grown, import the same into the United States, and sell and ship it to various states in the United States. Much of the fruit was sold free on board of cars at the place of deportation, but some was shipped to other states and sold while in transit, and sometimes after it reached its destination. There was great competition between the several parties engaged in the purchase of said fruit, and they were obliged, on account of such competition, to pay fair and reasonable prices for the same. There was no limitation upon the quantity of fruit that each importer should handle, and the quantity of fruit placed upon the market and the natural competition in its sale controlled the prices at which the fruit sold upon the market.

"In 1899, the United Fruit Company was formed, with a capital of $20,000,000, of which at least $11,000,000 was actually subscribed, and which subscriptions were subsequently increased to $15,784,000, and the means of said company were increased by the issue of mortgage bonds to the extent of $40,500,000; but this indebtedness has since decreased to some extent. The purpose of said company was to purchase the properties and business of other

fruit importing companies, individuals, and copartnerships, or to make such arrangements with them that would enable it to monopolize, as far as possible, the business of importing tropical fruit into the United States and selling such fruit throughout the several states of the United States; to control and regulate the prices at which cargoes of bananas could be obtained at points of shipment, and at which the same should be sold and disposed of throughout the United States; to regulate and restrict the quantity of tropical fruit placed upon the markets of the several states of the United States; to prevent competition in the purchase and sale of such fruit; and to reduce the price paid for fruit and increase the price at which same should be sold. Shortly after said corporation was formed, it entered into negotiations with the larger portions of persons, corporations, and copartnerships engaged in said business, with the view of forming such a combination or trust, and eventually succeeded in purchasing or making arrangements for the conduct of the business of numerous companies and individuals, and, as part of the agreement of purchase of each of such persons, it bound and obligated most all persons interested therein not to again enter into business in competition with the said United Fruit Company for various periods.

"Before making any arrangement or combination with Camors, McConnell & Co., the said United Fruit Company entered into active competition with said company, and for the purpose of destroying said business purchased fruits at the points where Camors, McConnell & Co. obtained their cargoes, at large prices, thereby forcing Camors, McConnell & Co. to obtain fruit at prices in excess of those at which they could profitably dispose of the same. After continuing this competition for some considerable time, and causing Camors, McConnell & Co. to lose large sums of money, the United Fruit Company, or persons representing it, entered into negotiations with the copartners composing Camors, McConnell & Co., with a view of forming a combination with it upon such terms as would limit the amount of fruit imported by said firm and prevent competition by it with the United Fruit Company and its combined associates, both in the purchase and sale of fruit. For the purpose of regulating the sale of fruit in the several states of the United States so as to prevent such competition, the United Fruit Company had caused to be organized a corporation, with the nominal capital stock of $10.000, known as the 'Fruit Dispatch Company,' all, or substantially all, of the stock of which was owned by the United Fruit Company, and which was wholly dominated and controlled by it. After negotiating and agreeing with the representatives of the United Fruit Company as to a method by which such combination should be formed to restrict the quantity of fruit imported, and regulate prices in the purchase and sale of fruit, it was agreed that a corporation should be formed to take over the business and property of Camors, McConnell & Co., with a capital stock of $60,125.00, divided into 481 shares, of the par value of $125 each. That said corporation was to take over the business and property of Camors, McConnell & Co., and was to turn over to said company 321 shares of the capital stock of said corporation in payment therefor, of which said 321 shares the United Fruit Company should purchase 161 shares for the sum of $30,000, and that the United Fruit Company should then subscribe for 80 shares of the unissued capital stock of the new corporation, and Camors, McConnell & Co. should subscribe for 80 additional shares of said stock, and that each should pay $10,000 therefor. That the new corporation should import from Bocas del Toro, Colombia, into the United States, such amounts of bananas, cocoanuts, and other tropical fruits as could be carried in two steamers, each of the carrying capacity of about 20,000 or 22,000 bunches of bananas, or, at their option, in three steamers of no greater aggregate carrying capacity, and that the United Fruit Company would not, without the consent of a majority interest of stockholders of the Camors-McConnell Company, who were originally interested in the firm of Camors, McConnell & Co., send any bunches of bananas through northern ports containing less than seven hands into any markets reached by the fruit of the Camors-McConnell Company, and that further restrictions on the importation of fruits might be made upon a pro rata basis to be mutually agreed upon by the United Fruit Company, the Bluefields Steamship Company, Limited, the Camors-Weinberger Banana Company, Limited, Orr-Laubenheimer Company,

and Camors-McConnell Company; and that, when such restrictions were agreed upon, they should be binding, and should be respected. That rules of classification and prices of fruits at the ports of shipment should be mutually agreed upon by the resident managers of the United Fruit Company and the Camors-McConnell Company, and that such classification should govern, as far as possible, any sale of the same fruit. That uniform rates of freight should be agreed upon by the United Fruit Company and the Camors-McConnell Company to apply to all steamers of the said two companies plying between the same or competitive points, excepting then existing contracts, which should be filed by the parties by the delivery of sworn copies of the original in each case to the other company, and said contract was to remain in force for a period of 10 years.

"It was further agreed that the Camors-McConnell Company should appoint the Fruit Dispatch Company its sole and exclusive agent, to sell all fruit imported by the Camors-McConnell Company from Bocas del Toro in Colombia, or elsewhere, to New Orleans, in Louisiana, or Mobile, Alabama, or elsewhere; the prices to be fixed weekly by four persons selected by the United Fruit Company, the Bluefields Steamship Company, Limited; the Orr-Laubenheimer Company, the Camors-Weinberger Company, Limited, and the Camors-McConnell Company. That the fruit of the Camors-McConnell Company should be sold to the best advantage free on board of cars at New Orleans or Mobile, or other ports of entry, under the direction of two competent persons, selected one by the United Fruit Company and one by the manager of the Camors-McConnell Company, and that all the fruit not so sold should be shipped or consigned by the Dispatch Company for sale for account of said Camors-McConnell Company, to such points as such persons should designate. That that contract was to remain in force for 10 years.

"The said United Fruit Company undertook to have said contract reduced to writing. Exhibit A to the bill of complaint was one of the forms of contract so prepared and presented to those interested in the firm of Camors, McConnell & Co. As so prepared and presented, the name of Andrew W. Preston appeared instead of the United Fruit Company therein, but all of the parties to said transaction always recognized the United Fruit Company as the true party in interest; and although stock in the Camors-McConnell Company was, after that company was formed, issued to said Preston, dividends thereon were paid to the United Fruit Company as the owner of said stock. There were a considerable number of dividends so paid, and, although the said Preston was the president of the United Fruit Company, he never questioned its right to use these dividends, or objected to the payment thereof to it. The United Fruit Company had the remaining terms of said contract reduced to writing in the form of two separate contracts, which were presented and executed by the parties whose names appear thereto, and which two contracts are marked Exhibits I and II to this answer and made part hereof.

"Further answering the bill of complaint, this defendant says that the said Camors-McConnell Company and the United Fruit Company are conducting their business in a manner violative of the laws of the United States; that at the time said contract, made Exhibit A to the bill of complaint, was made and entered into, the purpose of making said contract was to aid and facilitate the said United Fruit Company and the said Camors-McConnell Company and the other companies in combination with them in conducting their business in violation of the laws of the United States; that said contract was made in restraint of trade and commerce among the several states and with foreign nations, and for the purpose of forming and maintaining a combination in the form of a trust, to regulate and to limit the supply of tropical fruit imported into the United States and control the prices at which such fruit should be purchased from growers and at which it should be sold to dealers throughout the United States, and generally to monopolize and control said business; and that for said reason said contract is against public policy, and in violation of law, and is null and void.

"Further answering the bill of complaint, this defendant says that after the several agreements, one of which is made Exhibit A to the bill of complaint, and the other three of which are made Exhibits I and II and III to this

answer, were made and entered into, and after the United Fruit Company had bought out the property and business of a large number of competitors in the importation and sale of tropical fruits in the Central, Southern, and Western states, and bound most of the parties making such sales not to compete with them in the business, by agreements similar to the one made Exhibit A to the bill of complaint, and had made agreements similar to those attached to this answer as Exhibits I and II, with several other corporations and parties engaged in said business, and it and said corporations and parties, with whom it had such agreements, under such agreements fixed and regulated the price at which tropical fruits were purchased at the point of shipment, and sold and disposed of all of the fruits so imported by it and them through the Fruit Dispatch Company in such manner as to, to a large extent, fix and control the price at which tropical fruit was sold throughout the United States; that, out of the commissions paid to the Fruit Dispatch Company, the expenses of that company were paid, and the balance of its earnings were distributed pro rata among the several companies whose fruit it handled. By virtue of said several agreements and combinations, the United Fruit Company and its associations not only fixed and regulated the prices at which tropical fruits were purchased and sold, but monopolized almost the entire business in the Southern, Central, and Western states of the United States, and regulated the prices of tropical fruits therein, and, when necessary to do so in order to control and fix such prices, the said Fruit Dispatch Company, under the control and direction of the said United Fruit Company, caused a great deal of fruit to be destroyed."

Exhibits I and II are as follows:

Exhibit I.

"An agreement by and between the United Fruit Company, incorporated under the laws of New Jersey, of the one part, and J. B. Camors, Herbert L. McConnell, Rudolf Braden and Louis Weinberger (herein called stockholders) of the other part.

"Whereas, the stockholders are the holders of all the capital stock of the Camors-McConnell Company (herein called the Camors Company), which is engaged in the business of growing, transporting and selling tropical fruit, and the United Fruit Company is also largely engaged in similar business: Now, therefore, in consideration of the premises and of the mutual agreement hereof, it is hereby agreed as follows:

"(1) The United Fruit Company agrees that the Camors Company may import from Bocas del Toro, Colombia, into the United States, such amounts of bananas, cocoanuts and other tropical fruit as can be carried in two steamers, each of the carrying capacity of about twenty or twenty-two thousand bunches of bananas, or at the option of the Camors Company, in three steamers of no greater aggregate carrying capacity than that of the said two steamers above provided for, and that of the said two steamers above provided for, and which the Camors Company shall be entitled to substitute for such two larger steamers, and the said United Fruit Company agrees that after it has completed its own cargoes to an aggregate amount of not exceeding one hundred and twenty thousand stems per month of four weeks for its own ships operated by it to Bocas del Toro, it will furnish bananas of good average quality and quantity sufficient to complete the cargoes of and fill the steamers of the said Camors Company above described, at prices to be agreed upon between the resident managers of the United Fruit Company and the said Camors Company, but the same not to exceed twenty-five cents in the United States currency per bunch of firsts delivered alongside the steamer. It is further agreed that the said resident manager of the Camors Company shall be such person as the stockholders above named or the owners of a majority of their stock in said Camors Company shall designate so long as he performs his duties and obeys the mandates of the board of directors.

"(2) The United Fruit Company agrees that it will not, without the consent of a majority of interest of the above named stockholders, send any bunches of bananas through the northern ports containing less than seven hands into

any of the markets reached by the fruit of the Camors Company. Further restrictions on imports to southern ports may be made upon a proportionate basis mutually agreed upon by the following importers, namely, the United Fruit Company, the Bluefields Steamship Company, Limited, Camors-Weinberger Company, Limited, Orr-Laubenheimer Company, Limited, and the Camors-McConnell Company, and when so made shall be binding and respected. And the amounts of imports above prescribed may be increased proportionately for the said United Fruit Company and the Camors-McConnell Company, upon consent of the United Fruit Company and the majority of the above named stockholders, who hold the shares of stock which are retained by the Camors-McConnell Company pursuant to the contract.

"(3) Rules for the classification and prices of the fruit at port of shipment shall be mutually agreed upon by resident managers of the United Fruit Company and the Camors Company and the same classification shall govern so far as possible in the sale of the same fruit.

"(4) Uniform rates for freight and the carriage of passengers shall be agreed upon by the United Fruit Company and the Camors Company to apply to all steamers of the said two companies plying between the same or competitive points, excepting from the operation hereof such present existing contracts as shall be filed by the contracting parties by delivering a sworn copy of the original in each case to the other of the last said companies respectively.

"(5) This contract shall remain in force for ten years from this date, unless sooner modified by the consent of parties.

"In witness whereof the United Fruit Company has caused these presents to be executed in its name and behalf by its duly authorized officers and the said stockholders have hereto set their hands and seals, this 8th day of December, 1899.

"United Fruit Company,
"Minor C. Keith, 1st Vice President,
"By B. W. Palmer, Secretary.
"H. L. McConnell.
"Louis Weinberger.
"Rudolf Braden."

Exhibit II.

"An agreement made by and between the Fruit Dispatch Company, incorporated under the laws of New Jersey, of the one part, and the Camors-McConnell Company incorporated under the laws of New Jersey (hereinafter called the Camors Company), of the other part.

"Whereas, the Camors Company is engaged in growing, importing into the United States and selling tropical fruit, and the Fruit Dispatch Company is formed for the purpose of and is engaged in handling and selling such fruit: Now, therefore, in consideration of the premises and of the mutual agreements herein contained, it is hereby agreed and declared as follows:

"(1) The Camors Company hereby appoints the Fruit Dispatch Company its sole and exclusive agent to sell all fruit imported by the Camors Company imported from Bocas del Toro or elsewhere, to New Orleans, in Louisiana, or Mobile, in Alabama, or elsewhere.

"(2) All fruit of the Camors Company shall be sold to best advantage free on board cars at New Orleans or Mobile or other port of entry under the direction of two competent persons, one selected by the manager of the Camors Company (whose services shall be paid for by the Fruit Dispatch Company at such amount as the Camors Company and the Fruit Dispatch Company shall agree), and all fruit so unsold by them shall be shipped or consigned by said Dispatch Company for sale for account of said Camors Company to such points as said two persons shall designate, to be handled as they may direct.

"(3) Payments for the fruit sold by or through the Fruit Dispatch Company shall be made during each calendar week for all sales completed during the preceding calendar week. The Fruit Dispatch Company shall charge five per cent. on the selling price for all fruit sold by it.

"(4) This contract shall remain in force until December 8, 1909, unless sooner modified by the consent of the parties.

"In witness whereof the parties have caused these presents to be signed by their respective officers thereto duly authorized, this 27th day of January, 1900.

"Fruit Dispatch Company,
"By A. W. Preston, President.
"Camors-McConnell,
"By A. W. Palmer, President.

"Attest: Frank Hendrick, Secty."

The complainant excepted to ...e several portions of the answer hereinabove set out between quotation marks, as irrelevant, immaterial, and impertinent to the issue. The court referred the matter to a master, and he sustained the exceptions. The defendant excepted to the master's report, but these exceptions were overruled, and the action of the court in overruling the exceptions is assigned as error. Evidence was taken, and the case came on for final hearing, which resulted in the decree appealed from, perpetually enjoining the defendant from engaging in business in competition with the business of complainant for and until it has failed to show a profit for any calendar year after the year 1899.

Gregory L. Smith and H. T. Smith, for appellant.
Walker B. Spencer and Chas. P. Cocke, 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 question in this case which we deem it necessary to consider is: Was the contract between the parties void because made for the purpose of forming an illegal trust or combination? It is uniformly conceded that such a defense as this is a very dishonest one, and that it lies ill in the mouth of the defendant to allege it, and that it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. But that to refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum; that the more plainly parties understand that, when they enter into contracts of this nature, they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them, and in that way the public will secure the benefit of a rigid adherence to the law.

If the writing relied upon by the complainant is only a portion of the agreement that had been made between these parties, as the answer plainly alleges, although their agreement, in the first instance, was by parol, and only certain portions of it were subsequently reduced to writing, as averred and exhibited by that portion of the answer which was stricken out, the whole contract is none the less one and indivisible, just as though it had all been put in writing. If it had all been reduced to writing, the very learned counsel for the complainant would scarcely have argued that his client might maintain an action by relying on that part of the contract which he claimed was valid, and might discard or omit to prove that portion which was illegal. If the contract be as averred in the answer, and the complainant do not prove

the whole of it, the defendant could prove it, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the contract is not severed, or its meaning or effect in any degree altered, by putting part of it in writing and leaving the rest in parol. It would seem, therefore, that, in such case, to grant the complainant the relief which it here seeks would be, in substance, to enforce an illegal contract and one which is illegal because it is against public policy to permit it to stand.

What we have thus far presented is adopted almost literally from the opinion of Mr. Justice Peckham in McMullen v. Hoffman, 174 U. S. 649, 19 Sup. Ct. 839, 43 L. Ed. 1117. That learned justice had delivered the opinion of the Supreme Court in the cases of United States v. Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, and he was later the organ of the court in the case of Addyston Pipe & Steel Company v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and in Montague & Company v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. In each of the cases cited, but especially in the Joint Traffic Association Case, all of the contentions which have been urged on this question in this case were exhaustively considered, and, we think, were concluded against the contention of the complainant (appellee).

Soon after the passage of the act of July 5, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], the questions here involved were considered by the Circuit Court in this circuit for the Eastern district of Louisiana, Judges Pardee and Billings sitting at the hearing, on an application for equitable relief very similar to the relief sought in this case. We quote, from the syllabus, the following language:

"Defendant and his partner sold their bakery business to complainant corporation, receiving payment in its stock, and defendant leased to it the premises where the business was conducted, and contracted to carry it on as the purchaser's agent for a salary. After operating under this arrangement for a time, he repudiated the sale, resumed business under the old firm name, and refused to account to complainant. The bill was brought to enjoin him from asserting a hostile claim, for an accounting, and a receiver. Defendant and his partner, as intervener, filed a cross-bill for rescission of the sale, for fraudulent representations, and tendered back the stock. Complainant was practically a 'trust,' organized to monopolize the business, and had already control of 35 leading bakeries in 12 different states. Held, that while a case was made for a receiver, pending litigation between ordinary parties, the prayer would be denied, as equity would not encourage a combination in restraint of trade, and probably illegal, under Act Cong. July 2, 1890, 'to protect trade and commerce against unlawful restraints and monopolies.'" American Biscuit & Manufacturing Company v. Klotz (C. C.) 44 Fed. 721.

It is contended for the complainant (appellee) that, if such iniquity exists in the organization of that company as is averred by the answer, the remedy is by direct proceeding by the state to dissolve it, or to punish the guilty parties. In answer to this contention, we commend the parties who make it to a fuller and more unbiased study of the reported decisions we have cited. It is also urged that the United Fruit Company is not a party to this proceeding, and that therefore the matter averred may not be considered in the disposition of this suit. We do

not so read the pleadings. The bill was supplemented by the answer. It is the function of the chancellor to look through the form to the substance of the matter in which he is asked to act. Moreover, this suggestion, by a short analysis of its probable practical working, resolves itself into the former contention which, as we have indicated, we consider to be settled against the complainant (appellee) by the decisions which we have cited.

The averments of the answer show that the United Fruit Company has combined and dominates substantially all of the other persons, individuals, firms, or corporations engaged in the trade of importing tropical fruits from Central and South America and the Antilles; that there are 25 or more constituent agencies in this combine to monopolize the procuring by production and purchase, and the carriage and distribution to consumers, of these articles in universal use. The United Fruit Company, which dominates all of them, may act only through some one or more of them in its dealings with the public or outsiders. If, therefore, the so-called separate contracts of these numerous constituent agencies can and must be enforced by our courts of law and equity, the public policy of the country which it is so important to protect may indeed be enforced only through the action of the state as a party to a direct proceeding.

The cardinal principles of jurisprudence are as firmly settled as the Ten Commandments and the Roman Tables, but pleading, practice, and procedure must grow with the growth of civilization and commerce. The present and threatened development of producing, carrying, and trading corporations transcends recorded precedents. Their number, dimensions, and omniverous character have, in large measure, absorbed or devoured individual natural persons having capacity and inclinations for trade, until an action at law or suit in equity is rarely reported which does not show a contest between corporations or by or against a corporation or system of corporations. These unnatural persons, as they may well be called, when legally organized, and while conducting lawful trade in a lawful manner, have the right to judicial protection and relief, in like measure as natural persons enjoy, and are subject to the same legal and equitable limitations. The state may and will bring, in its courts, actions and suits to enforce its statute laws and its public policy against them, when necessity requires, to the extent that time and opportunity permit. But the harvest is great, the laborers are few, and time is short. These parties are wonderfully strong. Age does not impair their strength. They perennially recruit it from the highest ranks of the legal profession, with veteran experts in strategy and tactics, both grand and elementary. There are necessary delays in litigation, inherent weaknesses in its best machinery, obstructions will supervene, and all these elements are capitalized to the last extent of their earning capacity, by these highly organized unnatural persons, who decide and act with the promptness and prescience of the most superior human intellect. Direct proceedings by the state are overtaxed. The courts, especially the courts of equity, should not pose always as the fabled goddess, but keep an eye single to these exigent conditions and aid the state, as they rightly may, by withholding help or grace from graceless and hurtful dealings.

Other decisions of the Supreme Court than the leading cases we have cited furnish good reasons for, and illustrations of, the application of the doctrine now deduced from the recent statutes and the ancient common law. Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. A recent case reported from the Circuit Court of Appeals for the Sixth Circuit treats the question we are considering with great ability, and gives the result of the decisions of the Supreme Court with a clearness and force most persuasive to us. Continental Wall Paper Co. v. Voight & Sons Co. (C. C. A.) 148 Fed. 939.

We conclude that the lower court erred in sustaining the exceptions to the defendant's answer; that the decree appealed from must be reversed, and the cause remanded to the Circuit Court, with direction to overrule the exceptions, and thereafter to proceed agreeably to equity and the views expressed in this opinion.

And it is so ordered.

On Rehearing.

PER CURIAM. The application for a rehearing is denied. The scope and effect of the decree of reversal is to reinstate the parts of the answer which were stricken out by the circuit court. The record shows exactly the words of the answer, so that the decree cannot be misunderstood.

STEINBECK v. BON HOMME MINING CO. et al.

BON HOMME MINING CO. v. STEINBECK et al.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1907.)

(Nos. 2,433, 2,434.)

1. TRUSTS—CONSTRUCTIVE TRUSTS—BREACH OF DUTY BY TRUSTEE.
   One who occupies a fiduciary relation to another in respect to business or property, and who by the use of the knowledge he obtains through that relation, or by the betrayal of the confidence reposed in him under it, acquires a title or interest in the subject-matter of the transaction antagonistic to that of his correlate, thereby charges his title or interest with a constructive trust for the benefit of the latter, which the cestui que trust may enforce or renounce at his option.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 153.]

2. SAME.
   The test of such a trust is the fiduciary relation and a betrayal of the confidence reposed, or some breach of the duty imposed under it. One chargeable with a trust of this nature is a trustee de son tort, and, if he has not been guilty of wrong, he is not such trustee.

3. SAME—EXCEPTION TO RULE—PURCHASE AT JUDICIAL SALE.
   There is an exception to the general rule. It is that an agent or trustee may lawfully buy the property of his principal or cestui que trust at a judicial sale caused by a third party, which he has no part in procuring and over which he has no control.

4. SAME—TITLE OF PURCHASER—ESTOPPEL.
   The title of a purchaser chargeable with a constructive trust for the benefit of his correlate by reason of their fiduciary relation is not void, but voidable at the option of the cestui que trust only.

The absence of a prompt election to avoid it is an election to affirm it and estops from attack. Inaction for years after discovery of the title raises such an estoppel.

5. EQUITY—LACHES—LAPSE OF TIME.

Courts of equity act or refuse to act in analogy to the statute of limitations relating to actions at law of like character. Radical changes in the condition of the property and its speculative character induce them to apply the doctrine of laches in a shorter time than that fixed by the statute of limitations.

Six years' delay in commencing a suit after discovery by a principal of a tax title in its agent to its mining property, which was radically enhanced in value meanwhile by the labor, expenditures, risk, and energy of the holder of the tax title, constitutes fatal neglect, and estops the principal from maintaining the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 204, 206, 207.]

6. TRUSTS—CONSTRUCTIVE TRUSTS—BREACH OF DUTY—LACHES.

An agent to accept service of process, to care for mining property and its title for a corporation of which he was a stockholder, but without funds of the company to pay taxes, and without authority to advance money for it to pay them or to incur any liability on its account, notified the corporation that its taxes were due and sent it an advertisement of its approaching sale for taxes in 1891. After nearly all of the property had been sold at the tax sale to a stranger, the agent purchased the tax certificate in January, 1892, and on the next day wrote the company of the fact and notified it of the amount required to redeem. He again informed it in August, 1892, of the amount required to redeem and to pay subsequent taxes. The company paid nothing, and made no redemption. He bought the remainder of its property at the tax sale of 1892, and paid the subsequent taxes. In 1894 and 1895 he took and recorded tax deeds. In December, 1896, and in January, 1897, he notified the corporation that he had the tax deeds and had leased the property, and offered to convey his title for a part of the amount he had expended for the tax title and in payment of subsequent taxes, but the company did not accept. The property was unproductive and speculative, and he prospected, developed, and sold it. A lessee under his grantee expended over $20,000 in running a tunnel into it which struck a rich body of ore in December, 1902. The company paid nothing and expended nothing during this time until after the strike, when it made a contract to give a portion of the amount that might be recovered to those of its stockholders who would subscribe to pay the expenses of this suit, and this suit was instituted in March, 1903.

Held (1) The agent betrayed no confidence and violated no duty, and was not a trustee for the benefit of the company.

(2) If he had been such a trustee the company by its silence and inaction for six years after January, 1897, when it knew he held the tax title, exercised its election to affirm it.

(3) By its silence for six years after it knew that he held the tax deeds, and had leased the property, it was guilty of such neglect as bars its suit.

(Syllabus by the Court.)

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

The Bon Homme Mining Company, a corporation of the state of Louisiana, owned certain mining claims in the state of Colorado in the year 1888, and appointed James F. Steinbeck, who was one of its stockholders, at a salary of about $100 per month, to develop and operate a mine upon them. It also appointed him its agent to accept service of process upon it in the state of Colorado. Steinbeck operated the mine about 15 months, until October, 1889, when the company directed him to cease business because it had lost all the money it could raise, which was about $20,000. Steinbeck at that time and repeatedly thereafter urged and implored the company to resume and continue

the work of developing this mine; but it refused to do so. He had reported the taxes upon the property for the years 1888 and 1889, and had paid them with money which the company had furnished him for that purpose. During the year 1890 he had received a small amount of money from and paid a few obligations of the company, repaired its buildings, and performed some assessment work upon one of its claims. For these services he received wages. His salary had ceased in October, 1889. On November 5, 1890, his account with the company was balanced and closed. After that date he had no money of the corporation to expend, no authority to pay taxes or any other obligation for it, to incur any liability on its account, to sell, convey, mortgage, lease, incumber, clear of incumbrances, or otherwise affect for it the title to its property or to do anything for it except to care for and protect its property and report its condition as he had theretofore done.

The capital stock of this company was $1,500,000, but only $1,080,000 of this stock had been issued, of which Steinbeck held $125,000 at this time and $289,500 after November 10, 1891. The company owed $1,500 upon 10 promissory notes for $150 each. It endeavored to sell its bonds and its treasury stock, but was unsuccessful. The stock it had issued was nonassessable. It had no money and no way to raise any, and in this moribund condition it continued until the faith, persistence, and energy of Steinbeck developed in December, 1902, a rich body of ore in one of these claims, when the corporation sufficiently revived to make an agreement to pay a share of the amount that might be recovered for the prosecution of this suit. No meeting of its board of directors was held from July 11, 1892, until February 14, 1903, after the news of the development of this vein had undoubtedly been communicated to the directors of the company.

On April 1, 1890, Steinbeck had written to the secretary of the corporation that the taxes of 1890 were due and were drawing 25 per cent. per annum. In September, 1891, he had sent to the secretary of the company, and the latter had received, the newspaper in which the advertisement of the sale of its property for the taxes for 1890 was published. On October 10, 1891, one Le Fevre purchased all the company's mining claims but one at the sale for the taxes of 1890, and took a certificate of sale thereof. On January 28, 1892, Steinbeck purchased and paid for an assignment of this certificate to himself, and on the next day wrote to the company that he had done so; that the original purchase price of the certificate was $83.19; that he had paid $109.80 for the assignment of it to himself; that it was "particularly urgent that the company take some step to redeem"; that the sale was for the taxes of 1890; that the taxes of 1891 were due and probably amounted to $75 or $80; and that it would require close to $200 to remove the incumbrances. The corporation sent no money, took no step to redeem, and made no answer. On July 23, 1892, the secretary of the company wrote to Steinbeck that he had succeeded in getting a meeting of the board of directors of the company on the 11th, and that he was directed to request him to send his account of all taxes paid on the company's property so that he might be reimbursed for his outlay. On August 15, 1892, Steinbeck answered and specified $210. On August 20, 1892, the secretary wrote him that he had figured up what the proportions of the large stockholders would be; that he had the consent of the New Orleans people to put up $100 toward paying the taxes; that the proportion of Steinbeck and of his brother, who was also a stockholder, would be about $110, and added: "Please draw on the Bon Homme Mining Company for the amount of $100 accordingly." Steinbeck's proportion of the stock of the company was less than three-tenths and his proportion of this $210 was less than $63. He was not responsible for the proportion of his brother; and he declined the offer. In making this offer and subsequent suggestions of this nature the secretary trusted entirely to voluntary action by certain stockholders of the corporation and not to any action or funds of the company; for the stockholders were many, their stock nonassessable, and the company had no funds. Neither the company, the secretary, nor any of the stockholders paid, or offered to pay, the $210 or any taxes upon the property of the company or communicated with Steinbeck about it until December 24, 1896, and then only in answer to a letter of Steinbeck of December 2, 1896. Meanwhile, in November, 1892, Steinbeck had bought at the sale for the taxes of 1891 the re-

maining mining claim which had not been sold for the taxes of 1890. The laws of Colorado allowed the company three years in which to redeem from these sales. It made no redemption, and in December, 1894, Steinbeck took tax deeds upon the sale of 1890. On November 12, 1895, he took a tax deed upon the sale of 1891, and immediately thereafter recorded them. He paid all the subsequent taxes. On December 2, 1896, he wrote to the secretary of the company that he had been paying taxes for a number of years in the hope that the New Orleans people would take hold of the mines again; that he had paid as long as he felt able to do so and had concluded to quit. He added: "I don't suppose that it is any use to give this information. I merely do it to advise any who feel an interest so that they may have an opportunity to save the property in which I am willing to join." On December 24, 1896, the secretary answered that he had lost time to see the principal parties in interest, that he had arranged to have the New Orleans people pay their share of the Bon Homme taxes, and that he would be pleased to receive a statement of the amount Steinbeck had paid and of their proportion of it, including the taxes of 1895, which he requested him to settle. On December 31, 1896, Steinbeck replied that he had paid taxes for 1890 and succeeding years, that he could not then state the exact amount, and wrote: "Under our laws a purchaser becomes entitled to a deed after three years. I have had deeds for some time. Of course, this is not a serious obstacle, for I can deed back to the company. However, I have a suggestion to make upon which I desire your opinion at an early date. There are, no doubt, a number of stockholders who are indifferent and perhaps prevent those who feel inclined to do something. Why not give those who are willing a chance and deed the mine to them only. Lawyers whom I have consulted say they believe tax titles are good. At any rate, should the mines prove profitable, we could effect a favorable compromise. I am willing to do what is fair and just to all concerned." On January 9, 1897, he wrote: "The ex treasurer who held for nine years back figures the amount at nearly $650 I paid for 1890-91-92-93-94, and 95. However, if the company will refund me $500, I am willing to let the $150 go on my share of the taxes and will see that all that is necessary to be done to clear the title is accomplished. Tomorrow I go up to Bon Homme with two men and a load of provisions. I have leased to H. S. Barrett in a small way. There is but little ore in sight, and if he finds anything it might stimulate the company to action. Barrett and the company can both work without interfering with one another. * * * In the matter of taxes, I think I have made a reasonable proposition and I hope for a speedy acceptance. If there is any dissatisfaction, perhaps I may make further concession. I am willing to do almost anything within the bonds of reason to facilitate a resumption of work on the property." He wrote on January 25, 1897, that the taxes for 1896 became due January 1st and were $40, and added: "Do you think there is any probability that the company would entertain a proposition to bond and lease? If they do not contemplate working themselves, I may wish to make them an offer. I should like a long lease at a reasonable price." The company did not accept the proposition in Steinbeck's letter of January 9, 1897, nor did it answer either of his communications of that month. The next letter it addressed to him was dated March 26, 1901, and it contained the erroneous statements that the secretary did not get from Steinbeck the exact amount of back taxes, that it was for that reason that he could not get from the larger stockholders funds to repay Steinbeck for advances made by him for taxes, and that the secretary knew that the company owed no debts but for taxes to Steinbeck. Meanwhile Steinbeck and Barrett, his lessee, proceeded to prospect and develop the property. From May, 1897, until January, 1898, and again from May, 1898, until November, 1898, they worked underground in the shaft which Steinbeck had begged the company in vain to sink. In the year 1898 Steinbeck caused one Abbott to bring an action, procure a judgment against the company, and to sell the property here in question under an execution against it upon two of its promissory notes for $150 each, which it had never paid. Abbott purchased at the execution sale, received sheriff's deeds, and conveyed the property to Steinbeck.

On July 19, 1900, Steinbeck resigned his agency to accept service of process in Colorado for the company. On August 27, 1900, he commenced a suit in

one of the courts of Colorado against the company and others to quiet the title of the property in himself, and on December 3, 1900, obtained a decree to that effect upon a service of the summons by publication. On July 14, 1900. Steinbeck made an agreement to sell this and some other property to L. F. Twitchell for $45,000, to be paid in installments during 26 months; that he would execute deeds and place them in escrow with the bank; that the purchaser would pay the purchase price; and that until it was fully paid he would cause a mine upon the property to be continuously worked and would apply the profits of its operation to the payment of the purchase price. Twitchell assigned this contract to the Scantic Gold Mining & Milling Company. In October, 1900, Steinbeck placed the deeds in escrow with the bank to be delivered on payment of the purchase price. On February 3, 1902, the Scantic Company leased the property to the Bon Homme Mining & Development Company on condition that it should drive a certain cross-cut tunnel then about 1,000 feet in length 700 feet farther unless the Bon Homme vein was intersected at a less distance, and that it would continuously work the property. The development company drove the tunnel until in December, 1902. it intersected the vein and disclosed a rich body of ore, and it still continues to work the mine. Before this suit was commenced it had paid to Steinbeck upon the purchase price $23,706.56, to the Scantic Company, its lessor, $6,632.67, and $26,770.38 for driving the tunnel for the development of the property, in all $57,109.61.

The intersection of the vein by the tunnel was heralded as a great mining strike in the Denver newspapers and other publications, including some of the mining journals, and on March 6, 1903, the Bon Homme Company exhibited its bill and subsequently amendments thereto in the court below against Steinbeck, the Scantic Company, the development company, and others to quiet its title to the property it owned in 1888, to avoid the tax deeds, the sheriff's deeds and the decree to quiet the title in Steinbeck upon the ground that they were secured by fraud, and for other relief. Issues were joined, testimony was taken, and the decree was that the Scantic Company should pay into court $8,000 which still remained owing to Steinbeck on account of the purchase price of the property and should hold the title, and that Steinbeck should pay to the Bon Homme Company the $37,000 he had received on account of the sale of the property less $1,679.67 which he had paid on account of the taxes upon it. The Bon Homme Company has appealed because the court did not grant it a recovery of the property and its title, and Steinbeck has appealed because it adjudged that he should pay over to the complainant the part of the purchase price which he had collected.

Branch H. Giles, for Steinbeck.

Charles E. Fenner and Charles K. Phillipps (Charles Payne Fenner, on the brief), for Bon Homme Mining Co.

L. F. Twitchell (Frank C. Goudy, on the brief), for Scantic Gold Mining & Milling Co. and others.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

This suit was instituted to avoid the tax title, the sheriff's deeds, and the decree which quieted the title in Steinbeck, upon the ground that the latter had obtained these claims of ownership by deceit and fraud. These three sources of title may be considered in their order; and the first question the case presents is whether Steinbeck was guilty of any fraud or breach of duty in his procurement and assertion of the title in himself under the tax certificates and deeds. The material facts which condition this issue have been set forth. They not only fail to disclose any indication of deceit, concealment, or misrepresenta-

tion while he was obtaining the tax deeds and subsequently until the company and its stockholders in 1897 failed to accept his offer to convey the tax title to them for the amount of money which he had expended to procure it and to pay the subsequent taxes upon the property, but they demonstrate the utmost good faith on his part until, by their silence and inaction, the company and its stockholders had exercised their option to decline to share with him the burdens, risks, and possible benefits of his title under the deeds.

But counsel for the complainant invoke the general rule that one who occupies a fiduciary relation to another in respect to business or property, and who by the use of the knowledge or interest he obtains through that relation, or by the betrayal of the confidence reposed in him under it, acquires a title in the subject-matter of the transaction antagonistic to that of his correlate, thereby charges his title or interest with a constructive trust for the benefit of the latter which the cestui que trust may enforce or renounce at his option, and they insist that under this rule Steinbeck's title was charged with a constructive trust in favor of the company. The rule is wise and salutary, and it should be carefully and rigorously enforced in all cases to which it lawfully applies. But, like every rule and principle of the law, it is founded in a controlling reason which is its life, and, where the reason ceases, the rule is impotent. The reason is that no one may profit by a betrayal of the confidence of his correlate and by the use, to the latter's detriment, of knowledge or interest acquired by means of the fiduciary relation. The test of the existence of a constructive trust of this nature is the fiduciary relation, and the betrayal of the confidence reposed under it to acquire the property or interest of the correlate, and, in the absence of either of these indispensable elements, no such trust can arise. Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176.

An agent to sell is prohibited from buying the property of his principal at his own sale; but, if he discloses all his information and acts in good faith, he may purchase it directly of his principal or at a judicial sale which he cannot and does not procure or control. General statements from text-books and many authorities have been cited to the effect that a general agent to care for property or to pay taxes upon it takes any tax title he acquires in trust for the owner (1 Am. & Eng. Enc. of Law [2d Ed.] p. 1085; Blackwell on Tax Titles, § 598; Bartholemew v. Leech, 7 Watts [Pa.] 472; Bowman v. Officer, 53 Iowa, 640, 6 N. W. 28; McMahon v. McGraw, 26 Wis. 614, 623; Ellsworth v. Cordrey, 63 Iowa, 675, 679, 16 N. W. 211; Gonzalia v. Bartelsman, 32 N. E. 532, 143 Ill. 634; Continental Life Ins. Co. v. Perry & Townsend, 65 Iowa, 709, 22 N. W. 937; Page v. Webb [Ky.] 7 S. W. 308); but these cases are not inconsistent with the reason and the rule that some betrayal of confidence, some breach of duty, some bad faith, some abuse of the fiduciary relation is indispensable to the creation of such a trust. A constructive trust of this nature is the creation of a court of equity. But such a court never raises it unless the holder of the title has been guilty of some breach of duty; for "a court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can

attach upon it so as to give any jurisdiction." A purchaser chargeable with such a trust is a trustee ex maleficio or a trustee de son tort, and, if he has been guilty of no wrong, he is no trustee. Boone v. Chiles, 10 Pet. 177, 209, 9 L. Ed. 388; U. S. v. Detroit Timber & Lumber Co., 131 Fed. 668, 678, 67 C. C. A. 1, 11; U. S. v. Northern Pac. R. Co., 95 Fed. 864, 880, 37 C. C. A. 290, 306; Kinne v. Webb, 54 Fed. 34, 39, 4 C. C. A. 170, 175; U. S. v. Winona & St. Peter R. Co., 67 Fed. 948, 960, 15 C. C. A. 96, 108.

If one is employed by the owner of property to pay taxes upon it, and if he accepts the employment and pays them with his own funds, his purchase of a tax title upon the property without notice, or an offer to convey it to the owner, is a breach of his contract and of his duty and a betrayal of the confidence of his principal; and it charges his title with a constructive trust for the latter's benefit. The cases cited by counsel for the complainant are of that nature. Thus in Bowman v. Officer, 53 Iowa, 640, 6 N. W. 28, the agent accepted a power of attorney "to take charge of, lease, pay taxes, sell and convey by deed of warranty all or any portion" of the lands. He had paid taxes to the amount of hundreds of dollars and charged the account of his principal. He purchased at a tax sale for the taxes of a single year and subsequently continued to collect and expend money on account of the lands for his principal. The court rightly held that the tax title he procured was secured by a betrayal of the confidence reposed in him and a breach of his duty to protect the property of his principal. In cases of this character the principal incurs a personal liability for the money which the agent advances, a liability upon which the agent may maintain an action, and may subject the property itself to its payment. But no case has come to notice in which the principal neither furnished the agent the money nor the means to pay the taxes, nor subjected himself to legal liability to reimburse him for the moneys he might advance to pay them, in which the agent carefully notified the principal of the taxes due, of their delinquency, of his purchase of a title based upon them, and offered to convey it to him for the money he had expended, and the principal exercised his option to refuse the offer, where any court has held the tax title to be charged with a constructive trust for the benefit of the original owner.

On the other hand, there is an exception to the general rule that one who occupies a fiduciary relation may not lawfully purchase the property of his correlate for his own benefit, as well established as the rule itself. It is that an agent or trustee may lawfully buy the property of his principal or cestui que trust at a judicial sale caused by a third party which he has no part in procuring, and over which he can exercise no control. Allen v. Gillette, 127 U. S. 589, 596, 8 Sup. Ct. 1331, 32 L. Ed. 271; Eckrote v. Myers, 41 Iowa, 324; Twin-Lick Oil Co. v. Marbury, 91 U. S. 591, 23 L. Ed. 328; Prevost v. Gratz, 19 Fed. Cas. 1303, 1309, No. 11,406; Fisk v. Sarber, 6 Watts & S. 18; Chorpenning's Appeal, 32 Pa. 315, 316, 72 Am. Dec. 789.

In Allen v. Gillette, 127 U. S. 589, 596, 8 Sup. Ct. 1331, 32 L. Ed. 271, one of the executors of the will of a decedent purchased the interest of one of the devisees at a trustee's sale under a trust deed made

by the devisee to secure the payment of her debt to a third party. She brought suit against the executor to charge the title purchased by him with a constructive trust in her favor and to redeem from it. The Supreme Court held that the executor owed the devisee no duty incompatible with his purchase and dismissed the bill.

In Eckrote v. Myers, 41 Iowa, 324, a firm of attorneys was employed to foreclose a mortgage upon real estate. They brought the suit, carried it to a decree, and notified their client that no sale would be made under the decree until he paid the fees that would accrue in the sale. They had demanded expenses previously made and fees for prior services, and he had failed to pay them. He paid nothing and the suit remained pending. A year or two later there was a sale of the mortgaged premises for taxes, and the attorneys bought, notified the client of the purchase, demanded reimbursement of the money expended therefor and the payment of prior advances and fees. The title matured in one of the members of the firm, and the client brought suit to set aside the tax deed and for an accounting. The court held that the attorney had rights as well as the client, that the same rules of honesty and fair dealing govern both, and dismissed the suit.

In Chorpenning's Appeal, 32 Pa. 315, 316, 72 Am. Dec. 789, a guardian purchased the land of his ward at a judicial sale of it under a judgment against the administrator of the estate of the ward's father. The guardian had no money of the ward with which to make the purchase and none in expectancy. The court said:

"The doctrine that a party will not be allowed to purchase and hold property for his own use and benefit, when he stands in a fiduciary relation to it, if contested by the party entitled as cestui que trust, is indisputable. * * * The relation, however, must be one in which knowledge, by reason of the confidence reposed, might be acquired, or power exists to affect injuriously the interests of cestuis que trust, or advance that of the trustee. The reason of the law is its life, and, unless some advantage might be gained by reason of the relation, the principle does not apply."

And the court sustained the purchase.

Concede that Steinbeck was the agent of the Bon Homme Company to accept service of process upon it, to care for the property and its title, to report the taxes upon it, to do any acts regarding it which the company directed him to perform, and that he was a stockholder and director of the corporation, and the record discloses no more general agency, nevertheless the company never authorized him to advance any money to pay its taxes or to subject it or its property to any legal liability for such advance or payment, and it never furnished him any funds after December 5, 1890, for this purpose or to reimburse him for any of the moneys he expended in purchasing the certificates or the tax deeds. There was therefore no duty imposed upon him to pay the taxes or to buy the tax titles for the company, and he would have incurred no liability to it if he had done neither and the property had been sold to a stranger. He did not cause, and he could not control, the tax sales. They were procured by the state, and he was not disqualified by their character from purchasing the property of his principal either at them or under them. He acquired from his agency no knowledge or advantage in

making such purchases which strangers and the company itself did not possess. He secured no power by means of his agency to affect injuriously by his purchases the title of his principal. On the other hand, his purchases and his offer in 1897 to convey his title for its cost beneficially affected the title and the rights of his principal. They gave the company an opportunity to acquire the property free from tax titles many months after the time when an absolute title would otherwise have vested in a stranger. The fact that he was a stockholder and director did not disqualify him from securing in good faith and with full notice which he gave to the company, a lawful incumbrance upon, and title to its property. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 591, 592, 23 L. Ed. 328. The only confidence reposed in him by his agency here which he might have betrayed was that he would give timely notice of the taxes and incumbrances and apply any moneys the company remitted to him to discharge them. If he had betrayed that confidence, if he had silently procured a tax title for his own benefit, and refused to transfer it to the company or to share it with the stockholders for its cost, he might have been chargeable as a trustee; but he notified the company of the taxes of 1890 in April, 1891, sent it the advertisement of the sale in September, 1891, wrote it of the sale to Le Fevre, of his purchase of the certificate, that it "was particularly urgent that the company should take some step to redeem," of the amount required to do so, and of the taxes of 1891 on January 29, 1892, the day after he bought the certificate, again informed it of the amount required on August 15, 1892, and in December, 1896, and January, 1897, wrote the corporation that he had taken tax deeds of the property and had made a lease of it to Barrett, but offered to convey his title to the company or to the principal stockholders for $500, their proportion of the $650 which he had expended to procure and preserve it, and that he hoped for a speedy acceptance of his proposal. Here was no betrayal of confidence, no breach of duty, no use of his fiduciary relation to secure the title of his principal for his own benefit, but fair dealing, full notice, and the utmost good faith. It is not because Steinbeck failed to discharge his duty, but because the company exercised its option not to take the burden and the risk of this title which he offered it that it does not own it now.

It is contended that by his letters Steinbeck admitted that he held the tax title in trust for the corporation and to secure the payment of the amount he had expended for it, and in support of this argument attention is called to the fact that in some of his letters he wrote that he had paid the taxes for the years, among others, for which the sales were made, and that in his letter of January 25, 1897, he inquired whether the company would bond and lease the property and wrote that he would like a long lease at a reasonable price. But it is evident that the last remark was induced by the statement of the secretary in his letter of December 24, 1896, that he had arranged to have the New Orleans people pay their share of the Bon Homme taxes, and by Steinbeck's baseless hope and mistaken belief that his proposition of January 9, 1897, to clear up the title of the property for $500 would be accepted. His inquiry was not an admission that

the company owned the property, but that it would own it if it accepted his proposition to convey it as the secretary had written him he had arranged to do. Nor was his statement that he had paid the taxes an admission that he had not purchased, and did not hold his tax title for his own benefit; nor did it mislead or deceive the company, because he had carefully informed it that he held the tax deeds in his own name, that he had himself leased the property to Barrett, and they knew that he had proposed to convey the title under the tax deeds to it or to the principal stockholders for a fixed consideration, and that he had written them that lawyers whom he had consulted said that they believed that tax titles were good. The acts, letters, and circumstances of these parties must have a rational interpretation. They must be presumed to have intended what men of their intelligence ordinarily mean in similar circumstances. Tax certificates and tax deeds are not indications of loans or of their security. They evidence title accruing or accrued. Even when the title under them is charged with a constructive trust, they result in security for their cost, not because they were so intended, but because equity conditions its relief with the payment of the expense of the title under them on the maxim that he who seeks equity must do equity.

Nor is the fact that the holder of a tax title offers to sell it to the original owner for its cost any indication that the former holds it in trust for the latter. The tax title of Steinbeck was not charged with any direct or express trust. His notice of January 29, 1892, that he had purchased the tax certificate, his notice of August 15, 1892, that $210 was required to redeem from it and to pay subsequent taxes, his taking and recording of his tax deeds, his statements in his letter of December 31, 1896, that a purchaser became entitled to a deed after three years; that he had had deeds for some time; that he could deed back to the company; that he was ready to convey to the company or to those stockholders only who were willing to take a chance, upon payment of a part of the cost, his letter of January 9, 1897, that he had expended $650 in payment of the taxes; that if the company would refund $500 he was willing to let $150 go on his share, and would "see that all that was necessary to be done to clear the title was accomplished"; that he had leased to Barrett; that "in the matter of the taxes I think I have made a reasonable proposition and I hope for a speedy acceptance. If there is any dissatisfaction perhaps I may make further concession. I am willing to do almost anything within the bonds of reason to facilitate a resumption of work on the property," and the facts that the company knew all that has been recited and neither accepted his offer nor asked further concessions—converge with compelling force to prove that Steinbeck intended to buy and actually secured this tax title for his own benefit only and that it was never subject to any express trust in favor of the company. No proposition to convey for a consideration to the company or to the stockholders who would take a chance, no terms of conveyance were pertinent or necessary if he held the title in trust for the benefit of the corporation. A simple declaration of that fact would have been the natural and

probable evidence of it. No such declaration or admission can be found in the record. The only trust with which the property could be charged was therefore a constructive trust arising from the fiduciary relation, and, as he was guilty of no betrayal of confidence, no abuse of his fiduciary relation, and no breach of duty in acquiring or holding it and the failure of the corporation to secure it resulted only from its refusal to accept his offer to convey it, this title was not chargeable with any constructive trust for the benefit of the corporation.

There are other rules of law which interpose serious obstacles to a recovery by the Bon Homme Company in this suit if this title were chargeable with such a trust. It was not subject as we have seen to any express or direct trust, and hence it does not fall under the rule that no time runs against a trust until it is repudiated.

But the title of a purchaser chargeable with a constructive trust for the benefit of his correlate by reason of their fiduciary relation is not void, but voidable at the option of the cestui que trust only, and the absence of a prompt affirmative election to avoid it confirms it. "It is only voidable, and, as it may be confirmed by the parties interested directly, so it may be by long acquiescence or the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the cestui que trust." Hammond v. Hopkins, 143 U. S. 224, 250, 12 Sup. Ct. 418, 36 L. Ed. 134.

Four years after a stockholder and director of a corporation had purchased its property under a deed of trust made to secure a debt to him the corporation brought a suit to charge the title with a trust in its favor. The purchaser had made the statement to other stockholders that he only designed to purchase for the corporation, and there was testimony that after the sale he offered to relinquish his purchase if his debt was paid. The Supreme Court said:

"The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. * * * Though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed in a court of equity."

And the court dismissed the bill. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 592, 23 L. Ed. 328; Harwood v. Railroad Co., 17 Wall. 78, 21 L. Ed. 558; Hayward v. National Bank, 96 U. S. 611, 24 L. Ed. 855; Galliher v. Cadwell, 145 U. S. 368, 373, 12 Sup. Ct. 873, 36 L. Ed. 738.

Counsel for the company endeavor to avoid the effect of this principle because Steinbeck never demanded payment of the amount he had expended for his tax title and in payment of the subsequent taxes, and they insist that no time ran against the company because such a demand was not made. If the company had been legally liable to pay the amount which Steinbeck expended for his title and in payment of taxes, there would be more reason for this contention. In that case the company might have had a right to redeem reciprocal with his

right to enforce payment. But the company was not liable to repay to Steinbeck the money he expended, and the only right the company had was not the right to redeem from the tax sale, but the right to exercise its election to avoid it by paying its cost, or to affirm it and abandon the property. Nor could it avoid that election either by silence or by inaction after it had received the knowledge that Steinbeck held the tax deeds and the title under them, because delay, vacillation, an attempt to speculate upon the option, to await the event and thereafter to avoid, if the property has advanced in value, and to affirm, if it has depreciated, is fatal to the option, and affirms the sale. The Bon Homme Company knew the facts which conditioned its right to elect to avoid this tax title in January, 1897. Steinbeck then offered to convey it for a part of its cost. The company failed to accept and thereby rejected that offer. Steinbeck leased the property, operated it, sold it, caused the expenditure of tens of thousands of dollars upon it and the development of a body of ore which transformed land of such a character that its owner would not pay taxes upon it nor redeem it from tax sales into a productive and valuable mine, and then more than six years after it had learned every fact material to its right this company by the institution of this suit sought to exercise its option to avoid this tax title. It was too late. The law had exercised its option. Its speculation upon it, its inaction, its failure to share the heavy burden of the property, its care and operation during the tedious 90's affirmed the title of Steinbeck and estopped it from sharing the benefits his care and toil and money had earned.

Finally, section 2912 of Mills' Annotated Statutes of Colorado provides that:

"Bills of relief in case of the existence of a trust not cognizable by the courts of the common law * * * shall be filed within five years after the cause thereof shall accrue and not after."

If this tax title was chargeable with any trust, it was with a constructive trust not cognizable by the courts of the common law. The cause of action to enforce it accrued in January, 1897, and such an action was barred in the courts of Colorado before this suit was instituted. Courts of equity are not bound by, but they usually act or refuse to act in analogy to the statute of limitations relating to actions at law of like character. Radical changes in the condition and value of the property and its speculative character often induce them to apply the doctrine of laches in a shorter time than that fixed by the statute of limitations for similar actions at law. Kelley v. Boettcher, 29 C. C. A. 14, 21, 85 Fed. 55, 62; Lemoine v. Dunklin Co., 2 C. C. A. 343, 348, 51 Fed. 487, 492. Lord Camden said:

"A court of equity which is never active in relief against conscience or public convenience has always refused its aid to stale demands, when the party has slept upon his right, and acquiesced for a great length of time." Smith v. Clay, 2 Amb. 645.

"If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive,

prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage." Kerr, Fraud & Mistake, p. 306.

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third parties may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect." Penn. Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 698, 18 Sup. Ct. 223, 42 L. Ed. 626.

In Patterson v. Hewitt, 195 U. S. 309, 321, 25 Sup. Ct. 35, 49 L. Ed. 214, the complainants had transferred their interests in certain mining claims to a trustee who had made a written agreement of trust to convey their interests in the property, which amounted to one-fourth, to them upon the performance of certain conditions, and those conditions had been performed in 1884. One of the complainants demanded his deed in 1885 and another just before the commencement of suit in 1903. The analogous statute of limitations was 10 years. During the eight years just preceding the suit the trustee and his associates had performed a large amount of work in developing the mine to which the complainants did not contribute, and a large body of rich ore was discovered in 1890. The Supreme Court said:

"If appellants had expected a share in this property, they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

And the decree which dismissed the bill was affirmed. Stout v. Rigney, 107 Fed. 545, 549, 46 C. C. A. 459, 463; Hayward v. National Bank, 96 U. S. 611, 24 L. Ed. 855; Speidel v. Henrici, 120 U. S. 377, 387, 7 Sup. Ct. 610, 30 L. Ed. 718; Kinne v. Webb (C. C.) 49 Fed. 512; Societe Fonciere v. Milliken, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. Ed. 208; Galliher v. Cadwell, 145 U. S. 368, 375, 12 Sup. Ct. 873, 36 L. Ed. 738; Alsop v. Riker, 155 U. S. 448, 460, 15 Sup. Ct. 162, 39 L. Ed. 218.

The land in controversy here was a prospective mine, property of the most speculative nature. While it was unproductive, while

its value was doubtful, and the burden of protecting it against taxes and tax titles and the labor of developing it were heavy and the benefits to be derived problematical, the complainant refused to share either. For more than eight long years when times were hard, and the burden of caring for and protecting this property exceeded the benefit, Steinbeck bore it alone. Now, after he has prospected and operated the property, after he has bought the tax titles upon it and paid subsequent taxes, after grantees and lessees whom he secured have developed the rich ore and the benefit exceeds the burden, the complainant, which has refused to bear or to share the burden or the risk, prays a court of equity to confer upon it the reward which the money, the toil and the energy of Steinbeck have earned. There is no equity in such a suit. The complainant speculated upon its option. If the expense, toil, and effort of Steinbeck had come to naught, it would never have reimbursed him or have brought this suit. Its neglect, inaction, and silence during the six years after it knew he had a tax title to its property and the marvelous change in its value meanwhile estop it from maintaining this suit and compel a dismissal of its bill.

As Steinbeck's title under the tax deeds is impregnable to attack in this suit, it is not material whether or not his title under the sheriff's deeds and his decree quieting the title in himself were wrongfully obtained. They did not in any event impair his tax title, and they cannot affect the result of this suit. They will not therefore be further considered.

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

RODGERS, U. S. Immigration Com'r et al., v. UNITED STATES ex rel. BUCHSBAUM.

(Circuit Court of Appeals, Third Circuit. February 13, 1907.)

No. 39.

1. ALIENS—IMMIGRATION LAWS—FINALITY OF DECISION OF BOARD OF SPECIAL INQUIRY.

Under the Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213 [U. S. Comp. St. Supp. 1905, p. 274], and rule 7 of the regulations established thereunder by the Secretary of Commerce and Labor, an immigrant who on examination by a board of special inquiry has been denied the right to enter the United States has the right to be informed that he has a right of appeal therefrom, and the fact that he has been so informed must be entered of record in the minutes of the board's proceedings, and the withholding of that right precludes finality in the decision of the board which may in such case be reviewed by the courts on a writ of habeas corpus.

2. SAME—ALIENS DOMICILED IN THE UNITED STATES—RIGHT TO RE-ENTER.

An alien, who has acquired a domicile in the United States, cannot thereafter, and while still retaining such domicile, legally be treated as an immigrant on his return to this country after a temporary absence for a specific purpose not involving change of domicile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, § 105.]

3. SAME—CONSTRUCTION OF STATUTE.

The provision of section 2, Act March 3, 1903, c. 1012, 32 Stat. 1214 [U. S. Comp. St. Supp. 1905, p. 276], which excludes from admission into the United States "aliens" who are afflicted with a loathsome, or with a dangerous contagious, disease, cannot be construed to apply to aliens who are domiciled in this country, especially in view of the title of the act, which is "An act to regulate the immigration of aliens into the United States," and of its other provisions and prior statutes in pari materia.

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

J. C. Swartley and J. Whitaker Thompson, for appellants.

David Phillips, for appellee.

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

BRADFORD, District Judge. This is an appeal from an order of the district court of the United States for the eastern district of Pennsylvania discharging Isidore Buchsbaum on a writ of habeas corpus from alleged illegal restraint by John J. S. Rodgers, United States commissioner of immigration, and others. In his petition for the writ Buchsbaum alleges in substance that he is a native of Austria and emigrated to the United States, arriving in the city of New York with his wife and family March 10, 1901; that thereupon "he took up a permanent residence with his wife and family in said city and established himself in the window cleaning business, in which he still retains his interests"; that from the time of his arrival in New York until April, 1905, he continuously resided in that city with his family, "pursuing his aforesaid business and acquiring extensive contractual property and rights"; that he declared his intention March 8, 1905, before the circuit court of the United States for the southern district of New York to become a citizen of the United States; that in April, 1905, he "took passage on the Steamer Finland for Antwerp, and thither went to Galicia, Austria, for the purpose of settling an estate"; that in leaving this country for that purpose he "never intended to give up his rights which he had acquired in the United States, but went with the intention of returning as soon as his business was transacted"; that his family "consisting of wife and two children remained in New York and are still residing there"; that he returned to the United States arriving in Boston as a passenger on the steamer Marquette November 7, 1905; that the United States commissioner of immigration at Boston "refused him a landing and on November 9, 1905, ordered his deportation on the ground that he was afflicted with trachoma"; that the petitioner "was not given a lawful opportunity to appeal" by the commissioner and was conveyed on the Marquette to Philadelphia where he arrived November 19, 1905, and "is now illegally restrained of his liberty and illegally held in custody" in a house of detention in that city; that he is a resident of New York and never gave up his residence there; and that he "was not afflicted with any disease when he left New York City, nor when he left Europe on his return trip to the United States, and if he has any disease such as alleged, he must have contracted the same on board the Steamer Marquette on his return to

the United States." In the return of the International Mercantile Marine Company, Young and Johnston, to the writ it is alleged in substance that the master of the Marquette was notified November 17, 1905, by the commissioner of immigration at Boston that Buchsbaum "had been found to be of the class of aliens prohibited by law from entering the United States and had therefore been excluded," and was required by the commissioner "to receive the said alien on board his vessel and return him according to law"; and, further, that the master received Buchsbaum and took him on the Marquette to Philadelphia whence she was about to sail for Antwerp when the writ was served. It appears from the transcript of record that on the arrival of Buchsbaum at Boston in November, 1905, he was subjected to a physical examination by medical officers of the United States marine-hospital service who certified to the commissioner of immigration that Buchsbaum "has trachoma and the existence of such disease might have been detected by means of a competent medical examination at the port of foreign embarkation." A board of special inquiry, provided for in the act of Congress of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States" (Act March 3, 1903, c. 1012, 32 Stat. pt. 1, 1213 [U. S. Comp. St. Supp. 1905, p. 274]), having heard the case, decided that Buchsbaum was, under the provisions of the act, debarred from admission into the country by reason of trachoma and having reheard the case adhered to its former decision. Section 25 of the act provides relative to boards of special inquiry:

"Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported."

And further:

"The decision of any two members of a board shall prevail and be final, but either the alien or any dissenting member of said board may appeal, through the commissioner of immigration at the port of arrival and the Commissioner-General of Immigration, to the Secretary of the Treasury, whose decision shall then be final; and the taking of such appeal shall operate to stay any action in regard to the final disposal of the alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision."

Section 22 provides:

"That the Commissioner-General of Immigration * * * shall establish such rules and regulations * * * not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss, * * * all under the direction or with the approval of the Secretary of the Treasury."

By virtue of the act of February 14, 1903, entitled "An act to establish the Department of Commerce and Labor" (Act Feb. 14, 1903, c. 552, 32 Stat. pt. 1, 825 [U. S. Comp. St. Supp. 1905, p. 63]), the Secretary of Commerce and Labor has succeeded to the powers, duties and functions of the Secretary of the Treasury, relating to the "immigration service at large." Pursuant to the foregoing authority the Commissioner-General of Immigration with the approval of the Secretary of

Commerce and Labor established "Immigration Regulations," August 26, 1903. Rule 7 of these regulations is as follows:

"Every alien arriving at a port of the United States shall be promptly examined, as by law provided, either on shipboard or at some other place designated for that purpose. If found admissible, he shall be at once landed, but if upon special inquiry he is denied admission, he shall be informed that he has a right of appeal therefrom, and the fact that he has been so informed shall be entered of record in the minutes of the board's proceedings, but no appeal will be considered after any such alien has, in consequence of an adverse decision of a board of special inquiry, been transferred from an immigrant station to be deported."

The transcript of record sets forth what purports to be a copy of the minutes of the proceedings and of the testimony before the board of special inquiry at Boston. This copy by agreement of counsel was treated as evidence in the court below. It nowhere discloses expressly or by implication that Buchsbaum was informed that he had a right of appeal from the decision of the board. If he had been so informed it would have been the duty of the board to cause the fact to be entered of record in the minutes of the board's proceedings. There is no denial by the appellants or any of them of the truth of the averment made by Buchsbaum in his petition for the writ of habeas corpus that "he was not given a lawful opportunity to appeal" from the decision against him in Boston. Under these circumstances it fairly may be presumed that Buchsbaum was not informed of his right of appeal. He was not allowed to land in the port of Boston, but, with intent that he should be deported, was conveyed from that port on the Marquette to Philadelphia, whence she was about to sail for Antwerp, when the writ of habeas corpus was served. The action of the authorities in thus sending Buchsbaum from the port of Boston without informing him of his right of appeal was irregular and unlawful. Practically, and in legal contemplation, it impaired or deprived him of that right. For rule 7 of the regulations, as we have seen, provides that:

"No appeal will be considered after any such alien has, in consequence of an adverse decision of a board of special inquiry, been transferred from an immigration station to be deported."

And such a limitation is in harmony with and required by the statutory provision that:

"The taking of such appeal shall operate to stay any action in regard to the final disposal of the alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision."

The law has coupled the finality of a decision against an alien by a board of special inquiry with a right to appeal and to be informed of that right. The withholding of such right from the alien of itself precludes finality in the decision. And as the decision thereby lacks finality it is, and in the nature of things must be, competent to courts otherwise possessing jurisdiction to inquire by the writ of habeas corpus into the legality of the detention of the alien.

The question is thus presented whether Buchsbaum was, under the act of March 3, 1903, liable to deportation; and this was the only point considered by the court below. Section 2 provides that "persons afflicted with a loathsome or with a dangerous contagious disease" and who

are aliens "shall be excluded from admission into the United States," and section 19 provides for the deportation of "aliens brought into this country in violation of law." The evidence shows beyond dispute that on his arrival in the United States in March, 1901, with his family and children, he made his home in New York; that he had his domicil and conducted his business in that city for years; that he has never since establishing himself and his family in New York changed or intended to change his domicil; that in March, 1905, he declared his intention to become a citizen of the United States; that in going abroad in April, 1905, he went for a specific purpose involving only a temporary absence; and that he left in New York his business and his family with full intention to return to them as soon as he should have accomplished the object of his trip. The return of Buchsbaum from Austria to this country in November, 1905, did not clothe him with the character of an immigrant. He did not at that time seek to acquire a fixed residence or domicil in the United States. That had theretofore been accomplished. We are clearly of opinion that an alien who has acquired a domicil in the United States cannot thereafter and while still retaining such domicil legally be treated as an immigrant on his return to this country after a temporary absence for a specific purpose not involving change of domicil. The term "immigrant" as applied to him is a palpable misnomer. If the act of March 3, 1903, had expressly been restricted to alien immigrants no substantial question could have arisen on this branch of the case. But there is no such express limitation. Section 2 provides that "the following classes of aliens shall be excluded from admission into the United States"; and mentions, in the enumeration of those classes, "persons afflicted with a loathsome or with a dangerous contagious disease." The language of the section when taken literally is applicable to persons so diseased whether they are at the time of reaching the port of arrival alien immigrants or aliens whose domicil is in the United States. We think, however, that, notwithstanding the generality of the terms employed in the section, Congress did not intend that exclusion under the act on account of loathsome or dangerous contagious disease should extend to aliens domiciled in this country. In reaching this result the body of the act has been considered in its entirety in connection with its title, and in the light of other statutes in pari materia. The title is "An act to regulate the immigration of aliens into the United States." Certainly, if taken alone, it would indicate the inapplicability of the act to the case of Buchsbaum. It is well settled that, where the language of a statute is ambiguous or otherwise doubtful or, being plain, a literal construction would lead to such absurdity, hardship or injustice, as to render it irrational to impute to the law making power a purpose to produce or permit such result the title may be resorted to as tending to throw light upon the legislative intent as to its scope and operation. United States v. Fisher, 2 Cranch. 358, 386, 2 L. Ed. 304; Holy Trinity Church v. United States, 143 U. S. 457, 462, 12 Sup. Ct. 511, 36 L. Ed. 226; Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 563, 12 Sup. Ct. 689, 36 L. Ed. 537. Further, the body of the act contains provisions of such a character as, in connection with the title, to lead us to conclude that the statute was not intended to apply to aliens having their homes in the United States. Section 12 provides:

"That upon the arrival of any alien by water at any port within the United States it shall be the duty of the master or commanding officer of the steamer, sailing or other vessel, having said alien on board to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation of such alien on board such steamer or vessel, which shall, in answer to questions at the top of said lists, state as to each alien the full name, age, and sex; whether married or single; the calling or occupation; whether able to read or write; the nationality; the race; the last residence; the seaport for landing in the United States; the final destination, if any, beyond the port of landing; whether having a ticket through to such final destination; whether the alien has paid his own passage, or whether it has been paid by any other person or by any corporation, society, municipality or government, and if so, by whom; whether in possession of fifty dollars, and if less, how much; whether going to join a relative or friend, and if so, what relative or friend and his name and complete address," &c.

Section 13 provides:

"That all aliens arriving by water at the ports of the United States shall be listed in convenient groups, and no one list or manifest shall contain more than thirty names. To each alien or head of a family shall be given a ticket on which shall be written his name, a number or letter designating the list in which his name, and so forth, is contained, and his number on said list, for convenience of identification on arrival. Each list or manifest shall be verified by the signature and the oath or affirmation of the master or commanding officer or the first or second below him in command, taken before an immigration officer at the port of arrival, to the effect that he has caused the surgeon of said vessel sailing therewith to make a physical and oral examination of each of said aliens, and that from the report of said surgeon and from his own investigation he believes that no one of said aliens is an idiot," &c.

Section 16 provides:

"That upon the receipt by the immigration officers at any port of arrival of the lists or manifests of aliens provided for in sections twelve, thirteen, and fourteen of this Act it shall be the duty of said officers to go or send competent assistants to the vessels to which said lists or manifests refer and there inspect all such aliens, or said immigration officers may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve the transportation lines," &c.

Section 17 provides for the "physical and mental examination of all arriving aliens" by the proper medical officers or surgeons "who shall certify for the information of the immigration officers and the boards of special inquiry * * * any and all physical and mental defects or diseases" observed by them in any such alien. Section 18 provides:

"That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers," &c.

To apply these and other provisions in the act, solely on account of temporary absence from the United States on business or pleasure, to aliens domiciled in this country, many of whom have here had their homes and families for years, carried on business and acquired wealth and distinction, and have while here received equally with citizens protection of person and property, would, we think, not only create repugnancy between the body of the act and its title, but require a harshness of construction or interpretation never contemplated by Congress. A review of some of the earlier statutes and decisions

touching the immigration or importation into this country of aliens other than Chinese will throw much light on the subject under consideration. We say "other than Chinese" because cases arising under the Chinese exclusion acts are sui generis, involving the judicial or administrative enforcement of a particular policy on the part of the United States having as its object the prevention of competition between Chinese labor and other labor in this country. There, contrary to the general rules of evidence, prima facie presumptions are indulged against the Chinaman, and it may be that the principles of statutory construction properly may be applied to the Chinese exclusion acts in a manner somewhat different from that in which they are applicable to the act of March 3, 1903, and other statutes in pari materia. The act of February 26, 1885, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia" (Act Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290]), made it "unlawful * * * in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia." It further declared that all such contracts or agreements should be utterly void and provided penalties for violations of the act. Aliens belonging to certain enumerated classes, to which it is unnecessary to refer in this connection, were excepted from the prohibition of the act. The act nowhere mentioned "alien immigrants" and "immigrants" or either of them. It was amended February 23, 1887 (Act Feb. 23, 1887, c. 220, 24 Stat. 414 [U. S. Comp. St. 1901, p. 1293]), by the addition of several sections, which, among other things, provided that:

"All persons included in the prohibition in this act, upon arrival shall be sent back to the nations to which they belong and from whence they came."

The amendatory act did not mention "alien immigrants" or "immigrants." It was amended by the appropriation act of October 19, 1888 (25 Stat. 565, 566, c. 1210 [U. S. Comp. St. 1901, p. 1294]), which contained the following provision:

"That the act approved February twenty-third, eighteen hundred and eighty-seven, entitled 'An act to amend an act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia,' be, and the same is hereby, so amended as to authorize the Secretary of the Treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person previously contracting for the services."

This provision amounted, we think, to a legislative declaration or, at least, recognition that the act of February 26, 1885, and the amendatory act of February 23, 1887, notwithstanding the use of the terms "aliens"

and "foreigners," were intended to exclude only alien immigrants. For the latter act, as has appeared, provided that all persons included in the prohibition upon arrival "shall be sent back to the nations to which they belong and from whence they came"; and it would be unreasonable and incongruous to assume that by the amendment contained in the appropriation act of October 19, 1888, Congress, in authorizing the Secretary of the Treasury to cause immigrants who are allowed to land contrary to the prohibition to be deported within the period of one year next thereafter, did not intend that such authority should extend to the deportation within that period of all persons who should be allowed to land in contravention of the provisions of the original act as amended. Such, substantially, was the condition of legislation touching the immigration or importation into the United States of persons other than Chinese at the time of the passage of the act of March 3, 1891, entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294]. In the case of In re Martorelli (C. C.) 63 Fed. 437, Judge Lacombe held that the above legislation in force when the act of March 3, 1891, was passed, referred "to aliens who are imported into or who migrate to this country, not to persons already resident here, who temporarily depart and return." Section 1 of that act provided that:

"The following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease," &c.

Section 10 provided that:

"All aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in."

The act, save in section 8, nowhere mentioned "alien immigrants" or "immigrants." But that section provided:

"That upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. * * * During such inspection after temporary removal the superintendent shall cause such aliens to be properly housed, fed, and cared for, and also, in his discretion, such as are delayed in proceeding to their destination after inspection. All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers," &c.

We deem it clear that all "classes of aliens," whatever may be the meaning of the phrase, enumerated in section 1 were on arriving by water in this country intended by Congress to be reported in "name, nationality, last residence, and destination," to the proper inspection officers at the port of arrival, and to be subject to inspection, examination and detention, and to the decision of the inspection officers or their assistants touching the right to land. But section 8 exclusively provided for such procedure and expressly referred to the aliens subject to its provisions as "alien immigrants." Thus, taking the act of March 3, 1891, as a whole, the generality of the phrase "classes of aliens" as employed in section 1 must be restricted to classes of alien immigrants. Accordingly it was held by Judge Benedict in the case of In re Panzara (D. C.) 51 Fed. 275, arising under the act of March 3, 1891, that certain aliens, assumed to be Italians, having their domicil in the United States, though not naturalized, who went to Italy on a visit with the intention of returning to their homes in this country, could not on their return be treated as alien immigrants, and did not come within the provisions of the legislation then in force authorizing deportation. He said:

"From the testimony it appears in respect to such petitioner that he is not an alien immigrant, but a resident of the United States; that when detained by order of the superintendent of immigration he was on his way from Italy to his place of abode in the United States; and that his voyage to Italy was undertaken with intent to return to the United States, where he resided. Upon this testimony it must be held to have been shown in regard to each petitioner that he was not an alien immigrant; and. that fact appearing, even if it be assumed that the petitioner was born in Italy, and had never been naturalized. it must nevertheless be held that the order of the superintendent of immigration set up in the master's return is void for want of jurisdiction. The statute conferring power upon the superintendent of immigration to order the return of persons arriving in the United States from foreign countries confines his power to alien immigrants. He has no jurisdiction to direct the return to a foreign country of a person not an alien immigrant."

So, in the case of In re Maiola (C. C.) 67 Fed. 114, Judge Lacombe held that the statutes relating to the exclusion of alien contract laborers, including the act of March 3, 1891, did not nor did any of them apply to an Italian residing in the United States and returning here after a temporary absence abroad. In Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317, it was held that Isabella Gonzales, a citizen and native of Porto Rico, arriving from that island at a port of the United States, was not an alien immigrant within the meaning of the act of March 3, 1891. She had been detained as such by a commissioner of immigration for deportation, and the case turned upon the applicability to her of the term "alien." But Mr. Chief Justice Fuller, in delivering the opinion of the court said:

"If she was not an alien immigrant within the intent and meaning of the act of Congress entitled 'An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor,' approved March 3, 1891, 26 Stat. 1084, c. 551 [U. S. Comp. St. 1901, p. 1294], the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed."

The appropriation act of August 18, 1894, 28 Stat. 390, c. 301 [U. S. Comp. St. 1901, p. 1303], provided:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

Judge Lacombe, in the case of In re Monaco (C. C.) 86 Fed. 117, held that this clause did not exclude the jurisdiction of the courts in habeas corpus proceedings, where the alien is deprived of all opportunity to have his case heard on appeal to the Secretary of the Treasury. He said, among other things, with respect to the above provision:

"When it is remembered that this section took away from the courts the power to determine upon habeas corpus whether the alien was in fact an immigrant, and as such within the operation of the exclusion acts, it is the most natural construction of this language to hold that it gave the alien the right to have that important question passed upon by the Secretary of the Treasury. If the statements of petitioners' counsel are correct, this is a case in which a review somewhere should be allowed; for he asserts that the physician who at first reported that the immigrants were suffering from a loathsome contagious disease has modified his diagnosis. And upon the facts as asserted by petitioners, and not contradicted, two of the aliens are not immigrants; they have been domiciled here ten years, and are now returning after a brief absence."

In the case of In re Ota (D. C.) 96 Fed. 487, Judge De Haven said:

"It appears very clearly from these facts that Ota is not an alien immigrant, and the commissioner of immigration and the Secretary of the Treasury, if the same facts were before those officers, erred in ordering him to be returned to Japan as such. The act of March 3, 1891, c. 551, 26 Stat. 1024 [U. S. Comp. St. 1901, p. 1294], under which the order for the deportation of Ota is admitted to be justified, does not apply to aliens domiciled in this country, and who are returning thereto after a temporary absence."

He, however, held that the order of deportation, having on appeal been affirmed by the Secretary of the Treasury, was final. In Moffitt v. United States, 128 Fed. 375, 63 C. C. A. 117, the circuit court of appeals for the ninth circuit had occasion to consider section 10 of the act of March 3, 1891, providing for the deportation of "all aliens who may unlawfully come to the United States," and held that:

"This act clearly relates to immigration, and is leveled only against immigrants, although neither of those words is expressly mentioned in section 10 of the act."

The act of March 3, 1893, entitled "An act to facilitate the enforcement of the immigration and contract-labor laws of the United States" (Act March 3, 1893, c. 206, 27 Stat. 569 [U. S. Comp. St. 1901, p. 1300]) in some respects amended and added to the then existing legislation touching the importation of aliens other than Chinese into this country. This act clearly related only to immigrants and was wholly inapplicable to such a case as that of Buchsbaum. Its importance in this connection consists in the fact that it serves to indicate the general policy of Congress on the subject. The act of March 3, 1903, must, we think, in the light of antecedent legislation, to a portion of which reference has been made, be held to authorize deportation of aliens arriving by water in the United States only when they are at the time of their arrival "immigrants." Had Congress contemplated such a radical departure from the policy embodied in the earlier statutes touching importation of aliens

as to provide for their exclusion although not immigrant, but domiciled in this country, it is reasonable to assume that such intent, in view of such abrupt change of policy, would have been plainly expressed in the body of the act, and also that a title other than "An Act to regulate the immigration of aliens into the United States" would have been adopted. The counsel for the appellant Rodgers lay much stress upon Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082. It was there held that an application for the writ of habeas corpus on behalf of a Chinese merchant domiciled but not naturalized in the United States, who on his return to this country from a temporary visit to China was not permitted to land, but was detained by a collector of customs for deportation, must be denied under the act of August 18, 1894, c. 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303] which provides that in such a case "the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." In that case the point decided was the finality of the decision by the collector of customs, and not the question whether the Chinaman, aside from such decision, had a right to re-enter the United States. Mr. Justice Harlan, in delivering the opinion of the court, said:

"He cannot, by reason merely of his domicil in the United States for purposes of business, demand that his claim to reenter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the government in respect of a matter wholly political in its character. * * * To avoid misapprehension, it is proper to say that the court does not now express any opinion upon the question whether, under the facts stated in the application for the writ of habeas corpus, Lem Moon Sing was entitled, of right, under some law or treaty, to reenter the United States. We mean only to decide that that question has been constitutionally committed by Congress to named officers of the executive department of the government for final determination."

Lem Moon Sing v. United States lends no support to the contention of the appellants and is inapplicable to the case of Buchsbaum; for, not having been informed of his right to appeal, and not having appealed, and having been taken away from the port of arrival, the decision of the board of special inquiry, as before stated, was not final. We are satisfied that Buchsbaum was not an alien immigrant at the time of his arrival at Boston, and that, not being an immigrant, he was not liable to deportation under the provisions of the act of March 3, 1903, or any other statute of the United States. We are not aware of any decision in conflict with this conclusion.

The order of the court below discharging him must, therefore, be affirmed, with costs, and it is so ordered.

COHEN v. PORTLAND LODGE NO. 142, B. P. O. E. et al.

(Circuit Court of Appeals, Ninth Circuit. March 11, 1907.)

No. 1,392

1. JUDGMENT—COLLATERAL ATTACK.
An attempt by an independent proceeding to impeach a foreclosure decree rendered in another court is a collateral attack on such decree.

2. SAME—JURISDICTIONAL FACTS—IMPERFECTIONS OF STATEMENT.
Where a foreclosure decree was based on an order for the publication of summons as against certain nonresident defendants, the latter on a collateral attack on such foreclosure decree could not rely on mere imperfections or uncertainty of statement of jurisdictional facts, in the affidavit for the order for publication.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 928.]

3. PROCESS—PUBLICATION—JURISDICTION—PRESUMPTIONS.
Where jurisdiction of a proceeding in rem is sought to be obtained by service by publication, jurisdiction will not be assumed and exercised on the general ground that the subject-matter of the suit is within the power of the court, but can be sustained only on a showing that the statutory provisions for acquiring jurisdiction were followed with exactness.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 129.]

4. JUDGMENT—COLLATERAL ATTACK—PROCESS—AFFIDAVIT FOR PUBLICATION.
On collateral attack, on a judgment rendered on service by publication, the affidavit for the order of publication will be understood to speak the truth, and it will not be presumed that there was other evidence respecting the fact, or that it was otherwise than as averred.

5. SAME—EXTRINSIC EVIDENCE.
Where a foreclosure decree was based on service by publication authorized by an order granted on an affidavit, the affidavit is the only record that can be considered on a collateral attack on such decree for the purpose of ascertaining whether the facts authorized the order of publication.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 940.]

6. PROCESS—AFFIDAVIT FOR PUBLICATION—DILIGENCE.
Where the affidavit for publication of a summons as to certain nonresident defendants alleged that affiant had inquired of one of the executors of the will of the decedent through whom the property in question passed to such defendants as to their whereabouts, and was told that they were then in a particular orphan asylum in San Francisco under the charge of the executor giving the information, the affidavit sufficiently showed diligence on the part of the affiant.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 102, 118.]

7. SAME—NONRESIDENTS.
An affidavit for publication of a summons as against a nonresident minor declared that a summons had been delivered to the sheriff of the county for service and had been returned "Not Found," after diligent inquiry, etc. The affidavit then recited that inquiry from the executor of the estate from which the defendant's interest in the property in controversy was acquired, had disclosed that the defendant, who was a minor, was in charge of the executor and residing in a private orphan asylum in California, and that "therefore" a summons could not be handed to the defendant within the state. *Held*, that such allegations without a copy of the return of the sheriff on the summons sought to be served constituted prima facie evidence of the defendant's absence from the state.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 118.]

8. SAME—NONRESIDENTS.

The affidavit also sufficiently showed that defendant was prima facie a nonresident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 118.]

9. INFANTS—PROCESS—SERVICE ON MINORS—PUBLICATION.

B. & C. Comp. Or. § 55, provides for the service of summons on a minor under 14 years of age, by delivering a copy to such minor personally, and also to his father, mother, or guardian, or if there be none within the state, then to any person having the care or control of the minor, or with whom he resides or in whose service he is employed. *Held*, that such section did not apply to service on nonresident minors without the state, which could be had by publication as authorized by section 56.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 261, 265.]

10. SAME—MAILING COPY.

B. & C. Comp. Or. § 57, directs that a copy of the summons and complaint be mailed to the nonresident defendant, when his place of residence is known. *Held*, that though such section applied both to nonresident adults and minors, it did not require the mailing of a copy of the summons and complaint to the person with whom a nonresident minor defendant resided.

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

For opinion below, see 144 Fed. 266.

This is a bill in equity brought by M. Cohen by his next friend Henry Mauser, to redeem lots 5 and 6 in block 83 in the city of Portland, from a mortgage executed by Nathan Cohen and wife, father and mother of M. Cohen, on March 22, 1888, in favor of Joseph Hume. The original mortgage was to secure the payment of the sum of $4,000 which Nathan Cohen borrowed from Hume. Nathan Cohen died in September, 1891, leaving a widow and children. By the terms of the father's will the children were vested with an equitable title to an undivided interest in the above-described property. The provisions of the will designated trustees of the estate for the use and benefit of the children. By indorsement and transfer the mortgage passed into the hands of Henry J. Biddle, who brought suit in the state court for its foreclosure March 20, 1897. This plaintiff, M. Cohen, was made a party defendant in the foreclosure proceedings. At the time he was a minor under the age of 14 years, and service of summons by publication was attempted to be made upon him. Subsequently a guardian ad litem was appointed for defendant minor; default was taken against him, and on February 9, 1898, a decree was entered in the Circuit Court of the state of Oregon for Multnomah county, foreclosing the mortgage and directing the sale of the property. The property was sold pursuant to the foreclosure proceedings, and was bid in by one P. H. Blyth for $10,000. Thereafter, through conveyances it passed to the defendants Howes, Upson, and McDevitt, trustees for the defendant Portland Lodge No. 142, Benevolent Protective Order of Elks. The defendant Portland Trust Company of Oregon advanced money on a mortgage executed by the defendant Portland lodge and is therefore made a party defendant.

Appellant by answer relied upon the ground that the service had by publication against the minor was void and of no effect, and that he has never been divested of his undivided interest in the property. Testimony was taken which went to prove that at the time the foreclosure suit was brought in the state court appellant here (defendant in the foreclosure proceeding) was an inmate of the Pacific Hebrew Orphan Asylum in San Francisco. The boy was in the immediate custody of Henry Mauser in the asylum. There was some testimony taken as to the value of the property at the time of the mortgage foreclosure and sale. There was also testimony to show that no papers were ever received by Mr. Mauser as and for service upon the minor complainant, and this is one of the grounds upon which appellants attack the sufficiency

of the service in the foreclosure proceeding. There was also evidence, tending to show that the minor complainant did not know about the service of the summons upon which the defendants here now rely until December, 1904. At that time appellant received a communication from the Lodge of Elks at Portland transmitting a quitclaim deed, and offering him $250 for it. He then sought advice as to his rights and in March, 1905, instituted this suit. The Circuit Court held that upon the record of the action in foreclosure the service of the summons in the case of Biddle against the defendant therein, complainant herein, was valid, and that it was not necessary that a copy of the complaint and summons should have been mailed to Mr. Henry Mauser at San Francisco, the person with whom this complainant resided at the time of the foreclosure proceedings. The complainant's bill was dismissed, and from a decree of dismissal appeal was thereafter taken to this court.

Zera Snow and Wallace McCamant, for appellant.

Bernstein & Cohen and H. H. Northup, for appellees.

Before ROSS, Circuit Judge, and De HAVEN, and HUNT, District Judges.

HUNT, District Judge (after stating the facts). It is unnecessary to discuss at length the analytical distinctions sometimes drawn between what are called collateral and direct attacks upon judgments; for here the attempt to impeach the judgment rendered in the state court, being in an action other than that wherein the judgment was rendered, we can safely regard the proceeding as embraced within those attacks denominated collateral rather than direct. It is perfectly clear to us that the appellant cannot rely upon mere imperfection of statements, or even uncertainty of statement of jurisdictional facts in the affidavit for the order for the publication of summons obtained in the foreclosure suit. Nor can he admit that there was some evidence of the essential facts contained in the affidavit, yet contend that such evidence was not sufficient for the court to have acted upon. He must stand or fall upon the ground, not of irregularity or error, but that there was no evidence in the affidavit for an order of publication filed in the state court upon the points of residence and absence from the state of Oregon.

It is a fundamental principle that where jurisdiction is acquired against the person by the service of process, or by a voluntary appearance, a court of general jurisdiction will determine the matter in controversy between the parties. There is, however, a well-known exception to the application of this principle; that is, in cases where there is a special jurisdiction authorized by statute, though exercised by a court of general jurisdiction. And among the exceptional instances are methods of acquiring jurisdiction over persons not within a state. As to such methods the way as precisely pointed out by the statute must be followed. There can be no procedure except in cases authorized by the statute, and the statutory provisions for acquiring jurisdiction must be followed with exactness. In Boswell's Lessee v. Otis, 9 How. 336, 13 L. Ed. 164, the Supreme Court, through Justice McLean, said:

"When the record of a judgment is brought before the court, collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. * * * It may be difficult in some cases to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous. And in such cases every intendment should be favorable to a purchaser at a judicial sale. But the rights of all parties

must be regarded. No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding in rem, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of the law prescribed by the Legislature for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill. If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void."

Presumptions in favor of jurisdiction are lacking in a case where service of summons by publication is had. In discussing presumptions where special powers are conferred upon courts—and the power to order service of process upon a nonresident outside of the limits of the state is a proceeding had under special statutory authority—the Supreme Court in Galpin v. Page, 85 U. S. 350, 371, 21 L. Ed. 959, said:

"But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

Where the affidavit required by the statute for an order of publication of a summons states the evidence or makes an allegation concerning a jurisdictional fact, it will be understood to speak the truth on that point and it will not be presumed that there was other evidence respecting the fact or that the fact was otherwise than as averred. Galpin v. Page, supra. In the present case therefore, the record to which we must resort, and the only record to which we can resort, is the affidavit upon which the order of publication is expressly based. It is therein that the facts essential to the exercise of special jurisdiction must appear. We are limited to this one record because the order of publication in the foreclosure suit is based wholly upon the affidavit of one of counsel for the plaintiff, the court in the order of publication stating as follows:

"Upon reading and filing the affidavit of Warren E. Thomas, one of the attorneys for plaintiff in the above-entitled suit, and it satisfactorily appearing therefrom to me," etc.

We proceed, therefore, to ascertain what the affidavit must contain, and then whether upon its face it shows a want of jurisdiction in the court that rendered the decree. The statute requires that both nonresidence and absence must exist and both must appear to the satisfaction of the court to exist before the court can grant an order that service shall be made by publication; and there must always be a showing by affidavit that due diligence has been used to find the defendant within the state. So we have three matters material to the ultimate point involved in our inquiry, each of which must have been made to appear to the state court before the order could have been proper. First, it must have appeared that diligence had been used to find the defendant

in the state; second, it must have appeared that defendant could not be found within the state after a diligent search; and, third, it must have appeared that defendant was not a resident of the state when the order was applied for. The purpose of the statute, requiring a diligent search as a prerequisite to the consideration of the matter of absence and nonresidence, is obviously to allow no departure from the ordinary methods of service upon the person by delivery of process as prescribed, unless absence and nonresidence make a substitute service permissible.

Now, let us look at the affidavit under consideration and examine its allegations, and see whether there is in it some evidence showing or tending to show that the minor defendant named in the affidavit, complainant herein, was not within the state of Oregon and did not reside within that state when the application for an order of publication was made. It reads as follows:

"* * * That said summons issued as aforesaid was delivered to the sheriff of Multnomah county, state of Oregon, with directions to said sheriff to serve the same upon the defendants, and each of them, and said sheriff has returned said summons to the clerk of this court with his return indorsed thereon, to the effect that said defendants Aaron M. Cohen, Moses M. Cohen, and Emanuel Meyer, cannot after due diligence be found within this state, although diligent search and inquiry for the purpose of finding them have been made. That this affiant has made diligent search and inquiry for the purpose of finding the last-named defendants, and each of them, as follows: I have inquired of the defendant M. C. Lyon, who is one of the executors of the last will and testament of Nathan Cohen, deceased, the father of said defendants, Aaron M. Cohen and Moses M. Cohen, and he informs me that neither of said minors is at this time within the state of Oregon, and that both of them are at the present time residents of, and now are at, the Pacific Hebrew Orphan Asylum & Home Society, at No. 600 Devisadero, corner Hayes street, in the city of San Francisco, state of California, and that that is their present post office address; that the said M. C. Lyon informs me that he knows personally that said minors are at said place, as he placed them at said institution, which said institution is a school; and that he is in constant communication with the authorities there, and that he has charge of their schooling and education. * * * That this affiant therefore says that personal service of said summons cannot be made on said defendants Aaron M. Cohen, Moses M. Cohen, and Emanuel Meyer, and prays for an order that service of the same may be made by publication thereof, as is by law provided."

Undoubtedly the probative facts upon which the ultimate facts rest must be sufficiently set forth in the affidavit to enable the court or judge to base a conclusion upon that the ultimate facts alleged are proven. In this respect the affidavit, while not really a pleading, may be tested by familiar rules which are applied to pleadings. As we have seen, being the foundation upon which jurisdiction rests, it must be laid upon a showing strong enough to sustain the power of the court to make an order. Resuming, now, the examination of the affidavit, we can easily dismiss any suggestion of imperfection by way of a lack of showing of due diligence by affiant. Inquiry of one of the executors of the will of the deceased Cohen, as to the whereabouts of the minor child, and having been told by such person that he was then residing at a particular orphan asylum in San Francisco and that his schooling was under the charge of the executor giving such information, certainly constituted an ample showing of diligence to ascertain the whereabouts of the minor.

Indeed, we do not understand that appellant urges a lack of a showing of due diligence.

Let us move on then to the point that there is no evidence of absence from the state and of nonresidence. The affiant declares that a summons had been delivered to the sheriff to serve the same upon the defendant named therein, and that it had been returned indorsed, in effect, "not found," although diligent search and inquiry for the purpose of finding him had been made. This is affiant's statement of the substance of the record in the case; yet it is fairly entitled to be accepted as an accurate résumé of what the record shows, made by an attorney of the court. This statement is evidence, though subject to the criticism that it is not of as good quality or grade of evidence as the record itself would have been had copy thereof been incorporated as part of the affidavit. But it was not necessarily inadmissible solely on that account, and the court was justified in attaching to the declaration of the affiant such importance and weight as it would have given to the record return by the sheriff. When weighed by the court the official statement by the sheriff touching the things he was required by law to do by way of serving the defendant in the mortgage foreclosure suit with process, was at least prima facie evidence of the defendant's absence from that county in the state wherein the sheriff exercised official authority. Furthermore, the absence of the defendant from the state was made to appear by the information given to affiant by the executor. This information in itself was definite and positive; and, if it was a proper evidential basis upon which the affiant could legally and in good faith conclude that defendant was not in the state, then his sworn conclusion, that because of such information personal service was not to be had, was proper.

Appellant urges, however, that the averments of absence by affiant are mere opinions and hearsay, in that they are but evidence of the immaterial fact of what the executor told the affiant, and that there is no evidence of the truth of the executor's statement. But suppose a person cannot be found within a state after the exercise of ordinary and honest diligence to learn of his whereabouts. Suppose he is not at his usual abiding place, nor is he seen upon the streets of the city where he lives, nor is he doing business where he is ordinarily accustomed to. What is so natural in looking for him as to inquire of his relatives concerning his whereabouts; or if he be a minor to inquire of the one who has care of his person, his education or his property, or both? And if one makes such diligent search to find, and swears positively to its having been made, is he not in a position to accept and rely upon the information he has obtained by adopting a conclusion, necessarily a belief, that the person looked for is in fact absent from the state? We think he is, and that when he gives the source of his information, and then declares that because of the information a summons, or paper cannot be handed to the person sought within the state, he adopts the information, and, by adopting it, makes an averment of his own that the person is absent from the state. Or it may be put in another way: When the allegation of the affidavit positively shows due diligence to find, and states specific information given as to the absence of the person sought, then the affiant who states the information and follows the statement of it by the declaration that "therefore, personal service can-

not be made," makes his conclusion his own belief, properly resting it upon circumstances which he may reasonably use in support of the deduction positively made, which deduction is in effect nothing more nor less than that the defendant is absent from the state. It is true that the statement that "therefore * * * personal service * * * cannot be made," is a conclusion, and that an affidavit couched only in the words of the statute is not sufficient; but if there is a showing of facts constituting due diligence, positively made, as in this case, and if there is a positive statement of information received from others in a position to know of the presence or absence of the defendant, as there is here, the information received from such others is competent to show absence, and if adopted by the affiant, as it is here by using the words "therefore" etc., it is an oath as to the facts stated and it goes to prove absence in a legal way; and, therefore, as a part of the affidavit, is to be weighed by the court in passing upon an application for an order of publication. The argument is made by appellant that if the conversation with the executor took place as stated in the attorney's affidavit, then, even though appellant may have been known to be in Oregon, affiant was not guilty of perjury. We agree that behind each of the material probative facts there should stand the affidavit of some one who can be subjected to the pains and penalties of perjury if his affidavit is criminally false, but we disagree with the view that perjury might not be committed. Let us apply the test of a possible charge of perjury. If affiant willfully and corruptly swore that he received the information stated when in truth he had not, and willfully swore that because of the information personal service could not be had, we think he corruptly stated as an ultimate fact that which he could swear to based upon information received, and that, if he knowingly falsely stated the ultimate fact, he would be criminally liable in perjury. So when the several parts of the affidavit are considered we should include the ultimate fact which is in itself positively made, that personal service was not to be had because of the antecedent facts; and when we do so regard it, our opinion is that as a whole it contained a sufficient showing for the court to have acted upon.

We pass to the last phase of this branch of the case, namely the nonresidence of the defendant who is appellant here. The reasoning which has guided us to a belief that the affidavit contained some evidence of absence from the state is appropriate upon the point of nonresidence. Residence may be testified to upon information or belief. We know that in the daily practice of courts, witnesses swear positively to the nonresidence of people, and that their statements so made rest upon information and belief, yet such testimony is of practical necessity received as fit and sufficient proof. If the positive statement of nonresidence has been corruptly and falsely made, the witness who has so made it is liable to the pains and penalties of perjury, notwithstanding the fact that it was made on information and belief. In the affidavit under consideration there is the information of the nonresidence of the appellant, given to affiant by the executor. Affiant swore positively that because of this information personal service could not be made and asked for service by publication. His conclusion, when expressly based upon facts or information just theretofore stated,

must be considered with such information, and, as the conclusion or ultimate fact was legally inferable, we find that both probative facts and legitimate inferences of nonresidence appeared in the affidavit submitted to the court.

In considering pleadings demurred to for failure to state cause of action, it is often difficult to discriminate between conditions of partial and of total failure. Absolute deficiency must exist, however, in the affidavit examined here to warrant the court in ruling that the judgment of the State Court was a nullity. And we do not find an absolute deficiency. The affidavit is far more complete than that made by the affiant in the case of Neff v. Pennoyer, 3 Sawy. 274, Fed. Cas. No. 10,083; yet upon appeal the Supreme Court (95 U. S. 721, 24 L. Ed. 565), discussing the statute under which the court made its order, said:

"There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that, inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. * * * If, therefore, we were confined to the rulings of the court below upon the defects in the affidavit mentioned, we should be unable to uphold its decision."

And again, in Marx v. Ebner, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. Ed. 547, the Supreme Court, in considering an affidavit for an order of publication, held that it was proper to consider the return of the officer who was directed to serve the summons together with the other facts proved in the affidavit. The court also there held that there was some presumption that the public officer who received the process did his duty, and made diligent search for the defendant, and that it was not to be expected that positive proof that the defendant could not be found within the state or district would always be attainable. "Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a nonresident of the state, and there is an affidavit that personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case."

Appellant also contends that service upon the minor defendant under 14 years of age in the foreclosure suit could only have been had under section 55 of the Oregon B. & C. Comp., which reads as follows:

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint, prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows:

* * * * * * * * * * *

"(3) If against a minor, under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed."

The record shows that the mother of the minor was within Multnomah county, Or., when the summons was placed in the hands of the sheriff, but fails to show that any papers were served upon her as a service upon the minor; nor does it appear that any papers were sent

or delivered to Henry Mauser the adult with whom the minor was living in San Francisco at the time of the foreclosure suit. The Oregon statutes providing for the commencement of actions are divided into two principal sections—one, 55, which provides for personal service, the other, 56, which covers instances where personal service cannot be had. Each statute seems to be complete in defining how and upon whom service shall be had, and one is not to be read into the other. Section 55 enumerates how personal service is to be made upon minors, but we think it is confined to minors within the state, to minors who can be personally served by delivery of copy of the summons and complaint. Section 56 applies in all cases where service of the summons cannot be made, as prescribed by section 55. Section 56 is the only method laid down for service by publication, and its language is comprehensive enough to include defendants, adults, and minors, not within reach of personal service. Indeed unless section 56 provides for service by publication upon minors, then they cannot be served except by personal service. But as there are no words of exclusion or exception in section 56, we believe the accurate view is that minors can be served by publication, as by that section is provided. Again, section 57 of the Oregon Code directs that a copy of the summons and complaint be mailed to the nonresident defendant when his place of residence is known. This applies to all defendants within the purview of the statute, adults, and minors, who are nonresidents.

Appellant urges that the reason for the law requiring personal service of a copy of the complaint and summons applies as well to minors without the state as to minors within the state, and that the underlying purpose of the statute is to require notification by delivery to an adult most likely to guard the interests of the minor. This argument is not without force, but it cannot prevail as against the written law which puts the nonresident minor on the same footing with the nonresident adult. Nor is it unreasonable to believe that in enacting this legislation it was thought by the Legislature that mail for a nonresident minor, particularly if of tender years, would in all probability be received by an adult having the care of the person of the minor, and who would promptly inquire into the matter. But, however that may be, we are unable to conclude that it was necessary to mail a copy of the complaint and summons to the person with whom the minor resided in San Francisco.

Finding no error in the action of the Circuit Court, the decree is affirmed.

UNION PAC. R. CO. v. THOMAS.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1907.)

No. 2,469.

1. WITNESSES—COMPETENCY—PRIVILEGED COMMUNICATION—PHYSICIANS.

Information which is proper and necessary to enable the physicians of a railroad company to treat an injured person, which is acquired by them from such person for that purpose while they are endeavoring to treat

her professionally, although against her protest, is a privileged communication, under section 5907, Comp. St. Neb. 1901.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 768–772.]

2. SAME—ESSENTIALS—EMPLOYMENT BY THIRD PERSON.

The essentials of a privileged communication between physician and patient are: (1) The confidential relation of physician and patient; (2) the necessity and propriety of the information to enable the physician to treat the patient skillfully in his professional capacity; and (3) its acquisition by the physician from the patient during the existence of the relation.

Such a communication is not deprived of its privileged character by the fact that the relation is established at the instance of a third party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 768–772.]

3. SAME—WAIVER—VOLUNTARY TESTIMONY.

A patient waives his privilege by voluntarily producing, or introducing at the trial, evidence of the confidential communication, and thereby exempts the testimony of his physician thereto from all objections upon that ground, because he thereby publishes it and deprives it of its confidential character.

But neither the commencement of an action for an injury nor testimony of the condition of the injured party has this effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 781, 782.]

4. TRIAL—CORRECTION OF ERRORS.

Errors in rulings and misstatements of facts by the court during the progress of the trial, which are clearly corrected by it before the trial closes, or in the charge of the court to the jury, are not generally fatal to the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 968–973.]

5. SAME—CONDUCT—REMARKS OF JUDGE.

The opinion of the trial court expressed to the jury upon matters of fact which are ultimately submitted to them for their decision is not reviewable error in a national court, so long as no rule of law is incorrectly stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 80–84.]

6. TRIAL—INSTRUCTIONS—EXCEPTIONS—INSTRUCTIONS GOOD IN PART.

A general exception, which specifies no ground to a charge or a portion of a charge to a jury, which embodies several propositions of law, is futile if any of the propositions are sound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 694.]

(Syllabus by the Court.)

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

Edson Rich (John N. Baldwin, on the brief), for plaintiff in error.
Francis A. Brogan, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff below was injured by the collision of a car of the Union Pacific Railroad Company, in which she was a passenger, with an engine upon another track, and she was taken to the surgeon's room in the Union Station at Omaha, where two of the physicians of the company attended her. She brought this action for damages caused by her injury. The court refused, upon the ob-

jection of the plaintiff, to permit the medical men to testify to the examinations of the plaintiff which they made, to their conversations with her, and to the treatment which they gave her at the station, upon the ground that these were confidential communications under section 5907 of the Compiled Statutes of Nebraska of 1901, which reads in this way:

"No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

There was evidence that the physicians went to the station on behalf of the company to render professional services to any who had been injured by this collision who were in need of such services, that the questions which they asked, the examinations which they made, and the information which the plaintiff gave to them were proper and necessary to enable them to treat her as physicians in a skillful way, and that they were made and given for this purpose; but that the plaintiff refused to permit any extended examination of her person in the station, and when one of the physicians gave her a sedative she refused to take it, and demanded that she be removed to her home.

The essential elements of a privileged or a confidential communication to a physician under the Nebraska statute are: (1) The relation of physician and patient; (2) information acquired during this relation; and (3) the necessity and propriety of the information to enable the physician to treat the patient skillfully in his professional capacity. These attributes characterize the communications which the defendant sought to prove by the physicians, and they were not deprived of their privileged character by the fact that the relation of physician and patient was established at the request of the defendant and against the protest of the plaintiff. Confidential communications by a patient to a physician are not less privileged because the relation is established at the request of a third person. The physicians who testified in this case attended the plaintiff for the purpose of treating her in their professional capacity, in the discharge of their duty to the company which employed them. All the information which they acquired from her was necessary or proper to enable them to do so. This information was obtained during the existence of the relation of physician and patient, which they themselves established and by virtue of that relation alone, and it was rightfully excluded under the statute of Nebraska. Raymond v. Ry. Co., 65 Iowa, 152, 21 N. W. 495; Keist v. C. G. W. Ry. Co., 110 Iowa, 32, 81 N. W. 181; Renihan v. Dennin, 103 N. Y. 573, 579, 9 N. E. 320, 57 Am. Rep. 770; Griffiths v. Metropolitan St. Ry. Co., 63 N. E. 808, 171 N. Y. 106; Colorado Fuel & Iron Co. v. Cummings, 46 Pac. 875, 8 Colo. App. 541.

One of the questions and one of the answers excluded read in this way:

"Q. You may state what Mrs. Thomas said to you. A. She said she had been injured in the wreck by being struck on the back of the neck."

Counsel contend that, if the entire communications were incompetent, yet this question and answer were not privileged, because it was not necessary for the physician to obtain the information they contain in order to enable him to skillfully treat the plaintiff. But before this answer was given the physician had testified that he went to the station for the purpose of administering to Mrs. Thomas, or any other passenger injured by the collision, in such a way as her condition might require; that he commenced to engage Mrs. Thomas in conversation for the purpose of ascertaining her condition and to administer remedies. The physician, therefore, was of the opinion that the information obtained by the answer to this question was reasonable to enable him to ascertain the condition of his patient and to administer proper remedies to her. It was in the light of this testimony that the answer was excluded, and, in view of the probability that it was necessary and proper for the physician to learn in what part of her person the plaintiff had been injured in order to properly treat her, no sound reason occurs to us why the information which this answer conveyed was not privileged. In support of the opposite view, counsel cite two cases, in which information acquired by a physician from his patient relative to the way in which the accident happened, as that the injured person fell through a trapdoor, has been held admissible. Harriman v. Stowe, 57 Mo. 93; Greene v. Metropolitan St. Ry. Co., 63 N. E. 958, 171 N. Y. 201, 89 Am. St. Rep. 807. But these are not controlling authorities, because the questions they present are not analogous to that in hand. It may be unnecessary for a physician to learn by what force an injury was inflicted upon the patient, while it may be indispensable for him to know upon what portion of his person this force was imposed in order to treat him skillfully. The question and answer were a part of a communication between the physician and his patient which consisted of the statement in the answer, of other conversation and of a limited examination. They were all of a privileged character and properly excluded.

Another position of counsel for the company is that the plaintiff waived her privilege because she testified to the communication, and thereby rendered the evidence of the physicians competent. Testimony voluntarily produced on behalf of a patient or a client of communications between him and his physician or his attorney undoubtedly waives his privilege and exempts the evidence of the physician or attorney relative to the communication from all objection on the ground that it is confidential or privileged, because the patient or client has thereby made it public. Hunt v. Blackburn, 128 U. S. 464, 470, 9 Sup. Ct. 125, 32 L. Ed. 488. But the reason for this rule is that the patient or client has deprived the communication of its confidential character by voluntarily causing it to be recited in public. Testimony that is not voluntarily given and evidence that does not recite the communication works no waiver, because the reason for the rule there ceases, and the rule becomes inapplicable. Burgess v. Sims Drug Co., 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359. Upon her direct examination the plaintiff testified that some one whom she did not know came into the station, wanted to examine her, took hold of her feet and felt them, and put his hand under the back of

her neck, and she told him she did not want him to touch her, but gave no evidence that this person was a physician, or that there was any farther communication between them. There was no other evidence upon this subject in her direct examination, and this constituted no waiver of the privilege, because it did not recite or set forth any of the conversations with her or any of the information relative to her condition or her injury, which the physicians secured by virtue of their professional relation and the defendant sought to introduce by means of them. It is true that on her cross-examination the plaintiff testified that the person who attempted to examine her said he was a Union Pacific doctor, that another person came who said he was not a Union Pacific doctor, and she refused to permit him to make an examination, and he accompanied her to her home. But this testimony was not volunteered, and there was no recital of the information secured by the doctors in it, and consequently no waiver of her privilege.

Counsel have cited in support of their claim of waiver here the argument of Prof. Wigmore, in section 2389 of the third volume of his work on Evidence, that the law ought to be that the commencement of an action on account of a physical ailment or the voluntary testimony of the plaintiff to his physical condition is a waiver of his privilege to prevent his physicians from testifying concerning them. Suffice it to say that the learned author himself concedes, and the statutes of the states and the unvarying current of authority demonstrate, that the settled law of the land is otherwise. Williams v. Johnson, 112 Ind. 273, 13 N. E. 872; McConnell v. Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778; Green v. Nebagamain, 113 Wis. 508, 89 N. W. 520, 521. The only other authority brought forward to sustain the waiver is Sovereign Camp of Woodmen of the World v. Grandon, 64 Neb. 39, 89 N. W. 448, a case in which the introduction by the plaintiff of a written statement by the physician of the condition of the patient was held to be a waiver of the privilege to object to his testimony to that condition, a proposition which is conceded, but which has no application to the facts of this case.

Two physicians went to the hospital and examined the plaintiff, and one of them testified that he came to the conclusion that she was suffering from traumatic hysteria. The other physician had testified in the case and was in court, but no foundation had been laid to impeach him. Counsel complain because the first doctor was not permitted to testify that the second concurred with him in his conclusion. The ruling was right. The proposed evidence was nothing but hearsay.

There was evidence at the trial that the plaintiff was suffering from traumatic ulcers of the stomach, which might not be relieved by medical treatment, and the defendant offered the evidence of experts that this disease might and probably would be relieved by a surgical operation, which consisted of making a new opening in the lower part of the stomach and in the bowel below it and securing the latter to the former, so that the contents of the former might pass through this opening and through the latter. Objections were interposed to this evidence, and a colloquy arose between counsel for the railroad company and the court relative to its admissibility, in which the court ex-

pressed the opinion and ruled that it was immaterial. In the course of the colloquy, the court said, among other things:

"I think, where a person is injured by the wrongful act of another, the law only says to them you must exercise proper care in the selection of a reputable physician, and when you do that you must be governed by his advice, follow his advice and prescriptions, and it is no defense to say that had the physician followed some other course, prescribed some other remedies, results would have been different. That is no defense. The layman that is injured is not a physician; and all he has to do is to exercise proper care in selecting a reputable one and follow his directions; and, if the directions are not proper, it is the fault of the one who caused the layman to act. If that is true up to this time, why is it not true as to the future? You come in with one person on the stand who says: 'If you will take so many bottles of Peruna, that will cure you.' Another one says: 'If you will submit to a surgical operation, that will cure you.' And another one says: 'Some Pink Pills, or something of that kind, will cure you.' Has a person got to jump around and try all those different experiments that might be suggested by the other side, or may they not rely upon the advice and direction of the competent physician whom they have selected themselves, and in whom they have every confidence?"

Later in the trial all objections to this evidence were withdrawn, it was received, the court charged the jury that testimony had been introduced to show that plaintiff's future health could be restored by the surgical operation, and that, if her health could be thus restored, it was proper and competent for them to take into consideration the reasonable probability of such restoration in measuring her damages from future suffering and expense, and whether or not, considering both the rights of the plaintiff and the defendant, she should be required to submit to such an operation in view of the danger to life therefrom which had been disclosed by the evidence. No complaint is made of the charge upon this subject because it is in accord with the theory of the defendant. Nor was there any reversible error in the ruling of the court that the evidence was inadmissible, because this, if it existed, was extracted by the subsequent admission of the testimony and the favorable charge of the court. But counsel insist that the remarks of the court during the discussion of the admissibility of this evidence, especially those which placed the surgical operation in the same category with Peruna and Pink Pills, so belittled this branch of their defense that they were deprived of a fair and impartial trial. But the record does not appear to us to sustain this contention. These remarks were made upon an objection which was rightly sustained to this irrelevant question: "What surgical operations, doctor, are performed in cases of this character?" They were made, it is true, in a discussion of the general admissibility of evidence that the plaintiff's disease might be cured by a surgical operation; but they were made before that evidence had been introduced and for the legitimate purpose of informing counsel who proposed it of the reasons why it appeared to the court that it was incompetent, to the end that if possible they might overcome these reasons by more cogent ones in support of its admissibility, a task which they seem to have performed to the terror, if not to the satisfaction, of opposing counsel. Though these remarks were heard by the jury, they were not addressed to them, but to the counsel for the company. They were not intended to, and did not, instruct the jury of the weight

and effect of the testimony relative to the surgical operation which was actuallly introduced, because that evidence had not been developed. The charge of the court at the close of the trial upon this subject was their instruction and guide, and counsel concede that there was no mistake or error in that. There is a locus penitentiæ for court as well as for counsel in the trial of a lawsuit. If, in the admission or rejection of evidence, or in the discussion of questions of law or the effect of facts in the course of the trial, it falls into errors or mistakes which it discovers before the case is submitted to the jury, it may generally reverse its rulings, correct its errors, and so charge the jury that no injury will result to the parties, and that the jury will deliberate and decide according to the law and the evidence. A careful examination of the record has convinced that the court below perfectly accomplished this result in this case. The jury were not, they could not have been, misled. They knew that the remarks of the judge in the colloquy with counsel were not for their guidance, and that his charge to them at the close of the trial was, and they undoubtedly followed the latter. Besides, there was no error of law in the ruling at the close of the colloquy, and the only mistake was in the comment of the court upon the issues of fact, all of which were subsequently submitted to the jury under proper instructions, and the opinion of the trial court upon matters of fact which are ultimately properly submitted to the jury for their decision is not reviewable error in the national courts so long as no rule of law is incorrectly stated. Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co., 52 C. C. A. 95, 104, 114 Fed. 133, 142; Lovejoy v. U. S., 128 U. S. 171, 173, 9 Sup. Ct. 57, 32 L. Ed. 389; Rucker v. Wheeler, 127 U. S. 85, 93, 8 Sup. Ct. 1142, 32 L. Ed. 102; Railroad Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; Railroad Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161; U. S. v. Philadelphia & R. Co., 123 U. S. 113, 114, 8 Sup. Ct. 77, 31 L. Ed. 138.

Certain portions of the charge which relate exclusively to the facts of the case have been assigned as error, because the court failed to state the claim and evidence of the defendant to the effect that the plaintiff was not thrown from her seat in the car as she testified, and because the court declared that there was no material controversy as to the manner of the accident. There was no error here (1) because these portions of the instructions treated of issues of fact which were ultimately submitted to the jury for their decision, (2) because in another part of the charge the court stated that the defendant claimed that the plaintiff was neither thrown from her seat in the car nor across the car, and did not sustain the injuries she claims, and (3) because the manner of the accident was the collision of the engine with the car in which the plaintiff was riding, and about this there was no controversy.

The court instructed the jury that in assessing the damages which the plaintiff had sustained they might consider her age, the probable duration of her life, and the effect of her injury upon her ability to earn money; that, if they found that her injury was caused by the accident, and that it would destroy or decrease her ability to earn money in the future, they should award her such sum as would, in

their judgment, compensate her for the decreased or destroyed ability to earn money in the future, due allowance being made for the uncertainties and contingencies which inhere in such matters; that they should allow her (1) the amount she had incurred for medical attendance and nurse hire, (2) such amount as would reasonably compensate her for the pain and suffering she had sustained, (3) the amount she had lost on account of her inability to labor caused by the accident, (4) future nurse hire and medical attendance and compensation for future suffering. A single exception, which did not specify any reason for its being, was taken to this portion of the charge, and counsel now insist that it was erroneous, because it left the jury to assess the plaintiff's compensation for future loss of earning power by a multiplication of her daily earning capacity by the working days in her expectancy of life; but no such rule was declared or suggested by the instruction, no request was made for a rule more definite than that given by the court, and no exception was taken which subjects any part of the instruction upon the measure of damages to review. There are many declarations of law in this part of the charge which are not only correct, but unquestioned, and a general exception which specifies no ground to a charge or a portion of a charge which contains many propositions of law is futile if any of the propositions it declares are sound, because it gives no notice to the trial court of the ground upon which the exception is based, and hence no opportunity to correct an inadvertent error in its statement of the law. Price v. Pankhurst, 53 Fed. 312, 3 C. C. A. 551; Lincoln v. Claflin, 7 Wall. (U. S.) 132, 19 L. Ed. 106; Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382.

The alleged errors in the trial of this case which were assigned by the railroad company did not exist, and the judgment below must be affirmed.

It is so ordered.

KURTZ v. BROWN.

(Circuit Court of Appeals, Third Circuit. February 4, 1906.)

No. 24.

DISCOVERY—BILL OF DISCOVERY—DEFENSES.

Where an assessment has been duly ordered by a court on the shares of stock of an insolvent corporation which were not fully paid up, the receiver for the corporation, having a right of action at law against an owner of such shares to recover the assessment thereon, may maintain a bill of discovery against a broker who bought such shares for an undisclosed principal, and at the latter's instance had them transferred into the name of an irresponsible person for the purpose of concealing the real ownership, to compel him to disclose such ownership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 9.]

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

See 134 Fed. 663.

R. M. Schick, for appellant.
Reynolds D. Brown, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal from the Circuit Court for the Eastern District of Pennsylvania. In that court, Brown, the receiver of the American Alkali Company, filed a bill against Kurtz and Magee, to discover the names of the owners of certain stocks registered by Kurtz in the name of Magee, and against which persons complainant proposed to bring suits at law to recover unpaid assessments thereon. To this bill Kurtz demurred. This demurrer was overruled, and the case heard on bill and answer. Magee, the other respondent, did not appear or answer. A decree was entered directing respondents to make the discovery prayed for. From such decree Kurtz appealed.

From the bill it appears the American Alkali Company was a manufacturing corporation created by the state of New Jersey. It had 480,000 shares of common stock, full paid, and 120,000 shares preferred stock. Certificates for the preferred stock were issued, "$10 per share being paid on account of the par value of $50 by the original subscribers thereto, and the balance of $40 per share remained unpaid and subject to call." The company becoming insolvent, Brown and one Budd, since deceased, were duly appointed receivers thereof by the Circuit Court for the District of New Jersey and also in ancillary proceedings by the Circuit Court for the Eastern District of Pennsylvania. By order of the first-named court an assessment was levied by the receiver on September 19, 1905, on the holders of the said preferred stock of $2.50 per share, for the purpose of paying the debts of the company and the expenses of the receivership. On said date 3,700 shares of said preferred stock were registered in the name of Magee, one of the respondents. The bill then alleges:

"That said Henry G. Magee is not and never was the real owner of the said 3,500 shares of the preferred stock of said American Alkali Company, or any of them, but that they were purchased by the said W. Wesley Kurtz, trading as W. W. Kurtz & Company, for the purpose of concealing the names of the real owners thereof. That W. Wesley Kurtz was, on November 17, 1900, engaged in the business of buying and selling stock in the Philadelphia Stock Exchange, and 3,700 shares of American Alkali Company's preferred stock had been bought by him for clients of his, and it was for their benefit that with the consent of the said Magee he directed the agents of the American Alkali Company to issue the new certificates on November 17, 1900, in the name of said Magee. That your orator is advised that the person or persons for whose account the said 3,700 shares were purchased and placed in the name of Henry G. Magee are personally liable for the amount of said assessment."

It is conceded by counsel that unless the ruling of this court in Brown v. McDonald, 133 Fed. 897, 67 C. C. A. 59, 68 L. R. A. 462, is reversed, the decree entered below must be affirmed, and that this appeal was taken that this court might review and overrule that case. In view of the earnest and able contention of counsel, we have considered the questions involved anew; but this examination has deepened our conviction that the decision in Brown v. McDonald, as an

application of equitable principles to the facts of the case, was wholly in accord with well-recognized principles of chancery jurisdiction. It exhibits the capacity of the law, while adhering firmly to precedents of far-removed times, to adapt itself to new conditions. Our reasons for adhering to that decision we will briefly state. And first, let the facts in the case before us be clearly appreciated, for each case of equitable relief is decided, and its pertinence as a precedent thereafter depends, on the particular facts thereof. We note that the question of the final liability of the persons against whom the receiver proposes, after discovery, to bring suit, is not before us, and we express no opinion thereon. But as touching the questions before us we do note the facts that there are unpaid assessments duly made on the shares in question; that the persons of whose names discovery is sought own such shares; that the receiver has a right of action against them for such assessments; that Kurtz was the agent of these concealed purchasers, hired by them to buy such shares; and to conceal their identity they had certificates issued to an irresponsible person to escape liability for assessments. Now that by the purchase and ownership of stock in this company the owner assumed payment of unpaid assessments will not be or at least in this case is not questioned. But the actual owner here seeks by the act of his agent to vest ownership in himself, and at the same time divest the liability incident to such ownership. For one to falsely assume ownership of property not his own in order to obtain money from another is fraudulent. It may well be asked whether the converse thereof, viz., for one falsely to assume nonownership of his own property in order to withhold money from another is any less so. Now this bill is not against a mere stranger who casually discovers the identity or liability of another; but, be it observed, we are dealing, through an admitted agent who has actively forwarded his principal's purpose, with that hidden principal himself, for "qui facit per alium facit per se." Here then, we have a receiver with an unquestioned right against another, and that other subject to an unquestioned liability to the receiver and a court of law by its own process, powerless to enforce the liability. But the law's extremity is equity's opportunity. "Early in the history of our jurisprudence the administration of justice by the ordinary courts appears to have been incomplete, and to supply the defect courts of equity have extended their jurisdiction. * * * The courts of equity also administered to the ends of justice by removing impediments to a fair decision of a question in other courts, * * * and, without pronouncing any judgment on the subject, by compelling a discovery, or procuring evidence, which may enable other courts to give their judgment." Mitford's Pleading and Practice in Equity, p. 101. Now the present case is one, which, in accord with these principles, demands equitable relief to enable a law court to enforce complainant's unquestioned right, and the remedy sought is one which equity favors and invokes for that very purpose. "Bills of discovery," says Snell in his Principles of Equity, p. 485, "are greatly favored in equity, inasmuch as they tend to assist and promote the administration of justice in others, and will be sustained in all cases where some well-founded objection does not exist against the exercises of this jurisdiction."

To the same effect is 2 Story's Equity Jurisprudence, § 1488, where it was said:

"As the object of this jurisdiction in cases of bills of discovery is to assist and promote the administration of public justice in other courts, they are greatly favored in equity, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction. We shall therefore proceed to the consideration of some of the circumstances which may constitute an objection to such bills, leaving the reader silently to draw the conclusion that if none of these nor any of the like nature intervene, the jurisdiction to compel the discovery sought will be strictly enforced."

Now, none of the 12 principal grounds enumerated by Justice Story for resisting a bill for discovery in aid of law preclude relief in this case. True, he states it is ordinarily a good objection to a bill of discovery that it seeks the discovery from a mere witness who has no interest in the suit. Unless, therefore, Kurtz stands in the relation of a mere ordinary witness to the cause there would seem to be no ground for denying complainant relief. That he is a witness and not a party is clear in that no relief, other than mere discovery, is sought against him; but that he has by his conduct so connected himself with the subject-matter of the proposed suit that he is treated as wholly different from a mere witness is equally clear. In Orr v. Diaper, 4 Ch. Div. 92, a bill was brought by the owner of a trade-mark against shipowners who were mere forwarders of goods intended to counterfeit complainant's trade-mark. It was there contended such shipowners were mere witnesses and that complainant had no title to sue them. This contention was not sustained, and it is not without significance, as showing how firmly grounded the right of discovery in aid of a proposed action at law had become in English jurisprudence, that counsel for the bill were not called upon to answer. The court said:

"The plaintiffs state that they seek discovery in aid of other proceedings; and for the defendants it is contended that they cannot mean to take any proceedings against them, as they could do that without having the names of other persons. The plaintiffs, however, want to bring their action against those persons for whom the defendants have shipped goods with counterfeit marks. It has been submitted that the defendants are mere witnesses; but their position, they being actual shippers, is different from that of mere witnesses. I think the plaintiffs do show a title to sue. * * * In this case the plaintiffs do not know and cannot discover who the persons are who have invaded their rights, and who may be said to have abstracted their property. These proceedings have come to a deadlock, and it would be a denial of justice if means could not be found in this court to assist the plaintiffs."

If the relation of a shipowner, a mere forwarder of goods, so connects him with the transaction that he is regarded as other than a witness, there can be no question that Kurtz, the active agent to conceal the identity of the owners of this stock, is not to be regarded as a mere witness.

Great stress is laid, and rightly so, on Tweils v. Costen, 1 Pars. Eq. Cas. (Pa.) 373; but the facts on which that case was decided are so wholly different from the present one that apart from being both bills for simple discovery, they have nothing in common. In that case there was a public sale of land with a requirement of a deposit by an accepted bidder. Costen's bid was accepted, and he paid the required deposit as the approved purchaser. It will be noted he did nothing

to mislead, deceive, or wrong any one; but, on the contrary, by his purchase and by subscribing the agreement of sale, he assumed liability for the unpaid purchase money. His conduct showed good faith and fair dealing on his part. The whole trouble was that he was not financially able to comply with his bid, and thereupon the vendor, whose mistake was in accepting him, sought to discover whether he had not a responsible principal behind him. Here was manifestly a fishing bill of most objectionable character. There was no definite allegation that there was such a principal, and a statement of a right of action against any one made. Manifestly a decision that discovery would not be ordered upon such facts is not controlling on a state of facts where an actual though unknown principal has, by the services of a conceded agent, avoided all responsibility on the part of both, and has created a condition such that the creditors of this company are deprived of unchallenged legal rights against the owner of the stock. In Twells' Case, Costen was guilty of no act of commission or omission which deprived the plaintiff of any right. In the case in hand, there are positive, furtive acts, intended to and, if shielded by a court of equity, effective to deprive another of clear legal rights. Judged on its facts Twells v. Costen is no barrier to the grant of relief in the present case. In Hathcote v. Fleete, 2 Vern. 442, in Morse v. Buckworth, Id. 443, in Moodaly v. Norton, 2 Dick. 652 (where it will be noted the Master of the Rolls said: "In ordinary cases, it is usual in this court to grant discovery, auxiliary to a court of law), in Orr v. Diaper, supra, and in Post v. Toledo, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, as stated in Brown v. McDonald, supra, we heretofore found warrant to support this bill. To these we now add Marsden v. Panshall, 1 Vern. 407. That was a bill by the owner of goods intrusted to a factor for sale to compel a pawnee of them to discover whether they came into his possession from the factor, in order to enable the owner to bring an action against the latter. The bill was sustained, and the pawnee ordered to exhibit the goods, "the meaning of which was, and it was so taken by the court, that the plaintiff should thereby be enabled to bring an action at law." Now in none of those cases except Moodaly v. Norton had the respondent done any act which aided in concealing the identity of the person or in working any wrong to the complainant. In the report of Moodaly v. Norton, 1 Brown's Rep. 412, where, as noted above in 2 Dick. 652, a bill was sustained, it was said:

"But here is a prima facie ground of action; the company (the respondent) has put other persons in the way of doing the plaintiff an injury."

The positive acts of Kurtz, the present respondent, in thwarting complainant in the enforcement of his plain legal right has been noted above and brings this case directly in line with Moodaly v. Norton. He has put the unknown principal in the way of doing complainant injury. To treat an active party in effecting such a result as a party in interest is in line with the principle laid down in 2 Atk. 234, Mitford, 153, that:

"In case of fraud a party to the fraud cannot assert his want of interest in the subject."

While the cases in the Reports are few in number, yet the use of a bill for discovery simply seems well established in English jurisprudence. Hindman v. Taylor, 2 Brown's Rep. 10, was a bill for discovery on which to found a suit at law. The case was heard twice and evidently carefully considered. It is significant that no question was raised of the right to maintain such a bill (as was also the case in Orr v. Diaper, supra); but the effort was to defeat it by a plea of facts which would have also defeated the action at law. The plea was overruled, and the bill sustained, Lord Thurlow saying:

"This is a case where he (the complainant) has no election. He must sue at law. The dry question is this, whether there is any objection, in natural justice, to a defendant giving a discovery in order to found a relief at law."

The opinion in Brown v. McDonald states we are not willing to hold that the federal statutes affording discovery relief have supplanted relief by bill of discovery. While no authorities are there cited there is no lack of them and reference is made to Snell's Principles of Equity, 487; British Empire Shipping Co. v. Sombs, 3 K. & J. 433; Lovell v. Galloway, 17 Beavan, 1; McMullin Lumber Co. v. Strothers, 136 Fed. 301, 69 C. C. A. 433; Kelley v. Boettcher, 85 Fed. 56, 29 C. C. A. 14; Ryder v. Bateman (C. C.) 93 Fed. 31; Indianapolis Gas Co. v. Indianapolis (C. C.) 90 Fed. 196. Manifestly such statutes are remedial and enlarging in their nature. They apply to courts of law and are not intended to affect courts of equity or sheer them of recognized powers. The decision of Brown v. McDonald made possible the enforcement of just liabilities, was supported by precedent, and will not be disturbed by this court.

Judgment affirmed.

UNITED STATES v. WITTEMANN.

(Circuit Court of Appeals, Second Circuit. January 7, 1907.)

No. 258.

1. CUSTOMS DUTIES—FORFEITURE—STATUTE OF LIMITATIONS.

Section 1047, Rev. St. [U. S. Comp. St. 1901, p. 727], which provides a five-year statute of limitations for suits for "any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to customs revenue cases, which are subject to the three-year limitation for similar proceedings "accruing under the customs revenue laws of the United States," which is provided in section 22, Act June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 727].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 319.]

2. SAME—"PECUNIARY PENALTY"—FORFEITURE OF VALUE OF MERCHANDISE.

Section 9, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], provides for forfeiture of the value of undervalued importations; and section 22, Act June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 727], provides a three-year statute of limitations for proceedings for the recovery of "any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States." *Held*, that the former provision is penal in its nature, and is therefore subject to the latter provision.

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

The case, which was submitted without argument, involves the construction of section 22, Act June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 727], providing a three-year statute of limitations for proceedings for the recovery of "any pecuniary penalty or forfeiture of property." The government contended that the forfeiture of the value of undervalued merchandise provided in section 9, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], is not a "pecuniary penalty" or a "forfeiture of property," within the meaning of said section 22. The argument on this point is set forth as follows in the government's brief: "It is respectfully submitted that when section 9 provides that the merchandise or the value thereof, to be recovered from the person making the entry, shall be forfeited, it is providing that the merchandise, if seized, may be proceeded against by an action in rem, but if, on the contrary, the goods have been delivered, that then an action at law may be brought for the damage which the government has sustained by the fact that it cannot recover and sell the goods. This damage, it is submitted, would be equivalent to the home value of the goods themselves. This is not, it is submitted, such 'pecuniary penalty' as is contemplated by section 22. The pecuniary penalty attached to section 9 might seem to be the fine not exceeding $5,000, which is imposed upon conviction for such an offense. Or, again, inasmuch as the goods have been released and cannot be found or recovered, and inasmuch as the government is suing for a sum of money in the form of damages, it is respectfully submitted that such a suit could not be called one the object of which is to work a 'forfeiture of property.' Pecuniary penalties are specific sums of money which in a liquidated amount are set forth as the penalty for a certain act. A fine, the penalty for breaking a game law, the amount collected by a justice of the peace under a police statute, it is submitted, are the ordinary sorts of penalty. The object against which an action in rem may be brought is properly the subject of a 'forfeiture of property.'"

This cause comes here by writ of error to review a judgment of the United States District Court for the Eastern District of New York, dismissing the complaint in an action brought by the government, under the provisions of section 9 of the customs administrative act of June 10, 1890, for forfeiture of the value of goods comprised in 28 separate importations received at the port of New York between November 13, 1900, and June 23, 1902.

Thomas Ives Chatfield, Asst. U. S. Atty., and William J. Youngs, U. S. Atty.

Straley & Hasbrouck (John A. Straley, of counsel), for the importer.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge (after stating the facts). The complaint alleges that the invoices in question were false and fraudulent, in that the statement of the market value of the goods comprised therein was far below the true market value of said goods at the time of exportation in the principal markets of the country from which they were imported, and that said undervaluation was willfully made on the part of the defendant, with the intent to defraud the United States out of a portion of the lawful duty due to it, and that the goods were delivered to the defendant upon the payment of duty based upon said false, fraudulent, and undervalued valuation.

Section 9 of the customs administrative act of 1890 (Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895]) provides for a forfeiture, in such cases, either of the merchandise or of the value

thereof, and for a fine for each offense. The defendant interposed as a defense the statute of limitations of section 22, Act June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 727], which provides as follows:

"That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued: provided, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation."

The single question presented is as to the construction and application of this statute of limitations. Counsel for the government admitted that "all of the causes of action were saved from the effects of a five-year statute of limitations, but that a three-year statute of limitations would have been a defense to all, if valid as to any" and that "more than three years had elapsed before the attorneys for the government in this case received the papers or learned of the action," and "that the property imported * * * was not concealed or absent within the said period of three years," and that the government "does not claim that the defendant, Rudolph A. Wittemann, in this action was either a fugitive or absent from the United States during any of the said period of three years prior to the commencement of this action." The court directed judgment for the defendant, to which the government duly excepted, and the various assignments of error raise the single question whether the three years' statute of limitations was in force and applicable to said cause of action.

Prior to 1874, the following statute of limitations was in force:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."

In the Revision of 1878, the five-year statute was printed as section 1047 of the Revised Statutes [U. S. Comp. St. 1901, p. 727], but the law of 1874 was only referred to as a side note to said section 1047. Counsel for the government, therefore, argues that the commissioner who revised the statutes could not have considered the three-year statute of limitations as an amendment to the five-year statute, but as a specific statute existing for certain purposes during the entire time in which any of the causes of action could have been sued upon. There is no force in this contention, even if it be assumed that both statutes were in force at the time of the importations in question. Section 29 of the customs administrative act, under which this action is brought, provides that:

"Acts of limitation, whether applicable to civil causes and proceedings * * * or for the recovery of penalties or forfeitures, embraced in or modified, changed or repealed by this act, shall not be affected thereby."

Whether or not the five-year statute of limitations may apply to some causes of action not barred by the three-year statute is immaterial herein, because this action is specifically for the recovery of a forfeiture,

under the provision in section 9 of the customs administrative act of 1890, in a case of fraudulent undervaluation of merchandise, "such merchandise or the value thereof to be recovered from the person making the entry, shall be forfeited." And section 22 of the act of 1874 provides, as already shown that:

"No suit or action to recover any * * * forfeiture of property * * * shall be instituted unless such suit or action shall be commenced within three years after the time when such * * * forfeiture shall have accrued."

It is clear that this is a prosecution for a penalty or forfeiture under a federal penal statute having for its primary object the infliction of punishment upon the offender. United States v. Riley (D. C.) 88 Fed. 480, 104 Fed. 275; Davis v. Mills (C. C.) 99 Fed. 39; Waterford v. Elson (C. C. A.) 149 Fed. 91; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. In Helwig v. United States, 188 U. S. 605, 23 Sup. Ct. 427, 47 L. Ed. 614, the Supreme Court of the United States had occasion to consider section 7 of said customs administrative act of 1890, which, inter alia, then provided as follows:

"If the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry," etc.

Mr. Justice Peckham says:

"The sole question is whether the sum imposed by section 7, already quoted, is a penalty? Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated in the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addition to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his undervaluation of the goods imported; and it is without doubt a punishment upon the importer on account of it. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character. If it be said that the provision operates as a warning to importers to be careful and to be honest, it is a warning which is efficacious only by reason of the resulting imposition of the 'further sum,' in addition to the duties, provided for by the statute."

If the requirement in section 7 of the payment of an additional sum, in case of undervaluation, is penal in its nature, a fortiori the provision in section 9 for a forfeiture in case of a fraudulent undervaluation is penal.

The judgment is affirmed.

In re COFFIN (two cases).

(Circuit Court of Appeals, Second Circuit. February 26, 1907.)

Nos. 168, 172.

1. BANKRUPTCY—PROPERTY HELD BY BANKRUPT IN TRUST—ENFORCEMENT OF TRUST.

Where none of the creditors of a bankrupt extended credit to him in reliance on his ownership of property, which, while standing in his name, was in fact held by him in trust for others, his trustee takes no greater interest or right therein than he himself had, and, if the trust was enforceable in equity against him, it is equally so as against his trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 193, 225.]

2. SAME.

The stockholders in a western land company advanced it money pro rata to pay its debts, taking a mortgage therefor on certain of its lands. This mortgage was foreclosed, and a part of the lands were bought in by one of the stockholders, and a part by the trustee in the mortgage, who subsequently conveyed the same without consideration to such stockholder, who undertook to sell the lands and distribute the proceeds. His title having been questioned by purchasers, quitclaim deeds were executed to him by the corporation and the other stockholders, and a decree of court was also procured quieting his title as against them. He continued to make sales from time to time, depositing the cash proceeds with his own funds, but keeping account of the same, and made distributions among the stockholders of such proceeds and notes taken. He at all times by such distributions and by written statements to the other stockholders recognized the fact that he held the property as trustee. He subsequently became bankrupt, still having a part of the lands undisposed of and certain of the proceeds in his possession which he previously undertook to separate from his own funds by purchasing a draft therefor payable to himself as trustee, which draft came into possession of his trustee in bankruptcy. It appeared that none of his creditors extended credit on the faith of his ownership of such lands or their proceeds. *Held*, that by his acts in so recognizing the rights of the other stockholders after he became vested with absolute title to the property he created a new trust therein in their favor, which would have been enforceable by them in equity, and that it was also enforceable in the bankruptcy court as against his trustee.

Petition to Review and Appeal from Order of the District Court of the United States for the District of Connecticut.

See 146 Fed. 181.

This cause comes here upon petition to review an order of the District Court, District of Connecticut, enjoining the bankrupt from making any conveyances of certain real estate in western states, standing in his name, and directing him to turn over certain drafts and cash to the trustee in bankruptcy.

John M. Ragan and Clarence E. Bacon, for appellants.

H. L. Hotchkiss, Howard Taylor, and William H. Ely, for respondents.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). In 1890 a Nebraska corporation, the Real Estate & Live Stock Association, of which the bankrupt and his wife were stockholders, being financially embarrassed, sought a loan from its stockholders. The stockholders

advanced $50,000 ($18.75 per share of their respective holdings), and took as security a mortgage upon numerous parcels of real estate in Nebraska and Wyoming. The mortgagee named in the instrument was one Alonzo Clark as trustee. The money not being paid, Clark brought suit in foreclosure, and under proper decree the real estate in Nebraska was sold and bought in by him and conveyance thereof made to him by the "master commissioner under foreclosure proceedings." The real estate in Wyoming was bought in by Coffin. In November, 1900, Clark conveyed all the real estate to Coffin, who thereupon undertook to sell and dispose of the same and to distribute the proceeds ratably to the beneficiaries, for whom he was acting as trustee. Upon the sale of one parcel in Nebraska, the prospective purchasers questioned Coffin's title to the lands. Thereupon each of the parties interested and the association executed quitclaim deeds to Coffin of their respective interests in all said lands both in Nebraska and Wyoming. Moreover, a friendly suit was brought in Nebraska by Coffin against the association and all the other parties in interest to quiet the title, and decree was entered therein June 2, 1902, declaring that the title of Coffin in and to said lands was absolute as against any of the parties defendant. On or prior to that date the quitclaim deeds were all filed.

Subsequent to June 2, 1902, Coffin sold and conveyed from time to time portions of said real estate in both states, and received in payment therefor certain amounts of cash, which were deposited with his personal account in a bank in Middletown, and certain notes and mortgages which were taken in his individual name for part payment of such sales. From the amounts so received he paid between July 30 and October 30, 1902, to the parties who had advanced the funds to the association 30 per cent. of the amount so loaned or advanced by them, together with 8 per cent. interest thereon. Part of these payments were made in cash and part by the transfer to them of notes secured by mortgages received in part payment for the lands so sold. Subsequently to these payments there had accumulated a large sum over and above disbursements from sales of the land in question, which had been deposited in his bank account. On November 14, 1903, he drew his entire deposit ($4,800) from the bank, took $1,000 in cash which he kept in a drawer at his office, and added to it a draft of $1,915.86 which he had received from his agent in the West as proceeds of the sale of part of said lands, and bought a draft on New York to the order of himself as trustee of $7,715.86. This draft and some others sent from the West by said agent have come into the possession of the trustee in bankruptcy. On December 2, 1903, Coffin was adjudicated a bankrupt on his own petition.

Various technical matters have been eliminated during the argument, and the single question is presented whether the several parcels of real estate yet unsold prior to December 2, 1903, were held by Coffin in trust for the beneficiaries, and therefore did not pass to his trustee in bankruptcy, or whether they were a part of his individual estate to be disposed of by the trustee for the benefit of his creditors. That question may appropriately be answered by this court. The

bankrupt and the trustee (representing all the creditors) duly appeared. The record would seem to indicate that there was no appearance for the so-called "beneficiaries," who claim interest in the western lands, but it was asserted upon the argument that the record is defective in that respect, and, with the consent and concurrence of all parties, the beneficiaries formally entered their appearance in this court. It appears from the referee's findings of fact that credit was not given or extended by any creditors upon the strength of Coffin being the owner of the lands and property in question. This simplifies the situation, because under such circumstances the trustee in bankruptcy stands in no better position than that in which the bankrupt stood on the day the petition was filed, and it will be necessary only to determine whether, if there had been no bankruptcy, the beneficiaries could in a court of equity have established their right to have him dispose of these lands for their benefit and distribute the proceeds ratably among them.

The express trust created by the deeds to Clark as trustee and from Clark to Coffin, and resultant upon the furnishing of the money by the beneficiaries, was terminated by the delivery of the quitclaim deeds and by the entry of the decree of the Nebraska court on June 2, 1902. Coffin already held the legal title, and each quitclaim deed conveyed to him every right, title, and interest, legal and equitable, which the beneficiary executing it had to convey. At the close of this transaction Coffin was the absolute owner with no outstanding interest in and no resultant trust to any one. But, since the property was his absolutely, he was entirely free to do what he pleased with it. He could convey it to one, or more, or all of his fellow stockholders, or to a stranger. He could convey it to any one he chose in trust to make any disposition of it he might prescribe so long as such trust did not violate the law or the statutes of the state. He could make a declaration of trust which would constitute himself the trustee for any such purpose. What did he do after he became the absolute owner on June 2, 1902? Were his acts such that as between himself and the other stockholders —to whom undoubtedly he owed a moral obligation to distribute a proportionate part of the proceeds—a court of equity would hold that he had created a new trust in their favor? It seems to us that, upon this record, such question must be answered in the affirmative.

In the first place we have the sworn statement of Coffin himself made June 15, 1904, that although he held the apparent legal title to the several parcels of land, the same was really in trust for the benefit of the several individuals whom he enumerated and called beneficiaries. This statement was made after bankruptcy, and no act of his at that time, no position which he might take, could alter the status established by the bankruptcy. But it is not as an act of the bankrupt that this statement of June 15, 1904, is important. It is an historical narrative of a transaction long prior to the bankruptcy, and, with such a sworn "declaration against interest" in the case, it is difficult to see how a court of equity could refuse such relief as would give the applicants the benefit of the trust which he thus declared he had created. Nor is this declaration a mere afterthought. Coffin's whole

course of conduct shows that he considered himself a trustee for his fellow stockholders. The referee has found that between July 30 and October 30, 1902, he collected from the sale of these lands and distributed to them 30 per cent. of the amounts originally advanced by them. Nor were his declarations merely oral. The referee finds that:

"In and about October, 1903, he wrote to some and made statements to others of the parties named in the petition, and therein called beneficiaries, that he soon hoped and intended to pay another dividend of from 30 to 40 per cent. to claimants who had advanced funds to the Nebraska Real Estate & Live Stock Association, part of which was to be paid in cash and part with notes secured by mortgages on the land in question. See Exhibits 73 to 131."

Examination of the exhibits referred to shows that the declarations of Coffin as to the equities of the beneficiaries were much more explicit than the above quotation would indicate. Thus on August 2, 1902, he writes to one of the beneficiaries to whom he had sent three notes received as part payment for a parcel of land just sold:

"A party in Nebraska has made me an offer of $950 for each $1,000 note, but I have replied that the notes are not mine. If you should wish to accept the offer, please so advise when returning the receipt."

No one can peruse these exhibits without being convinced that subsequent to June 2, 1902, Coffin undertook to manage these lands, to sell them, and to distribute the proceeds in the interest of all who had originally invested in the enterprise. No doubt the fact that there was such a trust was kept secret, so that no other prospective purchaser might question the title to any property he sold, but it was communicated to the others over Coffin's signature repeatedly, and, since the rights of no one else had supervened during this period of secrecy, a court of chancery would have enforced their equities had application been made to do so just before the petition in bankruptcy was filed. As the district judge expresses it, "the acts of Mr. Coffin after the decree [of June, 1902] undoubtedly put the stockholders in a position where they could, if there had been time, have established such a relation"; i. e., a trust relationship. That being so, the trustee in bankruptcy, who is not the grantee of the bankrupt for a valuable consideration, but a transferee by act of the law, who takes his property subject to all existing equities, cannot successfully dispute their right to establish such relationship in an appropriate tribunal. And, since all parties are here, this court may properly dispose of the controversy.

As to the various drafts referred to supra, the evidence is not sufficiently clear to enable us to determine how much of them represents proceeds of sales of land and how much represents general funds of the bankrupt. Upon remand of the cause the District Court will be able to determine those questions.

The order is reversed, and cause remanded, with instructions to the District Court to vacate the injunction which now prevents Coffin as trustee for the "beneficiaries" from continuing to sell this western land and to distribute the proceeds between them. As to the drafts and cash, disposition can be made of them in conformity with the views expressed in this opinion.

THE ISLANDER.

THE PHILADELPHIA.

(Circuit Court of Appeals, Second Circuit. March 12, 1907.)

Nos. 155, 156.

1. COLLISION—NARROW CHANNEL RULE—LOWER HUDSON.

So much of North river as extends from Twenty-Third street, New York, to the Upper Bay, along the shores of which on both sides there is a continuous succession of wharves and piers, and which is one of the most crowded parts of the port of New York, cannot be considered a narrow channel, within the meaning of article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883], requiring vessels navigating such channels to keep to the right-hand side of the fairway.

2. SAME—STEAM VESSELS MEETING—VIOLATION OF RULES.

A collision in North river between Twenty-Third street, New York, and the Bay, between a ferryboat going up and a steam lighter descending, which were approaching each other nearly head on, each being a little to the port side of the other, *held*, on conflicting evidence, to have been due solely to the fault of the lighter in crossing the signal of the ferryboat to pass port to port, and attempting to pass to starboard of the ferryboat in violation of rules 1 and 3 of article 18 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2881]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 187–192.

Signals of meeting vessels, see note to New York Union S. S. Co. v. Erie & W. Transp. Co., 30 C. C. A. 630.]

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

This cause comes here upon appeal from two decrees of the District Court, Southern District of New York, holding the ferryboat Philadelphia solely in fault for a collision which occurred about 8 a. m. January 4, 1906, in the North river between the ferryboat and the steam lighter Islander. The collision took place about 500 feet or more off the Hamburg-American piers at Hoboken, N. J. The ferryboat was bound from the slip at the Pennsylvania Railroad station in Jersey City to Twenty-Third street, New York. The Islander was bound from Thirty-Ninth street, New York, to Barren Island.

W. S. Montgomery, H. G. Ward, and Robinson, Biddle & Ward, for appellant.

La Roy S. Gove and James J. Macklin, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The district judge did not discuss the conflicting testimony nor express any opinion as to the navigation of the respective vessels, otherwise than to hold that the narrow channel rule (article 25, Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) applied, and that the ferryboat violated it by not navigating to the starboard side of the fairway or midchannel.

We have recently had occasion to discuss the applicability of the narrow channel rule in two different cases. The Bee and The Booth, 138 Fed. 303, 70 C. C. A. 593, and Rose v. The Benjamin Franklin,

145 Fed. 13, 76 C. C. A. 43. Upon each occasion we carefully limited our rulings to the precise facts shown in the record. In the earlier case the Upper Bay of New York between the rivers and the narrows was held not to be a narrow channel, and in the later case it was held that the rule applied to the Hudson river opposite Yonkers and Ludlow. The authorities bearing on the application of the rule will be found very fully set forth in Judge Holt's opinion in The Booth (D. C.) 127 Fed. 453. Except for a Canadian authority, to be referred to later, no new citation bearing upon the question is presented. Reference is made in the appellee's brief to The Brittania, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660, and The John King, 49 Fed. 469, 1 C. C. A. 319, as holding that this rule is binding upon vessels at the entrance of the East river and in the North river off Twenty-Third street; the authority given being The Victory, 68 Fed. 395, 15 C. C. A. 490. The court in this last case, however, was misled by a change in the number of the rule. The old twenty-first rule (Act April 29, 1864, c. 69, art. 16, 13 Stat. 61 [U. S. Comp. St. 1901, p. 2898]), which the courts considered in the Brittania and John King Cases was that which required every steam vessel when approaching another vessel so as to involve risk of collision to slacken her speed, or, if necessary, stop and reverse. Neither court considered or discussed the narrow channel rule.

The locality now under discussion is so much of the North river as extends from Twenty-Third street to the Upper Bay. It is one of the most crowded parts of the port of New York, traversed continually by vessels of every type proceeding in every conceivable direction. The shores on each side are fully built upon. With the exception of the shoal water of Weehawken Cove and a few hundred yards along the high bank at Castle Point, there is an unbroken succession of bulkheads, wharves, piers, and slips upon both sides of the river. On each side of the river there is a contiguous series of long wharves (more extensive on the east than on the west side) known as the "Steamboat section," and applied to the uses of ocean steamers. A glance at the chart shows that there is not a street running to the river on either shore, which does not terminate in a pier, and in many places there are other piers between streets as well. We are clearly of the opinion that such a locality cannot be held to be a "narrow channel," within the meaning of such words as used in the rules of navigation. It may be noted that the Canadian courts have reached a similar conclusion as to the Inner Harbor of Boston, Mass. Lovitt v. The Calvin Austin, 9 Exch. (Canada) 160, affirmed 35 Sup. Ct. (Canada) 616.

It becomes necessary therefore, to examine into the circumstances attending the collision. The district judge states that he was at first inclined to hold both vessels in fault, because, approaching each other at the rate of 2,500 feet a minute, they did not exchange signals and begin to navigate relatively to each other until they had got so close together that reasonable time was not left for proper maneuvers. He reached the conclusion, however, that they were further apart than he at first supposed, and that the distance was "sufficient to enable them to avoid each other if they had maneuvered in time." We concur

in this conclusion, and are satisfied that no deficiency in maintaining lookout was in any way responsible for the catastrophe.

There is a very sharp conflict of testimony in the case upon the vital question of signals exchanged and helm movements, a conflict which must be decided one way or the other. In reaching a decision thereon, we are embarrassed by the circumstance that we have not seen or heard the witnesses, and have no information as to how the demeanor of any of them upon the stand impressed the district judge, since he did not discuss the general navigation, but based his conclusion solely on the narrow channel rule.

There seems to be no controversy that the facts prior to the blowing of the first signal were as follows: The ferryboat was bound up river. Several hundred feet ahead of her was the West Point, a Westshore ferryboat, bound in the same direction and a little on her starboard bow, so that, if the Philadelphia had been advanced on a projection of the line of her keel, she would have just about cleared the West Point, on her own starboard side. No other vessel was in the vicinity of the ferryboat on her starboard side. The Islander was bound down the river. About the time she was passing the West Point, she had the Philadelphia a little on her port bow, and at the same time she was herself a little on the port bow of the Philadelphia. If their respective courses had been unchanged, they would have cleared each other by a safe margin of from 50 to 150 feet. They were meeting almost head and head—that is "end on, or nearly so"—and their courses were not on the starboard of each other. Under article 18, Act Cong. June 7, 1897, rule 1, it was the "duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other." Moreover, under rule 3 of the same article, as amended and approved by the Secretary of the Treasury January 27, 1899, inasmuch as the vessels were approaching from opposite directions, each was forbidden to blow a cross-signal; that is, to answer one whistle with two or two whistles with one.

The West Point passed to eastward of the Islander at a distance estimated at from 100 to 200 feet. Between the Islander and the Jersey shore there was another ferryboat, not identified, also going down river. Her paddle box was almost abreast of the pilot house, and she was about 70 feet to the starboard.

Two witnesses from the Philadelphia testified that the Islander and West Point exchanged whistles before passing. The witnesses from the Islander deny this, and no one was called from the West Point. The circumstance is not of especial importance either way, since these two boats passed each other with a full margin of safety. The colliding boats came together so that the bow of the Islander struck the round bow of the ferryboat about four feet to the starboard of the line of the latter's keel. It is manifest that one, or the other, or both boats must have violated the article above cited, or such a collision could not have followed the position in which they were when they sighted each other. It seems clear, also, that there must have been a

greater change of heading than could have resulted during reversal from the operation of a screw or from the presence of a high southwest wind on the exposed stern of the ferryboat.

The contention of the ferryboat is that she blew first, a single whistle; that after a while the Islander answered with two, whereupon the ferryboat reversed and blew alarm whistles. That thereupon the Islander blew a single whistle, and immediately after alarm whistles. The contention of the Islander is that she blew first, a single whistle; that promptly, or after a while (her witnesses do not agree as to this), the ferryboat answered with two, whereupon the Islander reversed and blew alarm whistles. Each boat contends that at no time did it give a two-blast signal. It is an entirely proper assumption that the navigator who blew a signal operated his wheel in conformity thereto, so that, if we determine which one it was that blew a two-blast signal, we may safely conclude that he was the one who swung the head of his boat to port, contrary to the rule, and that to such improper navigation the accident was due.

From the ferryboat, three witnesses, the master who was navigating her, the wheelsman, and the upper deckhand all testify that the Islander crossed signals and navigated accordingly. And they are to some extent corroborated as to the whistles by the lower deckhand, who, however, did not see the other boat when she blew. From the Islander, two witnesses, her master, who was navigating, and the mate, testify that the ferryboat crossed signals and navigated accordingly. Mere preponderance in number of witnesses is, of course, of no importance. The ferryboat was the larger vessel, with many more persons on board who had opportunity to observe. After a careful study of the narratives of the respective witnesses, we cannot say, as to any one of them, that his testimony exhibits such discrepancies and contradictions as should lead to its rejection. Under these circumstances, there is nothing left but to inquire which of the two conflicting narratives is in harmony with the inherent probabilities. It seems to us entirely clear that under this test the story of those on the ferryboat is the correct one.

The ferryboat was bound north, meeting another boat end on, each on the other's port bow. To her own starboard hand there was open water entirely unobstructed till, at the distance of several hundred feet, there would be found the ice which a westerly wind had driven over to the east of midchannel. The West Point was a little to the starboard of the course of the ferryboat, but she was several hundred feet in advance and going faster. The ferryboat, although running up along the Jersey shore, was bound for Twenty-Third street ferry, on the New York shore. It would not have taken her out of her way to pass on the port side of the Islander, as the rule required. It would have taken her out of her way to work over to the westward, and so pass the Islander on her starboard side. There was no conceivable reason why she should not have kept on and passed port to port, as the rule required. The Islander, on the contrary, was moving between two other boats. On her starboard side was the unidentified ferryboat, of which her master says that she had been in company for some

time. "All along she was just gaining a little. By the time we got down close by the ferry, at the time of collision, she was about abreast of us." When she first appeared (further up river), he had starboarded his wheel until he got a safe distance from her, and then held it. This safe distance, however, was only some 70 feet, and it would, no doubt, seem rather risky to reduce it materially by porting. The other vessel on the Islander's port side, however, had just gone clear proceeding in an opposite direction, and the Philadelphia was still some distance away, far enough, if she would co-operate, to enable the Islander to pass her starboard to starboard, while there was abundant margin between the Philadelphia and the inside boat to make such a maneuver, so far as the latter was concerned, entirely safe. In view of the existing situation, we conclude that the narrative of those on the Philadelphia that the Islander blew a two-blast signal, and navigated accordingly, correctly states what took place, and that the Islander was therefore in fault for violating rules 1 and 3 of article 18.

We do not find any fault in the navigation of the ferryboat.

The decrees are reversed, with costs of this appeal, and the causes remanded, with instructions to decree in accordance with this opinion.

CITIZENS' GAS & ELECTRIC CO. v. NICHOLSON.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,391.

1. MUNICIPAL CORPORATIONS—STREETS—EXCAVATIONS—NEGLIGENCE—INJURIES TO TRAVELERS.

In an action for injuries to plaintiff by driving at night against earth piled in the street from an excavation, whether defendant was negligent in failing to properly guard the dirt with lights, and whether plaintiff was also negligent in failing to discover the same, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1749, 1756.]

2. SAME—USE OF STREET.

Where defendant excavated a street and threw the large part of the dirt on the west side thereof, the fact that plaintiff, while driving along the street in the night, knew or might have readily discovered that the west side of the street was obstructed and dangerous, did not make it negligence per se to use the east side of the street, on which a small portion of the dirt had also been placed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1749.]

3. SAME—ANTECEDENT NEGLIGENCE—PROXIMATE CAUSE.

Plaintiff, a fire department chief, while riding to a fire at night, was thrown from his vehicle, which was driven by a fellow fireman against a pile of freshly excavated earth in the street. The earth from the excavation had been mostly placed on the west side of the street, which had been protected by lights; but because of certain catch-basins a portion of the earth had also been placed on the east side of the street and left unprotected. *Held*, that the intervening act of the driver in driving against the earth was one which should have been foreseen or reasonably anticipated as a probable consequence of the excavator's failure to guard the dirt,

and hence the latter, and not the intervening act of the driver, was the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1666, 1667, 1669, 1671.]

4. TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUE.

Where, in an action for injuries to a traveler at night by his vehicle striking a pile of dirt negligently left unprotected in the street, the only question presented by the evidence was with respect to the excavator's alleged negligence in not taking the proper precaution to warn travelers against the obstruction, an instruction authorizing the jury to consider whether such excavator was negligent in throwing the earth to the east of the street and across the street car track was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Municipal Corporations, §§ 587, 593.]

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

Ralph W. Breckenridge (Emmet Tinley and Charles J. Greene, on the brief), for plaintiff in error.

George S. Wright (W. H. Hare, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. This was an action to recover for personal injuries, the evidence in which was substantially as follows: The plaintiff, while chief of the fire department of Council Bluffs, Iowa, was being driven rapidly along the east side of First street in the nighttime, in response to an alarm of fire, when the vehicle in which he was riding came in contact with a pile of freshly excavated earth, thereby throwing him out and injuring him. The vehicle was driven by a fellow fireman, who was under the plaintiff's direction and control. During the preceding day the defendant, in the course of altering its gas mains underneath the surface of the street, had excavated a trench lengthwise thereof, and a few feet west of the center, for a distance of 100 or 125 feet. Most of the earth had been thrown to the west, but the presence of two catch-basins near the curb on that side had made it necessary to throw some of the earth to the east across a street car track, which was parallel to and partly over the trench. The vehicle came in contact with the earth thrown to the east. It was piled 2 feet or more high and as near to the street car track as it well could be. There was room between it and the east curb for vehicles to pass, but the passageway was comparatively narrow. As a warning to those who might use the street during the night, the defendant had suspended three lighted red lanterns along the trench at an elevation of two or three feet. Two of these were immediately west of the trench, and one was directly over it. A watchman, with a lighted white lantern, was also stationed at the work; but his location at the moment of the accident is left in doubt, and it is not claimed that he attempted to give any warning as the firemen were approaching. The witnesses differed widely respecting the proximity of the red lanterns to the pile of earth on the east, and

also as to whether or not it and the lanterns could be readily observed. One witness stated that the distance to the nearest of the lanterns was 11 feet, and another said that none of them was in that vicinity. Some of the firemen and others stated that they readily saw the red lights a block or more away, but the plaintiff testified:

"I did not notice any lights as we went up First street. I was looking that night for obstacles in the street."

And his driver testified:

"I did not see anything in the road at the time the accident happened. * * * I did not see any lights, or anything of the kind, on the west side of First street. * * * It was dark so far as I could see it."

Both the plaintiff and his driver had passed along the street the morning before, and had then observed the work of excavation and its location and direction; but it is not certain that any earth had been thrown to the east at that time. It was admitted that the work of excavation was done under a permit properly issued by the city, and there was no claim that the defendant had violated the terms of the permit or any ordinance or statute. The verdict and judgment were for the plaintiff.

It is assigned as error that the court denied a motion by the defendant for a directed verdict in its favor; but, after careful examination of all the evidence, the substance of which has been recited, we are satisfied that it cannot properly be said that there was no substantial evidence of negligence on the part of the defendant, or that there was a conclusive showing of contributory negligence on the part of the plaintiff. Of course, the defendant was not bound absolutely and in every event to keep travelers away from the piles of earth and out of the trench; but it was bound to exercise ordinary care and prudence, to the end that reasonable warning be given of the existence and location of these dangerous obstructions to the usual and customary use of the street, and whether or not this duty was performed was made plainly a question of fact for the jury by the evidence respecting the relative location of the warning lights and the pile of earth with which the vehicle came in contact. Nor was the question of the plaintiff's contributory negligence in a different situation. While he and his driver, like other travelers, were bound to make reasonable use of their senses, and to exercise ordinary care and caution for the protection of themselves and others, they were entitled to assume that the street was in reasonably good condition, save as the contrary was known to them or was discoverable by reasonable use of their senses. The fact, however, that they knew, or might have readily discovered, that the west side of the street was obstructed and dangerous, did not make it negligence per se for them to use the other side; and whether or not, in doing so, they made reasonable use of their senses and exercised the requisite degree of care and caution, was, under the evidence, a question of fact for the jury. Gillespie Co. v. Cumming, 62 N. J. L. 370, 41 Atl. 693, 868; Carswell v. Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; White v. Boston, 122 Mass. 491.

But it is insisted that, even if there was negligence on the part of the defendant and no negligence on the part of the plaintiff or his

driver, the motion for a directed verdict should have been granted, because the act of driving against the pile of earth, without which the injury would not have occurred, was the independent intervening act of a third person, and in legal acceptation the proximate cause of the injury. The true rule, however, is that when the intervening act, whether that of a third person or otherwise, is one which should have been foreseen or reasonably anticipated, and which in an incidental or subordinate way works out the natural and probable consequence of the antecedent negligence, the latter is deemed the proximate cause of the injury, although it would not have occurred but for the intervening act. Cole v. German Savings & Loan Society, 59 C. C. A. 593, 124 Fed. 113, 63 L. R. A. 416; Demolli v. United States, 75 C. C. A. 365, 368, 144 Fed. 363, 366; Mahar v. Steuer, 170 Mass. 454, 49 N. E. 741; Lane v. Atlantic Works, 111 Mass. 136. In the last case it is said:

"The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

If the defendant was negligent in respect of the warning given, it was at least a permissible conclusion from the evidence that acts such as that of the driver, assuming that it was not negligent, should have been foreseen or reasonably anticipated, and that it in an incidental or subordinate way worked out the natural and probable consequence of the defendant's negligence. We think the motion for a directed verdict was properly denied.

In a portion of the charge to the jury it was said very plainly, although not in exact terms, that one of the chief questions presented by the evidence was whether or not the defendant was guilty of negligence in throwing the earth to the east across the street car track. This was excepted to by the defendant, and we think it was error, and was prejudicial. There was no evidence of negligence in respect of the place where the earth was thrown. It was conceded that the defendant was acting under a lawful permit, and there was no claim that the permit, or any ordinance or statute, prescribed what should be done with the excavated earth during the progress of the work. The uncontradicted evidence as to what was actually done was that most of the earth was thrown to the west, where it would work the least interference with the use of the street, and that the presence of two catch-basins upon that side made it necessary to throw the remainder to the east across the street car track. As entirely apposite we quote what was said by the Supreme Court of the state in disapproving a like instruction in the case of the plaintiff's driver (Stevens v. Citizens' Gas & Electric Co. [Iowa] 109 N. W. 1090):

"In explanation of the manner of doing the work we have the testimony of defendant's foreman to the effect that, when the catch-basins were reached, the earth was thrown to the east across the motor track in order to guard against the same getting into, and closing up, the basins. It seems clear that, standing alone, here was not enough to establish negligence. Cities, and public service corporations having the right of entry, are privileged to tear up or obstruct a street, even to the full width thereof, if necessary, in the course

of making public improvements or repairing the same; and it ought not to require discussion or argument to make it clear that the bare exercise of such right may not be distorted into an act of negligence. Indeed, it is in the very nature of things, and hence fundamental, that negligence cannot begin until the limits of right have been overstepped. As there was no law, by statute or ordinance, governing the subject, we must assume that defendant had the right to throw the dirt either way, and, in view of the explanation made by the foreman, most certainly the course here pursued was a reasonable one."

As we view the evidence, the only question which it presented respecting the claimed negligence of the defendant was whether or not the precautions taken by it were such as to convey to travelers, who were making reasonable use of their senses and were in the exercise of ordinary care and caution, a reasonable warning that the use of the portion of the street in which the accident occurred would be attended with danger.

Criticism is made of other portions of the charge, but separate consideration of them is rendered unnecessarry by what has been said.

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

VICTOR CHEMICAL WORKS v. HILL CLUTCH CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1907.)

No. 1,286.

SALES—CONSTRUCTION OF CONTRACT—PROVISION FOR WAIVER OF DAMAGES.

A provision in a contract for the sale of machinery for a manufacturing plant, which was to be delivered by a specified date, that "the acceptance of this machinery when delivered is understood to constitute a waiver of all claims for damages by reason of any delay," is valid, and, while it was optional with the purchaser to accept or refuse to accept the machinery if delivered after the time limited, his action in receiving, installing, and continuing to use the same when so delivered was an "acceptance," which rendered such provision operative and binding, and he cannot set off a claim for damages caused by the delay in delivery in an action for the purchase money.

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

The Victor Chemical Works, plaintiff in error, was the defendant below in an action brought by Hill Clutch Company to recover the balance unpaid upon account of machinery delivered under an express contract. From the judgment entered upon verdict in favor of the latter this writ is prosecuted; and the parties are hereinafter referred to as plaintiff and defendant, respectively, in conformity with their arrangement in the suit below.

The contract was for machinery to be furnished by the plaintiff for equipment of a manufacturing plant, which was in course of erection by the defendant; and was in the form of a written proposal by the plaintiff, with subsequent modifications, acceptance by the defendant, and correspondence on the part of both. No question of fact is presented for review in respect of the terms, time of deliveries, character of the machinery, or other issues. The original proposal was dated April 21, 1902, and states, among other matters, that delivery is to be made "on or about the fourth day of July, 1902 (unless delayed by unavoidable accidents or labor strikes, but named for prompt and immediate acceptance only)." Subsequently the time for "complete delivery" was fixed at July 1st. Delivery was not completed until several months after that date, but the defendant received and put into its plant all the machinery so

furnished. The proposal as accepted distinctly states: "The acceptance of this machinery, when delivered, is understood to constitute a waiver of all claims for damages, by reason of any delay." Error is assigned for rulings upon the meaning and force of this clause.

The defendant averred and offered to prove damages resulting from such delay—in the estimated rental value of the plant ($21,000), of which it was deprived of use pending complete delivery—and the court sustained an objection to this tender of proof under the plea of set-off. Verdict was directed in favor of the plaintiff for the unpaid balance of the contract price, but the bill of exceptions has not preserved all the evidence, so that no reviewable question arises, except it be in the rejection of the above-mentioned offer.

Other assignments of error and facts bearing upon the controversy are stated in the opinion.

George Burry, for plaintiff in error.

Horace Kent Tenney, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

The contentions of error upon this writ, except one assignment for the reception in evidence of certain letters, hinge upon the assumed meaning or inoperativeness of a clause of the contract in suit, which reads:

"The acceptance of this machinery, when delivered, is understood to constitute a waiver of all claims for damages by reason of any delay."

As the contract terms were otherwise undisputed in their import—that the plaintiff below was to furnish the machinery specified for equipment of the defendant's manufacturing plant and complete delivery on or before July 1st, for the prices stated—and performance on the part of the plaintiff is unquestionable, aside from delay in delivery, solution of the question raised is within narrow compass. In so far as the testimony is preserved, the record is conclusive that the machinery was made and delivered in conformity to the contract as to kind and quality; that all was received and installed by the purchaser and retained in its plant; that the amount awarded by the verdict and judgment is the unpaid balance of the purchase price; and that the judgment cannot be disturbed, if such acceptance of the machinery operated as a waiver of delay. The circumstances or causes of such delay do not enter into the inquiry; nor are they open to consideration in the absence of much of the testimony.

The object of this waiver provision in the agreement is plain; and it is expressed in terms which are not, as we believe, open to misunderstanding. The executory contract is positive and definite to deliver the machinery for the plant on or before July 1st, "unless delayed by unavoidable accidents or labor strikes." In the event of failure to perform, the defendant was entitled thereunder to recover damages for the breach, unaffected by the waiver clause, except upon its exercise of the option to take the machinery notwithstanding the delay. Under the general rule, in the absence of other agreement, the purchaser may elect either to receive the goods so delayed in delivery, or to reject them, and may sue for the breach in either case, unless the goods are accepted under circumstances which amount to discharge of the con-

tract or waiver of the default. Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40. So the question whether acceptance waives the delay, or other fault in performance, frequently arises in litigation upon contracts for the sale and delivery of goods. The waiver clause referred to is an express provision for that contingency —that "the acceptance of this machinery, when delivered, is understood to constitute a waiver"—and surely the parties may thus agree upon the meaning and effect of conduct which were otherwise open to dispute of such intention. It is contended that the word "acceptance," as there used, must be interpreted in the sense of the general rule referred to, as requiring both retention of the machinery and acknowledgment that the delivery was satisfactory. But such view is untenable, as it violates both letter and spirit of the provision—would nullify its obvious purpose, fairly expressed, and leave it meaningless. The authorities cited to that end are not applicable to this definite agreement, and we are satisfied that the terms "acceptance of this machinery when delivered" were used and understood by the parties in their ordinary sense, as intending receipt and retention of the machinery notwithstanding the delay; and not in the technical sense of "acceptance," with its two meanings (Underwood v. Wolf, supra), on which the contention rests.

Whatever the cause of delay in furnishing the machinery, it is undisputed that the defendant received and installed it upon arrival, and thus waived "all claims for damages by reason of any delay," as expressly provided in the contract. The defendant's tenders, therefore, under the pleas of set-off and recoupment, to prove damages caused by the delay, were rightly overruled, if the provision referred to was operative and bound the defendant as such waiver.

The validity of the waiver clause is challenged upon various general propositions of law which do not call for discussion, as we discover no bearing of either upon these contract terms as above interpreted. The general rule is well settled and conceded that the purchaser under an executory contract of sale may elect, after default upon the part of the seller, to accept the goods notwithstanding, and waive damages for the breach, either in express terms, or impliedly through his conduct in the acceptance; and that such waiver is binding.

Provision in advance to make the waiver certain in the event of acceptance, if delay occurs, is equally within the right of the contracting parties, and when fairly agreed upon is equally binding. While the contract remains executory, the obligations and remedies of the parties are unaffected by the proviso. The seller must perform all the terms, or answer in damages for his default; and the purchaser is required to accept the machinery only when all terms are performed on the part of the seller. All the common-law remedies for breach of the executory contract are preserved for each party; and the agreement is neither uncertain as to the time when delivery is required, nor unilateral in any executory provision. With or without this proviso, the seller may assume to deliver after the time limited by the contract, although, under either form of contract, he cannot require the purchaser to accept it in satisfaction of the contract, nor can the purchaser

enforce specific performance. So, upon the occurrence of the alleged default, no contract right, liability, or remedy of either party was changed by the proviso; and its sole operation was to settle, by mutual agreement, the meaning and effect of an acceptance by the purchaser, if the seller failed to furnish the machinery within the time stipulated and made subsequent delivery. Instead of leaving that contingency open to other arrangement and possible misunderstanding, it was thus agreed in advance that such conjoint action of the parties should serve for the agreement; neither being in any wise bound to such course.

We are of opinion that this provision is not open to the objections urged, either for want of mutuality and consideration or as opposed to public policy, and that no error appears in the rulings thereupon which are complained of—in effect, that damages for the alleged delay were barred by acceptance of the machinery when delivered.

The remaining assignment of error rests upon the introduction by the plaintiff below and reception of certain correspondence between the parties and their purported representatives, pending execution of the contract, which appears to have been offered as tending to excuse the delay in deliveries of the machinery. Under the final rulings of the trial court the issues raised as to delay in the performance were removed from consideration, and, if the admission of these letters were erroneous at any stage, which we do not intimate, the error was not prejudicial, and the assignment thereupon is without force.

The judgment of the Circuit Court is affirmed.

DELAWARE & HUDSON CO. v. YARRINGTON.

(Circuit Court of Appeals, Third Circuit. January 30, 1907.)

No. 8.

RAILROADS—ACTION FOR INJURY IN COLLISION—PENNSYLVANIA STATUTE.

Plaintiff, while riding as a mail agent in a car of one railroad company forming part of a train being operated by it on its own road, was injured in a collision between such train and a train of defendant company, which was on the same track. Defendant had the right by contract to use such track with its trains at certain times, but not at the time and place of the accident; its train being wrongfully there on the time of the train on which plaintiff was riding. *Held*, that the case was not governed by Act Pa. April 4, 1868 (P. L. 58), which provides that any person injured while lawfully engaged or employed "on or about the road, works, depots and premises of a railroad company," and who is not an employé or passenger of said company, shall have the same right of action and recovery against it as would exist if he were an employé, since the track was not at the time the premises of defendant, whose train was there without right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 886.]

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

For opinion below, see 143 Fed. 565.

J. H. Torrey, for plaintiff in error.

W. D. B. Ainey, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the Middle District of Pennsylvania. In that court Yarrington, in this opinion designated as "plaintiff," brought suit against the Delaware & Hudson Company, designated as "defendant," to recover damages for personal injuries. The jury found a verdict for the plaintiff, and, judgment having been entered thereon, defendant sued out this writ of error.

Plaintiff was employed as route agent in a mail car on a train on the Erie Railroad running from Susquehanna to Carbondale. When nearing Carbondale yard his train ran into the rear end of a train of defendant, and plaintiff was injured. The roadbed, where the accident occurred, belonged to the Erie, but defendant had trackage rights thereon. At the time of this accident, however, the Erie train had the right of way, and the defendant's train was running without right on the Erie train's track and on its time. As stated in defendant's counsel's brief:

"We are to assume, for the purpose of this discussion, he (Yarrington) was injured by the fault of the men in charge of the train and engine of the plaintiff in error."

That fault or negligence was its unwarrantably obstructing the passageway of the Erie train. Under these facts the right of the plaintiff to recover is clear, unless his recovery is precluded by the Pennsylvania statute of April 4, 1868, which provides:

"That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the road, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such a one as would exist if such person were an employé; provided that this action shall not apply to passengers." P. L. 58.

In Pennsylvania Railroad Company v. Price, 96 Pa. 256, the Supreme Court of Pennsylvania held a railway route agent was not a passenger within the exception to this statute. Assuming, for present purposes, that we are bound by such construction, although that question is not before us, do the facts of the present case bring Yarrington within the other provisions of the act? To us it is clear they do not. True, the track where the accident occurred was at times in the lawful use of the Delaware & Hudson Company, and at those times it is, for the purposes of this act, considered its track. "It is settled," says the court in Kelly v. Union Traction Company, 199 Pa. 322, 49 Atl. 70, "that the railroad on or about which the accident occurs need not be owned by the defendant company to bring it within the terms of the act of 1868; but the use, by agreement, of the road of another company by the defendant company makes it the latter's road in contemplation of the act." But, on the other hand, it is equally clear that, when the Erie train had the exclusive right of way over it, the defendant had no right at such time to occupy and obstruct that particular

track. It follows, therefore, that the roadbed where this accident occurred, and at the time it occurred, was not then the road or premises of the defendant, and the plainiff was, therefore, not employed on or about defendant's road. Consequently the act of 1868 has no application.

The cases especially urged by defendant's counsel to support an opposite conclusion do not do so when analyzed. In Mulherrin v. Railroad, 81 Pa. 366, the defendant's train was on a track and at a time when and where it had the exclusive right to its use. Mulherrin had no right to be on that track. In no aspect of the case could he recover. If he was a trespasser, clearly under the general principles of law he could not (Railroad v. Norton, 24 Pa. 465, 64 Am. Dec. 672); and if, however, he was regarded as lawfully employed on or about the road of the defendant company, the act of 1868 applied, and forbade his recovery for injuries caused by the negligence of the employés of that company. This is in accord with the construction placed on this case by the Supreme Court of Pennsylvania in Keck v. Phila. & Reading R. R. Co., 206 Pa. 506, 56 Atl. 47, where it is said:

"Even Mulherrin v. Del. & R. R. Co., 81 Pa. 366, where the facts are not very clearly stated with reference to this point, which was not raised, when carefully examined, shows that it is in accord. Plaintiff got off his train to open a switch in the performance of his duty, and his train passed on. He waited until it returned on another track, and then walked down the first track on his way to rejoin his train, and while so walking was struck by the train of the other company. The track on which he walked was the property of his road, and if he had been injured by the other train while in the performance of his duty on it he would have had his action. But at the time of the accident his train had passed off that track, which had become temporarily the property of the other company, the defendant, by the entry of its train. Plaintiff, therefore, was walking on defendant's track, and was rightfully held guilty of contributory negligence, as well as having his case come within the act of 1868."

Seeing, then, that the defendant company had at the time and place of this accident no right whatever to occupy this track, and that it was guilty of negligence in obstructing the passage of the train on which plaintiff rode, we hold the act of 1868 had no application, that there was no error in the court refusing to direct a verdict for defendant, and that this judgment must be affirmed.

NEWBURGER COTTON CO. v. YORK COTTON MILLS.

(Circuit Court of Appeals, Fifth Circuit. April 2, 1907.)

No. 1,645.

TRIAL—PROVINCE OF JURY—DETERMINING WEIGHT, PREPONDERANCE, AND EFFECT OF EVIDENCE.

In an action at law tried before a jury in a federal court, where an issue of fact is involved the determination of which depends upon the weight, preponderance, and effect of conflicting evidence, such issue must be determined by the jury, and it is error for the court to direct a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332, 342.]

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

Murray F. Smith, for plaintiff in error.

S. S. Hudson and W. W. Lewis, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. On the 18th of November, 1904, one R. B. Jennings, representing plaintiff, Newburger Cotton Company, of Greenwood, Miss., contracted at Yorkville, S. C., with the defendant, the York Cotton Mills, to sell and deliver to the said defendant 800 bales of cotton, even running strict middling in grade, and to be in staple as follows: 600 bales to be full 1¼-inch staple, type H E V N; 200 bales to be full 1 3/16-inch staple. Shipments to be as follows: 75 bales 1¼, type H E V N, and 25 bales 1 3/16 each month, commencing on the 15th day of January, 1905, and continuing on 15th of each following month until completion of contract. On or about the 31st of January, 1905, the first shipment, or a part thereof, under the contract in issue, arrived at Yorkville, and upon examination of the same by the president of the defendant company it was rejected on the ground that it was not in accordance with the contract. The plaintiff was so advised at once by wire, and the defendant refused to accept further shipments on account of the alleged breach by plaintiff. Thereafter, on the 4th day of April, 1905, plaintiff commenced this action by attachment in the circuit court of Warren county, in the state of Mississippi, against the defendant for breach of contract and damages in the sum of $12,189.12. The defendant filed its petition and bond, and secured the removal of the cause to the Circuit Court of the United States for the Western Division of the Southern District of Mississippi. In the Circuit Court the defendant pleaded the general issue that it did not undertake and promise in manner and form as alleged in the declaration, and gave notice as provided by the statutes of Mississippi that under this plea it would introduce evidence to show that plaintiff could not recover, because it had deliberately and voluntarily disabled itself from performing the contract had with the defendant by intentionally shipping cotton which they knew at the time was not according to the contract, and, further, that it could not recover because it had, either through ignorance, incapacity, or lack of business caution or disregard of its business obligations and written contract, failed, refused, and neglected to deliver the quality, grade, and staple of cotton to defendant as it contracted to do. On the issues thus joined the parties went to trial.

The plaintiff introduced the evidence of seven witnesses with considerable documentary evidence. The defendant introduced the evidence of five witnesses and more documentary evidence. The evidence on the part of the plaintiff proved the contract, the shipment of the first 100 bales thereunder, and the rejection of the same by the defendant, and tended to prove that the said 100 bales complied with contract and was a good delivery, and that after the contract was made up to the time of delivery there was a fall in the cotton market of the kind of cotton covered by the contract of $13.75 per bale. The

evidence offered by the defendant was to the effect that the 100 bales of cotton shipped in January and rejected by the defendant was not according to the contract, nor a good delivery thereunder. The transcript shows that after the evidence was closed the judge charged the jury, and thereupon—

"The jury retired to consider of their verdict, and, after deliberating for some time, conveyed to the court their desire to receive further instructions, and they were thereupon recalled to the courtroom and one of the jurors, speaking for the whole jury, said that the jury required further instructions, and, upon being interrogated by the court as to what point, said, 'as to the last remark you made to Mr. Smith, just before the jury retired,' and asked the court if he should repeat that word, and the court said 'Yes,' and the jury said with reference to the word 'full,' and the court thereupon in substance repeated its first charge, and the jury again retired to deliberate upon their verdict. After further deliberation for quite a while they were again brought back to the courtroom and announced their inability to agree upon a verdict, and the court then asked them if they had discussed the case among themselves, to which the jury answered in the affirmative. Then the court then asked them if they had been able to agree, to which the jury answered in the negative, and the court then asked them if they thought there was any possibility of their agreeing upon a verdict, and the jury answered in the negative, thereupon the court said: 'I do not see why you cannot agree upon a verdict. The burden of proof is upon the plaintiff to show by a preponderance of the testimony that it had complied with its contract to ship 75 per cent. inch and a quarter equal type H E V N and 25 per cent. inch and three-sixteenths. I do not believe that a preponderance of the testimony shows that the plaintiff has complied with its contract, and I now charge you to find a verdict for defendant.' After which charge of the court the plaintiffs, through its attorneys, in the presence of the jury, before they had retired or were discharged, and in the presence of the court, then and there instantly excepted."

The jury found a verdict for the defendant, the court rendered judgment thereon, and the plaintiff below sued out this writ of error, assigning as the first error that "the court erred in instructing the jury to find for the defendant." If there is anything well settled in our jurisprudence it is the proposition that in the courts of the United States in trials at law before a jury the weight, preponderance, and effect of evidence shall be determined by the jury. In Greenleaf v. Birth, 9 Pet. 292, 299, 9 L. Ed. 132, Mr. Justice McLean, speaking for the court, said:

"Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have."

In Phœnix Ins. Co. v. Doster, 106 U. S. 32, 1 Sup. Ct. 18, 27 L. Ed. 65, and again in Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 615, 4 Sup. Ct. 534, 28 L. Ed. 536, Mr. Justice Harlan, speaking for the Supreme Court, said:

"Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character, as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

Authorities to the same purport can be multiplied.

This case shows that the right of deciding as to the weight, preponderance, and effect of conflicting evidence was taken away from the jury.

Therefore it must be reversed and remanded; and it is so ordered.

HANSON et al. v. HAYWOOD BROS. & WAKEFIELD CO.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1907.)

No. 1,320.

SHIPPING—LIABILITY FOR LOSS OF CARGO—ERRORS IN NAVIGATION AND MANAGEMENT OF VESSEL.

The navigation and management of a vessel within the meaning of section 3 of the Harter Act, Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], includes the determination of the time and manner of leaving port, which is the prerogative of the master; and under said section, where a vessel was seaworthy and in all respects properly manned, equipped, and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage.

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

This appeal is by the claimants of the schooner Emily B. Maxwell from a decree in admiralty against the schooner, upon a bill filed by Haywood Bros. & Wakefield Co., owners of a cargo of lumber, to recover for the loss of a deck load thereof on the voyage of the vessel from Pine Lake to Chicago. The lumber was laden at East Jordan, on Pine Lake, about 16 miles from Charlevoix, Mich., and the schooner proceeded in tow to Charlevoix, arriving about 3 p. m. in a rainstorm, but with fair weather for sailing; so the schooner was towed out into Lake Michigan and headed for Chicago, with a light southwest wind. About 6 p. m. the wind came around to the northwest, increasing to a gale, and raising a heavy sea before midnight. The deck load was washed overboard by the sea, and sails and spars were injured by the storm. The libel alleges that storm signals were displayed at Charlevoix, when the schooner arrived there, and a bulletin was posted at the station, reading: "S. W. gales, shifting to N. W. this afternoon and tonight, with severe and dangerous thunder squalls, dangerous for practically all vessels to leave port." Negligence of the master is averred in thus sailing from Charlevoix—that he "willfully disregarded the warning of said weather bureau"—and such negligence is charged as the proximate cause of the loss suffered by the appellees. The master observed the signal which indicated "high southwest winds," but did not go to the signal office for information bulletined there. He testifies that the wind indicated by the flag was favorable for leaving Charlevoix, where the harbor opens northward; that his barometer indicated a shift of wind to the northwest, and it was deemed prudent and desirable to round the point before the wind shifted, as no dangerous storm was apprehended, and the northwest wind was favorable for the course to Chicago. The decree of the District Court upholds the libelants' contention of negligence, and awards recovery for the value of the lumber so lost.

Chas. E. Kremer, for appellants.

D. J. Schuyler, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The propositions on which the libel rests, and as well the decree, are threefold: (1) that the master was negligent per se in proceeding upon the voyage without consulting the reports of the weather bureau, when the warning signal was observed; (2) that such negligence was the proximate cause of the cargo loss; and (3) that the vessel and her owners were chargeable with liability for the assumed negligence of the master. Unless each of these contentions is tenable, the decree cannot be upheld, and the primary question for solution, in any view of the master's failure either to inform himself of the weather bureau advices or to delay prosecution of the voyage thereupon, is whether liability for loss of the deck load can be thus predicated.

Exemption from such liability is claimed under the provisions of the act of February 13, 1893, c. 105, known as the "Harter Act" (27 Stat. 445 [3 U. S. Comp. St. 1901, p. 2946]), of which section 3 reads:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

It is undisputed that the schooner was "in all respects seaworthy and properly manned, equipped and supplied," so that due diligence was exercised upon the part of the owners for carriage of the cargo. The departure from Charlevoix on the voyage to Chicago was an exercise of the master's prerogative in the management and navigation of the vessel, and we are of opinion that it was plainly within the terms and intent of the foregoing limitation of liability for faults or errors therein. Assuming (without deciding) that it was the duty of the master, not only to ascertain the full import of the reports at the signal station, but to rely upon such general warnings, rather than his own observations and judgment, and discontinue his voyage—when it was his belief that the signal as displayed meant favorable wind without serious danger—such obligation on his part was due alike to vessel and cargo. Under the express terms of the statute, the assumed fault in prosecuting the voyage is not attributable to the seaworthy vessel or her owners, as it relates alone to the management and navigation of the vessel. The Silvia, 171 U. S. 462, 466, 19 Sup. Ct. 7, 43 L. Ed. 241; The Wildcraft, 130 Fed. 521, 65 C. C. A. 145, affirmed 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794; The Etona, 71 Fed. 895, 18 C. C. A. 380; The Guadeloupe (D. C.) 92 Fed. 670. The numerous decisions cited in support of the decree are plainly distinguishable, having reference to the lading and care of the cargo, apart from the navigation, and are inapplicable to the negligence alleged in this libel. The master has entire charge of the navigation

of the vessel, which includes the time and manner of leaving port, equally with the course of sailing and the sail to be carried. So the contention that the voyage commenced at Charlevoix, and not East Jordan, on Pine Lake, the port of lading, if true under the conceded facts, is without force.

The decree of the District Court is reversed accordingly, with direction to dismiss the libel.

BACHMAN v. CLYDE S. S. CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1907.)

No. 146.

1. EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACT—VARIANCE.

Where a steamship ticket signed by the purchaser constituted a contract whereby he agreed that the carrier should not be liable for wearing apparel carried as baggage, beyond the amount of $100, unless freight was paid at the rate of 1 per cent. on the value over that sum, parol evidence of a conversation between the purchaser and the ticket agent at the carrier's office just before the ticket was purchased was inadmissible to vary the terms of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1826–1828.]

2. CARRIERS—PASSENGERS—SPECIAL CONTRACTS—AUTHORITY OF AGENT.

Where a railroad company gave a hotel the privilege of checking baggage of guests from the hotel instead of at the railroad station, and for this purpose the hotel company intrusted such duty to the head porter, the latter had no authority to make any representation to a guest whose trunk he checked, which would change the carrier's limited liability for damage to the passenger's baggage, as provided in the passenger's contract ticket.

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

Writ of error by the plaintiff to review action of the Circuit Court for the Southern District of New York in directing a verdict in favor of plaintiff for $100.

J. A. Carley (John A. Straley, of counsel), for plaintiff in error.

Robinson, Biddle & Ward (Henry G. Ward and F. G. Munson, of counsel), for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. In 1903 plaintiff was a dressmaker doing business in New York, and her brother Peter Becker was employed by her in her business. Becker purchased from defendant a round-trip ticket between New York and Palm Beach for a passage by defendant's steamer to Jacksonville, and thence by the Florida East Coast Railroad to Palm Beach, Fla., which contained, inter alia, the following provisions:

"It is not transferable. * * * It is not good for passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Florida East Coast Ry. at Palm Beach, Fla., on the day of departure returning. * * * It is mutually agreed that the carriers

in interest shall not be liable [under this contract] beyond their own line. * * * Passengers allowed to carry as baggage wearing apparel to the value of $100, and said carrier shall not be liable for other articles nor beyond that amount, unless freight at the rate of one per cent. on the value over $100 be paid. Baggage limited in weight to 150 lbs. for each passenger. * * * In consideration of the reduced rate at which this ticket was sold, I agree to the above contract, and also to use this ticket returning on or before the date punched on the margin, after which date this ticket will be void."

Becker through his agent signed said agreement, and he used the ticket for passage on the round trip. On his return trip he stopped at Ormond, a station on the line of said railroad, and from there he took two of the plaintiff's trunks with him. They contained dresses which the plaintiff had exposed for sale at the Ormond Hotel, and also her personal wearing apparel. When he reached New York by the defendant's steamship one of the trunks was wet, and when it was opened the dresses were wet and damaged. The plaintiff claimed damages to the amount of $3,560.

Error is assigned because of the refusal of the trial judge to permit the plaintiff to introduce testimony as to the conversation between the seller of the Becker ticket, at the office of the defendant, and the purchaser, just before he bought the ticket, and further to the refusal of the court to permit the plaintiff to testify as to her conversation with the porter of the hotel at Ormond at the time when she checked said trunks for New York.

This cause is distinguished from the cases such as The Minnetonka, (D. C.) 132 Fed. 52, The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, and The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, where the question was as to the passenger's knowledge of a notice printed on the ticket and as to the effect of such notice upon the rights and obligations of the parties. Here there was a contract signed by the purchaser of the ticket, whereby he agreed that the carrier should not be liable for wearing apparel carried as baggage beyond the amount of $100 unless freight was paid at the rate of 1 per cent. on the value over $100. Boylan v. Hot Springs, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290.

Even in the case of a mere notice, however—

"It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk." Railroad v. Fraloff, 100 U. S. 24–27, 25 L. Ed. 531.

And in such a contract, when signed—

"The limitation as to the value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld." Hart v. Pennsylvania Railroad Co., 112 U. S. 331–340, 5 Sup. Ct. 151, 28 L. Ed. 717.

The Kensington, supra.

We are of the opinion that there was no error in the refusal of the court to permit the plaintiff to offer testimony as to conversations with the ticket seller at New York or with the hotel porter who checked the baggage at Ormond. If any prior representations were made by the said ticket seller tending to vary or contradict the ordinary passenger's contract they were merged in the contract signed by plaintiff's agent. And there is nothing in the evidence which indicates that said hotel porter proposed to make any agreement inconsistent with said written contract, or which shows that he would have had any authority to waive the specific agreement as to limitation of liability. In fact it appears from the testimony of the porter himself that his sole authority in the matter was under an agreement between the Florida East Coast Railroad and the Ormond Hotel, whereby the railroad company "gave the hotel the privilege of checking baggage of the guests from the hotel instead of at the railroad station" and that he as head porter had charge of such checks.

It is, therefore, immaterial what conversations may have occurred between the plaintiff and said porter when she delivered said trunks to him, because in no event was he authorized to make representations or agreements which would be binding on any one except his principal, the railroad company, whose line extended between Ormond and Jacksonville. The complaint alleges that plaintiff delivered the property in question to the defendant at Jacksonville, and that it, for a valuable consideration, agreed to carry said property to New York, and that the damages resulted from the negligence of the defendant. Furthermore by the agreement on the ticket signed by plaintiff's agent, "It is mutually agreed that the carrier in interest shall not be liable [under this contract] beyond their own line." Myrick v. Michigan Central R. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325.

In view of this conclusion, it is unnecessary to consider or discuss any of the other questions raised.

The judgment is affirmed.

KELLOGG v. MALONEY et al.

(Circuit Court of Appeals, Ninth Circuit. March 11, 1907.)

JUDGMENT—CONCLUSIVENESS—MOTION TO SET ASIDE SUMMONS.

Where, in a proceeding to foreclose a tax lien, defendant, having been served by publication, appeared specially to move to quash the summons because proper foundation for the issuance of a summons had not been laid and because the summons did not comply with the laws of the state, which motion, after being heard, was denied, and defendant given five days in which to plead, which he failed to do, whereupon judgment was entered against him by default, such judgment was conclusive against defendant, who could not thereafter litigate the validity of such service in another court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

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

The plaintiff in error was plaintiff in the court below in an action of ejectment: the complaint alleging, among other things, that on and prior to February 29, 1904, the plaintiff and his then wife, Mary Tennessee Kellogg, were the owners as community property, seised in fee and in possession, and entitled to the possession as community property, of the lots of land in controversy, to wit, lots numbered 15 and 16, in block numbered 35, of Railroad addition in Centralia, Lewis county, Wash.; that while the plaintiff and his then wife were such owners, and so seised and possessed and entitled to possession, of the lots, the defendants did on the day mentioned, without right or title, enter upon the property and eject the plaintiff and his then wife therefrom, and have ever since withheld the possession thereof from the plaintiff; that on the 21st day of October, 1904, the plaintiff's wife died, and that he has since acquired all of her interest in the lots. The defendants in error defended the action, claiming title to the property under and by virtue of a tax deed, which the court below held to be valid.

The facts of the case were agreed to by the respective parties, and are, in brief, as follows: From November 2, 1898, until the issuance to the county of Lewis, state of Washington, of the tax deed, the plaintiff was the owner in fee of the property. June 1, 1903, there were delinquent and unpaid state, county, school, and municipal taxes thereon, including interest, penalty, and costs for the year 1897, in the aggregate amount of $196.29. On that day the county treasurer of the county of Lewis issued to the county a general certificate of delinquency in book form against the real property within the county for general state, community, school, and municipal taxes then delinquent and unpaid thereon, which certificate included the property here in question, and gave as the owner thereof the United States Savings & Loan Company. The certificate of delinquency was, upon its issuance, filed in the office of the clerk of the superior court of Lewis county by the treasurer of the county, and thereupon the treasurer commenced suit for the foreclosure of the tax lien, and published the summons issued in the case in a newspaper of general circulation in the county, as required by law. Due proof of publication of the summons was made and filed in the cause, after which the present plaintiff, Kellogg, moved the court to quash the summons, appearing specially for that purpose, upon the ground that "proper foundation for the issuance of a summons has not been laid, and that said summons does not comply with the laws of the state of Washington in such cases made and provided." The motion, coming on to be heard, resulted in this order of the court: "It is hereby ordered that said motion is hereby overruled, and J. A. Kellogg given five days to further plead. To which action of the court overruling said motion and holding said service sufficient as to J. A. Kellogg, the said defendant, J. A. Kellogg, excepts, and his exception is hereby allowed." Thereafter the plaintiff in the foreclosure suit moved the court: "To enter the default of the owner of lots 15 and 16, block 35, Railroad addition to Centralia, Wash., by reason of the failure of said owner or his attorney to make answer to this action within the time prescribed by order of court and oral stipulation of counsel extending the time prescribed by order of court, and to enter judgment herein as prayed for in the application for judgment."

Notice that the foregoing motion for the entry of default would be called up on November 30, 1903, at 10 o'clock a. m., was served on Kellogg's attorney November 27, 1903, and resulted in the making and entry of this order by the court on November 30th: "Geo. E. Rhodes, the attorney for J. A. Kellogg, the owner of lots 15 and 16 in block 35, Railroad addition to Centralia, Wash., having heretofore made and filed his motion to quash the summons herein issued, which motion was duly overruled by order of this court made and entered, and the said attorney on behalf of his said client was given five days further time in which to plead in this action, which time was afterwards extended to November 20, 1903, by oral stipulation between the attorneys in this case, and the time within which the said Kellogg, the owner of said lots as aforesaid, had to answer in this action having expired, and no answer having been made herein, it is therefore ordered that the default of the said J. A. Kellogg be, and the same is hereby, entered and established of record." And, proceeds the agreed statement of facts: "No person having appeared in said action to defend the same as to either of the tracts of land

described in said summons on November 30, 1903, a further order of default was made and entered against all persons interested in said lands, judgment was entered in the ordinary form, foreclosing the general certificate of delinquency against all the lands described in said summons and against each of the tracts herein described for the amount set opposite the descriptions thereof in said summons, and the same was ordered by the court to be sold at public sale as provided by law in such case."

The property in controversy was duly offered for sale at public auction under the decree of the court and in pursuance of law, and, there being no bidders, was struck off to the county of Lewis. A tax deed therefor was issued by the treasurer of the county. The county afterwards sold the property to the defendants in consideration of $460, and executed to them a deed therefor. March 2, 1904, the defendants commenced suit in the superior court of Lewis county, Wash., against J. A. Kellogg and others to quiet their alleged title to the property, in which suit summons was duly and regularly published, and, the defendants to that action having failed to appear therein, their default was entered, and on May 8, 1904, a decree was entered therein for the plaintiffs (defendants here). During all of the time mentioned, and until her death, Kellogg and his wife resided in the state of Tennessee, and prior to the defendants' entry no person was in actual occupancy of the property. At the time of the commencement of the present action the plaintiff was, and still is, a citizen of Tennessee, and the defendants citizens of the state of Washington. From 1897 to 1898, inclusive, the property was assessed upon the assessment roll of Lewis county in the name of the "U. S. S. and L. Co."; from 1900 to 1901, inclusive, to "G. H. Ellsburg"; and from 1902 to 1903, inclusive, to the plaintiff, Kellogg. At all of the times mentioned there were, and now are, platted additions to the city of Centralia, Lewis county, Wash., of record in the office of the county auditor of the county, and entitled, respectively, "Second Railroad Addition to Centralia," and "Third Railroad Addition to Centralia." On or about February 26, 1904, the defendants herein, relying on the tax deed issued to them, took possession of the property, and have since expended in improvements thereon and in payment of taxes upon the property the aggregate amount of $2,000 or thereabouts. On or about January 1, 1905, the plaintiff, who had succeeded to all of his wife's interest in the property, tendered the defendant $700, being the amount of the taxes, penalties, interest, and costs paid by them at the tax sale, which tender they refused.

B. F. Heuston and T. W. Hammond, for plaintiff in error.

W. C. Sharpstein, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The point relied upon by the plaintiff in error as ground for a reversal of the judgment of the court below is that the proceedings under the statute of the state of Washington, culminating in the tax deed under which the defendants in error hold and claim, were all void. That, manifestly, depends upon a proper interpretation of the statutes of that state; and, inasmuch as the plaintiff in error appeared in the suit brought in the state court to enforce the alleged lien for taxes and moved that court to quash the summons issued therein, for the reason that the proper foundation for the issuance of summons had not been laid, and that the summons itself did not comply with the laws of the state of Washington in such cases made and provided, he thereby invoked the judgment of the state court in respect to whether the foundation of the suit, to wit, the issuance of the certificate of delinquency, was in conformity with the provisions of the state statute, and whether the

summons also conformed to its requirements. The state court held the affirmative of both propositions in denying the motion to quash, and, furthermore, granted the plaintiff in error time within which to further plead in that cause, which time he procured to be extended by stipulation entered into with the attorney for the plaintiff in the suit. The plaintiff in error, therefore, had his day in court, and full opportunity not only to test the validity of the tax proceeding in the trial court of the state whose statutes are involved, but also by appeal to the Supreme Court of the state in the event of his dissatisfaction with the decision of the trial court. That the plaintiff in error cannot again litigate the same question in another court is clear. See Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; Sharon v. Hill (C. C.) 26 Fed. 357, 722; White v. Fresno National Bank, 98 Cal. 166, 32 Pac. 979; Baisley v. Baisley, 21 S. W. 29, 113 Mo. 544, 35 Am. St. Rep. 726.

The judgment is affirmed.

WRIGHT v. GORMAN-WRIGHT CO. et al.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1907.).

No. 700.

1. APPEAL—REVERSAL—DECREE—ENTRY IN TRIAL COURT—FURTHER APPEAL.
   Where a decree was reversed, and the cause remanded, with directions to the trial court to dismiss the bill, whereupon a decree conforming to the mandate was entered in the trial court, such decree was not reviewable on a further appeal; the only relief being by petition for rehearing in the appellate court filed within the term at which the judgment was entered, unless by special leave granted during the term, as authorized by Court of Appeals, Rule 29 (31 C. C. A. clxvii, 90 Fed. lix).
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 814.]

2. SAME—DECREE FOR COSTS.
   No appeal lies from a decree respecting costs and expenses.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 823.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

See 134 Fed. 363.

S. S. P. Patteson and H. A. Foushee, for appellant.

Geo. A. Hanson, for appellees.

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

PRITCHARD, Circuit Judge. This was a suit instituted by appellant in the Circuit Court for the Eastern District of Virginia against the defendants, alleging that the plaintiff was a resident and citizen of New York at the time of the commencement of the suit; that the defendant the Gorman-Wright Company was a corporation organized and existing under the laws of the state of Virginia; that the defendant J. N. Gorman was a resident and citizen of the Eastern District

of Virginia; that the defendant J. N. Gorman, being indebted to the plaintiff in the sum of about $36,000, executed his notes with personal security, and deposited as additional security 100 shares of the capital stock of the defendant the Gorman-Wright Company; that the notes were long past due and unpaid; that the said Gorman-Wright Company was insolvent, its assets being mismanaged by J. N. Gorman, general manager, secretary, and treasurer of said company, who was also insolvent, and, among other things, demanding that a receiver of the defendant corporation be appointed. The Circuit Court appointed Chas. T. O'Ferrall temporary receiver, from which order an appeal was taken to this court, and on November 15, 1904, this court filed its opinion, and, in the concluding part, it was said:

"If the question of jurisdiction had not been raised by the appellant, it would have been the duty of this court to have denied its own jurisdiction on its own motion, because the record before us clearly shows it. Reaching this conclusion, it becomes unnecessary for us to consider other matters raised by the assignments of error, and elaborately discussed by counsel. There is error in the decree complained of, and it will be reversed, and this case will be remanded with directions to the court below to dismiss the bill."

The court, in its mandate of December 23, 1904, directed as follows:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and this cause is remanded to the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, with directions to dismiss the bill."

Counsel for appellees files a motion to dismiss, based upon the ground that an appeal did not lie from the decree sought to be reviewed, and insists that, inasmuch as the Circuit Court followed the mandate of this court in the preparation of the decree of which appellant complains, no appeal lies from a decree entered under such circumstances; that the decree of the Circuit Court was the decree of this court as announced in its mandate when this case was here on appeal; and that the proper remedy for appellant was by petition to this court for a rehearing. Rule 29 of this court, is as follows:

"A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term," etc. 31 C. C. A. clxvii, 90 Fed. lix.

If there was error of law in the decree, as contended by appellant, such question could have only been considered by this court, and not by the lower court. The Circuit Court by its formal decree simply entered the decree of this court. Hence there was nothing which transpired in the court below from which an appeal would lie to this court. It would be unreasonable to hold that one would be entitled to an appeal from the action of the lower court in directing that a decree of this court be entered upon the records of that court.

In the case of Southard et al. v. Russell, 16 How. 569, 14 L. Ed. 1052, among other things, it is said:

"As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court on appeal, in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with.

The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. This may be corrected by a direct application to that court, which would amend, as a matter of course, any error of the kind that might have occurred in entering the decree."

The following cases are to the same effect: Boggs v. Willard, 70 Ill. 315, 22 Am. Rep. 77; Gillaspie v. Scott, 32 La. Ann. 767; Jenkins v. Guarantee Trust, etc., Co., 55 N. J. Eq. 798, 38 Atl. 695; Anderson v. Woodard, 47 S. C. 203, 24 S. E. 1037; Lowell v. Ball, 58 Tex. 562; Southard v. Russell, 16 How. 547, 14 L. Ed. 1052. The case of Southard v. Russell, supra, is on all fours with the case at bar, and is conclusive so far as this question is concerned.

Under the rule of this court, to which reference has been made, appellant had during the term at which the decree was entered in which to present a motion for a rehearing, and, having failed to take advantage of this rule, the judgment of this court became final at the end of the term at which the same was entered.

There is another reason why appellant is not entitled to invoke the jurisdiction of this court. It is well settled that in cases like the one under consideration an appeal will not lie from a decree for costs. In the case of Elastic Fabrics Co. v. Smith, 100 U. S., 110, 25 L. Ed. 547, Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"No appeal lies from a mere decree respecting costs and expenses."

Also, in the case of Dubois v. Kirk, 158 U. S. 58–67, 15 Sup. Ct. 729, 39 L. Ed. 895, Mr. Justice Brown, in delivering the opinion of the court, said:

"As costs in equity and admiralty cases are within the discretion of the court, we do not feel inclined to reverse this decree in awarding such costs to the plaintiff. This court held in several cases that an appeal does not lie from a decree for costs."

Justice Story, in delivering the opinion of the court in the case of Canter v. Insurance Co., 3 Pet. 318, 7 L. Ed. 688, said:

"As to costs and expenses, we see no error in the allowance of them in the Circuit Court. They are not matters positively limited by law, but allowed in the exercise of a sound discretion of the court. And, besides, it may be added that no appeal lies from a decree respecting costs and expenses."

Also the following cases sustain this view: Paper Bag Machine Co. Cases, 105 U. S. 766, 26 L. Ed. 959; Wood v. Weimar, 104 U. S. 786, 26 L. Ed. 779; Russell v. Farley, 105 U. S. 433, 26 L. Ed. 1060.

For the reasons hereinbefore stated, we find no error, and the decree appealed from is affirmed.

McDOWELL, District Judge. I concur in the conclusion reached, but not in the reasons assigned.

BROWN et al. v. MERCHANTS' MARINE INS. CO., Limited, et al.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1907.)

No. 1,226.

1. INSURANCE—MARINE POLICIES—INSURABLE INTEREST—SUBROGATION OF INSURER.

Where insured had an insurable interest in property covered by, and was therefore entitled to recover on, certain marine policies on disbursement and for increased value, insured against total loss only, warranted free from average and salvage charges, and containing a policy proof of interest clause, the insurers having paid as for a total loss were entitled to share with other insurers in the distribution of a fund recovered as the result of a proceeding to fix liability for the collision in which the vessel insured was lost.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1504–1516.]

2. SAME—RECOVERY OF DAMAGES—PARTICIPATION IN PROCEEDINGS—DELAY.

Such insurers were not precluded from participation by mere delay in paying the loss under their policies, nor by their refusal to participate in the proceedings to recover damages from the owners of the vessel liable for the collision.

3. SAME—SUBROGATION BETWEEN INSURERS.

Subrogation as between insurers results by operation of law from the mere fact of payment of the loss, and does not depend on the voluntary act of the assured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1504–1516.]

4. SAME.

In an action by one insurance company against the others interested in a loss on a vessel to share in the amount received in an action for the injuries received by the vessel, it was no ground for discrimination against the intervener that the policies which they issued covered disbursements.

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

See 144 Fed. 85.

The appellant is the assignee of certain insurance companies which had insured the City of Kingston, an American vessel, against all risks, under separate policies, in each of which the vessel was valued at $75,000. The appellees issued to the owners of the City of Kingston two policies aggregating $12,200 on disbursement and/or increase value insured against total loss only, warranted free from all average and salvage charges, and containing the policy proof of interest clause. In addition to these the St. Paul Fire & Marine Insurance Company had insured the vessel in the sum of $4,800 against total loss only, no valuation being inserted in the policy. All of the policies were for one year, beginning August 28, 1898, and ending August 29, 1899. On April 23, 1899, the City of Kingston came into collision with the steamer Glenogle in Tacoma Harbor and was sunk. The Glenogle was also damaged by the collision. The net value of the wreckage saved from the City of Kingston was about $1,500. All the underwriters represented by the appellant, together with the St. Paul Fire & Marine Insurance Company, paid a total loss. At the request of the underwriters, which are represented by the appellant herein, the owner of the City of Kingston took proceedings in the court below to recover damages for the loss of that vessel from the owners of the Glenogle. The latter made a counterclaim for injuries sustained by their vessel in the collision. On the hearing the District Court (The Glenogle, 122 Fed. 503) found that the ac-

tual value of the City of Kingston was $140,000, and that both vessels were in fault, and decreed that the aggregate damages to both be divided equally between the parties to the suit. The result was that $67,472.96 was paid into the registry of the court for the owners of the City of Kingston. On October 29, 1903, the District Court decreed the payment of costs, disbursements, and expenses in the litigation, leaving in the registry of the court $47,426.97, which was held for disbursement to the insurance companies entitled to receive the same. On December 29, 1903, the appellees intervened, alleging that they had paid a total loss and that they were entitled to share pro rata with the other underwriters in the fund in court. In February, 1904, the District Court ordered the payment to the said insurance companies, other than the appellees herein, of all the funds then in the court, save the sum of $4,132.92, and subsequently, under the order of the court, that sum was paid to the appellees herein.

Ira Bronson, D. B. Trefethen, and Milton Andros, for appellants.
B. S. Grosscup (L. S. B. Sawyer, of counsel), for appellees.

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

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

The appellant contends that his assignors, having insured the City of Kingston in the sum of $75,000 in policies which established her value at that sum, and having paid the full amount thereof on her loss, became entitled to be subrogated to that amount as to all damages awarded the owner of the City of Kingston, and that the appellees, who had issued wager policies, were not entitled to share in that fund.

It is true that the policies which were issued by the appellant are in form what are known as "wager policies." Each contains the provision that the policy shall be "proof of interest," and therefore by its terms dispenses with proof of interest in the insured in case of loss. Such a provision in the policy implies that the contract is not one of indemnity, but that it is a wager, in which the insured need have no interest in anything insured, and consequently need have nothing at risk. Arnould on Marine Insurance (7th Ed.) § 9.

By the law as it was administered in England prior to the act of 19 Geo. II, c. 37, such a wager policy was deemed a valid contract of insurance, but by the terms of that act it was provided that all such insurance on British vessels or cargoes therein carried should be void. That statute was held not to affect insurance policies taken out in England on foreign ships or cargoes. Thellusson v. Fletcher, 1 Doug. 15. But in the United States it is held that, while a wager policy on property in which the insured has no interest is void as against public policy, the provision in the policy that that instrument shall be proof of interest does not render the policy void if the insured in fact had an insurable interest, and that such policies are to be deemed policies on interest if the contracting parties so understood and agreed. Said Judge Story in Alsop v. Commercial Insurance Company, 1 Sumn. 451, Fed. Cas. No. 262:

"There is this difference between policies in America and policies in England containing stipulations like those in the present policy, 'interest or no interest,' or 'without farther proof of interest than the policy,' that in the latter country, such policies being prohibited as wager policies, the insertion

of the prohibited words in the policy is proof de facto that they are mere wagers; whereas in America such policies are not treated as necessarily purporting to be wager policies, but that they are deemed policies on interest, if the parties so understood and agreed. So it was held in Amory v. Gilman, 2 Mass. 1, and in Clendining v. Church, 3 Caines (N. Y.) 141. Prima facie they so import; but the implication may be rebutted by proofs of admissions."

See, also, New York & Cuba M. S. S. Co. v. Royal Exchange Assurance (D. C.) 145 Fed. 713.

The assured in the policies issued by the appellees was in fact the owner of the property insured, and could undoubtedly have recovered on the policies. Such being the case, we are unable to discover any recognized principle of law or equity on which it should be held that the appellees are not entitled to rank equally with the other underwriters in the distribution of the fund in court. No ground for discrimination against the appellees can be found in the fact that the policies which they issued covered "disbursements." The object of insurance on disbursements is to insure the shipowner the recovery of additional sums beyond the amount covered by his insurance on ship and freight, and it is made against total loss only. Arnould, Marine Ins. § 247. In International Navigation Company v. Atlantic Mutual Ins. Co. (D. C.) 100 Fed. 304, Judge Brown said that policies on disbursements are in very common use, and "are designed to cover a variety of interests not covered by policies in the ordinary form, including moneys which have gone into the construction of the hull and equipment and sunk in depreciation. * * * 'Disbursement' policies are often issued where the hull is fully covered by other policies." And, since the appellees could, as we have seen, have been compelled to pay the loss under their policies, they are not, as suggested by the appellant, mere volunteers in paying the same and therefore to be denied the right of subrogation. Nor do we see that their delay in paying or their refusal to participate in the proceedings to recover damages from the owners of the Glenogle should be held to be ground for excluding them from participation in the fund. Subrogation results by operation of law from the mere act of the payment of the loss, and does not depend on the voluntary act of the assured. Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; St. Louis, etc., Railway v. Commercial Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154. In The Livingstone, 130 Fed. 746, 65 C. C. A. 610, the amount in controversy was recovered by the unaided effort of the owners, and against the active opposition of the intervening underwriters. It was held, notwithstanding this fact, that the interveners were entitled to subrogation. We find the general doctrine applicable to this case in Arnould, Marine Ins. § 1215, where it is said:

"Upon abandonment each of the underwriters participates in the benefits of the transfer by sharing in the proceeds of the salvage according to the proportion which the amount of his subscription bears to the whole value of the thing insured, and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one."

We find no error in the decree of the District Court. It is accordingly affirmed.

COLLIN COUNTY NAT. BANK OF McKINNEY, TEX., v. HUGHES.*

(Circuit Court of Appeals, Eighth Circuit. March 26, 1907.)

No. 2,511.

1. COURTS—UNITED STATES COURTS—JURISDICTION—POWERS OF STATE LEGISLATURES.

The jurisdiction of a federal court over the subject-matter of and the parties to a judgment includes the power to enforce it, continues until it is satisfied, and may not be destroyed or impaired by the legislation of the states.

2. JUDGMENT—REVIVAL—SCIRE FACIAS—NATURE OF PROCEEDING.

A proceeding by scire facias to revive a personal judgment is a mere continuance of the action which resulted in the judgment, a supplementary remedy to aid in the collection of the debt. It is not an original or an independent suit or proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1613.]

3. COURTS—UNITED STATES COURTS—JURISDICTION—SCIRE FACIAS TO REVIVE JUDGMENT—ADOPTION OF PRACTICE OF STATE COURTS.

The power to issue writs of scire facias to revive judgments granted to the national courts by the fourteenth section of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 81) includes the power to prescribe the methods of their service and to cause them to be served either within or without the districts in which the courts sit.

While the national courts may follow the methods of service prescribed by the states for similar writs issued by the state courts, the national courts are not restricted to those methods, but may prescribe their own ways and cause them to be followed according to the course of the common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 917.]

4. WRIT OF ERROR—DECISIONS REVIEWABLE—FINAL DECISION — QUASHING SERVICE OF WRIT OF SCIRE FACIAS.

An order which quashes the service of a writ of scire facias by publication, without determining that the writ may not be otherwise served, and without dismissing the action, is not a final decision, and is not reviewable by writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 464.]

5. SAME—FORM OF REMEDY—EXISTENCE OF REMEDY BY MANDAMUS.

A writ of mandamus is, and a writ of error is not, the proper remedy for the refusal of a Circuit Court to prescribe the method and direct the service of a writ of scire facias and also for its refusal after sufficient service to take jurisdiction of and to decide the issues presented by the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 34.]

(Syllabus by the Court.)

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

On motion to dismiss writ of error.

Clayton C. Dorsey and W. V. Hodges, for the motion.

Clinton Reed and Samuel S. Large, opposed.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

*For opinion on rehearing, see 155 Fed. 383.

SANBORN, Circuit Judge. This is a motion to dismiss a writ of error which challenges an order of the Circuit Court that quashed the service by publication of a writ of scire facias to revive a judgment. The motion is made on the grounds that the order was not a final decision, that this court has no jurisdiction to review it, and that the citation in this court was not properly served.

On June 26, 1891, a judgment was rendered in the United States Circuit Court for the District of Colorado in favor of the Collin County National Bank of McKinney, Tex., and against J. A. Hughes, for $6,050. On December 16, 1905, the bank filed a petition, and on December 19, 1905, the court issued a scire facias to revive that judgment. On December 30, 1905, the marshal made a return that the defendant Hughes could not be found in the district of Colorado, on the 8th day of January, 1906, an affidavit was filed to the effect that Hughes resided in the state of Texas, and that his post office address was at Dallas in that state, and the court ordered that the writ of scire facias should be served upon him by a publication thereof in a Denver newspaper. The publication was made, and thereafter the attorneys for Hughes appeared specially for that purpose and moved the court to quash the service of the writ, and the court granted their motion.

The United States Circuit Court below had full jurisdiction of the subject-matter of, and of the parties to, the original judgment, and therefore it had plenary power to enforce it. "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." Riggs v. Johnson County, 6 Wall. (U. S.) 166, 187, 18 L. Ed. 768. "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment shall be satisfied." Wayman v. Southard, 10 Wheat. (U. S.) 1, 22, 6 L. Ed. 253. The fact that the statutes of the state of Colorado have or have not provided a method for the enforcement of such a judgment cannot limit or impair this power. The jurisdiction of a national court over a controversy once lawfully acquired includes the power to enforce its judgment or decree, and this power may not be destroyed or restrained by the legislation, or the lack of legislation of the states, because it is granted by the Constitution and the acts of Congress, which are the supreme law of the land. Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 949, 66 C. C. A. 55, 59, 67 L. R. A. 761; Brun v. Mann (C. C. A.) 151 Fed. 145; Chicot Co. v. Sherwood, 148 U. S. 529, 533, 534, 13 Sup. Ct. 695, 37 L. Ed. 546.

A proceeding by scire facias to revive a personal judgment is a mere continuance of the suit in which the judgment was rendered. It is a supplementary remedy to aid in the recovery of the debt evidenced by the judgment. It is not an original or an independent suit or proceeding. Lafayette Co. v. Wonderly, 92 Fed. 313, 314, 34 C. C. A. 360, 361; U. S. v. Payne, 147 U. S. 687, 690, 13 Sup. Ct. 442, 37 L. Ed. 332; Adams v. Savage, 3 Salk. 321, 2 Bac. Abr. 598; McGill v. Perrigo, 9 Johns. (N. Y.) 259; Humphreys v. Lundy, 37 Mo. 320, 323.

The authority of the Circuit Courts of the United States to issue, and ex necessitate to serve, writs of scire facias was conferred upon them by section 14 of the judiciary act of 1789. Act Sept. 24, 1789, c. 20, 1 Stat. 81; Rev. St. § 716 [U. S. Comp. St. 1901, p. 580]. And while these courts may follow the methods of issue and of service subsequently provided for the state courts by their Legislatures, just as they may enforce any rights such Legislatures may grant and administer any remedies they may provide, they are not restricted to those methods, but may issue and serve their writs according to the course of the common law. U. S. v. Insley, 54 Fed. 221, 223, 4 C. C. A. 296, 298. The defendant in this action is still within the jurisdiction of the Circuit Court. This is a proceeding to enforce the judgment which that court rendered against him. If the statutes of Colorado have failed to provide any adequate method of giving notice of this writ to the defendant, Hughes, the Circuit Court has ample power by its own order to prescribe such a method and to direct the service to be made accordingly. The only essential requisite is that it shall be such service as will with reasonable probability give the defendant notice of the writ and of the return day. The defendant cannot escape the jurisdiction of the court below by withdrawing his person from the district in which that court sits. If service of the writ by publication is insufficient to give the defendant reasonable notice of it, a question upon which no opinion is expressed, personal service of it upon him in the state of Texas or wherever he may be found, or service upon a person of suitable age and discretion living in his residence in the state of Texas, if he cannot be found, may be prescribed by the court below. Comstock, Adm'r, v. Holbrook, 16 Gray (Mass.) 111, 113; Battey, Executor, v. Holbrook, 11 Gray (Mass.) 212; Adams v. Rowe, 11 Me. 89, 97, 25 Am. Dec. 266; Minnesota, etc., Co. v. St. Paul, etc., Co., 2 Wall. (U. S.) 609, 633, 17 L. Ed. 886; Oglesby v. Attrill (C. C.) 14 Fed. 214, 215.

If a Circuit Court upon a proper application refuses to prescribe the method and direct the service of a scire facias, or if after sufficient service of it the court quashes the service and declines to take jurisdiction and decide the issues it presents, the remedy of the party aggrieved is a writ of mandamus, and not a writ of error. Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; In re Grosmayer, 177 U. S. 48, 20 Sup. Ct. 535, 44 L. Ed. 665; Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 953–957, 66 C. C. A. 55, 63–67.

The jurisdiction of this court upon a writ of error is limited to the review of a final decision of the court below. Act March 3, 1891, c. 517, § 6, 26 Stat. 828; Supp. Rev. St. p. 903, § 6 [U. S. Comp. St. 1901, p. 549]. An order, judgment, or decree which leaves the rights of the parties affected by it undetermined and open to further litigation in the same suit is not a final decision. Standley v. Roberts, 8 C. C. A. 305, 308, 59 Fed. 836, 839. The order which quashed the service of the writ of scire facias was not a final decision, because it did not discharge the writ or determine that it could not be legally served or refuse to direct its service, but determined only that the particular service already made was insufficient. If so, the action was still pending, the rights of the parties were undetermined therein, and it was the

duty of the Circuit Court to prescribe a suitable method of service and to direct it to be made, a duty which, if not already performed, will undoubtedly be speedily discharged upon a proper application. L. E. Waterman Co. v. Parker Pen Co., 107 Fed. 141, 142, 46 C. C. A. 203, 204. As the order which quashed the writ was not a final decision, it is not reviewable in this court, and the motion to dismiss the writ must be granted for that reason.

This conclusion renders our consideration of the other grounds of the motion unnecessary, and the writ of error is dismissed.

CRYDER v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1907.)

No. 2,440.

1. MASTER AND SERVANT—LATENT DEFECTS—FAILURE TO DISCOVER AND REMOVE NOT NEGLIGENCE OF MASTER.

The failure of a master or of his inspectors to discover and remove latent defects, which the exercise of ordinary care would not discover, in the place, articles, or machinery with which his servant works, is not negligence on their part, because the discovery and removal of such defects falls beyond the limits of their duty to exercise reasonable care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 233, 237.]

2. SAME—SERVANT ASSUMES RISK.

The servant assumes the risk of the latent defects in the place, articles, and machinery with which he works, which the ordinary care of the master to make and keep the place, articles, and machinery reasonably safe fails to discover and remove.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551, 552.]

3. SAME—NEGLIGENCE—PROOF OF INJURY BY NEGLIGENCE OR BY SOME OTHER CAUSE INSUFFICIENT.

Evidence in actions for negligence that the injury was caused by the defendant's want of reasonable care, or by a latent defect, or by some other thing for which he is not responsible, is insufficient, because the burden is on the plaintiff to show that the injury resulted directly from the negligence of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 897, 959.]

4. SAME—NEGLIGENCE—LATENT DEFECTS—FACTS—CONCLUSION.

A conductor was descending a ladder on the end of one of the cars of his moving train, when one end of one of the rounds gave way, and he fell and was injured. The car had been cornered, and this was one of five of the six rounds of the ladder which had been bent. The defendant had provided inspectors to examine this and other cars at the station at which the conductor took this train and to cause defects in them to be remedied. After the accident one end of the wood screw which fastened the round which gave way was found newly broken at a point from an inch to an inch and a half within the wood of the car.

Held, there was no substantial evidence here of negligence of the defendant or of its inspectors.

(Syllabus by the Court.)

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

W. S. Roark (Lee Monroe and W. F. Schoch, on the brief), for plaintiff in error.

Paul E. Walker (M. A. Low, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff was a conductor in the employment of the defendant, a railroad company. About midnight on July 5, 1903, he took his train at Horton, in the state of Kansas. After he had passed two or three stations he went forward on the top of the train until he came to a furniture car. He then attempted to descend on a ladder made of iron rounds about three-quarters of an inch in diameter fastened to the end of this car by wood screws, and, as he placed his hand or foot upon one of them, one end of it gave way, he fell, and was injured by the moving train. The company had furnished inspectors at Horton whose duty it was to examine this and other cars before they were delivered to the conductors and to use reasonable care to cause those found dangerously defective to be repaired. The furniture car had been cornered, and five of the six rounds of the ladder from which the plaintiff fell had been bent. After the accident one end of one of the rounds of the ladder was found to be loose and hanging by the other end. In the loose end of this round was one end of a wood screw, which had fastened it to the car, newly broken. This screw was about four inches long, and it had broken from an inch to an inch and a half within the wood of the car. Upon this state of facts the court sustained a demurrer to the evidence, and this ruling is challenged by the writ.

When one brings an action for damages on account of the negligence of the defendant, he assumes the burden of proving that the defendant was guilty of some breach of duty which caused the injury. The primary legal presumption in such a case is that the defendant and all who were charged with the performance of any part of his duty as a master have properly discharged their respective duties; that the defendant has exercised reasonable care to provide ordinarily safe cars, engines, and rails, and to furnish competent inspectors to examine and keep them in a reasonably safe condition; and that these inspectors have properly discharged their duty.

The breach of duty upon which the plaintiff relied in this case was the alleged failure of the inspectors at Horton to carefully examine and by that examination to discover, and cause a remedy of the defects in the screw, the break of which caused the accident. But the limit of the duty of the inspectors was to exercise ordinary care to examine the car and to remedy the defect, to exercise that degree of care which ordinarily prudent inspectors commonly use under like circumstances. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 411, 416, 12 Sup. Ct. 679, 36 L. Ed. 485; Southern Pacific Co. v. Hetzer, 68 C. C. A. 26, 35, 135 Fed. 272, 281, 1 L. R. A. (N. S.) 288. The only evidence to overcome the legal presumption that they discharged this duty is the fact that the car had been cornered, and five of the rounds of the ladder had been bent, the fact that the screw broke, and the accident itself. But four of the five bent rounds held fast, so that their crooked condition constituted no notice or evidence to the

inspectors that the screw in question was broken or that it would break.

A new fracture of the screw occurred an inch or an inch and a half within the wood of the car. But this fact fails to overcome the presumption that the inspectors discharged their duty, because the weakness of this screw may have been a latent defect which a reasonably careful inspection of the car would not have disclosed, and the servant assumes the risk of such defects.

The plaintiff was injured by the break of the screw. But the facts that the screw gave way, and that the plaintiff was thereby injured, are insufficient to establish the negligence of the inspectors or of the defendant, because they do not show whether the injury was caused by negligence in inspection or by a latent defect, and proof that it was caused by the former, and not by the latter, was indispensable to overcome the presumption that the inspectors exercised reasonable care to examine the cars. The doctrine res ipsa loquitur is inapplicable to cases between master and servant brought to recover damages for negligence. Patton v. Texas & Pac. R. Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361; Chicago & N. W. Ry. Co. v. O'Brien, 67 C. C. A. 421, 424, 426, 132 Fed. 593, 596, 598; Northern Pac. R. Co. v. Dixon, 139 Fed. 737, 740, 71 C. C. A. 555, 558.

The servant assumes the ordinary risks and dangers of his employment which are known to him and those which would be obvious to one of ordinary prudence in similar circumstances. One of these risks is that which arises from latent defects, which the ordinary care of the master may not discover, in the place, articles, and machinery with which the servant works. The failure of the master to find and remove such latent defects, which ordinary care is unable to discover, constitutes no negligence on his part, because the limit of his duty is to exercise reasonable care, and the discovery and repair of such defects falls without that limit. Illinois Cent. R. Co. v. Coughlin, 132 Fed. 801, 802, 65 C. C. A. 101, 102; Hodges v. Kimball, 104 Fed. 745, 753, 44 C. C. A. 193, 201; Killman v. Robert Palmer & Son, etc., Ry. Co., 42 C. C. A. 281, 102 Fed. 224; Carruthers v. C. R. I. & P. Ry. Co., 55 Kan. 600, 605, 40 Pac. 915; Allen v. Union Pac. R. Co., 26 Pac. 297, 298, 7 Utah, 239; Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660, 666, 7 Pac. 204.

There was no substantial evidence that the injury involved in this case was caused by any negligence of the defendant, and the court below properly directed a judgment in its favor.

No opinion is expressed upon the other alleged errors assigned, because, if the rulings challenged were erroneous, it is clear beyond doubt that no prejudice resulted or could have resulted to the plaintiff on their account. He could not have recovered if these rulings had been otherwise, for he was permitted to introduce all the evidence of causal negligence which he offered, it was insufficient to establish the liability of the defendant, and without proof of that liability he could not have secured a judgment in any event. Smiley v. Barker, 83 Fed. 684, 687, 28 C. C. A. 9, 12; Bank of Havelock v. Western Union Tel. Co., 141 Fed. 522, 527, 72 C. C. A. 580, 585, 4 L. R. A. (N. S.) 181.

The judgment below is affirmed.

HALL v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1907.)

No. 1,599.

POST OFFICE—USING MAILS TO DEFRAUD—INDICTMENT.

The provision of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], relating to the use of the mails to defraud, that an indictment may charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence, does not render an indictment bad because offenses not committed within the same six calendar months are joined therein, but the offenses in such case are separate and distinct, and punishable as such.

[Ed. Note.—Nonmailable matter relating to frauds and counterfeiting, see note to Timmons v. United States, 30 C. C. A. 86.]

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

Joseph S. Graydon, for plaintiff in error.

Sherman T. McPherson and Thomas H. Darby, for the United States.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The plaintiff in error was indicted under section 5480 of the Revised Statutes [U. S. Comp. St. 1901, p. 3696]. The indictment contained three counts, each charging the defendant below with placing a letter in the post office at Cincinnati, Ohio, in furtherance of a scheme to defraud. The letters were charged to have been placed in the post office, the first on September 7, 1903, the second on October 22, 1903, and the third on April 9, 1904. It will be perceived that the first letter deposited September 7, 1903, was not mailed within the same six calendar months, as the second and third letters were.

The defendant demurred generally to the indictment, urging upon the argument that the indictment did not show a scheme to defraud. The demurrer was overruled, and the case went to the jury, which returned a verdict of not guilty as charged in the first count, and guilty as charged in the remaining counts. Upon the argument of the motion for a new trial, the point was first made that it appeared from the indictment that the offenses joined were not all committed within the same six calendar months. The court below took the view that the provision of section 5480, limiting the joinder of offenses to the number of three when committed within the same six calendar months, is not a part of the description of the offenses created by the section, but relates only to procedure (U. S. v. Nye [C. C.] 4 Fed. 889), and the misjoinder complained of was an irregularity which the defendant might have waived, and which he did waive, by his plea of not guilty and the submission of the cause to the jury. Commonwealth v. Holmes, 119 Mass. 198. The defendant was not in any wise prejudiced by the misjoinder, for, the jury having found that he was not guilty as charged in the first count, their consideration of that question would not prejudicially affect their action upon the other

two counts, nor could it enter into the consideration of the court in pronouncing the sentence.

We are disposed to agree with the court below in the view that, if any irregularity by way of misjoinder existed in the indictment as it stood, such irregularity could have been waived by a failure to point out the defect in time. But we are not satisfied that it did exist. The provisions of section 5480, regulating the joinder of offenses against the post-office establishment for trial, were carefully considered in the case of In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174. Although Henry, the petitioner, was convicted under an indictment charging three separate and distinct offenses, all alleged to have been committed within the same six calendar months, nevertheless he was further indicted and convicted of three other offenses committed within the same six calendar months, and was sentenced to a further term, beginning at the end of that imposed under the first indictment. "We have carefully considered the argument submitted by counsel on behalf of the petitioner," said Mr. Chief Justice Waite (page 374 of 123 U. S., page 142 of 8 Sup. Ct. [31 L. Ed. 174]), "but are unable to agree with him in opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months." Again (page 375 of 123 U. S., page 143 of 8 Sup. Ct. [31 L. Ed. 174]):

"Under the present statute three separate offenses, committed in the same six months, may be joined, but not more; and when joined there is to be a single sentence for all. That is the scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself."

In other words, construing the act as indicated, the limitation resulting from the failure to include the offense committed on September 7, 1903, within the six calendar months covered by the offenses committed October 22, 1903, and April 9, 1904, was to place the offense of September 7, 1903, outside the category of offenses which could be severally joined in one indictment, and for which the court could give a single sentence. But it did not result from this that the defendant gained immunity from punishment for this offense. He could still be indicted and convicted, but it would be for a separate and distinct offense not covered by the sentence imposed for the offenses included within the period of six calendar months. The result is illustrated in the case of In re De Bara, 179 U. S. 316, 21 Sup. Ct. 110, 45 L. Ed. 207. In that case a number of indictments and a number of counts under each were consolidated and tried together. There was one conviction and one sentence, which was in excess of that prescribed for one offense. The Supreme Court, following the rule laid down in Re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174, sustained the sentence imposed, although in excess of the maximum; in other words, it sustained a number of separate convictions sufficient to justify the imposition of the sentence in excess of the maximum, which in the discretion of the court was imposed. Durland v. U. S., 161 U. S. 306, 316, 16 Sup. Ct. 508, 40 L. Ed. 709; U.

S. v. Nye (C. C.) 4 Fed. 888; Howard v. U. S., 75 Fed. 986, 996, 21 C. C. A. 586, 34 L. R. A. 509.

The judgment is affirmed.

In re ADLER.

(Circuit Court of Appeals, Second Circuit. March 5, 1907.)

No. 165.

1. BANKRUPTCY—STAY OF ACTION AGAINST BANKRUPT.

On an application to a district court in bankruptcy to stay an action against a bankrupt, or to vacate such a stay, the court is not required to enter into an investigation dehors the pleadings in such action to ascertain its nature.

2. SAME—DEBTS RELEASED BY DISCHARGE—MISAPPROPRIATION BY AGENT.

An action at law to recover a money judgment for a sum which the complaint alleges the defendant received as factor and agent of the plaintiff for the sale of goods, under a contract by which he was to bill the goods in his own name, collect the proceeds, and forthwith pay over the identical money so received to plaintiff, and which it is further alleged he misappropriated to his own use, is not one to recover a debt created by the defendant's fraud or misappropriation while acting in a fiduciary capacity, within the meaning of Bankr. Act July 1, 1898, c. 541, § 17a (4), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]; and on the bankruptcy of the defendant such action may properly be stayed by the court of bankruptcy.

Wallace, Circuit Judge, dissenting.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

On petition to review an order of the District Court for the Southern District of New York denying a motion of the Manhattan Oil Company to vacate and modify an order of said court, dated May 1, 1906, in so far as it stays the said oil company from proceeding to prosecute its action pending against said bankrupt in the Supreme Court of the state of New York.

H. M. Johnsson and Black, Olcott, Gruber & Bonynge, for petitioner.

I. L. Ernst and Olcott, Gruber, Bonynge & McManus, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The character of the action in the state court must be determined by the pleadings. The complaint alleges: That in February, 1904, the plaintiff, the Manhattan Oil Company, entered into an agreement with the defendant, the bankrupt, whereby he became the factor and agent of the plaintiff for the sale of its oil to the Johns-Manville Company. That the bills were to be made out in the name of the defendant as seller, but upon the receipt of payment he should forthwith pay over to the plaintiff the identical sums received by him, whereupon, and not prior thereto, the plaintiff agreed to pay his commissions as factor and agent for the consummation of said sales. That the Manville Company under this agreement has paid the defendant $2,780.19, which he has misapplied to his own use to the damage of the plaintiff in the said amount.

The answer admits every allegation of the complaint, except that the defendant received $2,780.19 from the Manville Company, which allegation he denies. For a separate defense he alleges the acceptance of three promissory notes in full payment and satisfaction of the claim for the alleged conversion. By stipulation between the parties, printed in petitioner's brief, no contention based on this defense is to be considered on the argument in this court.

It seems to be conceded on both sides that the only question to be determined is whether or not the indebtedness alleged in the complaint was created by the bankrupt's fraud, embezzlement, misappropriation or defalcation, while acting in a fiduciary capacity. It is well settled that a factor or agent who sells the goods of his principal and fails to pay over the money collected is not guilty of misappropriation, while acting in a fiduciary capacity, within the meaning of the bankruptcy act. Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Barrett v. Prince, 143 Fed. 302, 74 C. C. A. 440.

It is argued by the petitioner that the bankrupt was the trustee of an express trust by which he agreed to receive the checks paid for the oil company's property as custodian merely and to deliver them to the company intact, except so far as his indorsement was necessary to complete the transfer. The allegations regarding the transfer of the checks do not appear in the complaint, but in the affidavits presented upon the motion to dissolve the stay. In the complaint the averment is that "the said defendant should forthwith, without delay, pay over and deliver to the plaintiff the identical sums so received," which averment could probably be made with truth in all cases where a factor fails to account. If the amplifications of the affidavits are to be considered it is still a debatable question whether the parties intended thereby to create an express trust or whether they related merely to details of the manner in which the business was to be transacted. But however this may be we are of the opinion that the law does not require the district court to enter into an investigation dehors the pleadings to ascertain the nature of the action. He was asked to restrain the suit as it was, not as it might be.

The action is at common law for the recovery of a money judgment in the sum of $2,780.19. There is no allegation of an express trust and no demand that such a trust be decreed. If the defendant permitted a default it is difficult to see how the plaintiff could recover except for the sum demanded. The complaint alleges that "the defendant became the factor and agent of the plaintiff for the sale of certain goods," that "the plaintiff agreed to pay to the defendant his commissions as said factor and agent," that "the plaintiff delivered to the defendant certain goods * * * for sale by said defendant, as factor and agent of the plaintiff," and "that the defendant has received the said moneys so paid as factor and agent of plaintiff in a fiduciary capacity and misapplied the same to his own use to the damage of the plaintiff in the sum of $2,780.19." After all this can it be said that this action is an action for an accounting founded upon an express trust?

We think the facts fully warranted the district judge in granting, and refusing to vacate, the stay in question.

The order is affirmed.

WALLACE, Circuit Judge, dissents.

CARROLL et al. v. DAVIDSON.

(Circuit Court of Appeals, Seventh Circuit. November 9, 1906.)

No. 1,290.

1. ADMIRALTY—VACATION OF DECREE—SUMMARY PROCEEDINGS.

Summary proceedings are not maintainable in admiralty to set aside or satisfy a decree previously entered, where the controversy either arises collaterally between the parties or involves an adjudication between strangers to the original litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 674-678.]

2. SAME—APPEAL—INTERLOCUTORY ORDERS.

An order of a court of admiralty denying a motion to set aside and satisfy a decree previously entered in favor of a libelant against a steamer, its claimant, and a surety on a bond for release of the libel, was merely collateral to the admiralty decree, and not a final decision, which was reviewable on appeal.

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

This appeal is from an order of the District Court, in admiralty, which denies a motion on behalf of the appellants, "to set aside or satisfy" a decree theretofore entered in such court, in favor of James Davidson, as libelant, against the steamer Gordon Campbell and "William F. Carroll, the claimant of the said vessel, as principal, and Jeanie A. Carroll, as surety," under a bond for release of the vessel upon libel thereof. The motion was founded upon notice to the libelant's proctor and an affidavit of William F. Carroll that one John R. Lindgren was sued for the same claim, for which liability was adjudicated in the libel referred to, and judgment therefor was recovered and fully paid. In opposition to the motion the libelant introduced an affidavit of Lindgren, setting up assignment to him of the decree under the libel and these facts and equities: That for advances to the appellants for the purchase by them of the steamer title thereof was at their instance placed in the affiant, by way of securing payment by the appellants of such advances, and for no other purpose and with no other interest; that the suit referred to was brought upon the ground that the legal title was so vested in him; that the appellants undertook the defense of such suit, but judgment was recovered therein against the affiant, and he was compelled to pay and did pay to Davidson the amount of such liability; and that he claims to be subrogated to the rights of Davidson in the libel decree.

William T. Carroll, for appellants.

Samuel M. Fegtly, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

No meritorious question or substantial right on the part of the appellants is presented, either in the motion below or in this appeal. Upon

what theory of law or fact the motion was made in either phase—to set aside the decree in admiralty or to have satisfaction entered—in the face of the undisputed facts stated in the record below we are at a loss to understand. Conceding that the court sitting in admiralty may entertain a motion for an entry of satisfaction of its decree, upon notice and showing of payment, within the general doctrine of the control of courts over execution of their decrees (vide The Elmira [C. C.] 16 Fed. 133, 135), no rule or authority in admiralty sanctions summary proceedings thereupon to settle controversies which may arise collaterally even between the parties; and surely no such motion can extend to an adjudication against strangers. The citations to that end on the appellants' brief furnish no support for the summary relief sought, under the facts disclosed, even were their rule applicable; but all relate to the practice at law in various states, under statutory provisions, and are not precedents for such motion in admiralty. So, were the order denying the motion reviewable, the ruling upon appeal would be free from difficulty.

The question arises, however, whether such order is appealable, and we are of opinion that it was merely a ruling upon a collateral motion, and in no sense conclusive in respect of the controversy tendered. In the case of The Elmira, 16 Fed. 133, the opinion by Mr. Justice Matthews, sitting in the Circuit Court, aptly states the rule applicable to such proceedings in admiralty after final decree in the cause. There the appeal was to the Circuit Court from an order of the District Court —under the provision then existing in sections 631, 636, Rev. St., for appeals from final decrees in admiralty—denying a motion by one of the parties to quash and satisfy the execution issued under a decree. It was held that the decree terminated the litigation and fixed the rights of the parties; that the process of the court, in execution of the decree, was "under its control, exercising a discretion under the law"; and that denial of such a motion was not an appealable decision, under the authorities which are reviewed in the opinion. Of the authorities there referred to, it is sufficient to cite the leading cases of Boyle v. Zacharie, 6 Pet. 647, 8 L. Ed. 527 (see 3 Notes U. S. Rep. 306) and Pickett v. Legerwood, 7 Pet. 144, 8 L. Ed. 638. Like the denial of leave to intervene in a cause, the order in question is not reviewable (Credits Commutation Co. v. United States, 177 U. S. 311, 315, 20 Sup. Ct. 636, 44 L. Ed. 782), as it decides no ultimate rights of the parties, but relegates them to independent remedies.

This appeal challenges an order which merely denies a motion collateral to the admiralty decree, not determinative of any controversy of law or fact, and not a final decision within the settled rule and policy of all provisions for review under the federal system. McLish v. Roff, 141 U. S. 661, 655, 12 Sup. Ct. 118, 35 L. Ed. 893. So the appeal is dismissed.

RODGERS, Immigration Com'r, v. UNITED STATES ex rel. ELSBERG.

(Circuit Court of Appeals, Third Circuit. February 13, 1907.)

No. 41.

APPEAL AND ERROR—RECORD—INSUFFICIENCY.

It is the duty of a party appealing to see that there is sufficient in the transcript of the record brought to the appellate court to intelligibly present the questions sought to be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2624, 2627.]

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

J. C. Swartley and J. Whitaker Thompson, for appellant.
David Phillips, for appellee.

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

BRADFORD, District Judge. This is an appeal from an order of the court below discharging Lewis Elsberg on a writ of habeas corpus. The petition states that he was refused a landing in the United States and was ordered to be deported "on the authority of the marine surgeon's certificate, 'that the said Lewis Elsberg was an imbecile.'" On the other hand, the return made by the International Mercantile Marine Company states that admission was refused and deportation ordered because Lewis Elsberg was likely to become a public charge. The first two assignments of error are as follows:

"1. The learned Judge erred in holding that the proceedings before the Board of Inquiry at Philadelphia, were not final.
2. The learned Judge erred in holding that the proceedings before the Board of Inquiry at Philadelphia, were reviewable by the Court."

If there were any proceedings before a board of special inquiry at Philadelphia touching the right of Lewis Elsberg to land it may be of vital importance that they should be disclosed to this court. But aside from the statements contained in the above assignments there is absolutely nothing to show that any proceedings were had before a board of special inquiry at Philadelphia or elsewhere. Indeed, the transcript of record before us does not disclose any evidence on either side on any branch of the case. It is again necessary to remind counsel who are preparing cases for review in this court of the importance of having enough appear in the record brought up to render it intelligible. As stated by Mr. Chief Justice Waite in Railway Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431: "It is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here." The appellant has leave within thirty days to file in this court a supplementary transcript of record showing the evidence, oral and documentary, adduced before the court below. Should such supplementary transcript not be filed within that period the appeal will be dismissed.

And it is ordered by the court that copies of this opinion and order forthwith be transmitted by the clerk to the parties to this cause or their counsel of record.

CENTRAL TRUST CO. v. CENTRAL TRUST CO. OF ILLINOIS et al.

(Circuit Court of Appeals. Seventh Circuit. February 5, 1907.)

No. 1,344.

POST OFFICE—DELIVERY OF MAIL—SIMILARITY OF NAMES OF CORPORATIONS.

A decree affirmed which denied an injunction to a corporation to restrain the delivery of mail to defendant having a similar name, when so addressed that it might have been intended for either party; there being no claim of an intentional refusal to deliver to complainant mail so addressed to its business rooms or otherwise as to leave no doubt as to the identity of the addressee.

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

For opinion below, see 149 Fed. 789.

Daniel McCaskill and O. L. McCaskill, for appellant.

Max Pam, Harry B. Hurd, and Hugo Pam, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. From our affirming the decree without repeating or enlarging upon the views orally expressed at the argument, the parties must not infer that we sanction the delivery to the appellee company of mail so specifically addressed to appellant's business rooms that no doubt can exist as to the identity of the addressee. Appellant's bill, in our opinion, is bottomed on its asserted right to have delivered to it all mail addressed "Central Trust Company, Chicago, Illinois." There is no allegation of the postmaster's refusal to deliver to appellant the mail specifically addressed to its business rooms. An injunction should not issue on the bare fact that such mail may inadvertently have been delivered to the appellee company. In such instances the appellee company should at once return that mail unopened to the postmaster for prompt delivery to appellant.

The decree is affirmed.

GENERAL ELECTRIC CO. v. BULLOCK ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals. Sixth Circuit. March 21, 1907.)

No. 1,566.

1. PATENTS—INVENTION—FUNCTIONS NOT SPECIFIED.

It is not necessary for a patentee to describe in detail all the beneficial functions which he claims will result from his invention; but it is enough if such functions are evident and obviously contribute to the success of the invention, and they may in such case properly be taken into account in estimating its novelty and utility.

2. SAME—TRANSFER OF DEVICE TO NEW ART.

The relation between the mechanical and electrical arts is not so close that the adaptation of a known mechanical device to a new use in an

electric motor may not involve invention, where the result is an improvement over prior constructions of great utility and success.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 31, 32.]

8. SAME—ELECTRIC MOTOR.

The Parcelle patent, No. 463,704, for an improvement in an electric motor and dynamo, which consists of means for detachably fastening a laminated pole piece to the solid yoke, covers an improvement of utility and great commercial success, which involved magnetic and electric, as well as mechanical, problems, and was not anticipated, and involves invention; also *held* infringed.

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. 552.

W. K. Richardson, for appellant.

Thomas F. Sheridan and Clifton V. Edwards, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit in equity brought by the General Electric Company against the Bullock Electric Manufacturing Company and others, for an injunction, with the usual prayer for an accounting, for the infringement of claim 1 of letters patent No. 463,704, issued November 24, 1891, to Albert L. Parcelle, the assignor of the complainant, for improvements in an electric motor and dynamo. The answer set up want of novelty and invention and denied infringement. The court below in a short opinion held that patentable invention was not shown and dismissed the bill. From this decree an appeal has been taken.

The Parcelle invention in suit relates to the field magnet of a dynamo and provides a method of firmly fastening the laminated pole piece to the solid yoke thereof. A dynamo consists of two parts, the field magnet and the armature; the one being rotated and the other stationary. In the stationary field machine the armature is rotated within the field magnet, while in the revolving one the field magnet is rotated within the armature. The field magnet consists of a yoke and pole pieces, the number of the latter varying, but being alternately north and south; the magnetic lines of force being projected from the tip of one pole through the armature core back into the tip of the adjacent and opposite pole, and thence through the yoke to the first pole. As the conductors on the surface of the armature move through these lines of force, a current of electricity is generated. The armature is, of course, not in contact with the pole pieces of the field magnet, since the latter must rotate within the former, or the reverse, in order to generate electric energy. Yet at the same time the air gap which separates the two must be kept very small, in some cases not wider than one-eighth of an inch, in order not to interfere with the magnetic circuit. This intimate proximity of the pole pieces to the armature necessarily calls for careful and precise construction and adjustment of the former with respect to the latter. Early in the history of the art, as early as 1879, it was found to be desirable to use toothed arma-

ture cores, and it was then ascertained that, in order to avoid Foucault or Eddy currents in the field magnet pole pieces, it was necessary to laminate the latter. This necessity, however, did not extend to the yoke of the field magnet. It was cheaper and equally effective to keep it of solid iron. The problem, then, was to fasten the laminated pole piece firmly and rigidly to the solid iron yoke, so as to subserve all magnetic and electric requirements, resist all centrifugal and magnetic strains, permit the ready removal of the pole piece sidewise for repairs, and secure and preserve an expanded tip.

The court below, in its opinion, sought to limit the requirements of the problem solved by Parcelle to those of a purely mechanical nature. True, there was a mechanical problem, the firm fastening of the laminated pole piece to the iron yoke; but it was complicated by certain magnetic and electric conditions. These conditions brought about the necessity of the laminated pole piece, and the mechanical problem of fastening it to the yoke was varied by the magnetic and electric requirements to be subserved. The pole piece had to be laminated, yet each laminæ had to be clamped to the yoke so as to make a good magnetic joint. It was desirable to make the pole piece removable, in order to be able to use an expanded pole tip; and the side pieces could not in all cases be made thick enough to receive the bolts to hold the pole piece to the yoke without interfering with the magnetic and electric requirements of the problem. Before the necessity of laminating the pole pieces was known, solid pole pieces were attached to the yoke by bolts or screws. These pole pieces were readily removable sidewise. But with laminated pole pieces it became impracticable to do this, although the Dresskell patent, granted January 27, 1891, shows a method of tapping a bolt directly into the laminated plates; but this was a defective method, because of the fragile nature of the laminæ.

Prior to the invention in suit, either the pole pieces were made integral with the yoke, and both laminated, as shown in the Jablochkoff, Zipernowsky, Schmidt, and other patents, or by casting the yoke around the laminated pole pieces, as in the Schmidt patent of December, 1889, or by bolting the side plates of the pole piece to the core, they being thickened for that purpose, as in the Storey patent of 1890. None of these methods of fastening the pole piece to the yoke was esteemed successful. Laminating both the pole piece and the yoke was expensive, and the pole piece was integral with the yoke. The pole piece could not always be cast firmly within the yoke, and, besides, was irremovable; and to place the bolts in the side plates made them too thick and interfered with the preservation of the proper magnetic and electric conditions. Parcelle solved the mechanical problem of detachably fastening the laminated pole piece to the solid yoke by anchoring into the laminated plates a supporting bar, into which the bolts which held the pole piece to the yoke were firmly screwed. We insert here figures 1 and 3 of the Parcelle patent, which, taken in connection with the appropriate extract from the specification, which follows, sufficiently explains the patented structure:

Fig. 1, Parcelle Patent.

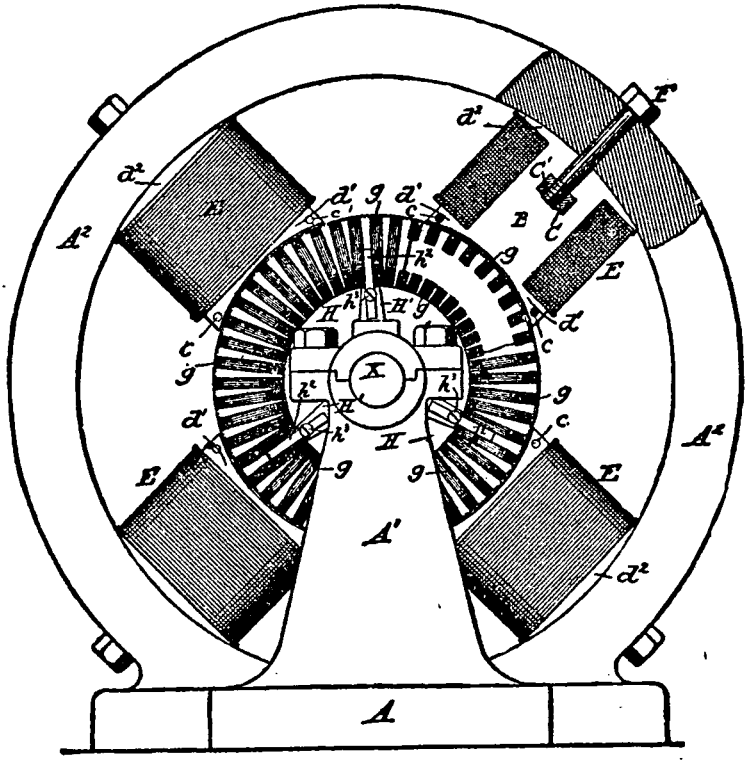
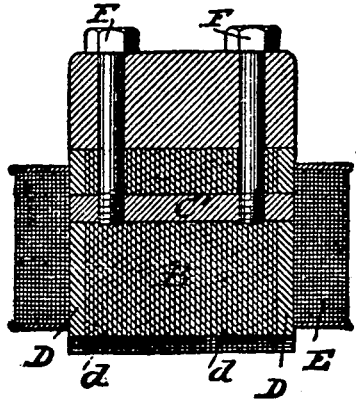


Fig. 3. Parcelle Patent



"The field magnet cores, B, are made up of thin plates, d, punched out of sheet iron. The shape of the plates is seen in Fig. 1, where it will be seen that they are formed with polar extensions, d^1, and with similar extensions, d^2, at the read end. The front edges of the plates are curved to conform to the armature, and the rear edges are curved to conform to the turned or bored interior of the yoke, A^2. Each plate is formed with a rectangular hole, C, towards the end of the plate next to the yoke, and smaller holes, c, are formed in the polar extensions. The outer plates, D, of the assemblage of plates forming a core, are made relatively thick, as shown. The plates are insulated, by varnishing, or by the use of thin sheets of paper, or in any of the usual ways, and are secured together by rivet bolts passed through the holes, c, and by a rivet bar, C^1, passed through the rectangular hole, C. The field magnet coil, E, may now be wound upon the core, the extensions, d^1, and d^2, forming seats for the wire. The rivet bar, C^1, which is preferably of iron, is provided with two screw-threaded holes, and holes are tapped through the yoke and into the rear end of the core, coinciding in alignment with the screw-threaded sockets in the bar, C^1. Bolts, F, having threaded ends, pass through the apertures in the ring and screw into the sockets in the bar, C^1. The extensions, d^2, furnish a large area of contact and a good magnetic connection between the core and yoke. The small holes through the polar extensions, d^1, do not materially reduce the plates at those points, as the iron is wider at the ends of these extensions."

Claim 1, the only one in suit, reads as follows:

"1. The combination, with the yoke, of a laminated core, the bar, C^1, passing through the laminations of the core, and a securing bolt or bolts passing through the yoke and into said bar."

By referring to the claim it will be perceived that it consists of (1) the yoke, (2) the laminated core, (3) the supporting bar, and (4) the bolt or bolts fastened through the yoke and into the bar. In this way Parcelle provided a method of fastening a laminated pole piece to the solid yoke, so that, while it could readily be removed sidewise, it was so firmly clamped against the yoke as to form a good magnetic joint, and at the same time so strong that it was able to resist all centrifugal and magnetic forces. The invention went into wide use. Mr. Reist, the designing engineer of the General Electric Company, estimates that that company, at the time he was examined as an expert, had employed the Parcelle invention in at least 20,000 pole pieces.

But it is insisted that, in supporting the usefulness and novelty of his invention, the patentee will be restricted to those beneficial functions which are described in the patent, and will not be permitted, in construing the patent, to rely upon functions which are not described, but merely contended for as evident. It does not follow that, because the patentee did not state all the advantages of his invention, he was ignorant of them. But if he was, yet if those advantages were really present, they might properly be taken into account in estimating the novelty and utility of the invention. In a number of opinions of this court it has been held that it is not necessary for the patentee to describe in detail all the beneficial functions which he claims will result from his invention. It is enough if those functions are evident and obviously contribute to the success of the invention. McCormick Harvesting Machine Co. v. Aultman Co., 69 Fed. 371, 378, 16 C. C. A. 259; Goshen Sweeper Co. v. Bissell Carpet Sweeper Co., 72 Fed. 67, 74, 19 C. C. A. 13; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 894, 53 C. C. A. 36; Goodyear Tire Co. v. Rubber Tire Wheel

Co., 116 Fed. 363, 375, 53 C. C. A. 583; Stilwell, etc., Co. v. Eufaula Cotton Oil Co., 117 Fed. 410, 415, 54 C. C. A. 584. It is quite impossible to read the description of the invention without observing that each particular part may serve some useful purpose in the electric art, although no claim in this regard is made. Thus the field magnet cores or pole pieces are laminated. The patent does not explain why, but the prior art does. The pole pieces are provided with polar extensions. For what purpose is partly explained and partly evident. And so with regard to each part of the description of the device as set forth in the specification. It is not a purely mechanical device. The mechanical features are designed to subserve magnetic and electrict requirements.

This brings us to the defense made for want of invention, which was sustained by the court below. That court, in its short opinion, held that in the light of prior art there was no question of interference with prevailing electric and magnetic requirements; that the only problem to be solved was how to provide a stronger, more rigid, more reliable union between the yoke and the core, which was merely one of mechanical construction. This the court held had been solved by transferring from the mechanic arts a well-known device employed in practically the same manner by Dodge in a pulley-covering device, in his letters patent No. 348,270, dated August 31, 1886. It was held that the existence of Dodge's device was within the knowledge, and its transference within the capacity of the skilled mechanic, without invention. The Dodge patent is only one of a number of patents from the remote arts, not concerned with the construction of dynamos or other problems of electric engineering. They are all methods of fastening one element to another by means of a device anchored in one of the elements in which the method of fastening is effected. Thus, in the Knipe patent of 1842, a bedpost is attached to the rail by a bolt which screws into a sunken nut. In the Bradley patent of 1865, armor plates are screwed to the hull of a vessel by means of bolts through which a transverse fastening pin is driven. In the Pechmann patent of 1867, the parts of a bedstead are fastened together by a screw which works into a sunken nut. In the Ives patent, a meat block made of sections or blocks are drawn together by transverse bolts, which are further held down by hooks. The Sheaffer patent is another bedstead, one where the bolt screws into a socket. The Whiton patent of 1886, shows a solid rubber bicycle tire, in which is imbedded a steel strip, which is held to the felly by means of screws.

The Dodge patent of 1886, upon which the court below planted itself, shows an iron pulley with a covering of wooden segments solidly cemented together and also to the iron pulley. The wooden covering or lagging is further attached by a series of transverse metal rods, which are held to the iron rim by means of screws which screw through the rod and into the rim. A hole is made through the lagging to receive each screw, which hole is subsequently filled up with a plug. The Sprinkle patent shows a split wooden pulley, in which the arms have stay rods. The outer ends of these rods are fastened by bolts or pins, which pass transversely through the rim. The other

ends are fastened to the arms by nuts. The rim of the pulley is composed of a plurality of segments or rings, which are held together by dowel pins, and there is no thought whatever of holding these segments against displacement. The Cantwell patent of 1899 relates to a method of laying wooden floor sections above a concrete floor. A series of tubes are placed within the concrete flooring, and each floor section is fastened down at right angles to these tubes by a series of bolts. The Macloskie & Baker patent of 1891 shows a trolley wire hanger wherein the metal ear, E, is connected with the porcelain cap, C, by a screw spindle, D, which screws into the metal ear, and is riveted to a metal washer imbedded in the cap.

Most of these patents are too remote to require particular consideration. No one would doubt that the joining of parts by a dovetail connection, or the fastening of one part to another by running a bolt secured in one part into another and then securing the farther end in a nut fixed in the other, were each old in the mechanical art. And if this was all that Parcelle did there would be no invention. But it was not all. He took these old devices and put them into the composition of an armature, not merely to secure a junction of the parts, but to put the parts of such old devices in such relation to the other parts of the armature as to effect a good physical connection, and to do this in such a way as to prevent or greatly minimize the obstruction of the magnetic current resulting from the interposition of means for effecting a substantial and secure union of the pole pieces with the yoke. In none of these patents was there any attempt to solve the problem ,successfully handled by Parcelle, the problem which contained magnetic and electric, as well as mechanical, conditions; in other words, the problem how to construct a field magnet with laminated pole pieces detachably fastened to the solid yoke.

This brings us to the point relied upon by the court below, namely, that the Parcelle patent contained no invention—that the only idea in it was a mechanical one, that suggested by the Dodge patent, when transferred from the mechanical to the electric art. And right here let the test of invention be made. If the Dodge patent was of such a nature as to suggest a transference, by appropriate means, from the purely mechanical to the electric art, of the invention embodied in the Parcelle patent, then the Parcelle patent contained no invention. And in this connection it is certainly a singular thing that the ten patents from the mechanical art, to which we have referred, should have been in existence for so many years without ever having suggested any expedient, like the Parcelle patent, for the purpose of supplying a needed want in the electric art. Obviously, the relation between the mechanical and electric arts was not so close and apparent that it would follow as a matter of course that the invention of a method of bolting a bedstead together, or of securing a wooden covering to an iron pulley, would, of itself, furnish a suggestion for solving the problem of detachably fastening the laminated pole pieces of a field magnet to the solid yoke thereof. In other words, as stated in the case of Potts v. Creager, 155 U. S. 597, 606, 15 Sup. Ct. 194, 198, 39 L. Ed. 275:

"But, where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use—particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer."

Again (page 608 of 155 U. S., page 199 of 15 Sup. Ct. [39 L. Ed. 275]):

"As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use."

And the court cites a number of cases illustrating the nature of the change required to constitute invention where there is a transfer of an old device, but so modified in some particular as to show new invention. After a discussion of the attempts to define what constitutes invention, the court, in McClain v. Ortmayer, 141 U. S. 419, at page 427, 12 Sup. Ct. 76, at page 78, 35 L. Ed. 800, says, in disposing of the matter:

"Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition."

Without further discussion it is enough for us to say that we are clear in the opinion that the Parcelle patent, in the first claim thereof, does involve invention, and that we are satisfied the defendant's constructions, No. 1 and No. 4, embody infringements of this claim.

The decree of the court below is reversed. The defendant is enjoined from infringement, and is ordered to account.

GUNN et al. v. BRIDGEPORT BRASS CO.

(Circuit Court of Appeals, Second Circuit. March 12, 1907.)

No. 243.

PATENTS—INVENTION—CARD RECORDS.

The Gunn patent, No. 583,227, for a system of card records, the improvement claimed being a carrying of the subdivision or classification one or more steps beyond what was possible with the records of the prior art, is void for lack of patentable invention, as merely a more minute subdivision by the larger use of division cards differentiated by means used in the prior art.

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

The cause comes here by appeal from interlocutory decree of the United States Circuit Court for the Southern District of New York, sustaining validity of complainant's patent, No. 583,227, for improvements in card records, granted to complainant Gunn May 25, 1897, and adjudging infringement by defendant and ordering an injunction and an accounting.

See 148 Fed. 239.

Fred L. Chappell, for appellant.

Livingston Gifford, Oden Roberts, Gifford & Bull, and Roberts & Mitchell, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. We are relieved from a discussion of the various claims urged in support of the patent in suit by the clear and unequivocal declarations of the patentee himself as to the underlying principle which characterizes his alleged invention, and which it is claimed differentiates it from the prior art. In his specification he says as follows:

"Prior to my invention it has been the custom to arrange cards in large numbers in a suitable drawer or receptacle and to divide them into divisions, each division containing a different record, or class of records, by inserting at desired intervals what are known as 'division-cards,' usually higher than the record cards, and which furnish a means of distinguishing the several divisions of cards and their records one from another for reference thereto. For many purposes, however, a subdivision or classification carried one or more steps beyond what is possible with the usual division cards is desirable—such, for instance, as subdividing one or more times the cards referred to. * * *

"My invention consists in a plurality of cards arranged behind each other and provided at their corresponding edges—for instance, along their tops—each with one or more distinguishing portions, in the nature of projections, depressions, or other distinguishing features or contours. * * *

"While I have thus far described the distinguishing portions as projections and as colors on the various cards, all the cards having the same distinguishing portions, being referred to in the claims as a 'group,' yet the distinguishing portions may equally well be depressions or otherwise. For instance, I have shown some of the cards in the record with their corners clipped at g, while others have not a corner so clipped, while in Fig. 4 the last card is shown as having a depression, h, removed from the end of the card, and by means of the depressions, h or g, arranged in proper manner either with or without the projections referred to, the possibilities may be greatly extended. From the foregoing brief explanation of a few of the uses to which my invention may be put the distinguishing features of the invention will be apparent, viz.: The providing of the several cards of a series with distinguishing portions either in the nature of projections or depressions differentially positioned on corresponding edges of different cards on which are entered different records or classes of records."

The prior art showed division cards with projections at their upper edges and with depressions and clipped corners and with distinguishing coloring features, all used for the purposes of classification, or, as the patentee says, "which furnish a means of distinguishing the several divisions of cards and their records one from another for reference thereto." Then he proceeds to describe his record as a "proposed subdivision or classification carried one or more steps beyond,"

etc. What he does in fact is to make each one of his whole set of cards a separate index or subdivision by the use of a plurality of the means of the prior art with or without the prior division card feature. Whether this be considered a mere multiplication of the prior means, or a rearrangement thereof with resultant change of positioning, or whether it may include the idea of transferring the old tabs or higher division cards to the record cards themselves and retaining the division card as part of the combination, it is merely, as the patentee says, "one or more steps beyond * * * subdividing one or more times the cards referred to, * * * the distinguishing features of the invention will be apparent, viz., the providing of the several cards of a series with distinguishing portions." We do not see how invention can be predicated upon this rearrangement or subdivision. We are unable to see why the person who found, for example, the three divisions of the prior art inadequate for his purpose, could not with a clip of the scissors "subdivide the cards referred to," and why he could not by writing thereon the appropriate subjects represent "* * * as many different kinds of records in the same main record," which, when duplicated as occasion may require, constitute the claimed "series of record cards distinguished in groups by having distinguishing portions differently positioned on the cards of different groups," etc.

In the patent to Fitch & St. John of 1870 for ledger indexes are shown pivoted stiff sheets provided with elevated tabs bearing, respectively, the letters of the alphabet, and so arranged that they can be separately lifted out until the entire length of any given sheet is directly exposed, or the sheets may be entirely removed and returned as in a card index. In view of the manifest adaptability of these sheets to accomplish the stated objects of the patent in suit, we think it fails to show any inventive conception.

Furthermore, the Curtis Publishing Company exhibit of an organization in public use prior to the earliest date of the conception claimed in the patent in suit showed elevated tabs differentiated by colors and clipped corners. There could be no invention in positioning the clipped corners by duplicating the clip at the other end of a card or by subdividing the elevated tabs, or in using the elevated tabs as records instead of, or in addition to, their use for purposes of division. The patent belongs to the same class with those considered in Hollister v. Benedict, 113 U. S. 72, 5 Sup. Ct. 717, 28 L. Ed. 901, Aron v. Manhattan R. R., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272, and numerous other kindred cases.

The decree is reversed, with costs, and the cause is remanded to the court below, with instructions to dismiss the bill.

LACOMBE, Circuit Judge. I concur in the conclusion reached by the majority of the court, but I do not find in the Fitch & St. John patent, nor in any other patent or publication prior to March, 1892, a sufficient disclosure of the principle of Gunn's device to negative patentable novelty. So far as all prior literature is concerned, it seems to me that he was the first to devise a combination which would

enable one to arrange the cards under a double classification within the same space. An illustration will best show the change he accomplished. Suppose it were desired to classify for reference by means of a card index the various judicial decisions in admiralty, one decision on each card. The various divisions of the subject—e. g., "charter party," "insurance," "navigation," etc.—would be indicated by division cards each with projecting tab appropriately lettered, each of such cards being followed by the recording cards giving decision and citation of the authority. For subdivision under "navigation" other division cards with the tab differently placed would be similarly used for "collision," "towage," etc. And in like manner "collision" could be divided into "ferry boats," "steam vessels," "sailing vessels," etc. Such a single method of division and subdivision might be continued as far as required; but, if it were desired to have all the decisions so classified that at the same time they were divided alphabetically—e. g., "Andrews v. Smith," "Brown v. S. S. Triton," etc.—none of the card indexes of the prior patents would admit of such a double classification, and no prior patent or publication, as it seems to me, would indicate to one skilled in the art how it might be accomplished. By Gunn's system it is easily done. The recording cards may be arranged in alphabetical order of the plaintiff's names (with a division card for each letter of the alphabet), and the other divisions and subdivisions indicated by tabs on the recording cards themselves appropriately positioned. I should be inclined therefore to find patentable novelty were it not for the prior use known as the Curtis Publishing Company exhibit. That places classification marks on the recording cards themselves, while at the same time division cards may be used for effecting double classification. The distinguishing mark in Curtis exhibit is color, instead of differently positioned tabs, and it is not so efficient as Gunn's device, because it is more difficult to pick out colors and the range of differences is perhaps less, but the exhibit does show the fundamental change which differentiated Gunn's improvement broadly from the earlier art, and with the exhibit before him it did not require invention for one skilled in that art to elaborate further improvements calculated to make the card index more convenient for use.

EDISON GENERAL ELECTRIC CO. v. CROUSE-HINDS ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. March 12, 1907.)

No. 231.

1. PATENTS—CONSTRUCTION OF CLAIMS.

Where an alleged element or characteristic feature of an invention is not necessarily inherent in the invention itself, the failure of the patentee to refer to it is persuasive evidence that it is not within the scope of his invention, and, not being disclosed to the public, it should not be read into the patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 241.]

2. SAME—INFRINGEMENT—LAMP SOCKET.

The Metzger patent, No. 489,682, for an electric lamp socket, which as stated in the specification consists primarily in a socket having an in-

sulating body with an extension on which the terminals are mounted, cannot be construed to cover a secondary structure not having such extension, no such device being shown in the specification or drawings, and all the claims must be construed to include the extension as an element. As so construed, *held* not infringed.

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

This cause comes here on appeal from an interlocutory decree of the United States Circuit Court for the Northern District of New York, adjudging validity, and infringement by defendant, of claims 5 and 7 of complainant's patent, No. 489,682, granted January 10, 1893, to Amandus Metzger, for a lamp socket. The opinion of the court below is reported in 146 Fed. 539.

Arthur E. Parsons, for appellant.

Samuel Owen Edwards, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The patentee in his specification says as follows:

"The invention consists primarily in a socket having an insulating body with an extension on which the terminals are mounted in the manner hereinafter set forth, and the invention consists also in the several combinations hereinafter described and claimed. * * *

"In constructing the socket, I form an insulating base, 1, of rubber, porcelain, or other insulating material, having at the center an integral extension, 2, considerably smaller than the main part of the body and, when the socket is to be used as a stand or wall socket, a circumferential rib or flange, 3. The extension, 2, is preferably provided on its outer face or end with a depression or ledge, 4, on which an inwardly bent flange, 5, on the bottom of the ring terminal, 6, rests, and said terminal is securely held in place by a U-shaped clamping piece, 7, which is adapted to rest on said flange and to surround the central raised portion, 8, of the insulating extension. * * *

"In Fig. 5, the insulating base is much smaller than in Figs. 1, 2, and 3, but is larger than the extension. * * *

"The extension, 2, is formed in substantially the same manner as above described."

Counsel for complainant argues as follows:

"Thus the patent details two forms; one comprising a structure in which the insulating foundation is provided with an 'extension' upon which the metallic parts are secured, and the other comprising a structure in which the insulating foundation has no such extension, but upon which the metallic parts are mounted directly. This distinction it is important to note, for it is carried out in the claims of the Metzger patent, the first four of which refer to the form first named, the 'insulating body with an extension,' while the remaining three are drawn upon the second form in which the 'extension' is dispensed with, the metallic parts being mounted directly upon the 'insulating body.'"

The expert for the complainant testified as follows:

"23 X-Q. In the drawing of the Metzger patent, which of the figures shows a lamp socket not containing the extension 2?

"A. Neither of them.

"24 X-Q. Please refer by page and line to the parts of the specification which state that the Metzger lamp socket may be unprovided with the extension 2, and in answering this question, if you will, kindly omit any refer-

ence to the claims. Also omit all other portions of the specification, so that the quotation called for may stand by itself.

"A. The statement of the specification which indicates that the Metzger lamp socket may be unprovided with the extension 2 is indirect, rather than direct and specific. I have referred to it at the opening of my answer to question 4. There is no statement in the specification in exact accordance with the requirement of the present question.

"25 X-Q. The quotation to which you refer in your last answer includes also other matter, and is found at lines 8 to 19 inclusive, page 1, according to my understanding. Will you please now quote, solely by itself, the portion of the specification inquired about in X-Q. 24?

"A. I have intended to be understood by my last answer that the only statement in the specification of the Metzger patent bearing upon the matter of 24 X-Q. is an indirect one, and that I do not find any direct statement which I can quote.

"26 X-Q. Kindly quote from the specification, omitting reference to the claims, the parts of the specification from which you draw the inference that Metzger had in mind disclosing a lamp socket in which the extension, 2, was not present?

"A. It is included in the quotation specified in 25 X-Q., and is in the following words: '* * * The invention consists also in the several combinations hereinafter described and claimed.' I have at several points in my direct testimony referred to this passage as indicating what may be called the secondary features of the disclosure as an entirety, in contrast with what the prior part of the same sentence designates as primary invention.

"27 X-Q. And this subject-matter which you understand the patent designates as the 'primary invention,' you do not find in complainant's exhibits defendant's sockets or receptacles 1, 2, and 3? Is not this so?

"A. Yes.

"28 X-Q. And if, as a matter of law or fact, the claims in controversy must be held or construed to include this 'primary invention,' viz., the extension, 2, then you would not find in defendant's sockets, 1, 2, and 3, complainant's exhibits herein, the subject-matter of such claims 5, 6, and 7? Is not this so?

"A. It is."

"Witness makes the following statement: 'In reading again the last question, X-Q. 28, I think it possible that the court may attach to its terms a meaning other than that which it conveyed to me at the time of making my answer to it. The idea that I intended that answer to convey is that, if claims 5, 6, and 7 must be held or construed to include an additional element, not stated in either of those claims, namely, the extension, 2, of the specification and drawings, then I would not find in complainant's exhibits, defendant's sockets Nos. 1, 2, and 3, the entire combinations of those claims, because, as I understand the matter, the extension, 2, which is illustrated and described in the drawings and specifications, is not present in those exhibits.'"

The sole affirmative support for complainant's contention on this point is found in the above quotation by its expert from the language of the specification. Such general language is frequently inserted in patents which cover sub-combinations of a broad invention.

In the case at bar the alleged secondary invention is limited in terms to "the several combinations hereinafter described and claimed." But, while the brief specification elaborately describes the details of various constructions of said extension, and refers to it in some 12 instances, and illustrates it in all of the drawings, there is not a line in the specification which even suggests that it may be dispensed with, or indicates any construction of which it is not an integral and apparently essential part. We are of the opinion that, as the specification nowhere describes a socket unprovided with such extension, said general reference to "the several combinations hereinafter described and claimed"

cannot be so construed as to include a combination which necessarily excludes the primary feature of the invention, expressly described as "an insulating body with an extension" or the "central extension."

Even the claims in suit, from which it is contended that the extension is omitted, refer, respectively, to "the flange or projection resting on a part of said insulating body," claim 5, or "the combination of an insulating body," etc., claim 7, whose clamping piece, counsel for complainant says, "extends, as the lower court found, around three sides of the central terminal, and therefore of the central raised portion, 8," described in the patent as "the central raised portion 8 of the insulating extension," all "substantially as described." And claim 6, held to be void by the court below, covers "a flange resting on said ledge"; the ledge being described in the specification as part of the extension. Where an alleged element or characteristic feature of an invention is not necessarily inherent in the invention itself, the failure of the patentee to refer to such alleged feature is persuasive evidence that it is not within the scope of his invention, and, not being disclosed to the public, it should not be read into the patent.

A fortiori must this principle be applied where the patentee in his specifications has limited himself to what he states to be his primary invention, and to "the several combinations hereinafter described and claimed," and where the combinations upon which the contention of infringement is based are neither described, claimed, nor illustrated. Inasmuch, therefore, as we are of the opinion that the claims in suit must be construed to include the extension, and as it is expressly admitted that defendant's sockets do not contain said extension, there is no infringement.

The decree of the court below is reversed, with costs, and the cause is remanded to the court below, with instructions to dismiss the bill.

DEY TIME REGISTER CO. v. SYRACUSE TIME RECORDER CO.

(Circuit Court, N. D. New York. April 2, 1907.)

1. PATENTS—INFRINGEMENT—EQUIVALENT PARTS IN COMBINATION.

Where a patent is for a mere improvement consisting of a new combination of old elements, the range of equivalents is narrow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 386.]

2. SAME.

A substituted part in a patented combination, in order to constitute an equivalent which will not avoid infringement, must not vary in any manner the idea of means, and, while it may perform some new or additional function, and still be an equivalent, it must perform all the functions of the element for which it is substituted in substantially the same way, and be a mere change of parts and form involving no inventive skill, but suggested by the patented invention itself to every person skilled in the particular art. If it not only performs the functions of the element for which it is substituted, but introduces into the combination a new idea or a much more extended development of the idea of means, it is not an equivalent, but a patentable improvement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 386.]

3. SAME—WORKMAN'S TIME RECORDER.

The Dey patent, No. 524,102, for a workman's time recorder, discloses no new or novel mechanism or means, but is for an improvement only which consists in a reorganization of old parts to produce a better operation and an improved result, and must be construed and limited accordingly. Claim 1 is not infringed by a machine in which the platen, which is an essential element of such claim, is wholly dispensed with, as well as the mechanism necessary for its operation, without the substitution of a new part; its functions being devolved on a remaining part by a change of mechanism and a different mode of operation.

In Equity. Suit to enjoin alleged infringement of claim 1 of United States letters patent No. 524,102, to John Dey, of Syracuse, N. Y., dated August 7, 1894, application filed November 11, 1892, and now owned by complainant.

Warfield & Duell (Charles H. Duell and F. P. Warfield, of counsel), for complainant.

Howard P. Denison (Frank Hiscock and William W. Dodge, of counsel), for defendant.

RAY, District Judge. The claim in suit and alleged to be infringed reads as follows:

"(1) A workman's time recorder comprising time-printing wheels, a band movable longitudinally in either direction in proximity to said printing-wheels and having a longitudinal row of consecutive numbers marked upon it, a manually operated lever, controlling the movement of said band, and an index traversed by said lever and numbered to correspond to the band; and a platen actuated by said lever and pressing the band into contact with the time-printing wheels as set forth."

Its elements are: (1) Time printing wheels; (2) a band movable longitudinally in either direction and in proximity to the said printing wheels, and having thereon a longitudinal row of consecutive numbers which may be printed or written thereon; (3) a manually operated lever which controls the movement of the band; (4) an index traversed by said lever and numbered to correspond with the band; and (5) a platen actuated by said lever and pressing the band into contact with the time-printing wheels; lastly, "as set forth." This is not the pioneer invention in this type of time recorders, which is known as the "Dial Time Recorder," as distinguished from the Card Time Recorder, Cooper patent, and the Key Time Recorder, Bundy patents. The general operation of the recorder described in this patent is as follows: As the workman enters, he moves the lever to his number on the dial (each workman having a number), and presses the same back against or towards it. On the inside of the end of this lever is a pin which enters a small opening or perforation in the dial, located at this number, and, pressing against and actuating certain mechanism, causes the platen on a sort of hammer to rise and strike or press quickly against the band, at and by the side of the corresponding number thereon, thereby causing the band and interposed inking material, or carbon, to strike or press, or be pressed, against the time-printing wheel, which has type thereon designating the hour and minute at all times during 12 or 24 hours of the day. This operation prints on the band opposite the number of the workman pushing the lever the hour

and minute when it is done, and consequently registers the time of his arrival. The clock and clockwork are old. The time-printing wheels are old. They move with the clock, and are found in the prior art. The band, having a longitudinal row of consecutive numbers marked upon it, is also old, found in the prior art, and, indeed, shows no novelty. It is simply a strip of paper, or like material, having these numbers marked thereon. When used for the day, it is or may be taken out, and may then be filed or bound as a permanent record. It is like the sheet of paper put in a typewriter. It is put in to be printed upon, and, when printed on for the day, or, it might be for the half day, it is taken out. There is nothing new or novel in moving it longitudinally. The manually operated lever is not new or novel. It has a mode or mechanism of its own for controlling the movement of the band. The index traversed by the lever and numbered to correspond with the band is old in the prior art. It has the apertures for the pin, but there is nothing new or novel about it. The platen actuated by the lever and pressing the band into contact with the time-printing wheels has no new or novel features. Complainant's counsel says in his brief:

"These elements are the chief characteristics of the well-known type of machine known as the 'Dial Time Recorder,' and the claim relates to this general combination of elements, and does not concern itself with the unimportant details of the mechanism by which the general combination of elements may be embodied."

Turning to the specifications of the patent in suit, we have a detailed description of the mechanism shown in the drawings, but nothing as to possible variations thereof either in essential or nonessential details. The patent expressly refers to a similar time recorder covered by United States letters patent to Alexander Dey, No. 411,586, of September 24, 1889, and says:

"The invention [of the patent in suit] consists in an improved reorganization of the recording mechanism and means for operating the same, all as hereinafter fully described and summed up in the claims."

No new or novel mechanism or means is claimed. The invention is in the reorganization and possible improvement of the old mechanism incident thereto, in the new arrangement and putting together with necessary changes in construction. The patentee confesses himself to be a mere improver, and that his improvement consists in the "reorganization" of old parts; a new organization in a different way, or manner, but in an improved manner, so as to produce a better operation and an improved result. The construction and limitations of the claim in suit are to be measured accordingly. After describing the type-wheel and hour-wheel, "time-printing wheels," the patent locates, and to an extent describes, the "platen" and its operation, as follows:

"Facing the said type-wheel and hour-wheel and preferable arranged directly under them is the vertically movable platen, C, which is attached to the free end of a spring-arm, c', fastened to a rock-shaft, d, pivoted to the plate, A'; said platen receiving its vertically oscillatory motion by the mechanism under control of the operator, as hereinafter described."

Then, says the patent:

"At opposite sides of the platen are two rollers, D and D'; mounted on revoluble shafts, e, e, which are parallel with the axis of the type-wheel."

Also,

"An impression-receiving band or ribbon, E, is wound upon and secured at opposite ends to the rollers,"—meaning the rollers, D, D'.

This "impression-receiving band" is the "band moving longitudinally in either direction" of the claim. The manner and means for doing this are described at length. The movement of these rollers, D, D', the attachment thereto of the impresssion-receiving band, and the movement of the platen are described at great length as follows:

"The rollers, D, D, are made to revolve with their shafts by the latter being square in cross-section, and upon these shafts are mounted sleeves, f', also squared internally and cylindrical externally and screw-threaded on their rear end-portions and provided with fixed collars, f'', f'', a proper distance from the screw-threaded portions to receive between them the rollers, D, D', which are mounted on said sleeves. The hollow roller or drum is of metal and fastened directly to the roller, f', and inside of said drum is the spool, D'', loosely mounted on the sleeve and fixed to a cap which covers the open rear end of the drum and is held in position by a nut on the screw-threaded end of the sleeve. To the inner periphery of the drum is fastened one end of a spring-plate, t', which lies with its free end across the slot, u'. The band, E, passes from the spool over the end of the spring plate and back through the slot, u, and is thereby clamped in the drum. The said rollers are rotated in unison so as to cause one roller to wind up the impression band, E, as fast as said band is unwound from the other roller, and this is effected at will of the operator by the following mechanism:

"Horizontally through the case, A, passes a hollow shaft, g, which is journaled in suitable bearings inside of the case and protrudes through the front thereof, where it has affixed to it a crank, g', to which is pivoted a lever, g'', one end of which extends across the end of the shaft and the other end extends to a dial, F, which is concentric to the shaft, g, and is marked with consecutive numbers distributed uniformly around the dial, and opposite each of said numbers is a perforation, g''', in the front plate of the case. A pin, h, projecting from the free end of the lever, g'', is adapted to enter into any one of the perforations at a time. The inner end of the hollow shaft, g, has fastened to it a gear-wheel, h', which meshes with pinions, h'', h'', mounted on the shafts, e, e, of the rollers, D, D'. Hence by turning the hollow shaft rotary motion is imparted to the said pinions. One of the pinions, h'', is mounted loosely on its shaft, e, and connected to it by a spiral spring, f''', which exerts a strain on the shaft in opposite direction from that of the shaft of the collar, and thereby maintains the impression band, E, constantly taut between the rollers. The impression band, E, has printed upon it lengthwise thereof a row of numbers corresponding to those on the dial, F, which latter serves as an index by which to determine the degree of rotation to be imparted to the lever, g'', to bring the impression-receiving band into its requisite position in relation to the time-printing wheels to print the time opposite the proper number on the band. The said band is so adjusted on the rollers as to bring O directly over the platen when the pin, h, of the lever, g'', is inserted in the perforation directly opposite O of the dial. For this purpose I fasten a ratchet-wheel to the sleeve, f', of the solid roller, D', and pivot to said roller, a pawl, t, which engages said ratchet-wheel as shown in Fig. 12 and causes the same to rotate with the sleeve. In adjusting the band, E, as aforesaid, it is drawn out of the hollow roller or drum and wound upon the roller, D, which is effected without turning its sleeve and shaft with it. In order to accomplish this adjustment more accurately I attach to the cross-bar, a', a, pointer, h''', as shown in Fig. 2 of the drawings; said pointer being set directly over the platen.

"The platen receives its vertical oscillatory motion toward and from the type-wheel by means of a plunger, i, extending through the hollow shaft, g, and bearing with its inner end on a cam or a short lever-arm, d', affixed to the rock-shaft, d, the outer end of the plunger bears against the lever, g'', and is forced outward or toward said lever by means of a coil spring, O, bearing at

opposite ends on shoulders formed on the interior of the hollow shaft and exterior of the plunger, as shown in Fig. 4 of the drawings. In pushing the free end of the lever toward the dial at the same time of entering the pin in the perforation of said dial, the plunger is forced inward, and by means of the cam or lever arm, d', throws the platen toward the type-wheel. In order to obtain a more effective stroke of the said platen I pivot a latch, j, to a bracket, i', fastened to the rear of the plate, A', as shown in Figs. 4 and 9 of the drawings. Said latch comes in contact with the spring-arm, c', of the platen in its movement toward the type-wheel and subjects said spring-arm to considerable strain toward the latter part of the inward movement of the plunger. A tripping finger, d''', fixed to the rock-shaft, d, strikes the latch during the latter part of the movement of the plunger, and thereby releases the spring-arm, c', from the latch. The platen then receives the spring action of the spring arm.

"In order to hold the type-wheel stationary during the period of printing, I employ a detent, F', which engages the notched-wheel, B', similar to that shown in the patent to Alexander Dey hereinbefore mentioned. Said detent is pivoted to a bracket, F'', fastened to the top portion of the plate, A', and is thrown into engagement with the said notched-wheel simultaneously with the movement of the platen toward the type-wheel by means of an arm, d'', fixed to the rock-shaft, d, and a rod, d''', connecting said arm with the detent in front of the pivot thereof, as shown in Fig. 6 of the drawings."

Then follows a description of the "carbon ribbon" which passes between the type-wheel and impression band, E, and is wound upon and secured at opposite ends to the spools, E', and their moving mechanism is then described. These spools, E', correspond in location with the rollers, D, D', and the carbon ribbon travels in unison with the impression-receiving band, but by its own mechanism. The rollers, D, D', are shown in the drawings arranged in a horizontal plane at some little distance from each other and below the time wheels. The platen is located at an intermediate point just below a line drawn in the horizontal plane of the upper edges of these rollers. Consequently that part of the band, as well as that part of the carbon ribbon reaching from roller to roller and from spool to spool, respectively, are in the air, so to speak, unsupported except at the points where they touch the rollers and spools. This part of the impression band and this part of the carbon ribbon are kept taut in the manner described. This suspended part of the impression band is guarded against disruption as follows:

"A stop, t', on the dial prevents the lever, g'', from making more than a complete revolution in either direction, thus obviating the danger of disrupting the impression receiving band."

The construction and combination pointed out and described neither presents nor suggests an alternative construction, nor presents this as a preferred construction. The patent points out and sets forth a specific "band movable longitudinally in either direction" and specific means for so moving it and a specifically arranged and located "platen actuated by said lever" which is operated by the specific means described.

Here arises the controversy in this case. The defendant's time recorder, which is of the same type, has in combination (1) the time-printing wheels; a band, impression band having "a row of consecutive numbers marked upon it," and which is "movable longitudinally in either direction" only in so far as any tape or band wound upon a single wheel or spool, or roller, is movable longitudinally in either

direction as it is unwound therefrom by the revolution of such wheel or spool, or as it is carried (a very small portion of it indeed) in a longitudinal direction by the revolution of the wheel or roller. In strict refinement, in this latter case, it is but a mere point of the band that is movable in a longitudinal direction as the roller revolves. Such a movement of the band is very far from the longitudinal movement of the band when unwound from one wheel or roller and wound upon another of the same size both revolving in the same horizontal plane. This is not a fanciful nor a technical difference, but a substantial one. In defendant's time recorder, alleged to infringe, this band, having the consecutive numbers marked thereon, is wound on one roller, and not attached to any other, and all the printing done on it is done by either striking or pressing this roller, and consequently the band, against the type on the time-printing wheel, or by bringing the latter down against the roller having the band wound thereon. Defendant's time recorder has, also, the manually operated lever controlling the movement of the band, for the reason it controls the revolution of the roller on which it is wound, and for no other reason and in no other way, and also the index traversed by the lever and numbered to correspond to the band; but, the important and crucial question is: Does the defendant's recorder have "a platen actuated by said lever and pressing the band into contact with the time-printing wheels as set forth," or an allowable equivalent?

One roller of the patent in suit is dispensed with entirely; both rollers as therein described, and one roller is substituted. So the platen and much of the mechanism actuating it of the patent in suit is dispensed with entirely. And the substituted platen, if it may properly be called that, does not press the band into contact with the time-printing wheels, except as it, being wound on the roller and on the periphery thereof before the band is wound thereon, is necessarily interposed between the wheel proper and the band, and, therefore, when the roller is pressed against the time-printing wheels, or vice versa, the band is necessarily pressed into contact with the time-printing wheels. In no proper sense, in my judgment, does this platen, which is merely some yielding substance attached to the surface of the periphery of the roller, press the band into contact with the time-printing wheels. That is done by the roller as it moves or as it is struck by the moving time-printing wheels. In the patent in suit, the operation of the platen there shown, described and made an essential element of the claim, and without which the device patented is inoperative, has an independent movement of its own and, in part, independent mechanism for actuating it. It does not operate in the same way as does defendant's to effect the printing. In the alleged infringing time recorder, the platen is a mere incident to the completed roller and may be of any material, or may be wholly omitted as the recorder, the wheels, and roller would record or print the time on the band just the same, although not as well or as distinctly.

In defendant's recorder we have in place of the two rollers, D, D', and the independent hammer or free end of the spring-arm on the face of which the platen proper is placed, and the spring-arm and its

actuating mechanism, and some of the mechanism of one of the rollers, a single roller on the periphery of which is placed, conforming thereto, a substance of the same general nature and serving the same purpose as the corresponding substance on the hammer at the free end of the "spring-arm," c', and which together make the platen, and on this, conforming to the periphery of this roller, is wound the "impression band." This is not the platen of the patent in suit, but it is broadly, in connection with the roller, an equivalent in so far as it serves the same purpose, but it does not operate in the same way, nor is it actuated in the same way, or by the same or even similar means. The actual printing is not done in the same way. It is an improvement and a marked improvement on the platen of the patent in suit. It is not a mere change in form. In printing "a platen" is "the flat part of a press which comes down upon the form, and by which the impression is made. Platen press, any form of printing press which gives impression from a platen, in distinction from rotary or cylinder presses, which give impression from a cylinder or a curved surface." Century Dictionary. Platen:

"(a) The part of a printing press which presses the paper against the type and by which the impression is made; (b) hence an analogous part of a typewriter on which the paper rests to receive an impression; (c) the movable table of a machine tool, as a planer, on which the work is fastened and presented to the action of the tool."

From a careful study of the derivation and meaning of the word "platen" in mechanics, especially in the printing press art, and from the minute and detailed description of the "platen" of the patent in suit, given in the specifications thereof, I am convinced that Dey had in mind and intended a combination, in claim 1 in suit, having a separate and distinct platen as a separate and distinct element movable and actuated by its own peculiar mechanism, as distinguished from the rollers, D, D', carrying the band. The two rollers, D, D', are not made an element of the claim, but "a band movable longitudinally in either direction in proximity to said printing wheels" is, and as this must be in the combination and connected with it, in some way, and that way or mode is specifically pointed out and is by means of the two rollers, without which the device would be wholly inoperative, I think the rollers, or an equivalent, are a part of that element of the combination, and must be so considered. Therefore the one roller of defendant's recorder, with the impression band thereon, is the substitute for and equivalent of the "band movable longitudinally in either direction," and answers to that element including the two rollers; but it is not at the same time a substitute for and the equivalent of that other element of complainant's claim 1, "a platen actuated by said lever and pressing the band into contact with the time-printing wheels as set forth." In truth defendant's time recorder has wholly omitted and dispensed with the platen of claim 1 of complainant's patent. Defendant does not use one element of the claim in suit, and does not infringe. In complainant's recorder, both rollers move up with the band to meet the time-printing wheels, or in another construction may remain stationary while the time-printing wheels come to them, or into the same line with their upper periphery; but the

same is true of the one roller of defendant's recorder. Dey was but an improver, in no sense or degree a pioneer, and the range of allowable equivalents is so narrow, and the defendant's recorder, in respect to the very elements in question, is so plainly and distinctly differentiated from complainant's, that infringement is not made out. If I have any proper conception of the principle repeatedly declared by the Supreme Court of the United States and plainly and recently stated in Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 406, 407, 25 Sup. Ct. 697, 49 L. Ed. 1100, infringement is not established in this case. The syllabus of that case is as follows:

"A greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, although the last and successful step, in the art theretofore partially developed by other inventors in the same field.

"The patent involved in this case for the unhairing of seal and other skins, while entitled to protection as a valuable invention, cannot be said to be a pioneer patent.

"In making his claim the inventor is at liberty to choose his own form of expression, and, while the courts may construe the same in view of the specifications and the state of the art, it may not add to or detract from the claim.

"As the inventor is required to enumerate the elements of his claim, no one is the infringer of a combination claim, unless he uses all the elements thereof.

"Where the patent does not embody a primary invention, but only an improvement on the prior art, the charge of infringement is not sustained, if defendant's machines can be differentiated."

In the opinion, the court says:

"In determining the construction to be given to the claim in suit, which is alleged to be infringed, it is necessary to have in mind the nature of this patent, its character as a pioneer invention or otherwise, and the state of the art at the time when the invention was made. It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, may be the last and successful step, in the art theretofore partially developed by other inventors in the same field. Upon this subject it was said by this court, in Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, quoted with approval in Singer Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437: 'To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a "pioneer." This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before.' * * * In making his claim, the inventor is at liberty to choose his own form of expression, and, while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof. Shepard v. Carrigan, 116 U. S. 593, 597, 6 Sup. Ct. 493, 29 L. Ed. 723; Sutter v. Robinson, 119 U. S. 530, 541, 7 Sup. Ct. 376, 30 L. Ed. 492; McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Wright v. Yuengling, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; Black Diamond Co. v. Excelsior Co., 156 U. S. 611, 617, 15 Sup. Ct. 482, 39 L. Ed. 553; Walker on Patents, § 349."

And in the recent case of Computing Scale Company of America v. Automatic Scale Company (decided by the Supreme Court February

25, 1907, not yet officially reported), 27 Sup. Ct. 307, 51 L. Ed. ——, the court said:

"Conceding that this spiral rod and its connections with the cylinder in the manner and for the purposes stated is a novel feature in the combination and entitled to protection, it is of that narrow character of invention which does not entitle the patentee to any considerable range of equivalents, but must be practically limited to the means shown by the inventor. The distinction between pioneer inventions permitting a wide range of equivalents, and those inventions of a narrow character, which are limited to the construction shown, has been frequently emphasized in the decisions of this court. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 406, 25 Sup. Ct. 697, 49 L. Ed. 1100, and cases therein cited. Thus limiting the invention, we do not think the construction of the defendant amounts to an infringement."

In view of a patent to said John Dey dated July 10, 1894, No. 522,784 (the patent in suit is dated August 7, 1894), and granted 27 days prior to the grant of the patent in suit, but applied for January 16, 1893, about two months after the filing of the application for the patent in suit (the patent in suit was applied for November 11, 1892), I do not see how it can be claimed that the single-roller construction, the roller carrying the band and doing the work of a platen, and used by defendant, is covered broadly, or otherwise, by claim 1 of the patent in suit. Having applied for the patent in suit November 11, 1893, and inserted claim 1 for the combination therein mentioned, including as a necessary and material element the specific platen described in the specifications, on the 16th day of January, 1893, 65 days later John Dey applied for another patent for workman's time recorder, consisting "more particularly in specific improvements of the construction and combination of the details of the apparatus as hereinafter fully described and set forth in the claims." He then mentions the clock mechanism, the time-printing wheels, and then says:

"Beneath the minute-wheel, C, and hour-wheel, C', is the impression roller, R, mounted longitudinally movable on a shaft, a''', which is parallel with the shaft of the said minute-wheel and journaled in vertically movable props, P, P, by which the roller, R, is lifted to cause the types of the wheels, C, C', to make their impressions on the band of paper secured to the periphery of the roller. This paper has printed upon it consecutive numerals arranged in a row extending lengthwise of the paper, and I preferably wind one end thereof upon a spool, R', mounted on the shaft, a''', inside of the roller, R, which latter is formed hollow and provided with a transverse slot in its periphery, through which slot the paper band passes and thence around the external periphery of the roller and back through the aforesaid slot and is clamped or otherwise suitably fastened to the inner periphery of the roller, as illustrated in Fig. 3 of the drawings. At the end of each working day the portion of paper containing the records is removed from the roller, R, and torn from the roll, and another section of paper is drawn out and applied to the exterior of the roller, R, in the manner as before described. The successive sections of the roll of paper are numbered alike." * * * To produce the impressions of the minute-wheel, C, and hour-wheel, C', upon the paper band mounted on the roller, R, the ink ribbon, I, is interposed between said wheels and paper. * * * In order to allow the recordings during different periods of the day to be made distinctly on the band of paper, I make the latter and its carrying roller, R, of sufficient width to allow the different times of recording to be printed in rows opposite the respective numbers marked on the paper, and to allow the roller to be shifted laterally and thus permit the printing to be done at different points in the width of the paper I mount said roller loosely on its shaft, a''', and connect

it thereto by a spline in the hub of the wheel entering a longitudinal groove, s, in the shaft."

He then claims:

"(1) In combination with the time-printing wheel and a revoluble impression roller, a lever turning said roller, a rock-shaft moving said roller toward the printing wheel and a plunger operated by the lever and actuating said rock-shaft, as set forth."

This roller carries on its periphery the impression band of the patent in suit. It carries this band into contact with the time-printing wheels, and it must perform every function of the platen of the patent in suit, operating in substantially the same way to produce precisely the same result, if the single roller of defendant's recorder is the equivalent of and takes the place of the platen specifically described in the patent in suit. In short, if claim 1 of the patent in suit is broad enough to include the single roller carrying the impression band, and does, then we have a case of double patenting. To my mind the fact that the same patentee, two months after applying for the patent in suit, applied for a patent for this single roller carrying on its periphery the impression band and doing the printing by being brought into contact with the time-printing wheels, demonstrates that he had no conception, idea, thought, or intent that the said single roller, carrying the band, was the equivalent of the platen he had described in his application for the patent in suit. It shows conclusively that the patentee himself so differentiated them that it cannot be contended the single roller construction and operation is covered by claim 1 of the patent in suit. If it is so covered, then claim 1 of the patent in suit is void. It is in this element that complainant says his invention resides. As he had a patent for it July 10, 1894, in combination with other old elements, working in a given old way, to produce an old result, how could he have another valid patent for the same element in combination with other old elements, operating in the old way, to produce the old result?

The complainant's expert repeatedly admits that defendant's recorder does not have the specific form or embodiment of parts or mechanism shown and described in claim 1 of the patent in suit, and that it is only by reading into such claim elements not referred to that an operative recorder is found, or that the claim covers or can be applied to defendant's structure. In short, according to this expert, we must change the reading of claim 1, and strike out the words "a platen actuated by said lever and pressing the band into contact with the time-printing wheels as set forth," and substitute the words "means for effecting impressions of the printing mechanism on the record sheet." He thinks complainant entitled to a construction so broad that defendant's single roller is both the support and guide of the impression band, "band movable longitudinally in either direction," etc., and the "platen actuated by said lever and pressing the band," attached to and supported by and, in part, extended between two rollers without support, except as held "taut" by the mechanism described, "into contact with the time-printing wheels as set forth." I think such a construction is not warranted, in view of the language of the claim, the specifications, the fact that this is merely an improvement, and the decisions referred to.

It should be noted that the following elements of claim 1 of the said patent to Dey of July 10, 1894, No. 522,784, are found in claim 1 of the patent in suit, viz.: Elements: (1) Each, time-printing wheel; (2) "revoluble" impression roller which includes band having the numbers, in the one patent, and "a band movable longitudinally," etc., in the other, being made movable by two rollers; (3) "rock-shaft moving said roller," etc., in the one and "platen * * * pressing the band into contact with the time-printing wheels" in the other, the pressing being done by the rock-shaft; (4) "plunger operated by the lever and actuating the rock-shaft" in the one end and "plunger" operating with the lever and rock-shaft to press "the band into contact with the time-printing wheels, as set forth," in the other. The plunger and rock shaft are both "set forth" and fully described in the description of the elements of claim 1 of the patent in suit. The functions are substantially the same in both patents. And then claim 1 of the patent in suit has the additional element of the "platen," which, as stated, is wholly omitted from defendant's recorder, as well as from patent No. 522,784, to Dey. In patent 522,784, "lever" is designated I; in patent No. 524,102, as g." "Plunger" as g in the one; as i in the other. Rock-shaft as e in the one, and as L in the other. In the patent in suit, we have "movable platen, C, which is attached to the free end of a spring-arm, c', fastened to a rock-shaft, d, pivoted to the plate, A," and "the platen receives its vertical oscillatory motion toward and from the type-wheel by means of a plunger, i, extending through * * * affixed to the rock-shaft, d, the outer end of the plunger bears," etc., and "in pushing the free end of the lever * * * the plunger is forced inward and * * * throws the platen towards the type-wheel." In the patent of July 10, 1894, No. 522,784, we have "the shaft * * * is hollow and in the interior thereof is the longitudinally movable plunger, g, which is forced outward and caused to abut against the lever, I, by means of the spring, g', pressing against the inner end of the plunger. On the exterior of the shaft * * * is a * * * collar, F, which is connected to the plunger, g, by * * *." The result is that by pressing the free end of the lever, I, towards the case, A, the plunger, g, is pushed inward and carries with it the collar, F. This movement of the collar causes the finger, e', to turn the rock-shaft, e, which, * * * and this action of the shaft causes * * * to lift the roller, R," etc. Again: "The shaft, l', receives its rocking motion * * * projecting from the rock-shaft, e, which is actuated by the plunger, g." And again: "Then by pushing the lever towards the case, A, the plunger, g, is actuated to arrest the movement of the minute-wheel, C, and lift the impression roller, R, to print the time upon the paper mounted on said roller."

The complainant claims invention in this single roller construction and combination used by the defendant, and, such being the case, I do not understand how it can be claimed as the equivalent of the platen of claim 1 of the patent in suit. An equivalent must not vary in any manner the idea of means, or affect it in any degree. It is quite true that the equivalent may perform some new or additional

function in the invention, and still be an equivalent; but it must perform all the functions of the element for which it is a substitute in substantially the same way, and I do not think that it is material that the element for which another is substituted has more parts or less parts. The substitution of an equivalent is, however, a mere change of parts and form involving no inventive skill, but suggested by the invention itself to every person skilled in the particular art. If the alleged equivalent not only performs the function of the element for which substituted, and perhaps more, but introduces into the combination a new idea, or new ideas, or a much more extended development of the idea of means, then we do not have the substitution of an equivalent, but a patentable improvement—something different in principle and function. In combination claims this is especially true. 1 Rob. on Patents, 254; Wells v. Curtis, 66 Fed. 318, 13 C. C. A. 494; 20 Eng. Pat. Cas. Am. Notes, 271.

When we have in combination certain elements working together and co-operating to produce a given result, they work in accordance with and in obedience to some law of co-operative action. When we change one element which works and operates differently from the one for which it is a substitute we necessarily change the action of all, and then the combination operates according to and in obedience to another co-operative law, and we have a new combination working in a different way to produce a result, and it may be the same result; but it is not obtained in the same way by the co-operation of the same elements or their equivalents. Such, in my judgment and opinion, is this case. It is not enough that the two elements, one of which is alleged to be the equivalent of the other, perform the same function when in the same place; but they must perform that function by applying the same force to the same object, through the same mode of application. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. Ed. 149, which was a patent for a process; Burr v. Duryee, 1 Wall. 531, 572, 17 L. Ed. 650, 660, 661; Westinghouse v. Power Brake Co., 170 U. S. 568, 569, 18 Sup. Ct. 707, 42 L. Ed. 1136; Curtis on Patents (4th Ed.) § 310; Machine Co. v. Murphy, 97 U. S. 125, 24 L. Ed. 935; Carter Machine Co. v. Hanes (C. C.) 70 Fed. 859, 865; Duff Mfg. Co. v. Forgie, 59 Fed. 772, 775, 8 C. C. A. 261, citing and approving 1 Rob. on Pats. § 247.

The object or purpose of the patent in suit is to print on the band or time slip, by means of the type, and by bringing the two in contact, the hour and minute of the workman's arrival and departure. The object and purpose of defendant's device is the same. The force employed is applied to the same object, viz., the band, through the medium of certain mechanism. If that force is the hand of the workman manipulating and pushing the lever, we have the same force. If it be the platen in the one case, and the roller in the other, each of which presses the band against the type because of the force applied by the workman, we do not have the same identical "force," but an equivalent "force," clearly. Hence we have the same force applied to the same object, to accomplish the same purpose or result. The question remains: Is this force applied to this object and to accomplish the pur-

pose through the same mode of application? But "mode of application" does not mean the mere contact of the band with the type, but the mode of action of the mechanical devices used to bring them together. Is the same law of co-operative action employed in both cases acting through substantially the same means?

In the claim in suit of the complainant's patent, this impression band is carried on two rollers, and must be movable longitudinally. This is the essence of this element of the claim and made so by express words. It is made so movable by two rollers on distinct shafts and arranged in the same horizontal plane which turn in unison and wind the band onto the one roller as it is unwound from the other. This longitudinal movement of the band is impossible in defendant's construction, and is not present. The law of its movement in defendant's construction is circumferential or rotary, and not longitudinal. In the one case the band is rotated with the roller as a whole to bring the required number to the type, and there is no winding and unwinding. The type and band are then brought together by raising the roller into contact with the type-wheel or by dropping the wheel into contact with the roller, and thus the printing is done; while in the other it is not rotated as a whole, but, as one part or end is unwound from one roller, it is carried longitudinally through space underneath the type on the printing wheels by the revolution of another roller, halted long enough to be pressed against such type by an independent platen and receive the impression, and then wound upon the other roller. It is the part suspended in space, away from both rollers, that is pressed against the type and receives the impression therefrom. It is so pressed against the type by independent means, a distinct element of the claim absolutely essential to its operativeness by the action of other laws, by the same force, but applied in a different way, and by different means.

I deem it immaterial that two elements of a claim of one patent are inserted in one element of the claim of an alleged infringing patent. Bundy Mfg. Co. v. Detroit Time Reg. Co., 94 Fed. 524, 538, 36 C. C. A. 375. Such union of the two elements does not avoid infringement, provided they both be there. But both must be found in the alleged composite element; that is, both must be found in the infringing device. It is no answer to say that both are unnecessary, and one may be dispensed with without impairing the claim or patented device. The patentee, by putting it in as an element of the combination, makes it essential. Take it out, and you no longer have the combination of the patent. If invention is involved in joining the two, then, within the cases cited, there is no equivalency. Here claim 2 of the patent in suit has as its second element "a band movable longitudinally in either direction," etc. These words "movable longitudinally" are not merely descriptive of the band, but show an essential mode of putting the band into the combination, attaching it to, or connecting it with, the other elements to make an operative device or apparatus. Unless so movable, the recorder is wholly inoperative. Such a band defendant does not use. If the two rollers, D, D', are not an essential part of the second element of claim 1 of the patent in suit, then we have simply a band in the combination designed to be put in, printed on and removed like the sheet of paper in a typewriter, and it becomes a fugitive element,

not a proper element of a patentable claim. Morgan Envelope Co. v. Albany Co., 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; Stearns v. Russell, 85 Fed. 218, 225, 29 C. C. A. 121.

Here claim 2 of the patent in suit has another element, "a platen actuated by said lever and pressing the band into contact with the time-printing wheels as set forth." Such a platen defendant does not have. It has one roller on which a band not movable longitudinally is wound, and there is no platen whatever in the sense of the patent, for the reason that in defendant's construction and mode of operation and printing a platen is wholly unnecessary. The roller carrying the band is all-sufficient. Defendant dispenses wholly with one roller, the platen, and much mechanism necessary for the operation of that platen. It substitutes nothing. Defendant requires no substitute, no equivalent. It, by changes of mechanical means and a different mode of operation, a change in the idea of means, makes one roller do the work of two rollers and a cumbersome and involved platen. Defendant may infringe the Dey patent, No. 522,784, if it be valid; but that question is not in this case. No such claim is made in the bill of complaint herein.

There is great doubt that John Dey invented the recorder of the patent in suit; but I cannot say it is established beyond a reasonable doubt that F. E. Cable, and not John Dey, was the inventor. The payment to Cable of $1 in addition to his wages on every machine made is an important circumstance; but he was quiet, and allowed Dey to take out the patent in his own name, and has been silent since. What others "understood" is hardly evidence that Cable was the inventor. But it is unnecessary to pursue that feature of the case. I have fully canvassed the prior art, which shows Dey to be but a mere improver in the art, and not entitled to a broad range of equivalents. This is emphasized by the fact his patent is for a mere combination, where the range of equivalents is much narrower than in other cases. 1 Robinson on Patents, §§ 254, 255; Carter M. Co. v. Hanes (C. C.) 70 Fed. 859; Duff Mfg. Co. v. Forgie, 59 Fed. 772, 8 C. C. A. 261.

Defendant does not infringe. There will be a decree dismissing the bill of complaint, with costs.

HEYWOOD BROS. & WAKEFIELD CO. v. SYRACUSE RAPID TRANSIT RY. CO.

(Circuit Court, N. D. New York. March 27, 1907.)

1. PATENTS—VALIDITY AND INFRINGEMENT—CAR SEATS.

The Aze and Gilfillan (Wheeler, assignee) patent, No. 491,761, for a car seat having a reversible back of the "walk over" type, the essential feature of which is a pair of arms connecting the back to the seat frame, having the one end of the pair pivoted to the end of the frame near the center thereof by pivots arranged in a horizontal plane, and having the other or upper end of the pair pivoted to the end of the back by pivots arranged in a plane substantially at right angles to the plane of the back, in such method of pivoting discloses novelty and patentable invention, and is entitled to a broad range of equivalents. Also *held* valid as against the claim that the invention was made by another than the patentees and infringed by a seat having at one end a pair of arms exactly like those of

the patent, and at the other end a pair which were functionally equivalent.

2. SAME—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS OF DEVICE.
In all cases the great commercial success of a patented device, and the fact that it supplants or supersedes other devices of the same kind used for the same purpose, are evidence of patentable invention, novelty, and utility of no mean order or low degree, and such facts are in many cases persuasive evidence of a most valuable conception.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 39.
Utility, extent of use, and commercial success as evidence of invention, see note to Doig v. Morgan Mach. Co., 59 C. C. A. 620.]

3. SAME—CONSTRUCTION OF CLAIMS—EFFECT OF PROCEEDINGS IN PATENT OFFICE.
While it is settled law that a patentee who has acquiesced in the rejection of a broad claim by substituting a narrower one cannot insist upon a construction of the latter to cover that which was rejected, yet such rule does not debar him from a liberal construction of the claim as granted, nor from the benefit of the doctrine of equivalents.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 244.]

4. SAME—AMENDMENT OF CLAIMS.
If there was no amendment narrowing a claim of a patent in respect to the essential feature of the invention disclosed therein, amendments made in reference to an incidental matter intended to perfect the claim or device impose no restriction on the rights of the patentee in respect to equivalents.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 244.]

5. SAME—INFRINGEMENT—CAR SEATS.
The patentable invention disclosed by the Curwen patent, No. 784,383, for a car seat, relates to one thing, while that of the Aze and Gilfillan patent, No. 491,761, relates to an entirely different thing, which is not claimed nor covered by the Curwen patent, and the fact that a structure conforms to that of the latter patent and contains the patentable feature thereof is not even presumptive proof that it does not also embody the invention of the Aze and Gilfillan patent and infringe the same.

In Equity. Suit for alleged infringement of claims 2, 3, 4, 5, 10, and 11 of United States letters patent for car seat to Aze and Gilfillan, No. 491,761, dated February 14, 1893, on application filed November 24, 1891. The defendant is a user of the alleged infringing seat.

Samuel Owen Edmonds (J. Edgar Bull, of counsel), for complainant.

Gannon, Spencer & Michell (Melville Church and Francis Rawle, of counsel), for defendant.

RAY, District Judge. The patent in suit relates to "car seats," although the same may be used in any place where such a seat is desired, and was issued February 14, 1893, on application filed November 24, 1891, to Emile Aze and Essington N. Gilfillan, assignors to Harris A. Wheeler. The seat constructed under this patent has come to be known, generally, as the "Wheeler Seat," and will be so referred to, and the patent will be referred to as the "Wheeler Patent." This seat belongs to the type known as "walk over," as distinguished from the "turn over." In both types the back of the seat is carried from the one side thereof to the other, being pivoted to the frame near the center of the seat at both ends in some manner, but in the

latter type the back turns completely over, making a half revolution, so that what was the upper edge when on one side of the seat becomes the lower edge when on the other, and consequently the same side of the seat back is always presented to the back of the occupant and receives the wear. The "walk over" back does not revolve at all, but is carried over, being pivoted to the frame, or frame and arm of the seat in some manner, always retaining its upright position, and consequently the same side of the seat back is not always presented to the occupant and both sides have equal wear, and the upper edge when in one position is the upper edge when in the other. There are other alleged advantages in the "walk over" type, such as ease and rapidity and certainty of movement, etc., when a change of position is desired; but it is unnecessary to go into detail, as the utility of the patented device, and, to an extent, the superiority of this "walk over" type, is conceded. The proof shows that, in many cases at least, this type of seat has superseded, and is superseding, the "turn over," and has met, and is meeting, with large sales. Complainant's seat is a commercial success; has had, and now has, large sales. In short, it is conceded that the patent in suit discloses some patentable novelty, but defendant contends that it is not for a pioneer invention and is to be quite narrowly construed and limited, and that so construed and limited as it must be, in view of the prior art and the proceedings in the Patent Office, disclosed by the file wrapper, the defendant does not infringe. The defendant also insists that the patentee's assignors were not the first inventors, but that one Emery B. Cushing was, and therefore the patent is void. It insists that, as early as 1888, Cushing made the complete invention of the entire subject-matter of the claims in suit, completed a working model which was operative, and disclosed his invention to some of his friends and neighbors. This alleged model is in evidence, and shows substantially all that is disclosed by the patent in suit. But it is not identified by any person except Cushing, and I do not think the proof shows it was in existence at any date prior to the application for and the granting of the patent in suit. Cushing applied for a patent on the device embodied in his model some two years after the patent in suit had been issued and the structures in accordance therewith had been put in practical and public use. A somewhat lame excuse for this delay has been given, but I am not satisfied with it. Undoubtedly he was at work on a car seat; but, if he had completed the model in suit, it is incredible that he did not apply for a patent. He was not a novice nor ignorant of the patent laws. In short, I find that Cushing was not the inventor, but that Aze and Gilfillan were.

The claims of the patent in suit which are in issue read as follows:

"(2) In a reversible car seat, the combination with a frame and a back, of a pair of arms substantially equal in length, pivoted to each end of the back at their upper ends, and having their lower ends pivoted to the frame near the center thereof, the pivots connecting said arms to the back being arranged in a line extending at an angle to the plane of the back, substantially as set forth.

"(3) In a reversible car seat, the combination with a frame, and the back, of a pair of substantially parallel arms pivoted to said frame and to each side

of said back, and such latter pivots being in a line at right angles to the plane of the back, substantially as set forth.

"(4) In a reversible car seat, the combination with the frame and the back, of a pair of substantially parallel arms pivoted at their ends respectively to each side of the back and the frame, the pivots thereof at the upper end of the pair being arranged in a plane at right angles to the back and at the other end in a horizontal plane, substantially as set forth.

"(5) In a reversible car seat, the combination with a frame and a back, of a pair of substantially parallel supporting arms, pivoted to the lower edge of said back, and to the frame, at each side, and a stop for limiting the movement of said arms, the pivots connecting the arms to the back being arranged in a line extending at an angle to the plane of the back, and the pivots connecting the arms to the frame, being located near the center of the frame, substantially as set forth."

"(10) In a reversible car seat, the combination with the frame of the back having heads rigidly fixed to both sides thereof, and arms pivoted to the said heads, and to both sides of the frame near the center thereof, the pivots connecting said arms to the said heads being normally arranged in a line extending at an angle to the plane of the back, substantially as set forth.

"(11) In a reversible car seat, the combination with the frame of the back having heads rigidly fixed thereto and projecting below the lower edge thereof, and arms pivoted to said heads, and to both sides of said frame near the center thereof, the pivots connecting said arms to the heads being arranged in a line extending at an angle to the plane of the back, substantially as set forth."

Claim 2 has in combination in a "reversible car seat" (1) a frame and a back; (2) "a pair of arms" substantially equal in length (a) pivoted to "each end" of the back at their (the arms) upper ends, and (b) having their (the arms) lower ends pivoted to the frame near the center thereof; and (3) the pivots connecting said arms to the back being arranged in a line extending at an angle (any angle?) to the plane of the back, substantially as set forth.

Claim 3 has in a "reversible car seat" the combination of (1) a frame; (2) a back; (3) a pair of substantially parallel arms (a) pivoted to said frame and (b) to each side (end) of said back; and (4) the pivots attaching the arms to the back being in a line at "right angles to the plane of the back." Claim 3 differs from claim 2, in that the arms are "substantially parallel," but not necessarily of substantially the same length, and the pivots connecting the arms with the back are in a line at "right angles" to the plane of the back, instead of extending at an angle to the plane of the back.

Claim 4 has, in a "reversible car seat," the combination (1) with the frame and the back; (2) a pair of substantially parallel arms (a) pivoted at their ends respectively to each side (end) of the back and the frame, the pivots thereof (b) at the upper end of the pair being arranged in a plane at right angles to the back, and (c) at the other end in a horizontal plane. This claim mentions the manner in which the lower end of "the pair is pivoted to the frame."

Claim 5 calls the arms "supporting arms," which they are in fact in all the claims, pivots the upper end to the "lower edge of said back," intending evidently the lower position of the edge of the end, not the edge of the lower side, although this might be done, adds a "stop" for limiting the movement of the arms, but the pivots connecting the arms to the back are not necessarily arranged in a line extending at a "right angle" to the plane of the back.

Without describing the other claims more in detail, the main idea present in each claim is a "pair of arms" pivoted at each end of the pair; the one end being pivoted to one end of the back of the seat, and the other end to the corresponding end of the frame of the seat. It is conceded by both parties that claims 3, 4, 5, 10, and 11 are to be read with "end" substituted for "side," where the pivoting of the pair of arms to the back is spoken of, and that each claim in suit calls for two "pair of arms," one pair at each end of the seat. Read as they do read, literally, this is not true, for in claims 3 and 4, for instance, only one pair of arms is mentioned, and this pair of arms (two arms make a pair of arms) is pivoted at one end thereof (not at each end of each arm) to each side of the back. This is possible and practicable, for the one arm of the pair could be pivoted to the front side of the back, and the other arm of the pair to the back side of the back. Claim 2 expressly states that a pair of arms is to be pivoted to each end of the back. Hence that claim calls for two pairs of arms. But a reference to the proceedings in the Patent Office demonstrates beyond all question that the claims were only allowed when changes were made which included two pairs of arms, one pair at each end of the seat, and complainant's expert testified "the words 'end' and 'side,' while referring to the pivotal connection of the arms to the back and the seat frame, mean one and the same thing."

Claim 2 now in suit was an additional claim (5) presented June 17, 1892, and read as follows:

"In a reversible car seat, the combination with a frame and a back, of a pair of arms substantially equal in length, pivoted to each end of the back and to the frame, the pivots connecting said arms to the back being arranged in a line extending at an angle to the plane of the back, substantially as set forth."

This took the place of original claim 5, which became claim 7. This additional claim was objected to July 19, 1892, as follows:

"Claims 5, 7, 9, and 10 are each rejected as expressed on the patent to Stanley, reversible seat, No. 186,505, January 23, 1877 (Car Seats). These claims should each set forth the arms at each side of the back."

This meant each end of the back; that is, the aisle end and the end next the side of the car. September 17, 1892, the applicants amended this claim, then 5, now 2, as follows:

"Claim 5, line 3, cancel 'and to the frame' and insert 'at the upper ends, and having their lower ends pivoted to the frame near the center thereof.' "

This was done, and the additional claim 5, substituted for original claim 5, which had become claim 7 by amendments, etc., of June 17th, became claim 2 of the patent in suit.

The history of claim 3 of the patent in suit is as follows: Original claim 4 read:

"In a reversible car seat, the combination with the back, of a pair of substantially parallel arms pivoted to said back and such pivots being in a line at right angles to the frame of the back."

January 23, 1892, this was objected to as follows:

"Claims 3, 4, 7, and 8 are objectionable in form for the reasons urged against claim 1, and are rejected on the reference cited therefor."

The objections and reference as to original claim 1 were:

"Claim 1 is indefinite and incomplete. The supporting frame and the pivoted connection of the arms thereto should be included. It is rejected on patent to Norcross, No. 436,313, September 9, 1890."

June 17, 1892, the applicants said by way of amendments:

"Claim 4, line 1, after 'with' insert 'a frame.' Line 2, after 'said' insert 'frame and to.' Line 4, change 'frame' to 'plane.' Same line, after 'back' insert 'substantially as set forth.' Also change numerals of claims 2, 3, 4, * * * to 3, 4, 6, * * * respectively, and insert the following additional claims."

Claim 4 then became claim 6; a new claim, later claim 2, coming in as claim 5. In reference to the claims as thus presented, the applicants said:

"Claims 5, 6, 7, and 8: The reference does not show pivots at the upper ends of the arms arranged in a line at right angles to the back, nor are the arms substantially equal in length. By such a construction, the applicants gain all of the advantages of the references, and none of the disadvantages, and with applicants' construction, the arms need not project above the bottom cushion, and yet they produce the maximum length of throw."

July 19, 1892, the Patent Office said, "Claim 6 when amended to include a pair of arms at each side of the back may be allowed." The words "each side (end) of said," before "back," in line 4 of claim 3 in the patent, and the word "and," after "frame," line 1, were then inserted, and by cancellation of claims and change of numerals claim 6, original claim 4, became claim 3 of the patent in suit.

It is evident, therefore, that while this claim was originally rejected on Norcross, No. 436,313, this was not persisted in in face of the protest and statement of June 17th, already quoted, calling attention to the arrangement of the arms in a line at right angles to the back and their pivoting to the back in that form and to their equal length. The Patent Office acquiesced in the equity of that contention, and required the addition merely of another pair of arms at the other end of the seat.

Norcross, No. 436,313, September 9, 1890, shows a pair of arms (levers) at the end of the seat; each arm having a short right angle arm at the lower end, which short arms are crossed upon each other, said levers (arms) lying edge to edge in the same vertical plane when the back is in position, and are pivoted to the seat frame at their lower ends on the same horizontal line, and to the back at their upper ends "as set forth." As set forth, "Plates, G, are attached to the ends of the back and the levers (arms), FF', are pivoted to it in such a position as to be relatively reversed as to points of attachment with reference to their lower ends," and so as to bring the one or the other of them under a spring bolt shown when the back is in position for occupancy. While these levers or arms are pivoted to the seat frame "on the same horizontal line," they may or may not be pivoted to the end of the back of the seat by pivots arranged in a line extending at an angle to the plane of the back, or by pivots "being in a line at right angles to the plane of the back." Norcross is not only silent on the subject, but shows a pivoting of the arms to the back of the seat that is entirely and radically different from the conception of the patent in suit. On this point, the patent in suit says:

"In any event, however, the pivots at the upper ends of each pair of arms should fall in a line substantially at right angles to the plane of the back."

The result is that the very essence or gist of each of the claims in suit is, not merely two pairs of arms, or one pair of arms, the arms thereof being of substantially equal length, pivoted, the one end of the pair to the frame by pivots arranged in a horizontal plane, and the other or upper end of the pair pivoted to the end of the back by pivots arranged in any convenient manner with reference to the plane of the back, but a pair of arms having the one end of the pair pivoted to the end of the frame near the center thereof by pivots arranged in a horizontal plane, and having the other or upper end of the pair of arms pivoted to the end of the back of the seat by pivots, not a pivot, "arranged in a plane at right angles to the back," or at least "in a line extending at an angle to the plane of the back substantially as set forth," which means "in a line substantially at right angles to the plane of the back," as we have seen by reference to the specifications. In short, the very gist of each claim is the place, mode, and manner (angle) in which the pair of arms, one pair at least, is pivoted by pivots to the frame, and especially to the end of the back of the seat. And here is the conception, the patentable invention, or novelty of Aze and Gilfillan as disclosed in the Wheeler seat. Take this from either claim in suit, and it falls, for we would have an old combination of old elements; old elements combined in substantially the old way, to produce the old result. Retain this conception, and pivot the upper end of the pair of arms to the end of the back of the seat by pivots arranged in a plane at right angles to the back, or substantially at a right angle thereto, and we have old elements; but they are combined in a new way, and they operate in a new way, to produce an old result, but they produce it much more quickly, easily, certainly, in a much better way. This is patentable invention.

In the Stillwell and Brundage seat of the prior art and in the Gordon and Degener movement applied to a car seat, we have two arms at each end of the seat, a pair of arms, the lower ends of the arms being pivoted to the frame, the one arm to the arm of the seat, and the other to the end of the frame proper; the pivots being in a perpendicular line. The other or upper ends of these arms are pivoted to the end of the back of the seat, but in a line in the plane of the back, not at an angle therewith, and the result is that when the back of the seat is carried across, unless constantly supported by the hand of the operator, it will fall down when half way over, as all the pivots of all the arms are then in a line with the plane of the back. This defect in the prior art was obviated by the Aze and Gilfillan patent.

In close cases, the commercial success of an alleged invention sometimes turns the scale in determining whether or not patentable invention is disclosed. In all cases the great commercial success of the patented device, and the fact that it supplants or supersedes other devices of the same kind used for the same purpose, are evidence of patentable invention, novelty, and utility of no mean order or low degree. These facts are in many cases persuasive evidence of a most valuable conception.

In this case, I have examined the file wrapper and the prior art to ascertain if there is any suggestion in the prior art of this mode of pivoting the arms to the back of the seat. I am unable to find it in this or any analogous art. I have also examined the file wrapper critically to ascertain if the patentees in any way limited their real invention or its application. It seems to me they should be entitled to the broadest range of equivalents. As the claims were first filed, the one end of the back of the seat was left without support, swinging in the air, or means for causing the back to move as a whole, both ends of the back in unison and with adequate support after being moved from the one side to the other. Hence arms or some equivalent at each end of the back should have been included, and were required by the Patent Office, and, later, included. This amendment calls for a pair of arms at each end of the seat. But does this, in such an invention as this, permit without infringing the substitution of an equivalent at one end—an equivalent which performs all the functions demanded of that pair of arms, and which is also the equivalent in name? That is the question in this case. The criticism can be made that defendant's substitute is not "a pair of arms." But this is hypercritical. Primarily "pair" means "two things of a kind, similar in form, identical in purpose and matched or used together." But secondarily, the word means "a single thing composed essentially of two pieces or parts which are used only in combination, and named only in the plural." A pair of shears or scissors has two blades, but one may be shorter than the other, and they are of different shape, etc. The Patent Office itself subsequently set that question at rest, as we shall see.

The defendant uses a seat which is a "Chinese copy" of complainant's in every material respect, except one. In that respect, he has substituted an equivalent pair of arms which performs every function of the pair of arms pivoted as described in the patent for which it is a substitute. This substituted pair of arms is pivoted somewhat differently, but, in substance, operates in precisely the same way. Its object, purpose, and result is the same. This fact was subsequently declared by the Patent Office. Defendant has a pair of arms at each end of the seat back, but in the equivalent pair, placed at the end next the side of the car, it has a pair of arms, one of which arms is much shorter than the other, and the lower end of this short arm is not pivoted to the end of the frame. The upper end of this pair is pivoted to the end of the back of the seat, but not by two pivots, only one, and these arms, instead of being side by side in a line at right angles with the plane of the back, are movable on the same pivot, and are arranged in a line with the plane of the back when upright; that is, the short one is immediately in front of the longer one as we look at the seat from the aisle of the car, or behind it as we view the seat from the opposite direction. This long arm of this pair is pivoted to the frame of the seat near the center of the end, and is connected with and acts and moves synchronously with the pair of arms at the other end, and operates or acts to hold the end of the back to which it is pivoted in position, and carry it without bend or wobble to its new position on the other side of the seat. The short arm of this

pair moves synchronously with the long arm thereof, but does not maintain or have the same inclination. The two are parallel only when the back is exactly upright on its way from the one side of the seat to the other. When the back has been changed—that is, when it is in position for use by the occupant of the seat—the lower end of this short arm, being pointed, fits into a socket on the frame of the seat, and, acting in connection with the long arm, supports and holds the end of the back to which attached firmly in position. I repeat: The objects, purposes, and functions of the substituted pair of arms are precisely those of the duplicate pair of the Wheeler seat made under the patent in suit. The two pairs of arms in both seats are made to operate or act in synchronism by substantially the same means or connections, although the Curwen patent which covers these means, and to which attention will be called later, is for an improvement in such means. In short, the invention of the Curwen patent, as we shall see, is for improved means for connecting the arms at the two ends of a car seat and causing them to work in unison, and nothing more.

It is true that, in the broad sense, Aze and Gilfillan were not pioneers in this art, or in this branch of the art relating to "walk over" backs. They were improvers, and they made a long and useful step in advance. The Brill Company, really defending this suit, and now making and using and selling with their cars, equipped therewith, the alleged infringing seat, formerly used and equipped the cars made and sold by it with the Wheeler seat. That company acquiesced in the validity of the Aze and Gilfillan patent for years, and recognized the utility and commercial value of the seats made in accordance with it; but this fact does not estop them or preclude them from using any car seat they see fit to use, provided it does not infringe. That company had the right, with all other persons, to invent, if it could, or secure an improved car seat, or to substitute an inferior one, but not to appropriate the Aze and Gilfillan invention. The fact is mainly pertinent as bearing on the novelty and value of the real conception and patentable novelty disclosed in the Wheeler seat. Aze and Gilfillan were pioneers in walk over seats, having a pair of arms with the upper ends of the pair pivoted to the end of the back of the seat by pivots arranged in a line substantially at right angles to the plane of the back, or in a walk over seat having two pairs of such arms so pivoted and also pivoted to the frame of the seat. A pair of arms at each end of the seat, and single arms at each end, were old in the art, and, as stated by the Patent Office in considering the Curwen application subsequently, "there was no invention in combining the two." In that particular feature, they were pioneers. In that feature they or the complainant are entitled to a fair range of equivalents. My attention is invited to a seat having the Stillwell and Brundage devices and the Gordon and Degener mechanical movement added and applied or pivoted to the back of the seat and the frame in the same manner Aze and Gilfillan apply it. Aze and Gilfillan did not patent a mechanical movement. The trouble with the illustration is that it comes too late, long after Aze and Gilfillan had made their invention and obtained their patent. Having pointed the way, it

now seems simple enough. But it is contended that as Aze and Gilfillan were merely improvers, and defendant's seat can be differentiated from complainant's, the charge of infringement cannot be sustained. Cimiotti Unhairing Co. v. American Fur R. Co., 198 U. S. 399, 414, 25 Sup. Ct. 697, 49 L. Ed. 1100; Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689.

It is settled law in patent cases that:

"When an inventor seeking a broad claim which is rejected, in which rejection he acquiesces, substitutes therefor a narrower claim, he cannot be heard to insist that the construction of the claim allowed shall cover that which has been previously rejected." Computing Scale Co. of America v. Automatic Scale Co. (Supreme Court of U. S., Feb. 25, 1907, not yet officially reported) 27 Sup. Ct. 307, 51 L. Ed. ——; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38–40, 14 Sup. Ct. 28, 37 L. Ed. 989; Hubbell v. United States, 179 U. S. 77–80, 21 Sup. Ct. 24, 45 L. Ed. 95, and cases there cited.

Still "the patentee is entitled to a fair construction of the terms of his claim as actually granted." Hubbell v. United States, supra. It is a matter of course, in view of the authorities cited, that in order to infringe the defendant must have and use a car seat having a pair of arms at each end thereof, or an equivalent, and these pairs of arms must be pivoted to the back in substantially the manner described, or an equivalent manner, and also to the frame of the seat. I do not understand that these cases hold that, where an inventor substitutes and accepts a narrower claim than the one first presented, that having been rejected, he is confined to that precise form allowed and bars himself from the benefits of the doctrine of equivalents, unless he has used language which does confine him to the precise form described. He may limit himself in the use of equivalents, of course. He is not entitled "to any considerable range of equivalents, but is practically limited to the means shown by the inventor" (Computing Scale Co. of America v. Automatic Scale Co., supra); but no one can take his invention bodily and escape the charge of infringement by using it in a different form merely, or in connection with some other thing which in no sense modifies or is modified or affected by it. If that can be done, then every inventor whose invention is new and resides wholly in some one element of his claim loses all right to the doctrine of equivalents, if he makes the claim for that element too broad to begin with, and is required to make it narrower to accord with his actual invention, and does make it narrower to express his real invention. And in such case, if that be true, an infringer may take it, the element containing his invention, bodily and combine it in a claim with other old and equivalent elements, all together working or operating in the same way as the inventor's combination to produce the same result sought and obtained by the true inventor. The greater should include the less, and, while Aze and Gilfillan cannot claim the seat with only one pair of arms, they may claim the seat with two pairs of arms, any two pairs of arms that embody and use their true invention. If there has been no amendment or narrowing of the claim in respect to its very essence, the "pith and marrow" of the invention disclosed in the claim, if there was no issue as to that, and the amendments were made in reference to an incidental

matter, something that would perfect the claim or device and make it more useful or operative, then there is no restriction of limitation on the rights of the patentee as respects equivalents for some part of his device when made in accordance with his patent. Reece Co. v. Globe Co., 61 Fed. 958, 10 C. C. A. 194; United States Co. v. Sturtevant Co., 125 Fed. 384, 60 C. C. A. 244; Winans v. Denmead, 15 How. (U. S.) 330, 14 L. Ed. 717. The law is to protect meritorious patentees and promote justice.

We return, therefore, to the question whether or not the defendant's seat is so differentiated from complainant's that it must be held the charge of infringement is not sustained. Defendant has not dispensed with a pair of arms at either end of the seat. It has substituted another pair at one end, and at the other end uses an exact duplicate of the complainant's pair of arms, including the pivoting to both frame and back, and has, in so doing, appropriated the invention of Aze and Gilfillan, now the property of complainant. It connects these two pairs of arms in the same way complainant does, and so that they operate synchronously. It by no new or patentable device, but by an old socket attached to the frame, dispenses with the necessity of absolutely pivoting the short arm of the substituted pair to the end of the frame of the seat, as when this short arm sets into the socket, as it necessarily must, being carried to it by the action and movement of the first pair of arms, pivoted as are complainant's, it performs all the functions, the very function, of the second arm in complainant's pair attached to and used at that end of the seat. Pivoted to the end of the back at its upper end, and seated in the socket at the other, this short arm is a complete substitute for the second arm of the pair at that end and its full equivalent. The long and short arm forming this substituted pair are each pivoted to the end of the back, but not by two pivots arranged in a line at right angles with the plane of the back, but by one pivot in a line at right angles with the plane of the back, and, of course, in a line drawn at any angle with the plane of the back. The substituted pair of arms performs every function required or demanded by the Patent Office of the second pair of arms when it insisted on a pair of arms at each end of the seat. The Patent Office so held and declared subsequently in the following language:

"In claim 1 it is evident that if one link (arm) of Aze is left off the back will operate the same as if it is on, although it might not operate so smoothly."

The occasion of this will be stated later. The Patent Office did not demand that the second pair of arms should be pivoted in any particular manner. The demand was:

"Arms at each side (end) of the back should also be included. * * * Claim 6 [of which I have given the history, and which became claim 3 in the patent as finally granted], when amended to include a pair of arms at each side (end) of the back, may be allowed."

As to claims 5, 7, 9, and 10, "these claims should each set forth the arms at each side of the back." So of the other claims. No importance whatever was attached to the mode or manner of pivoting the second pair of arms to the back or frame, and nothing was said

on that subject. Certainly they must move in unison with the others, and be attached to the seat; but their function was to support the back, steady it, and hold it when in position, merely, not to carry it over and prevent it from falling down, etc., and give the proper inclination to the back of the seat, as all that is effectively done by the first pair of arms properly pivoted in accordance with the patent, and which pair of arms is used by the defendant. There is no patentable difference in the modes of using or in the use or in the application between complainant's pair of arms and defendant's substituted pair of arms. Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 Sup. Ct. 150, 34 L. Ed. 719.

There is another and a familiar rule of law, perfectly just and applicable here, which is: "That which would anticipate, if earlier, will infringe, if later." Clearly, if the defendant had patented the alleged infringing car seat, and the complainant had then made and used the Wheeler seat, he would infringe. He could not escape by saying: "For the same purpose, and to attain the same result, I use two pairs of your arms each pivoted according to the very essence of your patent, each containing the very gist of your invention, instead of one pair, and therefore I do not infringe your patent."

The defendant claims that its seat is constructed in accordance with the patent to Samuel M. Curwen, issued March 7, 1905, No. 784,383, for car seat, and that, as the structure there shown was held to show patentable novelty, it is proof that the Patent Office found a patentable difference in the two structures, and therefore they are sufficiently differentiated. The fallacy of this is easily seen and demonstrated. The claims of the Curwen patent, 11 in number, do not, nor does either one of them, mention the mode or manner of pivoting the arms, or "links," as Curwen calls these arms, to either the back or the frame of the seat. That question is not involved in the claims of the Curwen patent. Had Curwen pivoted his links to the seat back by pivots arranged in a line substantially at right angles with the plane of the back, or to the back in that manner and to the frame in the manner described, and claimed that manner of pivoting, etc., his claim would have been promptly rejected as anticipated by the Aze and Gilfillan patent in suit. Claim 1 of Curwen reads:

"(1) In a car seat or similar device, a walk over back with a single link at one end and a plurality of links at the other end and means for causing said links to move in unison when the back is reversed."

His third claim reads:

"(3) In a car seat or similar device, a walk over back with a single link at one end and a plurality of links at its other end, said single link being fixed to a shaft, a crank fixed to said shaft, a link connected with said crank, and means connecting said link and the plurality of links so that the link secured to the back will act in unison when it is reversed."

But more, Curwen appealed from the rejection of certain of his original claims, and on appeal the examiner submitted the following:

"The references of record show that car seats have been provided with a plurality of links at each end as shown in Rochester and Aze et al. The references also show that car seats have been provided with a single link at each end. See Norcross and Barney. Rochester and Aze et al. show a car

seat provided with a plurality of links at each end and means for shifting the seat when the back is reversed. Norcross shows a car seat with a single link at each end and means for shifting the seat when the back is reversed. In view of the above references, it is the opinion of the examiner that applicant's invention does not lie in the number of links used at each end of the seat, that the number used is purely a matter of judgment; but after having determined on the number of links to be used, applicant's invention lies in his novel means for producing an operative structure. In view of the prior art, applicant's novel means resides broadly in the subject-matter covered by claim 1, viz., a means for moving these links in unison. Claim 7 is believed to be met by Aze et al. and Barney; Aze showing a plurality of links at one end and Barney a single link at one end. Claim 8 differs from claim 7 in the addition of stops to limit the movement of the links. Barney shows stops, 3, and Aze shows stops, r. Claim 9, taken in connection with claim 7, Aze et al. and Norcross both show means for tilting the seat cushion when the back is reversed. Claim 12, Aze, shows a plurality of links at one end; Norcross shows a single link at one end; Aze shows stops, r, and means for tilting the seat when the back is reversed."

Note the statement:

"In view of the prior art applicant's novel means resides broadly in the subject-matter covered by claim 1, viz., a means for moving these links in unison."

On appeal this was approved. Therefore the defendant can claim no warrant in the Curwen patent for using or appropriating the complainant's invention. The patentable invention disclosed in the Aze and Gilfillan patent relates to one thing, and the patentable invention disclosed in Curwen relates to an entirely different thing. It will be specially noted that claim 1 of the Curwen patent, as allowed (at first rejected on Aze and Gilfillan, No. 491,761, February 14, 1893, the patent in suit), provides as one element "means for causing said links (arms) to move in unison when the back is reversed." Here the Patent Office held the entire Curwen invention to reside. The pivoting at right angles to the plane of the back has nothing directly to do with these means and is not mentioned as a part of them. In regard to the other element of claim 1, "a single link at one end and a plurality of links at the other end," the Patent Office said, December 3, 1903:

"Claims 1, 6, 7, 8, 9, 10, 11, and 12 are rejected on the following patents: Aze and Gilfillan, 491,761, February 14, 1893; Rochester, 595,415, December 14, 1897; Koehler, 679,081, July 23, 1901; Norcross, 610,719, September 13, 1898—car seats. These claims do not patentably differ from these references. In claim 1 it is evident that if one link of Aze is left off, the back will operate the same as if it is on, although it might not operate so smoothly. Then, again, it is old to have double links at both ends and also single links at both ends, and there is no invention in merely using the combination of the two kinds. All links move in unison, otherwise the seat would not be operative. The same remarks hold for claim 6, to which stops have been added. All seats have stops for limiting the movement."

The seat used by the defendant is plainly and distinctly differentiated from the Wheeler seat covered by the patent in suit in respect to the subject-matter of the invention disclosed by each, as such patentable invention of each relates to a distinct subject-matter, the one to the mode and manner of pivoting the arms to the back of the seat, the other to the means for connecting the pair of arms at one end of the seat to the arm or arms at the other end so as to cause them to work

in unison; but with this the mode and manner of pivoting the arms to the seat have nothing whatever to do, and are not mentioned in the claims. Hence the infringing device of the defendant's seat which does not embody the invention of the Curwen patent, but which does embody the invention of complainant's patent, cannot possibly be differentiated from complainant's device covered by his patent and alleged to be infringed. The case is not within the principle of Kokomo F. M. Co. v. Kitselman, supra, or Cimiotti U. Co. v. Am. Fur Ref. Co., supra. I do not think you can differentiate by substituting an exact equivalent in a nonessential of the claim or an essential which does not go to the gist of the claim, so as to escape infringement. This would be using shadow as substance. The mechanical movement used by Aze and Gilfillan may be old, but they have applied it in a new and novel manner, in a new place to meet a novel exigency.

This court therefore holds and decides:

1. That the claims in issue of the Aze and Gilfillan patent disclose patentable novelty in the respects named, and were not anticipated, and are valid.

2. That Aze and Gilfillan were the first and only inventors, and that Cushing was not the inventor.

3. That while the car seat used by defendant has means for connecting the arms at the two ends of the seat, which means show patentable novelty and are protected by the Curwen patent, same are not used by complainant, and have nothing to do with the invention of Aze and Gilfillan.

4. That, while the complainant is limited by the terms of its patent to a seat having a pair of arms at each end of the seat, it is not so limited that one who uses its pair of arms pivoted to the back and frame, in the mode and manner required by its patent at one end of the seat, does not infringe when it uses a full equivalent for the second pair of arms at the other end; such equivalent consisting of a pair of arms performing every function of complainant's arms.

5. That defendant's seat in its patentable novelty and patentable device can be and is differentiated from complainant's seat and its patentable device; but in its infringing devices it is not so differentiated, and cannot be, and defendant uses and appropriates the patentable and patented device of complainant's patent.

6. That the cars used by the defendant appropriate and use the patentable and patented device of complainant's patent, Aze and Gilfillan, and therefore defendant infringes each of the claims in issue.

There will be a decree for the complainant for an injunction and an accounting.

WESTINGHOUSE ELECTRIC & MFG. CO. v. NATIONAL ELECTRIC CO.

(Circuit Court, E. D. Wisconsin. February 20, 1905.)

PATENTS—INFRINGEMENT—ELECTRIC MOTORS.

The Tesla patents, Nos. 381,968, 381,969, 382,280, and 382,281, for electric motors, construed, and *held* infringed.

In Equity. Final hearing of bill upon Tesla patents, Nos. 381,968, 381,969, 382,280, and 382,281, issued of like date, May 1, 1888. The alleged infringing device is a synchronous motor and alternating current polyphase generator, thus distinguishable from the nonsynchronous motors involved in prior adjudications under the broad patents, Nos. 381,968 and 382,280.

Kerr, Page & Cooper and Edward Rector, for complainant.
Winkler, Flanders, Bottum & Fawsett, for defendant.

SEAMAN, Circuit Judge. While the validity of all the patents is assailed by the answer and testimony on the part of the defendant, the only issue pressed at the hearing and in the briefs by way of defense is noninfringement. That issue, however, rests on consideration of the prior art, and the difficulties in the way of its solution are not much simplified by passing the question of validity. Indeed, in the light of the opinions which have been handed down, discussing both prior art and alleged anticipations, and upholding the broad patents, Nos. 381,968 and 382,280, I am impressed with the view that the character of the invention and validity of those patents may justly be treated as well established. The opinions referred to are instructive as well for the purposes of the present issue of infringement, though not involving synchronous motor infringement. The case against New England Granite Co. (C. C.) 103 Fed. 951 (on affirmance 110 Fed. 753, 49 C. C. A. 151), is the leading one, with that of Royal Weaving Co. (C. C.) 115 Fed. 733, in line; and other reported decisions are Tesla Electric Co. v. Scott & Janney et al. (C. C.) 97 Fed. 588; Westinghouse E. & M. Co. v. Dayton Fan & Motor Co. (C. C.) 106 Fed. 724; Dayton Fan & Motor Co. v. Westinghouse Electric & Mfg. Co., 118 Fed. 567, 55 C. C. A. 390; Westinghouse E. & M. Co. v. Dayton Fan & Motor Co. (C. C.) 106 Fed. 729; Westinghouse E. & M. Co. v. Catskill Illuminating Co. (C. C.) 110 Fed. 377; Westinghouse E. & M. Co. v. Hiram C. Roberts et al. (C. C.) 125 Fed. 6; Westinghouse E. & M. Co. v. Mutual Life Insurance Co. (C. C.) 129 Fed. 213; Westinghouse E. & M. Co. v. Stanley Instrument Co., 133 Fed. 167, 68 C. C. A. 523. With the excellent and thorough review of the earlier patents and prior art, and the well-considered concurrent view of the novelty and scope of the Tesla inventions covered by the patents, thus appearing in several of these opinions, I am relieved of any need to attempt an analysis of the general showing in the present case, which departs from the prior cases only in respect of the application of the invention to the synchronous motor type. Although the inquiry thus presented is not free from difficulty, involving abstruse discussion and distinctions in the electrical art which are perplexing to the nonexpert understanding and are not clarified by the many pages of conflicting expert testimony, the arguments at the bar were clear and well directed, and I am convinced that the issue as now presented is within narrow compass and governed by tests for its solution which are not complicated. Favored with opportunity to take up the final consideration without delay, I deem it just to all interests (with the patents soon expiring) to pass the decree in conformity with my conclusions thereupon, without ex-

tended discussion of the interesting questions involved, as the time remaining at my disposal before interlocutory decree should be entered, to be seasonable for appeal, is now quite limited.

The defendant's contentions are, in substance, that the Tesla invention, embodied in each of the patents, is the "rotating field mode of operation," which is "the production by the conjoint effect of out of phase currents of a progressive shifting of the polarity," and thus "identical in its effect with that of a rotating physical magnet"; that it is limited to a self-starting motor so operated, and both by the terms of the patents and the state of the art the defendant's synchronous motor with direct current excitation is not within the invention; that the defendant's synchronous motor is simply a reversed "two-phase alternating current dynamo of the prior art used as a generator," adapted to alternative use; and that the claims of patents 381,969 and 382,281, which bring in "direct current excitation producing synchronous operation," must be limited to such use "after the motor is started by the Tesla means and method and brought up to speed." If the invention is so limited by the prior art, it is plain that the defendant escapes infringement. On the other hand, if not so restricted, it is equally clear that the claims of the patents are broad enough to reach the defendant's means and method of operation. The Tesla discovery for which these patents were granted revolutionized the art of electrical power transmission, as well demonstrated in the record from both judicial and scientific standpoints. Judge Townsend's definition in reference to the generic patents in the New England Granite Case, repeatedly approved by other courts, is adopted for this consideration, namely:

"Tesla's invention, considered in its essence, was the production of a continuously rotating or whirling field of magnetic forces for power purposes, by generating two or more displaced or different phases of the alternating current, transmitting such phases, with their independence preserved, to the motor, and utilizing the displaced phases as such in the motor."

So viewed, the patent monopoly was rightly granted for its brief term to the use of the means and methods thus discovered. While it could not exclude the known uses of the prior art, it is surely entitled to be protected against like motor structure and mode of operation, not clearly disclosed in the prior art, and the patent claims to that end must be fairly construed in conformity with the rule applicable to such inventions. I am of opinion, therefore, that the several contentions for the defendant are either without force or untenable for the following reasons: Whether the effect of the Tesla invention, in its production of the "whirling field of magnetic force," is identical with that of a rotating physical magnet, as argued by experts and counsel, does not impress me as material to this issue. Nor does it seem material that in the one form of motor "the rotation is produced by the unaided effect of alternating out of phase currents," as described by counsel, and that, so applied, a self-starting motor is obtained. The discovery was of means and method in the polyphase rotating field motor to produce the whirling field of force, and employment thereof was patentable with or without direct current excitation of the armature or secondary element. So the fact that its use produced a self-

starting motor without the aid of such excitation cannot alone serve to limit the invention to that effect, and I find no such limitation in the terms of the patent. The quotations from the arguments of counsel and experts for the complainant in prior cases, urging the distinction of this self-starting effect in reference to the application of the generic patents to nonsynchronous motors, are without force in the present controversy, and it is unnecessary to ascertain their consistency or inconsistency with the interpretation sought on this hearing. Unless limitation to self-starting motors arises out of the prior art, none can be imposed upon the claims in suit.

The further propositions urged by way of defense, aside from the defense founded upon prior inventions of the synchronous type to be considered, are these: (1) That the synchronous motor of the defendant is the old generator of the art, simply reversed; and (2) that the Tesla invention is not present therein, because (as asserted) "the preponderating magnetization of the" direct current displaces and obliterates the "shifting alternating current magnetization," or Tesla "whirling field of force." However specious both propositions appear on their face and in the argument, neither of them impresses me as controlling.

1. The first raises the question of invention in reversing the dynamo electric generator to serve as an alternative current motor in transmission of power, which was aptly and satisfactorily answered by the opinions in the New England Granite Case, and I deem it sufficient to remark that the differing features and additional showing in the present case do not modify my concurrence in the view there adopted.

2. Whether the theory advanced on the part of the defendant of obliteration of the alternating current magnetization by that of the direct current to the secondary element of the motor is or is not true, is not deemed material as it is unquestionable that the Tesla invention as above defined is brought into the operation of the motor and the structure is within the patent description. Under the view before indicated the defendant cannot escape infringement by the introduction of this element "for better or worse."

The patent references which are relied upon to narrow the invention to nonsynchronous motors remain to be considered. These are the French patents of Cabanellas and Dumesnil and the Bradley United States patent, No. 390,439, each of which devices is set up as disclosing a polyphase power-transmission means by coupling two single phase motors in combination or aggregation. Each has received extended consideration in one and another of the previous decisions upon the issues there presented for construction of the generic patents. That of Bradley, which is strongly pressed in the argument as showing a polyphase machine, stated to be adapted for use "as a motor when fed or actuated by alternating currents," is subsequent in date of patent issue to the Tesla patents, though the original application bears date prior to that of Tesla. The testimony of Mr. Bradley and his attorney, introduced in the present record, cannot affect the interpretation which must be given the disclosure of invention in the original application, and, if such application can be treated as a disclosure of the prior art, I am of opinion that it fails to reach the Tesla conception. Its de-

ficiencies in that regard are clearly pointed out in the New England Granite Case and later cases, and further comment is unnecessary. The French patents referred to are deemed equally inapplicable and equally well discussed in the prior cases, with no additional showing in the present case which calls for discussion.

I believe that no propositions in the able and extended arguments on the part of the defense have been overlooked in my consideration of this case, although it has not seemed needful to discuss all of them for the purposes of this opinion. My conclusions are that the defendant's synchronous motor structure and operation are within the generic invention as patented, and expressly covered by the claims of Nos. 381,969 and 382,281; that the invention is utilized in the defendant's motor operation, notwithstanding the introduction of direct current excitation to make it synchronous, in lieu of the full realization of the revolving field effect for self-starting; that such supplemental aid does not escape infringement, with or without advantage in such association; and that, in any view, the combination patents referred to are not limited to after-effect of the direct current excitation, but apply to the defendant's combination.

Decree will be entered accordingly, as prayed in the bill.

THE ISLAND QUEEN.

(District Court, W. D. Pennsylvania. March 23, 1907.)

No. 8.

COURTS—FEDERAL COURTS—PROCEDURE—ADOPTION OF STATE PRACTICE—EXECUTION—STAY.

Rev. St. § 988 [U. S. Comp. St. 1901, p. 708], which provides that "in any states where judgments are liens upon the property of the defendant, and where by the laws of such state defendants are entitled in the courts thereof to a stay of execution for one term or more, defendants in actions in the courts of the United States held therein shall be entitled to a stay of execution for one term," gives such right of stay in a federal court only when the defendant has property upon which the judgment, if in a state court, would be a lien, and who by reason of such lien would be entitled under the state law to a stay of such judgment. Under Act Pa. June 16, 1836 (P. L. 762), which makes judgments liens on real estate, but not on personal property, and gives a right of stay to a defendant owning sufficient real estate without other security, and also a right of stay to other defendants on their giving bail, a judgment defendant in a federal court who has no real estate cannot obtain a stay by virtue of said section 988 by giving bail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 935, 936.

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

In Admiralty. On rule to show cause why execution should not issue.

Reed, Smith, Shaw & Beal, for libelant.

L. C. Barton, for respondent.

EWING, District Judge. The libelant having obtained a decree in this case, the owner of the defendant vessel thereupon went to the clerk's office and offered bail for stay of execution in accordance with the provisions of the act of the General Assembly of Pennsylvania of June 16, 1836 (P. L. 762), § 4, claiming the right to do so by virtue of the provisions of section 988 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 708]. The bail was not accepted, but, in order to raise the question after the tender thereof was made, the libelant came into court and obtained a rule on the defendant to show cause why execution should not issue, and this is the matter now before us for consideration.

Said section of the Revised Statutes of the United States is as follows:

"In any state where judgments are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

In Pennsylvania, judgments are liens upon the real estate of the defendant within the jurisdiction of the court in which the judgment is obtained, but not upon the personal property of the defendant, and the third section (page 762) of the act of June 16, 1836, above referred to, provides that:

"In all actions instituted by writ for the recovery of money due by contract, or of damages arising from a breach of contract, except actions of debt and scire facias upon judgments, and actions of scire facias upon mortgages, if the defendant shall be possessed of an estate in fee simple, within the respective county, worth, in the opinion of the court, the amount of the judgment recovered therein, or the sum for which the plaintiff may be entitled to have execution by virtue thereof, clear of all incumbrances, he shall be entitled to a stay of execution, upon such judgment, to be computed from the first day of the term to which the action was commenced, as follows, to wit:

"(1) If the amount or sum aforesaid shall not exceed two hundred dollars, six months.

"(2) If such amount or sum shall exceed two hundred dollars, and be less than five hundred dollars, nine months.

"(3) If such amount or sum shall exceed five hundred dollars, twelve months."

And the fourth section of the same act provides that:

"Every defendant in any judgment obtained as aforesaid * * * if * * * he shall give security to be approved of by the court, or by a judge thereof, for the sum recovered, together with interest and costs, he shall be entitled to the stay of execution hereinbefore provided, in the case of a person owning real estate."

It is because of these provisions of the Pennsylvania act of 1836 that the defendant here claims that the right to stay of execution is conferred by said section 988 of the Revised Statutes. It seems that the question has never heretofore arisen in this court, and the counsel in the case have been unable to find any reported case in which it has arisen elsewhere. The question is therefore with us one of first impression. It strikes me that a fair construction of said section of the Revised Statutes of the United States is that in states where judgments are liens upon the property of the defendant, and by the laws of

that state the defendants are entitled, in the courts thereof, to a stay of execution by reason of the judgment being a lien upon such property of the defendant, that then, and only then, and for the same reason, namely, that the judgment is a lien upon the property of the defendant, the defendant shall be entitled to a stay of execution, in actions in the courts of the United States held in such state, for the period of one term; and that this construction involves the conclusion that, if a defendant has no property upon which such judgment is a lien, he is not entitled to a stay of execution in the courts of the United States, notwithstanding the laws of the state may provide for stay of execution by defendants who have no property upon which judgments against them would be a lien, upon their entering security. It thus appears to me that this section of the Revised Statutes should be interpreted as if it read as follows:

"In any state where judgments are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, by reason of such lien, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

Thus if, in the present case, the defendant possessed real estate upon which the judgment or decree in this case is a lien (which does not appear), then such stay of execution might be allowed under the provisions of said section 988, but allowed only because of the lien of such judgments upon such real estate, and of the provision in the act of 1836 providing for such stay under those circumstances. If the intent and purpose of said section of the Revised Statutes of the United States was to enable the defendants in judgments obtained in the courts of the United States to obtain stay of execution thereon in accordance with the general laws of the state in which such courts are held, it would not have been necessary to specify in said section that such stay should only be allowed in cases where such judgments are liens upon the property of the defendants, for, as we have seen, in this state that is not a prerequisite to a stay of execution by the defendant, for he can enter security therefor, notwithstanding he may have no property at all, and obtain such stay. What could have been the purpose in providing that only in states where judgments are liens upon the property of the defendant such stay of execution can be had, except to obtain the benefit of such lien, and to place the defendant, upon whose property judgments in the United States courts are such liens, in the same position in which he would have been had the judgment been rendered in the state court? If that is not the purpose of this section, it is difficult to see why any reference is made to the judgment being a lien upon the property of the defendant, and if that is the purpose of said section, it then follows that defendants in judgments in the United States courts, in states where judgments of the state courts are liens upon the property of the defendants, shall have only such rights as to stay of execution as those accorded to them by the state courts by reason of such lien. If this construction of the act be correct, there can be no stay of execution taken by the defendant in this case, as has been attempted.

In this view of the case it is not necessary to determine what is

meant by "one term," whether it is the period of six months (the duration of one term in this district) from the return day of the writ, or one term after that to which the writ is returnable, since the conclusion reached is that the defendant is entitled to no stay at all.

The rule is therefore made absolute.

UNITED STATES v. OREGON & C. R. CO.

(Circuit Court, D. Oregon. March 18, 1907.)

No. 2,286.

1. PUBLIC LANDS—RAILROAD GRANTS—PASSAGE OF TITLE.

The title to land lying within the primary or place limits of a railroad grant passes ordinarily to the railroad company at the time of the filing of the map of definite location of the line of the railroad and the acceptance and approval thereof by the Secretary of the Interior, while the title to land within the indemnity limits does not pass until there is a selection under the direction or with the approval of the Secretary of the Interior.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 232.]

2. SAME—DONATION CLAIM—ABANDONMENT.

Where a settlement under the donation act was made on land within the primary limits of a railroad grant and was finally abandoned without completion of the steps necessary to perfect title prior to the filing of the railroad's map of definite location and the approval thereof by the Secretary of the Interior in January, 1870, such land was not reserved from sale, but passed under the grant, though the records in the Land Office did not show that the donation claim had been abandoned.

In Equity.

This is a suit for the cancellation of a patent issued by the general government to the defendant railroad company July 12, 1871, so far as it purports to grant to said company lots 5 and 6, section 3, township 7 south, range 3 west of the Willamette meridian, or, in the event that the land has been conveyed to an innocent purchaser for value, then it is prayed that plaintiff may have a decree for the value thereof. The facts upon which the bill of complaint is predicated are, briefly, as follows:

The land lies within the primary limits of the land grant made by the act of Congress approved July 25, 1866, to which the defendant company has succeeded. The map of definite location of the railroad opposite and coterminous with the said lots was filed and approved by the Secretary of the Interior January 29, 1870. Some time in May, 1855, one Edmund F. Gholson settled upon the lots under the donation act, and on November 3d following he filed in the office of the Surveyor General of the United States for Oregon his donation notification covering the same. The parties to the suit have further stipulated that: "Thereafter the said Gholson abandoned the said lots without having paid for them; and the said Gholson was not residing on the said lots on July 25, 1866, nor did he reside thereon at any date after July 25, 1866, and the records of the General Land Office do not show that the claim had been abandoned by Gholson prior to the passage of said act of July 25, 1866, or the definite location of the line of road thereunder, or whether Gholson resided thereon for the period of four years." Aside from the stipulation, it is shown that Gholson lived with his wife upon the land until the last day of October, 1856, when they moved away, with no intention of returning; nor have they ever returned thereto.

See 133 Fed. 953.

Wm. C. Bristol, U. S. Atty.

Wm. D. Fenton and Wm. Singer, Jr., for defendant.

WOLVERTON, District Judge (after stating the facts). This case differs from that of Oregon & California Railroad Company v. United States, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012, in one particular only, and that consists in the fact that here the land in question lies within the primary or place limits of the grant to the railroad. There it was within the indemnity limits. The question is, does this difference lead to any different result? It has been established by the uniform decisions of the Supreme Court of the United States that the title to lands lying within the primary or place limits of the grant passes ordinarily to the railroad company at the time of the filing of the map of definite location of the line of the railroad, and the acceptance and approval thereof by the Secretary of the Interior. In Van Wyck v. Knevals, 106 U. S. 360, 366, 27 L. Ed. 201, Mr. Justice Field says:

"Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

So in a later case, Sioux City, etc., Land Company v. Griffey, 143 U. S. 32, 38, 12 Sup. Ct. 362, 36 L. Ed. 64, Mr. Justice Brewer says:

"The first and principal question is at what time the title of the railroad company attached, whether at the time the map of definite location was filed in the General Land Office at Washington, or when, prior thereto, its line was surveyed and staked out on the surface of the ground. While the question in this precise form has never been before this court, yet the question as to the time at which the title attaches, under grants similar to this, has been often presented, and the uniform ruling has been that it attaches at the time of the filing of the map of definite location."

In a much later case, Tarpey v. Madsen, 178 U. S. 215, 223, 20 Sup. Ct. 849, 44 L. Ed. 1042, after citing authorities, the distinguished jurist has this further to say:

"By those cases it was settled that the time at which the title of the railroad company passed beyond question was that of the filing of an approved map of definite location in the office of the Secretary of the Interior."

So are all the authorities bearing upon the subject. See, also, Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 112. In a late case involving this identical grant—Oregon, etc., R. R. v. United States, 189 U. S. 103, 23 Sup. Ct. 615, 47 L. Ed. 726—it is held that:

"No right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary of the Interior."

This proposition will not be questioned.

Now, speaking of the grant relative to its effect as it respects the two kinds of lands, the court, in the case of Ryan v. Railroad Company, 99 U. S. 382, 386, 25 L. Ed. 305, says:

"Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became ipso facto fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

Recognizing the distinction, Mr. Justice Miller, in St. Paul Railroad v. Winona Railroad, 112 U. S. 720, 731, 5 Sup. Ct. 334, 28 L. Ed. 872, makes this further comment:

"The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss."

The only point of distinction, therefore, as it pertains to grants of land within the primary and those within the indemnity limits, is that, as to the primary, the grant attaches at the date of the filing of the map of definite location of the road and its approval by the Secretary of the Interior, while as to the indemnity lands it attaches at the date of actual selection by the railroad company and the approval of such selection by the Secretary of the Interior. Any right acquired in or to such lands, whether they be primary or indemnity, whereby they are segregated from the public domain, or, in other words, are appropriated in pursuance of law, anterior to the taking effect of the grant to the railroad company, operates to reserve them from the grant, unless there has been an abandonment of the right and the land has reverted to the public domain in the meantime. This is determined in effect by the case of the Oregon & California Railroad Company v. United States, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012. The grant there, being of indemnity lands, took effect at the date of selection and its approval by the Secretary of the Interior. But it was held that, as it appeared that there had been an abandonment of the donation by the claimant after the filing of his application and prior to the selection, the land had reverted to the public domain, and became and was subject to the grant; or, in other words, the abandonment having taken place prior to the time of selection, the lands were yet to be deemed public lands, so that they could not be said to be reserved, as it related to the grant under the act of Congress of 1866. The determination has exact application here, the grant becoming effective by the filing of the approved map of definite location, instead of by selection.

Judge Bellinger, in the case of United States v. Oregon & C. R. Co. (C. C.) 133 Fed. 953, 954, which was not as strong for the government as this, says:

"This claim was of record and uncanceled when the map of definite location was filed, but neither final proof nor payment had been made. The stipulation

of facts is silent as to whether Dougherty was residing upon this donation at the time the map of definite location of defendant's road was filed, and without such residence the claim was abandoned. Final proof or continued residence was necessary to the life of this donation. The former is negatived by the stipulation of facts, and there is no presumption in favor of the latter. Oregon & C. R. Co. v. United States, 190 U. S. 186. The facts relied upon to except the particular land from the grant must be shown, and in this case they are not shown."

But the case of the Oregon & California Railroad v. United States, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012, is controlling, and it is unnecessary to discuss further the matters touching the abandonment of the claim. A reference to that case will disclose the potent and sufficient reasons for the decision, which is conclusive against the right of the plaintiff here to sustain the suit preferred. The bill of complaint will therefore be dismissed at the cost of the plaintiff.

WESTERN TRANSIT CO. v. BROWN.

(District Court, S. D. New York. March 11, 1907.)

1. INSURANCE—MARINE INSURANCE—COLLISION.
   The word "collision," as used in marine insurance, is no longer strictly limited to that fortuitous injurious contact of navigating vessels which is its obvious and natural signification.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1101.]
2. SAME—RUNNING-DOWN CLAUSE—WHAT CONSTITUTES COLLISION.
   Where two vessels are under the same physical control, as in case of a tug with a tow alongside, so that an impulse given to the tug must necessarily be communicated to the tow, and negligence in the tug's navigation causes an injurious contact between the tow and a third vessel, for which the tug is held liable, she should be regarded as having been in collision within the meaning of the ordinary collision or running-down clause of a marine policy of insurance; but, if the control is only intellectually exercised, or if there is no control at all of one vessel over another, there can be no collision within the meaning of such clause without an actual injurious contact between the vessel insured and some other object.
3. SAME—FACTS CONSIDERED.
   The running-down clause of a marine policy provided that, "if the ship hereby insured shall come into collision with any other ship or vessel or raft and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum, * * * we, the insurers, will pay." While running alongside of another vessel, having no connection with her, through the negligent navigation of both, the suction created by the insured vessel caused the other to sheer and come into collision with a third, and both were held liable in damages. *Held*, that the insured vessel was not in collision within the meaning of the policy, and not entitled to recover the damages so paid from the insurer.

In Admiralty. On exceptions to libel.

Harvey D. Goulder and Frank S. Masten, for libelant.
Wing, Putnam & Burlingham, for respondent.

HOUGH, District Judge. While the steamers Troy and E. P. Wilbur were running nearly alongside each other upon Lake St. Clair,

they approached the steamer Mariposa, pursuing an opposite and nearly parallel course, and towing the barge Martha on a hawser. Through the concurrently negligent navigation of both Troy and Wilbur, the latter and smaller vessel fell within the suction influence of the Troy's propeller in such manner that there immediately followed a rank sheer on the Wilbur's part which caused or contributed to a serious collision between that steamer and the Martha. In the ensuing litigation both Troy and Wilbur were held responsible for the collision damage (Minnesota S. S. Co. v. Lehigh Valley Transportation Co., 129 Fed. 22, 63 C. C. A. 672), and this action is promoted by the owners of the Troy to recover from their underwriters the damages paid by them under the decision referred to.

It is agreed that the Troy was not in contact with any other vessel at the time of disaster; that she herself suffered no injury, was entirely independent of the Wilbur as to ownership, management, and navigation, and was held responsible solely because her negligence contributed to placing the Wilbur and Martha in a position which rendered collision inevitable. Neither is it denied that the word "collision," as used in marine insurance, can no longer be limited to that fortuitously injurious contact of navigating vessels which is its obvious and natural signification. Chandler v. Blogg, 1 Q. B. 32; London Assurance Co. v. Campanhia de Moagens, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113; Re Margetts, etc., Corporation, 2 K. B. 792; Cline v. Western Assurance Co., 101 Va. 496, 44 S. E. 700; Burnham v. China Insurance Co., 189 Mass. 101, 75 N. E. 74, 109 Am. St. Rep. 627; Newtown Creek, etc., Co. v. Ætna, etc., Co., 163 N. Y. 114, 57 N. E. 302; Wright v. Brown, 4 Ind. 95, 58 Am. Dec. 622. The underwriting in suit is an ordinary vessel policy with the running-down clause incorporated therein. The adventures and perils assumed by the insurers are "of the inland seas and waters, enemies, pirates, rovers, thieves, fires, explosions, collisions, jettisons, barratry of the master or mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of said vessel or any part thereof." The material words of the collision, or running-down, clause, declare:

"It is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel or raft and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum * * * we the insurers will pay," etc.

Libelants admit that collision damages paid by the insured are not a peril of either the high or inland seas, nor within the sue and labor clause; but they insist that upon the true construction of a policy drawn and proffered by the insurer such a running-down clause as the one here under consideration means that a vessel which causes a collision and is held liable for the same "comes into collision" within the meaning of the whole policy. To support this contention it is urged that the Troy's liability was established in a "cause of collision," and that she must be held to have "come into collision" because liable for collision damage in such a suit. This argument rests upon too loose a use of the word "collision," and relies on form rather than upon sub-

stance. By ellipsis certain admiralty litigations are called "collision cases," yet the gist of such actions is not the fact of collision, but the torts (maritime because of locus) from which the collisions result. The Troy was not liable because there was a collision, but because her navigators were guilty of a maritime tort; i. e., careless navigation.

No better statement of libelant's position can be made than was advanced by distinguished counsel for the plaintiffs in The Niobe, 7 Asp. Mar. Cas. 89. It there appeared that a collision had occurred between a tug towing the Niobe on a hawser and the Valetta. The tug was under the orders of the Niobe's navigators, and her owners, having been obliged to pay the Valetta's damages, sued their underwriters under a running-down clause in all material parts identical with the one at bar. Their counsel (then Sir Richard Webster) stated on behalf of the plaintiffs two grounds of recovery: First, that "if a ship is negligently maneuvered, so that in order to avoid a collision another ship is put in such a position that it sustains damage, this is damage from collision. The contract must be taken to have been made subject to this known liability, and it is too narrow a construction to restrict it to actual contact." And, second, "the tug is the servant of the ship and the tug and tow must be considered as one." Of the four judges who heard the cause Lord Morris certainly assented to the first proposition, and apparently also to the second. Lord Watson assented to the second and expressly dissented from the first, and the chancellor, in my opinion, agreed with Lord Watson. Lord Bramwell dissented in toto. The Niobe cannot be regarded as authority for any wider proposition than that under the law of England and the circumstances of that case the tug and tow were regarded as one vessel. It seems to me clear that, if two vessels be so united under a single control that an impulse carelessly or negligently given to the controlling craft must be communicated to the other, both may well be regarded as an entity for purposes of navigation. If such control be physical (as in the case of a tug with tow lashed alongside), and negligence of the tug's navigator produces injurious contact between the tow and third vessel, the tug may and should be regarded as having "come into collision," as truly as one man strikes another, whether he use for that purpose his fist or a club held in that fist.

But if the control be but intellectually exerted (as by flagship over flotilla), or if there be no control at all (as in this case), there can be no collision in the sense under consideration without an injurious contact between the vessel insured and some other object, just as no man could be said to strike another if by careless or inadvertent movement he caused the arm of a second person to hit a third, even though he were liable in tort for the resultant damage.

I do not think that the libelant's claim can be sustained either upon principle or authority, and it is directed that the exceptions be sustained, and the libel dismissed, with costs.

WEISS et al. v. HAIGHT & FREESE CO.

(Circuit Court, D. Massachusetts. March 22, 1907.)

No. 179.

TRUSTS—TRACING TRUST PROPERTY—SUFFICIENCY OF IDENTIFICATION.

Where defendants receive $5,000 on a trust in favor of O., and mingle it with their own funds in one bank account, and deplete the account only by certified checks in effect in favor of and retained by them, and before the money represented thereby is transferred to another they replenish their deposit, so that, excluding certified checks retained by them, there always remains in the account at least $5,000, the trust may be enforced as a charge on the fund in preference to the claims of defendants' general creditors.

In Equity.

See 148 Fed. 399.

William P. Maloney and Walter S. Bucklin, for American Surety Co.

Wm. D. Turner, for receiver.

LOWELL, Circuit Judge. The cashier of the Oxford National Bank speculated through the Haight & Freese Company, which held itself out as a stockbroker, but was actually engaged in swindling its customers. To carry on his speculation, he drew a cashier's check in favor of the company upon the Boston correspondent of his bank on November 29, 1904, and sent the check to the Haight & Freese Company, which, on November 30th, deposited it to its account in the Shawmut Bank. The Shawmut Bank collected the check in due course. On the day of deposit the Haight & Freese Company drew certified checks to the order of Beardsley, its cashier, for substantially the amount of the deposits made on that day. In order to avoid the attachment of its funds these certified checks were kept for about 10 days in a safe-deposit box. On December 9th the certified checks were deposited in the Shawmut Bank to the account of Lillis, an officer of the Haight & Freese Company, and on the same day the Lillis account was overdrawn.

There were three accounts in the National Shawmut Bank used by the Haight & Freese Company in its transactions, one in the name of Haight & Freese, to the credit of which the cashier's check was deposited (hereinafter called the company's account), another in the name of Lillis, and the third in the name of Poor, the company's manager. These accounts were consolidated into one on April 17, 1905.

Funds received from customers were deposited in the company's account. It was the practice of the officers of the company immediately after deposits were made to this account to draw out practically all the money standing to the credit of this account by certified checks to the order of Beardsley or of Lillis, and to retain these checks in the safe-deposit vault for some time until the amount was necessary for the company's purposes. This course was taken to prevent the assets from being attached. All checks drawn on the company's account were certified.

There was on deposit to the credit of these three accounts added together, at all times from the time of the deposit of the company's

draft to April 17, 1905, a sum exceeding $5,000, if the certified checks be omitted from the reckoning; and the same condition was true of the consolidated account from April 17th to the date of the appointment of the receiver. The outstanding certified checks not used for the company's business always exceeded $5,000. As the certified checks were drawn only against the company's account, it follows that that account always contained, including the sums covered by the certified checks drawn against it but not deposited, more than $5,000. When the receiver took possession, there appeared by the books of the bank to be on deposit to the credit of the consolidated account but a few hundred dollars, but there were certified checks to the order of Lillis and Beardsley to the amount of about $70,000, of which $29,000 were in vaults and about $40,000 with the teller of the bank. Counsel for the receiver admitted that the company had constructive notice of the cashier's fraud, and took the $5,000 upon a trust in favor of the bank. The bank was reimbursed for its cashier's defalcation by a fidelity insurance company, which has thus succeeded to the rights of the bank.

The only question now before the court is this:

Is the Oxford Bank permitted to follow its money into the funds acquired by the receiver so as to be entitled to priority of payment against the general creditors of the company? Where a trustee mingles a beneficiary's money with his own in one bank account, an act ordinarily improper, but not necessarily fraudulent, the beneficiary may follow his property into the mingled deposit, and he has a lien thereupon for repayment. "If the proceeds of trust property can be traced into a particular fund, the trust may be established and enforced as a charge upon the fund." Lowe v. Jones, 78 N. E. 402, 403, 192 Mass. 94. Where the trustee thereafter draws a check generally against the deposit, a court of equity raises a presumption that the trustee has acted honestly so far as he may—that he has drawn out his own money and has spared that which did not belong to him. But if the deposit is so far exhausted that some of the beneficiary's money has been misapplied, a subsequent replenishment of the account by later deposits, without their specific allocation to the trust fund, will not give the beneficiary a lien upon these deposits. How stands the case where the account is made good after the check is drawn, but before it is paid? Whatever may be the answer to this question where the check is delivered to an outsider for value or in payment of a debt, yet where the check is in effect retained by the trustee who drew it, I think that the presumption above mentioned still avails the defrauded beneficiary, and that his lien upon the total deposit remains. And although the check is certified, yet where it is thus retained by the trustee, the result is the same.

In the case at bar the bank could have followed the $5,000 belonging to it into the company's account, and could have established a lien upon that account at any time before it was depleted. The certified checks drawn against it were in effect retained by the company, and before the money which they represented was transferred to the Lillis account the company replenished its original deposit, so that, excluding from the computation the certified checks in the safe-de-

posit vaults, there always remained in that account at least $5,000. Under these circumstances the artificial presumption of the trustee's honesty above stated, however ill-founded in fact, still avails the bank, and it is entitled to payment in full from the company's assets.

PATTERSON v. KATES (two cases).

(Circuit Court, E. D. Pennsylvania. March 25, 1907.)

Nos. 58, 59.

MASTER AND SERVANT—LIABILITY FOR SERVANT'S NEGLIGENCE—DEVIATION BY SERVANT FROM INSTRUCTIONS.

Defendant owned an automobile, which broke down on the way from Atlantic City to Philadelphia, and which he then left in charge of his driver, with directions to repair it and bring it on to Philadelphia. After the driver had reached the Delaware river, and while waiting for the ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making such trip, through his negligence in running too fast, he came into collision with a horse and buggy on the highway, by which plaintiffs were injured. *Held*, that under such facts defendant was not liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1223, 1224, 1229.]

On Motion for Judgment upon Reserved Point Notwithstanding the Verdict.

Stanley Williamson and John Boyd Avis, for plaintiffs.
Frank P. Prichard, for defendant.

J. B. McPHERSON, District Judge. The defendant is the owner of an automobile, which had broken down at Egg Harbor, on the way from Atlantic City to Philadelphia. He instructed his driver to repair the machine and bring it to its destination, and, in obedience to these instructions, the driver started from Egg Harbor, passed through Mt. Ephraim, and reached Gloucester, on the Delaware river, intending to take the ferry at that point for Philadelphia. When he reached Gloucester, he went to a saloon kept by one of his friends, where he met a man named Fernley, who had business at Northmont, a small settlement about a mile back upon the road to Mt. Ephraim, and asked the driver to take him there in the machine. The driver consented. Two other persons accompanied Fernley, and the road toward Mt. Ephraim was thereupon retraced as far as Northmont, or perhaps a little farther. The machine was then turned about to go back to Gloucester, and, on the way, injury was done to the plaintiffs by the negligence of the driver. After regaining Gloucester, the driver resumed his journey to Philadelphia, where he arrived in due course.

There was no dispute about these facts, and with the assent of the parties the question of the driver's negligence was submitted to the jury, and the court reserved for its own determination, as a question of law, whether the defendant is liable for the driver's fault. Obviously, he is liable if the driver's careless act—namely, running too fast, and in consequence colliding with a horse and buggy upon the

highway—can properly be said to be within the scope of the driver's employment, taking into consideration also the fact that the injury was done while the driver, for a purpose of his own, was deviating from the ordinary route. Upon the question suggested by these facts, the authorities cannot be reconciled. They are collected in an exhaustive note to Ritchie v. Waller, 27 L. R. A. 161, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, and in an earlier discussion of the same subject in the note to Ware v. Canal Co., 35 Am. Dec. 192, 15 La. 169. In view of the numerous and elaborate opinions dealing with the subject of the master's liability under such circumstances, which are to be found in both the English and the American reports, it would be superfluous for me to marshal the arguments that have been put forth on one side and the other, and to repeat the reasons that commend themselves to me as the weightier. Reference to these arguments has already been made in the notes just referred to, and further consideration of the subject may also be found in 20 Amer. & Eng. Enc. of Law (2d Ed.) p. 163, and in the various text-books upon torts, and upon the relation of master and servant.

There is no serious dispute about the general rules that govern a master's liability. They are well expressed in the following quotation from the note in 35 Am. Dec.:

Page 192. "The master is liable for the wrongful and negligent acts of his servant, performed while engaged in the pursuit of the master's business, within the scope of his employment, or which, from all the circumstances, may be reasonably, fairly, or necessarily included, or by implication embraced, within the objects of the business the execution of which has been confided to the servant's charge. O'Connell v. Strong, Dudley's Law (S. C.) 265; Andrus v. Howard, 36 Vt. 248, 84 Am. Dec. 680; Luttrell v. Hazen, 3 Sneed, 20; Patten v. Rea, 2 C. B. (N. S.) 606; Jones v. Glass, 13 N. C. 305; Priester v. Augley, 5 Rich. Law (S. C.) 44; Wanstall v. Pooley, 6 Cl. & Fin. 910, note; Gass v. Coblens, 43 Mo. 377; Shaw v. Reed, 9 Watts & S. 72; Smith v. Webster, 23 Mich. 298; Allison v. Western N. C. R. R., 64 N. C. 382; Chicago, St. Paul & F. R. R. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Stone v. Cheshire R. R., 19 N. H. 427, 51 Am. Dec. 192; Carman v. S. & I. R. R., 4 Ohio St. 399; Corrigan v. Union Sugar Refinery, 98 Mass. 577, 96 Am. Dec. 685; Byram v. McGuire, 3 Head (Tenn.) 530; Barlow v. Emmert, 10 Kan. 358; Tuel v. Watson, 47 Vt. 634. The liability of the master in these cases proceeds from the maxim: 'Qui facit per alium facit per se.' The general rule expressed above is permanently established. The only disagreement manifested by the authorities is in regard to the manner in which the principle governing cases of this character is to be applied to meet the special exigencies of particular cases. The liability of one, who has created an agency, or authorized an act, for all the consequences which may ensue from the exercise of the one, or the performance of the other, is undisputed. This liability depends, however, upon the existence of a particular relation. The principal question arising in cases involving the liability of one person for the wrongful or tortious act of another, is, whether the particular act, out of which the injury complained of arose, was either expressly or impliedly authorized by the person whose accountability it is sought to establish."

Page 194. "Servant's deviation from the business of his master for the sake of accomplishing a personal or individual object, disconnected with his master's business, will relieve the master from liability for injuries occasioned by the servant's wrongful or negligent acts committed while such deviation continued. The question, how far a servant's willful and malicious act is deemed to be by implication a departure from his master's business, is considered in another portion of this note. If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose

which may be said to be the servant's individual and exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to his master."

With these rules no one quarrels. The difficulty has been, to determine whether they are applicable to a given state of facts, and upon a question of this kind opinions will always differ. To take the case in hand, it would be easy to cite decisions that hold the master to be liable under similar or analogous facts, and it would be just as easy to cite cases—for example, the recent case of McCarty v. Timmins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490—in which his liability has been denied. I shall not extend this opinion by taking up either class of decisions, but shall content myself with saying that my opinion is against the master's liability under the facts now before the court. As it seems to me, the driver had temporarily abandoned his employment, and had gone off upon an expedition of his own, for a purpose in no way connected with his duty, but, on the contrary, opposed thereto, and I do not think that he could bind his master while he was engaged about his private affairs. Of course, he had no express authority to turn back for such a purpose, and I am unable to see upon what ground the master's assent to his deviation can be fairly implied.

In each case judgment may be entered for the defendant, notwithstanding the verdict.

F. W. WOOLWORTH & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1907.)

No. 4,140.

CUSTOMS DUTIES—CLASSIFICATION—SPLASH MATS—PAINTINGS.

Splash mats or screens, which have been crudely decorated at an expense of about 2½ cents apiece by stenciling and by hand painting, which are worth about 4 cents apiece, and which primarily are articles of utility rather than for decoration, are not dutiable as "paintings in oil or water colors" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678].

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

The question at issue concerns the classification for tariff purposes of so-called splash mats or screens, which the collector of customs at the port of New York classified as "manufactures of wood," and which the importers contended should have been classified as "paintings in oil or water colors" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678]. A further description of the articles and the views of the Board of General Appraisers appear from the following extract from the board's opinion:

McClelland, General Appraiser. The maximum invoice value of the mats in question is 2 marks, 25 pfennigs, per dozen, or about an average of 4 cents United States currency each; and it appears that the cost of stenciling the colors thereon is from 1 mark to 1 mark, 25 pfennigs per dozen. We think it wholly immaterial, however, to a determination of the issue involved what may be the comparative value of the material from which the mats are made

or the cost of placing the color thereon. It is conceded by the importing company that these mats are bought and sold as splash mats, and they are commonly known in the trade as such. They are unquestionably articles of utility, being used either as a protection to the wall behind a washstand, or as receptacles for newspapers when doubled in pocket form. The evidence before us is that the coloring on the mats, which is in oil, is mainly placed thereon by the stenciling process, and in some instances the figures are touched up with a brush by hand. We do not think that articles such as these mats, of such insignificant value and decorated in such a crude, cheap way, rise to the dignity of paintings. It is manifest that it requires no artistic skill to place the decorations upon them.

Our attention is directed to a decision of the United States Circuit Court of Appeals in the case of United States v. China & Japan Trading Co., Limited, 58 Fed. 690, 7 C. C. A. 433, wherein certain Japanese wall decorations made of paper, or of paper and cotton, or of narrow strips of bamboo joined together with a cotton cord, and upon which representations of flowers, birds, or human figures were painted in water colors, a large part of the color being applied by stenciling, while the features of the work, which were delicate and ornamental and gave character to the article, were placed thereon by hand, were held to be paintings in oil or water colors; but we think there is a marked difference between the issue here involved and that which was before the court in the case cited. The court said, among other things: "The articles were made for the purpose of hanging upon the wall of a room, and were not intended to be objects of utility, but to be merely decorative. * * * In our opinion, the samples are by far the most important part of the testimony, and show that while the large bodies of color may have been applied by stenciling, the features of the work, which are delicate and ornamental and which give character to the article, were added by hand."

Here there is no question that the mats in question are not articles of utility, but merely decorative. On the contrary, it appears that their general use is as articles of utility; nor does it appear that the features of the work as the result of the appliance of the brush by hand, nor any part of the work on the mats, is delicate and ornamental. The question involved is very similar to that before the board in T. D. 21,406 (G. A. 4,492), wherein certain mats and covers similarly made for similar use were held to be manufactures of wood.

Our conclusion is the same in this case, and we overrule the protest, and affirm the collector's decision.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

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

HAZEL, District Judge. The articles in question consist of wood strips joined or sewn together and known in trade as splash mats or screens. They were correctly assessed for duty by the collector at 35 per cent. ad valorem as manufactures of wood, under paragraph 208 of the act of July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]. The articles are not paintings, as claimed by the importers, even though pictures or landscapes appear thereon. The testimony shows that the outlines of the pictures are first stenciled and then painted by hand; but the mats or screens are articles of utility, and the decorative or coloring feature is secondary. As a precedent for holding that the articles in fact are dutiable as "paintings" under paragraph 454 of said act, the importers cited United States v. China & Japan Trading Co., Limited, 58 Fed. 690, 7 C. C. A. 433. In that case the articles were wall decorations and were not "objects of utility."

The decision of the board is affirmed.

KRESHOWER v. UNITED STATES.

(Circuit Court, S. D. New York. January 8, 1907.)

No. 4,088.

1. CUSTOMS DUTIES—CLASSIFICATION—ORNAMENTAL LEAVES—PREPARED LEAVES —WREATHS.

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], relating to artificial or ornamental leaves, *held* to include leaves elaborately prepared so as to restore their natural appearance and prevent decomposition; also to include them when made up into wreaths and attached to wire frames.

2. SAME—"MANUFACTURE"—PRESERVATION OF LEAVES.

As to palm leaves which have been subjected to processes that restore their natural appearance and prevent decay, and some of which have been arranged in wreaths on wire frames, *held* that, as there had been no advance in manufacture that destroyed the original articles or made them useful for other purposes or altered their trade designation, they still remained dutiable as "leaves," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], rather than as "manufactures" of palm leaf, provided for in paragraph 450, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678].

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

The decision below affirmed the assessment of duty by the collector of customs at the port of New York on goods imported by L. J. Kreshower; the Board of General Appraisers following a former decision reported as G. A. 5,800 (T. D. 25,630).

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importer.

J. Osgood Nichols, Asst. U. S. Atty.

HAZEL, District Judge. The articles in question, consisting of cycas palm leaves and of wreaths made of such leaves, were assessed for duty at 50 per cent. ad valorem under paragraph 425 of the present tariff act (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675]), which includes artificial or ornamental leaves, flowers, and stems of whatever material composed, not specially provided for. The protest states that the leaves and wreaths are dutiable at 30 per cent. ad valorem under paragraph 449, which includes manufactures of palm leaf or of which the same is the component material of chief value, or, in the alternative, at 20 per cent. ad valorem under section 6, as nonenumerated manufactured articles. The importers contend that the leaves and wreaths, having passed beyond the condition of mere leaves, are not properly dutiable as artificial or ornamental leaves. The proofs show that the natural leaves are first dried, then boiled in a solution of glycerin, and after again being dried are varnished; the purpose being to restore their natural appearance and prevent decomposition. The single question is whether the articles are more specifically described in the paragraph under which the importers claim they are dutiable, or whether the classification of the collector was correct. It seems to me that, as the object of the treatment of the leaves was to prevent decomposition and to retain or restore their

original appearance, they are more appropriately included in the category of artificial or ornamental leaves, and cannot be classed as an article of manufacture. The wreaths of leaves, it is true, were made in part of metal; that is, the leaves were suitably attached to a circular thin wire frame. The collection of leaves in a wreath was not a transformation or alteration of them, and the wire attachment certainly was not a component part of the wreath, but it seems to have been merely an incidental part thereof. No new branches or parts were added. The treatment did not result in a change of the leaves from their former appearance. There was no advance in manufacture in the sense that the process of preservation destroyed the original articles or made them useful for other purposes or altered their trade designation. Hartranft v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012.

In the cases of In re Sheldon, G. A. 4,247 (T. D. 19,982), and G. A. 4,560 (T. D. 21,625), which counsel for the importer points out were followed by the Circuit Court in the cases of G. W. Sheldon & Co. v. United States, No. 3,364 (T. D. 26,101), and No. 3,281 (T. D. 26,462), single palm leaves that had been chemically treated were held to be dutiable under paragraph 449 as manufactures of palm leaf, but the question as to whether such articles were dutiable under paragraph 425 was not presented or considered in those cases.

The principle of De Jonge v. Magone, 159 U. S. 562, 16 Sup. Ct. 119, 40 L. Ed. 260, is not inapplicable, and therefore the decision of the Board of General Appraisers is affirmed.

SAHADI BROS. v. UNITED STATES.

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

No. 4,218.

CUSTOMS DUTIES—CLASSIFICATION—"GHEE."

"Ghee" is within the provision for "butter, and substitutes therefor," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 236, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649].

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

For decision below, see G. A. 6,307 (T. D. 27,180), in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York.

The opinion filed by the board reads as follow:

WAITE, General Appraiser. The merchandise in question was imported from Beirut, Syria, and is an oily substance with a melting point of 75 degrees Fahrenheit, produced from the milk of sheep. It is invoiced as "salted butter," and is described by the importer in his testimony as "ghee." The testimony also shows that "ghee" may be produced from either goats' or cows' milk as well. The collector assessed duty upon the article at 6 cents per pound under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 236, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], providing for "butter, and substitutes therefor." It is claimed to be dutiable as "tallow," at three-fourths of 1 cent per pound, under paragraph 279; at 2 cents per pound as "lard," under paragraph 277;

under paragraph 3, covering chemical compounds, etc., or under section 6 as an unenumerated manufactured article.

"Butter" is thus described in the Encyclopedia Britannica (9th Ed.) vol. IV, p. 590: "Butter is the fatty portion of the milk of mammalian animals. The milk of all mammals contains such fatty constituents; and butter from the milk of goats, sheep, and other animals has been, and may be used; but that yielded by cows' milk is the most savory, and it alone really constitutes the butter of commerce." "Ghee" is defined by the Standard Dictionary as follows: "Butter clarified by boiling or heating and skimming or straining until it becomes a liquid or semisolid oil, capable of being kept for many years; largely used in India, in cookery and medicines, and in religious rites."

We do not think the article can be said to be tallow, which is usually composed of harder and less fusible animal fats, nor lard, which is made from hogs' fat. That it is not a chemical compound within the meaning of paragraph 3 is too clear for argument. If it be assumed that the article is neither the butter, tallow, nor lard of commerce, we think it must be found that it resembles butter more closely, and in more particulars than either of the other substances, and that this resemblance in material, quality and use is sufficiently substantial to make operative the provisions of the similitude clause contained in section 7 of the act. The testimony, it is true, shows that the article is used for cooking, as is lard and some other vegetable and animal oils or fats. But in this regard it also resembles butter, in so far as butter is so used. An analysis of the commodity shows, however, that it resembles butter most closely in its component elements or material; and this is corroborated by the description given in the testimony of its origin and process of manufacture. It appears to be composed of the fatty portion of the sheep's milk, and it would seem that it might be described with aptness as sheep's-milk butter. We are of the opinion that it is dutiable by similitude, if not directly, at the rate prescribed by paragraph 236.

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

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

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

HAZEL, District Judge. The merchandise involved in this appeal was invoiced as "salted butter" and is described by the importer in his testimony as "ghee." The collector assessed duty upon the merchandise at 6 cents per pound as "butter, and substitutes therefor," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 236, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]. It is claimed by the importer in his protest to be dutiable at three-fourths of 1 cent per pound as "tallow," or at 2 cents per pound as "lard" under paragraphs 279 and 277, respectively, of said act, or at 20 per cent. as a nonenumerated manufactured article under section 6 of the same act. On the trial importers' counsel abandoned his claims under paragraphs 277 and 279, and relied only upon the provisions of section 6.

I think there is a substantial similarity between the article in question and butter of commerce. I have considered the evidence as well as the decision rendered by the Board of Appraisers, with which I concur.

The decision of the Board of Appraisers is therefore affirmed.

UNITED STATES v. C. NEWMAN WIRE CO.

(Circuit Court, S. D. New York. January 28, 1907.)

No. 4,130.

CUSTOMS DUTIES—CLASSIFICATION—STEEL PLATES—DRAWPLATES—WORTLES.

Drawplates and wortles, which are practically completed articles manufactured from steel bars or plates and having a purpose distinct from that of the original product, are not within the provision for plates in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638], relating to "plates and steel in all forms and shapes." This provision was not intended to include plates manufactured into some other completed article.

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

For decision below, see G. A. 6,157 (T. D. 26,731), reversing the assessment of duty by the collector of customs at the port of New York.

J. Osgood Nichols, Asst. U. S. Atty.

Everit Brown, for importers.

HAZEL, District Judge. The merchandise in question, consisting of drawplates and wortles, was returned by the appraiser as manufactures of metal. Duty was accordingly assessed thereon by the collector at 45 per cent. ad valorem, under paragraph 193 of the tariff act approved July 24, 1897 (chapter 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]), which provides for "articles or wares not specially provided for in this act, composed wholly or in part of * * * steel." The importers protested, urging before the Board, among other things, that the merchandise was dutiable under paragraph 135 as plates or steel in all forms and shapes. The Board overruled the classification of the collector and held the merchandise dutiable, as claimed, under paragraph 135, upon the authorities of Buehne v. United States (C. C.) 140 Fed. 772, Morris v. United States (C. C.) 140 Fed. 774, and the ruling of the Board in F. L. Schmidt & Co., G. A. 5,682 (T. D. 25,296). The government has appealed to this court for a review of the decision of the Board.

The single claim now urged by the importers is that the articles are dutiable under paragraph 135, as steel plates, at the rate per pound therein specified; the earlier claim urged before the Board, that the drawplates and wortles relate to steel "in all forms or shapes," having been abandoned. The government contends that the drawplates and wortles are manufactured from bars of steel, that the term "plate" as applied to the article is a misnomer; it having originated in shop phraseology, and particularly that paragraph 135 contemplates the payment of a duty upon steel in its crude and unfinished forms and shapes only, and not upon finished articles manufactured therefrom.

The evidence before this court shows that the merchandise in question is manufactured from steel bars; that a drawplate used in making steel wire ordinarily consists of a piece of steel about 6 inches wide, 10 or 12 inches long, and 1¼ inches thick, one of the ends being elongated or drawn out to form a handle; and a series of holes correspond-

ing in size to the wire to be drawn through them are drilled into the plates by hand or machinery. The wortles are bars of steel of different lengths, about 1¼ inches wide and 1½ inches deep, having holes suitable for wire drawing.

The decision of Judge Lacombe, in United States v. Meier, 136 Fed. 764, 69 C. C. A. 421, cited in the opinion of General Appraiser Fischer, in G. A. 6,406 (T. D. 27,536), would seem to be applicable to the case under consideration. I quote:

"Although its component materials are unchanged, processes of manufacture have produced a completed commercial article known and recognized in trade not as composition metal but as flitters, and which is designed and adapted for a particular use, to which the composition metal of trade could not be put until it had first been subjected to such additional processes of manufacture."

The drawplates, as said, are manufactures of steel bars or plates, but they are no longer the plates specifically enumerated in paragraph 135; but, by a process of manufacture, the bars or plates have become articles practically completed in manufacture and with a purpose distinct from that of the original product.

But it is contended by the importers that the term "plates," as used in paragraph 135, has heretofore been held by this court, in Morris v. United States, supra, to include a steel table which was attached to a frame that could be moved on wheels, and that such case is a precedent here. In that case the decision evidently was based upon the case of Buehne v. United States, supra; the court holding that the article came within the provision for "plates and steel in all forms and shapes." These citations are thought inapt; for in the record it is stipulated by the importers that they do not rely on that part of paragraph 135 which relates to "steel in all forms and shapes." Conceding, however, an analogy between the articles under consideration and the steel table in the Morris Case, I am, nevertheless, constrained by the evidence and reasoning of counsel for the government to now hold that Congress primarily intended by paragraph 135 to simply include steel plates that have not been manufactured into some other completed commercial article.

The decision of the Board is overruled, and the classification of the collector is affirmed.

In re WALDER.

(District Court, D. Connecticut. March 7, 1907.)

No. 1,388.

1. BANKRUPTCY—DISCHARGE—HEARING BEFORE SPECIAL MASTER.
   A special master, on the hearing of objections to a bankrupt's discharge, must be governed solely and entirely by such legal evidence as may be admissible under the specifications.
2. SAME—BURDEN OF PROOF.
   On the hearing of an application for the discharge of a bankrupt, the burden of proof to sustain the specifications of objection is upon the creditors who filed the same, and that burden never shifts.
3. SAME—EVIDENCE.
   A referee, acting as special master in hearing objections to a bankrupt's discharge, has no legal right to consider any evidence which has been pre-

viously offered before him as referee, or to refuse to recommend a discharge upon the ground that, at some former hearing before him as referee, he, as such referee, may have formed some opinion upon some fact which would be sufficient to bar a discharge, unless such fact is legally established by proper evidence under the specifications.

In Bankruptcy. On report of special master on petition for discharge.

See 142 Fed. 784.

William A. Wright, for trustee.

Benjamin Slade, for bankrupt.

PLATT, District Judge. On June 15, 1905, the bankrupt filed in this court a petition asking for a discharge from all his debts in bankruptcy, which was in due course referred to Henry G. Newton, referee, as special master, to report thereon. Creditors were duly notified by the special master, and at the time appointed certain ones appeared, and, on July 7, 1905, filed specifications of objection to such discharge. Continuances were had until December 17, 1906, at 4 p. m., which time was definitely set for a hearing on said specifications of objection. Mr. William A. Wright, counsel for the objecting creditors, then appeared, and stated that his clients did not wish to proceed in the matter, and that he should not do anything more in relation to the opposition to the discharge. From the report before me it positively appears that nothing further was done by him or by his clients in support of said specifications. Not a scintilla of testimony was presented to the special master, bearing upon or in any way affecting the specifications. In fact, no witness was called and sworn before him for any purpose whatsoever.

In that situation the duty of the special master was plain. It was supposed that, after the lessons contained in my opinion in 138 Fed. 473, In re Hendrick, supplemented as they are by final action in the same case (143 Fed. 647), there would be a clear understanding among the referees as to the way to act when petitions for discharge should be referred to them as special masters. I recommend a careful examination of the two opinions cited, and cannot believe that, after such study, any one can entertain a reasonable doubt as to the course which he must pursue in such matters.

Counsel for bankrupt made certain claims of law before the special master which were inferentially overruled by the special master. They express sound law, and, although the Hendrick Case may be enough, some of these are so tersely and forcibly stated that I am impelled to insert them:

"(a) That the special master must be governed solely and entirely by such legal evidence as may be admissible under the specifications."

"(c) That the burden of proof to sustain the alleged specifications is upon the creditors that filed the same, and that burden never shifts."

"(f) That the special master, before whom these specifications are pending, has no legal right to refuse to recommend such discharge upon the ground that, at some former hearing before him as referee, he, as such referee, may have formed some opinion upon some fact which would be sufficient to bar a discharge, unless such fact or facts were legally established by proper evidence upon the specifications.

"(g) That such special master is by law prohibited from considering any evidence that has been offered before him as referee, and is further prohibit-

ed from concluding upon such evidence, or through any source whatever, that any of the facts mentioned in the specifications were legally established, in the absence of proper evidence duly admitted upon the hearing before him as special master upon the petition for a discharge, and the alleged specifications."

The court sympathizes with the special master, and is pained to feel that the bankrupt must go scot free. His case is a bad one; but, if the creditors do not care to press matters, no one can rightfully lay any blame upon either the court or the referee. To sustain the specifications in the way proposed would clearly deprive the bankrupt of his "day in court," and cannot be tolerated.

The recommendation submitted with the report is therefore rejected, but sufficient facts appear in the report to warrant an order of discharge.

Let the same be entered.

In re ELDRED.

(District Court, E. D. New York. March 20, 1907.)

BANKRUPTCY—APPLICATION FOR DISCHARGE—REFERENCE.

Under rule 41 in the Eastern district of New York, it is the duty of objecting creditors to see that the objections to a bankrupt's application for discharge are referred to a referee as special master and to arrange for the hearing thereon.

In Bankruptcy. On motion to dismiss application for discharge.

Earl A. Bowman, for bankrupt.

Henry W. Sykes, for creditors.

CHATFIELD, District Judge. This motion to dismiss the bankrupt's application for discharge was made by the objecting creditors, who filed specifications on the 15th day of January, 1907. Thirty days have elapsed since that time, and neither the objecting creditors nor the bankrupt have taken any steps to have the issues referred to a special master or brought on before the court. The Bankruptcy Law of July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], provides:

"a. Any person may, after the expiration of one month * * * subsequent to being adjudged a bankrupt, file an application for a discharge in the court * * *" etc.

"b. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless * * *" etc.

Under this section of the bankruptcy law it would seem to be necessary to have a calendar for issues raised by objections to applications for discharge, and to have some calendar practice as to the bringing on of these issues for trial. In the Southern district of New York, it being impossible for the court to dispose of such a calendar, the matters are referred as of course to the referee, who has acted in the proceeding, as special master, and it is then the duty of the bankrupt, inasmuch

as it is held that he is asking for the privilege of a discharge, to bring the matter on before the referee. In the Eastern district of New York no uniform rule for reference to a special master has been adopted; but, inasmuch as the court could not find opportunity to dispose of these issues, each one has been referred to a special master, and rule 41 adopted, by which the objecting creditors have been compelled to arrange for the hearings before the referee as special master, and therefore, inferentially, to see that an order of reference has been entered. In the case at bar the attorney for the objecting creditors, apparently in reliance upon the rule in the Southern district, has done nothing, and the attorney for the bankrupt, following the rule in the Eastern district, has also taken no steps.

Without further comment or discussion, and as rule 41 covers the practice in the Eastern district, it seems to the court that the issues raised by the objecting creditors on the application of the bankrupt for discharge should be referred to the referee as special master to take testimony and report thereon, and the clerk will enter an order accordingly.

Thereafter it will be the duty of the objecting creditors to arrange for a hearing under rule 41.

In re LUBER et al.

(District Court, E. D. Pennsylvania. March 8, 1907.)

No. 2,392.

BANKRUPTCY—TRIAL ON INVOLUNTARY PETITION—EVIDENCE.

Where a fraudulent transfer of property is charged as an act of bankruptcy, in an involuntary petition, great latitude in the admission of evidence should be allowed on the trial, and all the circumstances fairly connected with the transaction may be shown.

In Bankruptcy. On motion for new trial.

J. B. Colahan, for petitioning creditors.
Greenwald & Mayer, for alleged bankrupts.

HOLLAND, District Judge. The averment in the involuntary petition in bankruptcy in this case was that the alleged bankrupts conveyed, transferred, concealed, and removed merchandise with intent to hinder, delay, and defraud their creditors.

In the investigation of questions of fraud, as a rule, great latitude is allowed in the admission of evidence, in order that the jury may be able to determine from all the circumstances whether the transaction was fraudulent or not. Questions of fraud can scarcely ever be proven by direct evidence, hence the necessity for the admission of all the circumstances fairly connected with the transaction. All the evidence to which objection was made was clearly admissible, nor can I agree with the exceptants that there was error in the charge of the court.

The motion and reasons for a new trial are overruled.

In re BROMLEY.

(District Court, E. D. Pennsylvania. February 28, 1907.)

No. 2,491.

BANKRUPTCY—OBJECTIONS TO DISCHARGE—AMENDMENT.

Specifications of objection to the discharge of a bankrupt which are in the language of the statute without more, and contain no statement of facts, are not amendable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 716.]

In Bankruptcy. On petition to amend.

Morgan & Lewis and R. Stuart Smith, for petitioner.
E. Cooper Shapley, for bankrupt.

HOLLAND, District Judge. The petition of W. F. Bay Stewart for leave to amend specifications of objection to the discharge of the bankrupt should be refused. The original specifications were in the language of the act, and nothing more. There is no statement of fact on which an amendment can be grafted, and leave to amend should not be granted where only the words of the statute are used. In re Pierce (D. C.) 103 Fed. 64; In re Mudd (D. C.) 105 Fed. 348; In re Peck (D. C.) 120 Fed. 972.

It is so ordered.

MOXIE NERVE FOOD CO. OF NEW ENGLAND v. MODOX CO. et al.

(Circuit Court, D. Rhode Island. February 20, 1907.)

1. TRADE-MARKS AND TRADE-NAMES — SUIT FOR INFRINGEMENT — BURDEN OF PROOF.

A complainant, seeking the aid of a court of equity in protection of his rights in a proprietary medicine, should be required as a part of his affirmative case to allege and prove that his preparation is what it purports to be, and is represented to the public to be, there being no presumption that such representations are true upon which a court can act.

2. SAME—SECRET PREPARATION.

While the proprietor of a secret preparation is entitled to protection of his trade secret, yet to the extent that he has revealed or represented the character or composition of his preparation to the public he has waived secrecy, and there is no hardship in requiring him to prove the truth of such representations to a court of equity whose aid he invokes for its protection.

3. SAME—RIGHT TO RELIEF IN EQUITY—FRAUDULENT REPRESENTATIONS TO PUBLIC.

Complainant manufactured and sold in bottles, a liquid called "Moxie Nerve Food" or "Moxie," which was represented to the public by the labels and wrappers to have been prepared "from a simple sugar cane like plant grown near the equator," discovered by a Lieutenant Moxie, and to be a nerve food which had recovered brain and nervous exhaustion; also paralysis, softening of the brain, locomotor ataxia, and insanity, when caused by nervous exhaustion. In a suit for an injunction restraining infringement of the trade-mark under which the preparation was sold and unfair competition, the bill did not allege that such representations were true, nor that the preparation contained such ingredient or the

properties so claimed for it; and no evidence was introduced to show that it contained any ingredient which warranted the name of "nerve food," or to show a reasonable basis for a belief that the statements as to its curative powers were true. On the other hand, defendant introduced the evidence of physicians and chemists who made analyses of the preparation and of a former employé of complainant, which established affirmatively a very strong probability that the statement that the liquid was a preparation from a plant such as described was pure fiction, and that it was merely root beer, containing no nerve food or other curative agent, except perhaps a small amount of a bitter principle such as gentian or cinchona. *Held*, that under such state of the evidence, complainant was not entitled to the protection of a court of equity even as against undoubted infringement and unfair competition.

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

4. SAME.

Where a proprietary preparation purchased and used largely as a mere beverage was also falsely and fraudulently represented by its manufacturer to contain valuable medicinal ingredients, a court of equity cannot afford protection to any part of its business against infringement of trade-mark or unfair competition.

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

In Equity. On final hearing.

Oliver Mitchell, Robert Cushman, James A. Bailey, Jr., and Roberts & Mitchell (Charles D. Woodberry, of counsel), for complainant.

Charles A. Wilson and George H. Huddy, Jr., for defendants.

BROWN, District Judge. This is a bill in equity brought by the Moxie Nerve Food Company of New England, manufacturers of a liquid known as "Moxie Nerve Food" or "Moxie," against the Modox Company and others, manufacturers of a beverage called "Modox," charging that the defendants have infringed the complainant's trademark rights, imitated its trade-name and goods, and in various ways have been guilty of unfair competition. The defendants contend that the complainant has been guilty of such false representations to the public that, under the principles set forth in Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282, it is barred from the right to seek the aid of a court of equity.

Before considering the defendants' specific charges of fraud, it is proper to inquire whether the complainant has made out a case for equitable relief. In Moxie Nerve Food Co. of New England v. Holland (C. C.) 141 Fed. 202, this court referred to the language of the Supreme Court in Deweese v. Reinhard, 165 U. S. 386, 390, 17 Sup. Ct. 340, 341, 41 L. Ed. 757:

"The right, whatever it may be and from what source derived, must be not only one not protected by legal title, but in and of itself appealing to the conscience of the chancellor. A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

It is incumbent upon the complainant to move the conscience of the chancellor. It is shown, and is not denied, that the complainant's article "Moxie" or "Moxie Nerve Food" is a harmless beverage which

for many years has had a very large sale. It also appears that it is offered to the public as a "Nerve Food," or "food for the nervous system," and as a cure for nervous disorders; and that there is a public demand for the article as a cure for nervous disorders.

The trade-mark which the complainant desires to protect was registered in the Patent Office in September, 1885, upon a statement and declaration by Dr. Augustin Thompson:

"This trade-mark I have used continuously in my business since April 1, 1885, and the particular description of goods is a liquid preparation charged with soda for the cure of paralysis, softening of the brain, and mental imbecility, and called the 'Moxie Nerve Food.' It is comprised in the class of medical compounds."

Upon the label accompanying the declaration was the statement:

"Moxie Nerve Food. Has not a drop of medicine, poison, stimulant, or alcohol in its composition; but is a simple starchy plant grown in South America, and the only positive nerve food known that can recover brain and nervous exhaustion, and loss of manhood at once unaided. It has cured paralysis, softening of the brain, and mental imbecility," etc.

It also appears that, at the time of the filing of the bill, Moxie was represented to the public as a nerve food or a food for the nervous system, and as a preparation containing an ingredient of remarkable curative powers, as will appear from the following copy of the label affixed to the bottles:

More Palatable if Served Ice Cold. Keep in Cool Place.

Moxie Nerve Food.

Trade-Mark Registered.

A Food for the Nervous System, also a Delicious Beverage.

Contains Not a Drop of Poison, Stimulant, or Alcohol.

It is prepared from a simple sugar cane like plant grown near the equator. It was lately discovered by Lieut. Moxie, who placed his discovery in the hands of Dr. Augustin Thompson who has demonstrated its value as a food for the nervous system.

It has proved itself the only harmless and effective nerve food known to science and has recovered brain and nervous exhaustion, also paralysis, softening of the brain, locomotor ataxia and insanity, when caused by nervous exhaustion. It nourishes the nervous system, gives a durable solid strength without stimulation or reaction, creates a vigorous, healthy appetite, removes fatigue from mental and physical overwork and brings refreshing sleep at night. Does not interfere with the action of vegetable medicines.

The genuine is put up only in bottles of this shape, and is never drawn from soda fountains.

Moxie Nerve Food Co. of New England,
Sole Proprietors and Manufacturers.

Boston, Mass. Branch, N. Y. City.

The wrapper of the Moxie bottle, furthermore, contains many statements as to curative virtues in "helpless cases of paralysis." The bill alleges:

"That the beverage 'Moxie,' * * * is a meritorious and useful article well esteemed for its tonic action and its useful and remedial effects under certain conditions and diseases, and that it is recognized by reputable members of the medical profession as a meritorious preparation, and is and has been by them prescribed when indicated, and public institutions such as hospitals, homes for consumptives and the aged and infirm, and the like, have been at their request supplied with 'Moxie' for the use of the inmates."

A comparison of the allegations of the bill and the actual representations made to the public as to the character of Moxie reveals an important discrepancy. It is the duty of a complainant seeking relief in a court of equity to present his case fully and fairly in his bill. The complainant, in seeking protection for its trade-mark, seeks protection for the business associated with the trade-mark. The trade-mark and the business are inseparable. Paul on Trade-Marks, 136. A complainant in equity, therefore, should show fully and fairly what is the business which he is conducting under the trade-mark. He cannot aid his case by omitting material facts as to the true nature of his business.

In McMullen v. Hoffman, 174 U. S. 639, 656, 19 Sup. Ct. 839, 846, 43 L. Ed. 1117, it was said:

"'It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him.'"

In Moxie Nerve Food Co. of New England v. Holland (C. C.) 141 Fed. 202, 204, it was said, "The statements upon the label or wrapper of a patent medicine bottle do not prove themselves." The statements upon the bottles are mere recitals. They prove what representations are made by the complainant to the public. They do not prove the truth of the representations. These recitals are proof only that they are recitals. Murphy v. Packer, 152 U. S. 398, 14 Sup. Ct. 636, 38 L. Ed. 489; Herron v. Dater, 120 U. S. 464, 7 Sup. Ct. 620, 30 L. Ed. 748.

In the Holland Case above cited, it was queried whether it would not be reasonable for a court of equity to hold that a complainant seeking to protect his proprietary rights as the owner of a patent medicine should produce legal evidence that it is in fact what it purports to be. Upon a further consideration of this point, I am of the opinion that the complainant, according to the ordinary principles of equity pleading and procedure, should be required, as a part of its affirmative case, to show that its preparation is what it purports to be. If a complainant seeks protection in the sale of bottled goods, he should be willing to swear that his bottles contain what he represents to the public that they contain, and that his goods are in fact what they are sold for. If a complainant in a bill in equity should allege, "I am selling to the public under a certain trade-mark an article which I represent to the public as fig syrup," such a bill, in my opinion, should be demurrable on the ground that the complainant has no right to protection in a mere business of making representations to the public, but only in a bona fide business of selling an article for what it is in fact. A court of equity should not extend protection to a business of selling medicine for paralysis or other serious diseases simply upon proof that the preparation is a harmless beverage with some slight tonic properties. Missouri Drug Co. v. Wyman (C. C.) 129 Fed. 623, 629.

The complainant's affirmative case affords no evidence upon which the court can find that its preparation is in fact what it is represented to be. We are asked to extend protection to the complainant upon presumptions in its favor. If this court should act upon the presump-

tion that this liquid is a preparation "from a simple sugar cane like plant grown near the equator," of remarkable value as a food for the nervous system, and as a cure for paralysis and other serious diseases, it would, in my opinion, depart from the ordinary rules which require allegation and proof. While fraud is not presumed, the truth of a mere allegation is ordinarily not to be presumed, but must be established by sworn evidence.

Courts of equity have frequently extended to the proprietors of patent medicines and like preparations privileges not extended to other litigants. They have assumed the truth of incredible or doubtful statements made by patent medicine vendors, without requiring them to make allegations to the court substantially similar to those made to the public, and have protected businesses which were neither presumptively nor in fact entitled to protection. Instances may be found where a complainant has received protection from a court of equity while making most incredible and preposterous statements to the public as the basis of his business. Is there any reason why a court of equity should act upon the presumption that a patent medicine vendor, or the vendor of a preparation offered to the public with statements as to wonderful ingredients and marvelous curative properties, states the truth upon his bottles and labels? Eminent jurists have acted upon the contrary presumption. In Williams v. Williams, 3 Merivale, 157, 15 Jurist, 794, Lord Eldon said: "Upon general principles, I do not think the court ought to struggle to protect this sort of secrets in medicine." Other cases to the same general effect are referred to in the opinion in Worden v. California Fig Syrup Co., 187 U. S. 527, 23 Sup. Ct. 161, 47 L. Ed. 282.

While this may be an extreme position, it is no more extreme than the cynical view that, despite extravagant and apparently unfounded statements, patent medicines should prima facie be regarded as property entitled to protection. In Worden v. California Fig Syrup Co., 187 U. S. 530, 23 Sup. Ct. 165, 47 L. Ed. 282, is cited with apparent approval the remark of Lord Chancellor Westbury:

"That he could not receive it as a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood, because it may be so gross and palpable as that no one is likely to be deceived by it," etc.

But why, in dealing with patent medicines, should a court of equity proceed upon general presumptions? A court of equity, when invoked to protect a business, cannot avoid a fair examination of the character of the business. Of the truth or untruth of certain representations or statements a court may take judicial notice. The ordinary rules as to judicial notice undoubtedly could be properly applied to preparations whose statements were on their face too preposterous or incredible. In many cases, however, the truth or untruth of representations cannot be determined upon the principles of judicial notice. A court should not, of course, take judicial notice that all patent medicines or secret preparations are fraudulent and lack merit, and refuse relief on this ground. It by no means follows, however, that it is required to presume that representations to the public are prima facie true. Ordinarily, those things of which a court does not take judicial notice must be proved.

In the present case, I find in the complainant's proof no sufficient reason for belief that this article is in fact what it is represented to be, either as to ingredients or curative value. I think that I cannot take judicial notice that the representations are untrue. The statements seem to be improbable. They cannot be ignored. And should relief be extended to the complainant, it would be with decided misgivings whether the court was not protecting a business of selling root beer under false representations that it contains an ingredient which is a cure for nervous disorders and serious diseases.

To apply the rule that a complainant must allege fairly and fully what his business is, and produce proof substantially supporting his allegations, should not require of the complainant the allegation and proof of the minute particulars of his business; but it should, I think, require a complainant who asserts that he has an article which is good as a beverage, and is also good as a cure or medicine because of certain ingredients, to make proof substantially to the extent of his general representations to the public. The proprietor of a secret preparation may justly claim protection of a trade secret, but to the extent of his representations to the public secrecy is waived; and there is no hardship in requiring a complainant who has stated certain things to the public as truths in order to promote the sale of his goods to state the same things as truths to the court, and prove them as truths, in order to secure equitable relief. The right to preserve a trade secret does not carry with it a general right to have one's bare word or unsworn statement accepted in a court of equity, or excuse a failure to prove the truth of what is published to the public. To the extent that a manufacturer of goods chooses to reveal their character and composition to the public—to that extent he waives the right of secrecy in a court of equity.

If it is not incumbent upon a complainant to prove something more than that he is representing his goods to the public in a certain way under a certain trade-mark, a court of equity, by ingenuously assuming the truth of what vendors tell the public about their goods, particularly goods of the patent medicine class, will indulge in a presumption not entertained by ordinary persons of intelligence, and which is contrary to that public experience which has resulted in the enactment by Congress of laws for the protection of the public against unscrupulous statements in relation to a very large number of articles in whose preparation there is an opportunity for adulteration, substitution, or secret fraud.

A presumption in favor of a complainant may be grounded on general experience, probability of any kind, or merely on policy and convenience. It is very doubtful if a presumption in favor of this complainant can rest on either of these grounds. I see no reason why, in the absence of averment and proof, this court should assume that Moxie is a preparation from a sugar cane like plant which has remarkable properties as a nerve food.

A complainant must by allegations and proof show that he is entitled to relief. Knox v. Smith, 4 How. (U. S.) 298, 317, 11 L. Ed. 983. The allegata and the probata must reciprocally meet and conform to each other. Harrison v. Nixon, 9 Pet. (U. S.) 503, 9 L. Ed. 201.

It seems to have been assumed in the argument that the burden rests upon the defendants to show with a high degree of certainty that the complainant's preparation is not what it purports to be. The record in this case well illustrates the practical inexpediency of supporting a complainant's case by a presumption of the truth of what he has not alleged to be true. If, as a fact, the complainant is selling root beer as a medicine for paralysis, etc., and can rely upon an artificial presumption that it is not, it can continue to do so with the assistance of a court of equity, and enjoin all defendants who have not the financial means to secure evidence in the very difficult task of proving a negative. If it be the fact, this complainant can easily prove that its liquid does contain the important ingredient which gives it remarkable qualities as a nerve food, and it can prove what it alleges to the public without fear that a court of equity will require it to disclose what it has chosen to keep secret. This court has so decided upon an interlocutory application in this case.

The question, where rests the burden of proof that Moxie is a preparation of a plant of remarkable virtue in nervous disorders? is one of great importance in this case. If the complainant does not offer affirmative proof, it runs what Mr. Wigmore terms "the risk of non-persuasion" of the court. If it may rely upon a presumption that it is not guilty of fraud, it should not rely upon a presumption that the court will assume its numerous statements to be true.

From the nature of this case, as well as of all cases involving a trade-mark upon goods, whose exact character can be known only to the manufacturer, but which are put forth with specific statements to induce the public to purchase them, the burden of proof as to the truth of the statements should rest upon the manufacturer. A chancellor should not be required to assume on the bench what he would not believe without proof when off the bench. Proof should be required from that person within whose knowledge the fact rests. Selma, Rome, etc., Railroad v. United States, 139 U. S. 560, 567, 568, 11 Sup. Ct. 638, 35 L. Ed. 266. There should be no such technical application of rules concerning presumptions or the burden of proof as to relieve a complainant from the obvious duty of satisfying the court that his goods are what they purport to be and what he represents them to be.

The complainant's attitude on the argument is substantially this: It is true that we represent this article as a preparation of a plant which has remarkable virtues in nervous disorders, but we do not propose to prove that it is what we represent it to be. We are entitled to the protection of a court of equity unless the defendants can prove that it is not, and the burden of proof is obviously altogether too heavy for the defendants to sustain.

The natural contempt of the chancellor for a fraudulent imitator who sets up the defense that he is imitating only a fraud apparently has often led the courts to treat with leniency a complainant who seeks protection for a valuable business built largely upon misrepresentation. It is quite true that the defense of unclean hands comes with ill grace from a rival manufacturer who is a fraudulent imitator whose hands are equally unclean. Siegert v. Gandolfi (C. C. A., 2d Circuit, De-

cember, 1906), 149 Fed. 100. But this, as it seems to me, is entirely aside from the merits of such a defense. It is not a question of grace. The validity of such a defense is well established. Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282. As the courts should not, in such cases, take into consideration the attitude of the defendant (187 U. S. 529, 23 Sup. Ct. 164 [47 L. Ed. 282]), so they should not take it into consideration when discussing the question of the burden of proof.

"It is a clear rule, laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth." 187 U. S. 529, 530, 23 Sup. Ct. 165 (47 L. Ed. 282).

But how determine if a complainant's case is founded in truth? The rule is simple. Let the complainant state fully the real case, and support it by proof. The representation upon the label of a package is a material part of the vendor's business, and no undue hardship or inconvenience will result to an honest vendor if he is required to prove the truth of his label as he is required to prove the truth of any other material fact. This rule, I am aware, may prove exceedingly embarrassing to many vendors of patent medicines, but only to those who are guilty of misrepresentation and deceit. It need not prove embarrassing to one who wishes to keep a trade secret, for he need only forbear publishing what he does not care to prove.

In Worden v. California Fig Syrup Co., 187 U. S. 527, 23 Sup. Ct. 164 (47 L. Ed. 282), it was said that, in the absence of legislation, "courts cannot declare dealing in such preparations to be illegal, nor the articles themselves to be not entitled, as property, to the protection of the law."

I find in this opinion, however, no authority for relieving patent medicine vendors from the ordinary requirement that a complainant must affirmatively make out his right to relief, or for extending to them a presumption that what they have stated to the public is to be accepted as true by a court of equity without the support of sworn testimony.

I am of the opinion that this complainant has not made out a case for equitable relief, for the reason that it has failed to show the substantial truth of the representations made upon its labels and wrappers as to the ingredients and curative powers of Moxie in nervous disorders.

If it is wrong to refuse to extend to the complainant a presumption that its representations are true, it is yet very clear that a presumption of this class, if allowed to supply the place of fact, cannot stand against established facts. Fresh v. Gilson, 16 Pet. 327, 10 L. Ed. 982; Lincoln v. French, 105 U. S. 614, 26 L. Ed. 1189. The defendants' evidence is more than sufficient to overcome any mere presumption of the truth of the complainant's representations. This evidence will, however, be considered in connection with the defendants' contention that they have affirmatively established the defense of unclean hands, and of fraudulent representations to the public.

The complainant's representations to the public, which seem important on the issue of fraud, relate to the origin, ingredients, and curative powers of Moxie. The label states:

"It is prepared from a simple sugar cane like plant grown near the equator. It was lately discovered by Lieut. Moxie, who placed his discovery in the hands of Dr. Augustin Thompson who has demonstrated its value as a food for the nervous system."

The wrapper says:

"A little insignificant weed revolutionizing the habits of the world.

"We hereby agree to give any person $10,000, if they can show their preparations contains any Moxie, or if they can produce any of the plant, or its beneficial results.

"Moxie is compounded from well-known flavors, and the richest predigested nerve food ever discovered, by one of the most successful old physicians in New England."

"No representations can be more material than that of the ingredients of a compound which is recommended and sold as a medicine. There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious and perhaps fatal consequences." Fetridge v. Wells, 13 How. Pr. 385, quoted in Worden v. California Fig Syrup Co., 187 U. S. 531, 23 Sup. Ct. 165, 47 L. Ed. 282. See, also, Perry v. Truefitt, 6 Beav. 66.

The defendants have offered in evidence advertisements inserted in the Lowell Morning Times by Dr. Augustin Thompson in February, 1885, in part as follows:

"From South America.

"On the Pacific side, in South America, the Indians grow a plant something like our rhubarb from which they make a decoction like our tea and coffee. This is their national drink. From its use they are able to undergo great fatiguing exertions without the ordinary result. It seems to be a nerve food instead of a medicine, as its use leaves no reaction or nervousness. * * * One of our prominent physicians is about to introduce it here and it will soon be on sale by the grocers and apothecaries, cheap enough that all may use it. * * * It will be called the 'Bolivian Nerve Food,' or 'Moxie Appetizer.' It builds an appetite by building the nervous system, which governs the functions of the body. Will be ready by March 3d."

The next advertisement, in March 1885, was in part as follows:

"South America Again to the Front.

"Last week we called your attention to that plant from South America lately introduced by Lieut. Moxie as a nerve food. His attention was first called to it from its general use by the natives, and singular action on the nervous system, while he was traveling in Bolivia. Through information obtained from him, it has been brought to Lowell and thoroughly tested for three months."

Medical and chemical experts say that these descriptions are suggestive in part of coca—"erythroxylon coca"— described by one witness as a stimulating substance not unlike the extract of tea.

In the bulletins of the Bureau of American Republics (printed by the government) appears, in the handbook on Bolivia, Vol. 4, p. 42, a reference to "coca," "erythroxylon coca"—

"the dry leaves of which are a highly stimulating narcotic, and are chewed by the Bolivian and Peruvian Indians, by travelers in the Upper Andes, and by the Bolivian soldiers, when in the field, just as betel is used by the inhabitants of the East Indies."

The complainant's statement that the preparation contains not a drop of stimulant, as well as other statements, and the results of chem-

ical analysis, negative the use of coca. It is nevertheless highly probable that the author of these advertisements was influenced by knowledge of this stimulant used by the Bolivians when he called his preparation "Bolivian Nerve Food," and wrote his account of the "national drink." That there is another Bolivian plant which has such points of resemblance to coca, and is yet so different, and which forms the curative agent in Moxie, does not seem highly probable.

The evidence raises serious doubts as to Lieut. Moxie, the discoverer. The existence of Lieut. Moxie can hardly be regarded as a trade secret. No one but Dr. Thompson seems to have known about him, so far as this record discloses. The defendants' reference to the existence in Bolivia of a tribe of Indians known as "Moxas" or "Moxos" (Cent. Dict. & Cyc. [Ed. of 1900] Vol. 9, p. 696; Enc. Brittanica, Vol. 12, p. 825) suggests the possibility that the lieutenant's name "Moxie" is also of Bolivian origin, and that Lieut. Moxie and the sugar cane like plant are both derivatives from literature concerning Bolivia. Were it not for the statement concerning the discoverer, it would seem to have been natural to name a Bolivian nerve food after a Bolivian Indian tribe, the Moxas or Moxos. We may conceive, of course, that by some remarkable coincidence of names a Lieut. Moxie was traveling among the Moxas Indians when he made his discovery, but this does not seem highly probable.

It is by no means necessary to infer that Moxie Nerve Food was named either from the Moxas tribe of Indians or from Lieut. Moxie. Moxie is said by the defendants to be a botanical name, and they have introduced in evidence a box labeled "Moxie," which a botanical druggist of Lowell, Mass., says contained a drug which he had in his shop before Moxie Nerve Food was put on the market by Dr. Thompson, and which was called by the druggist "Moxie." There is also evidence as to the "Moxie berry" (see Plant Names, Scientific and Popular, A. B. Lyons, M. D., Detroit, Mich.); but this is not Dr. Thompson's plant either in quality or habitat. But wherever Dr. Thompson may have found the name "Moxie," there remains a strong suspicion that Lieut. Moxie got his name from Dr. Thompson.

According to the complainant's brief, the Moxie business was established in 1884 by Dr. Augustin Thompson, a homeopathic physician of Lowell, Mass. The defendants show that Dr. Thompson had taken a mortgage upon a tonic beer factory in Lowell, and subsequently took possession of the property in satisfaction of his debt, and continued the same business. The "Moxie Nerve Food" was apparently the result of variations of or additions to the formula for ordinary root or tonic beer, so-called.

The complainant has proved that Moxie has been the same in composition from the beginning. Upon a label adopted by the complainant since the beginning of this suit it is described as a "bitter tonic beverage." While there is evidence that, upon analysis, Moxie shows evidences of containing gentian and cinchona, and while Dr. Tuttle, the only physician who testifies as to the merits of Moxie, was of the opinion that Moxie has a tonic effect, in his opinion, "due in part to bitter principles contained," yet Dr. Thompson, in his application for registration of trade-mark, said:

"The material to be covered by this trade-mark is a fluid resembling in color the usual extract of vanilla; has a bitter taste with an associate taste like common 'Tonic Beer.' The taste is from the flavoring extract. The base, or most useful part of this compound, is as tasteless as cornstalks."

The statements, therefore, that Moxie is a nerve food and a cure for paralysis, etc., cannot be supported upon the basis of any merit it may have by virtue of bitter principles which Moxie contains. The value as a nerve food and cure for paralysis is distinctly attributed to the supposed sugar cane like plant or simple starchy plant. This is what is referred to as "A little insignificant weed revolutionizing the habits of the world," and as "the richest predigested nerve food ever discovered." There is no claim by the complainant that the bitter ingredients of Moxie can justify the claims made for it.

Moxie was put up not only in liquid form, but in the form of lozenges. The statements concerning Moxie made in connection with these lozenges seem directly relevant to an inquiry into the true origin and ingredients of Moxie. Attention is called to the medicated Moxie Lozenges, respondent's Exhibit 37. On the box is the statement:

"The Moxie Nerve Food from which this Lozenge is made, has had the largest sale ever known in the history of trade, 5,023,741 quart bottles having been sold during the first fifteen months. * * * It is generally believed it has saved 228,000 drunkards, and 389,000 nervous wrecks during the last year."

This exhibit contains a printed sheet with the printed signature of A. Thompson, M. D.:

"288 Doses for 10 Cents.

"Will break colds, coughs, rheumatism, pneumonia and fever in their first stage. I used them 26 years for that purpose, in the largest practice in New England. After exposure, dose, one-eighth of a lozenge and wait. If an attack of rheumatism or pneumonia is treated, dose same every three hours until better. A. Thompson, M. D."

The date of this exhibit is not later than 1899. Subtracting 26 years from that date would throw the origin of Moxie back to 1873. This is not consistent with the statement in 1885 that it was lately introduced by Lieut. Moxie as a nerve food, and that it had been brought to Lowell and thoroughly tested for three months.

The defendants have offered in evidence other exhibits tending to show that Dr. Thompson was a writer of medical fiction, and an originator of marvelous discoveries, or, in other words, a manufacturer of several quack medicines. Public confidence is besought for the preparation upon the ground that it is a product of the medical knowledge and medical skill of an experienced physician. Moxie Nerve Food is presented to the public as the production of Augustin Thompson, M. D., "one of the most successful old physicians in New England." The qualifications and good faith of this expert are open to inquiry, and the inquiry is open whether Dr. Thompson's expert opinion as to Moxie was actually entertained or fraudulently stated. Missouri Drug Co. v. Wyman (C. C.) 129 Fed. 623.

Upon the complainant's brief it is stated that the complainant company had filled unsolicited orders for Moxie Lozenges, Moxie Catarrh Cure, and Family Safeguard. Assuming that the present complain-

ant is not responsible for any statements made as to "A Sunbeam" or "J. S. Q. Nerve Food," I think that the other preparations sold by the complainant are competent evidence.

Dr. Augustin Thompson was always connected with the Moxie business, and with the several owners, until his death in 1903, according to the complainant's brief. The brief states that in 1894, 10 years after the establishment of the business, 51,000 cases of 12 bottles each were sold; and in 1904, the year in which the bill of complaint was filed, 392,385 cases of 12 bottles each of Moxie were sold; and that the complainant produced in 1904 approximately 400,000 cases of Moxie. Thus, at the height of its business, after an expenditure of hundreds of thousands of dollars and of great efforts in advertising, the business had not reached the proportions stated upon the Moxie Lozenge box to have been attained within the first 15 months.

The defendants have also attempted to show by chemical analyses the nonexistence in Moxie of its advertised ingredient and qualities. The complainant has made a most elaborate and careful attack upon the analytical methods, and has devoted much testimony and argument to show the impossibility of an absolute analysis, either qualitative or quantitative, and the impossibility of determining from vegetable extractive matter the natural source or vegetable from which the extractive is derived. The defendants' chemists, however, are of known reputation and skill; and, while the analyses may not prove a negative with scientific certainty, they cannot be disregarded or dismissed as of no value. It is fair to say that, so far as careful analyses disclose, Moxie contains no ingredients which are recognized as of value as a nerve food or cure for serious diseases; that it corresponds in its composition with root or tonic beer, being composed principally of sweetened water and well-known flavorings, with indications of gentian and cinchona; and that it is practically devoid of predigested solids. Mr. Wyatt was of the opinion that the extractive bodies were a mixture of cinchona and some other bitter roots or plants such as gentian or chiretta or quassia, either of which give a similar taste.

While we may concede that the complainant has shown the possibility of the existence of a small amount of an unidentified agent of remarkable virtues, the probability that there is such ingredient, and that such ingredient corresponds to the various descriptions of it by the complainant, is very slight.

The defendants have also introduced the testimony of a large number of eminent physicians, who are of the opinion that the language of the label and wrapper of Moxie are untrue and deceptive. Among these are Drs. Edward Cowles, George F. Jelly, and John P. Sutherland, of Boston; Dr. George S. Adams, of Westboro, Mass., of the homeopathic school, who states that the preparation is inconsistent with the principles of homeopathy; Drs. William J. McCaw, George L. Shattuck, and Frederick T. Rogers, of Providence; and Dr. Eunice D. Kinney, of Revere, Mass. This evidence seems to me of great weight in determining whether Dr. Thompson did in fact have either the opinions or ingredients which he claimed to have, and whether the present complainant has acted in good faith.

The most liberal allowance should be made for difference of medical opinions. Moxie Nerve Food Co. v. Holland (C. C.) 141 Fed. 202. Conceding that a preparation which is put forth with honest claims may be entitled to protection though these claims are contrary to the weight of medical authority, and recognizing that this court should not sit as a court of medical inquiry to settle differences of medical opinion, we have the question of fact, does Moxie contain any such ingredient as it is represented to contain?

Dr. Frederick T. Rogers says:

"It is impossible, with the thousands of enthusiastic and educated men who are investigating and studying the medicinal virtues of the world's flora, that any one man should discover and appropriate to his own uses any plant which possessed in any degree the properties ascribed to the principal ingredient of Moxie without its becoming common knowledge, and there is not in materia medica any single or combined vegetable agent which possesses these powers."

This opinion, taken in conjunction with the statements of the Bolivian origin and the extensive use of the article as a national drink, seems to be reasonable. If in fact there is an article of general use which has so many of the beneficial properties of erythroxylon coca, and no detrimental qualities, it seems improbable that it should not have become known to materia medica.

Dr. Rogers further says:

"Any adequate knowledge of the complex nature of the nervous system of the human body, of the metabolism occurring in health and disease, and of the structural and functional changes which present to the clinician and pathologist in the diseases which it is claimed are cured by the use of Moxie, will absolutely controvert the statement that any food will cure the diseases specified, viz., cerebral softening, locomotor ataxia, or insanity, with their attendant structural changes. It would be quite as probable to assert that such a food would lengthen a leg shortened from tubercular hip-joint disease, would replace pulmonary tissue destroyed by a suppurative process, restore sight to an eye blind from atrophy of the optic nerve, or preserve the integrity of an organ the seat of a cancerous inflammation."

To meet this testimony of Dr. Rogers, the complainant has introduced in rebuttal the testimony of Dr. Richard T. Bang, of New York, who states:

"I do not believe that anything stated on the label is impossible, and if Moxie Nerve Food contains the proper ingredients it is also quite probable."

He criticises the statement of Dr. Rogers that there is no plant known in medicine which could possibly have the effect such as is claimed for Moxie Nerve Food, and states that he has personally known of a plant which grows in Brazil, and which is known as "Fedegosa," which contains a marked amount of nerve food known as "lecithin." He states that he knows it to be a physiological fact that lecithin is also found in all of the cereal grains, such as wheat, rye, oats, etc., and peas, beans, and lentils; and that it is also found in the cellular juice of many plants. He was of the opinion that lecithin itself possesses the powers ascribed to Moxie Nerve Food in its label and advertising.

Dr. Alfred H. Tuttle, of Cambridge, Mass., testified that he had used Moxie in many cases of nervous exhaustion, in conjunction

with other treatment, and in some instances practically it was the only treatment. He was asked:

"From your observation, can you state what the physiological effects of Moxie are when exhibited in cases of nervous exhaustion? A. It produces a mild evacuation of the bowels, and increases the flow of urine, and promotes the appetite. It causes a mild sense of well being which is evidently of a tonic nature, because there is no after reaction which would come, in the sense of the question, from stimulation. Digestion, assimilation, and nutrition are improved, and in the course of time there is a general improvement in the physical and mental conditions of the patient in many cases. * * * It tends to eliminate the waste deleterious products of the body, and secondly promotes the healthy reconstruction.

"I consider Moxie as a valuable adjunct in the treatment of all cases of nervous disorders caused by nervous exhaustion, and in many cases, is all the treatment, excepting rest, fresh air, and restricted diet, that is necessary."

The result of this is that one of the complainant's physicians is of the opinion that the statements made on the Moxie bottle are not scientifically impossible, though he gives no opinion as to the merits of Moxie; and that another physician, without a knowledge of its composition, has used Moxie in many cases of nervous exhaustion.

If we assume that the complainant has a reasonable basis for a belief that Moxie can accomplish or has accomplished what is claimed for it, there is force in the complainant's argument that we should not inquire too closely whether it acts as a specific which feeds the nerves or as a tonic and laxative which eliminates waste products of the body and thus effects the claimed effects.

In the patent law, if an inventor makes a machine that works, he does not lose his rights by a mistaken and erroneous statement of the theory or principle upon which it works. On similar principles, if Moxie has such effects as it is represented to have, we might disregard as unimportant an inquiry into the way it works, provided there were room for a difference of opinion. But, assuming that Moxie is believed by the complainant's officers to be all that Dr. Tuttle claims for it, this is no warrant for representing to the public that it has recovered brain and nervous exhaustion; also paralysis, softening of the brain, locomotor ataxia, and insanity when caused by nervous exhaustion; has recovered a host of helpless cases of paralysis, or that a tumbler full will break a recent intoxication in an hour; and does not detract from the value of the testimony of the eminent physicians who believe these claims to be without foundation and fraudulent, and who believe that the simple starchy plant is a pure fiction.

Even where a preparation is shown to have greater virtues than those of the falsely advertised ingredient, as in Worden v. California Fig Syrup Co., 187 U. S. 534, 23 Sup. Ct. 161, 47 L. Ed. 282, this is no excuse for misrepresentations as to ingredients. In addition to the intrinsic improbability of the story about the sugar cane like plant, and the heightening of this improbability by the testimony of chemists and doctors, the defendants offer the testimony of a former employé which tends to show the nonexistence of this ingredient.

George P. Walker, who appears to have been intimately associated with Dr. Thompson for several years in the Moxie business, testifies that he continued the manufacture of Moxie six years, using a formula

given him by Dr. Thompson, and not using any Moxie plant. He testifies that the flavoring and the extract are distinct; that the flavoring is made from oils, and the extract is made from a formula which was given him by Dr. Thompson, and which he now has. Upon cross-examination this witness was apparently embarrassed by testimony given by him in 1888, while employed by the Moxie Company, when he said:

"The Moxie is the secret of the business. It is something with which I am not familiar."

Upon the complainant's brief it is said, in italics, of Walker's testimony:

"He says that this 'ingredient' as to which he testified in Philadelphia was the extract of the Moxie plant."

The record does not support the brief nor the contention that Walker then claimed to have used and seen the Moxie plant extract. In his former testimony he did not use the word "plant," but referred to the "extract" as made by a formula. In the present case, complainant inquired on cross-examination:

"X-Q. Then the ingredients which Dr. Thompson disclosed to you early in 1886 did not include any Moxie plant extract? A. No, sir.

"X-Q. Then in your testimony at Philadelphia in the Chase Case the Moxie which you said was the secret of the business about which you did not know anything was the Moxie plant extract? A. Yes, sir. I knew about the other.

"X-Q. What did this Moxie plant extract look like. A. I never saw the Moxie plant extract. My only information was from the circulars written by Dr. Thompson."

The testimony of this witness must be regarded with caution, as his statement as to the date on which Dr. Thompson communicated to him the formula is not consistent with his statement in 1888, and because it appears from a written agreement made in 1889, whereby he was given the exclusive right to bottle and sell Moxie Nerve Food in 24 states and territories for 20 years, that he was to purchase his "Moxie extract" and to use "Moxie extract as received from first hands." The "extract" referred to in this agreement, however, apparently contained all that was necessary to make the complete article, excepting sugar, water, sugar color, and soda water. There is evidence that Walker purchased ingredients in large quantities—juglans or butternut bark, gentian, and paradise seeds—for use in Chicago, so that it is perhaps true that some Moxie extract was manufactured in Chicago, as the witness says it was; and his statements that he was familiar with its composition, and that he purchased some of the "extract" and made some at Chicago, are not improbable under the circumstances. Other employés had no knowledge of a plant known as the Moxie plant, though it appears from one of them that Dr. Thompson drew money for the purchase of secret ingredients.

It is true that the positive testimony of Walker as to the nonexistence of the plant requires corroboration. This is found in the chemical analyses, in the opinions of a large number of physicians of the highest standing, and in the circumstances surrounding the origin of Moxie, as well as in the probabilities of the case.

I am of the opinion that the defendants have affirmatively proved that the complainant has misrepresented to the public the composition and ingredients of its preparation. But, were it doubtful whether the defendants had affirmatively established misrepresentations, yet an injunction could hardly be issued in this case. It is a familiar rule that an injunction will not issue to enforce a right that is doubtful. Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 20 Sup. Ct. 628, 44 L. Ed. 777.

The complainant's right to protection of its trade-mark, or of its trade, is at least doubtful for these reasons:

It has introduced no evidence sufficient to show that its preparation contains any ingredient which warrants the name of nerve food, or that it is in fact a preparation of a plant such as is described in the declaration for trade-mark registration, and in the label and wrapper.

It has introduced no evidence which tends to show a reasonable basis for a belief that the statements which it makes as to curative powers "in brain and nervous exhaution, paralysis, softening of the brain, locomotor ataxia, and insanity, when caused by nervous exhaustion," are true, or that it "has recovered" a "host of helpless cases of paralysis," or that "a tumblerful will break a recent intoxication in an hour," or that it will cure paralysis caused "from malnutrition or overwear of the nervous system."

The complainant's evidence at best shows that Moxie is a mild evacuant and diuretic, with some tonic effect due possibly in part to bitter principles contained in it.

The defendants' evidence, on the other hand, establishes affirmatively a very strong probability that the statement that Moxie is a preparation of a plant corresponding to the complainant's description of it is pure fiction, and that it contains no nerve food or curative agent other than a small amount of bitters, such as gentian or cinchona. The possibility that there are other ingredients which have escaped chemical analysis, and that there may be an ingredient which in any respect conforms to the descriptions of its origin and nature, is altogether too remote for consideration in the practical administration of equity.

A dealer in bottled goods who is unwilling to swear to the truth of the representations it makes to the public, or to swear that its bottles contain what the labels say they contain, and who has it in its power to produce convincing proof if its representations are true, cannot expect a court of equity to come to its aid with artificial presumptions in its favor.

Upon the evidence, I am of the opinion that the defendants have been guilty of unlawful imitation of the complainant's trade-name and trade-dress, and have also been guilty of such unfair competition that an injunction should issue in behalf of a complainant who showed a right to equitable relief. I regret that this court is unable to protect the legitimate part of the complainant's business from the indefensible acts of the defendants.

In considering this case, I have not lost sight of the fact that a very large part of the demand for Moxie is based upon its merits as a

mere beverage without regard to its curative virtues; and I have carefully considered whether it might not be possible to protect this undoubtedly legitimate part of the business, while denying protection to what may be termed the medicinal part of the business. Such separation, however, is impractical, for if the plaintiff "has thought fit to mix up that which may be true with that which is false, * * * unless he establish his title at law, the court cannot interfere on his behalf." See Worden v. California Fig Syrup Co., 187 U. S. 530, 23 Sup. Ct. 165 (47 L. Ed. 282). The silence of the complainant on the vital issues, in the face of the strong evidence that its statements to the public are mere fiction and misrepresentation, cannot be satisfactorily accounted for as due to a desire to preserve a trade secret, for proof is required only of what already has been stated to the public.

The bill will be dismissed.

RANCH v. WERLEY et al.

(Circuit Court, D. Oregon. March 4, 1907.)

No. 3,001.

1. PROCESS—SERVICE BY PUBLICATION—AFFIDAVIT.

Under B. & C. Comp. Or. § 56, which provides that an order for service on a defendant by publication may be made when the defendant, after due diligence, cannot be found within the state, and that fact is made to appear by affidavit to the satisfaction of the court or judge, an affidavit is sufficient to sustain a judgment rendered on such service when collaterally attacked where it showed that the defendant was a corporation of another state where it had its principal office, that a summons had been issued and returned by the sheriff without service, and that the affiant had made diligent inquiry from a number of persons who were named, and could not learn from them of any officer or agent of the defendant on whom service was authorized by the statute within the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 177–180, 193.]

2. SAME—ORDER AND SUMMONS—OREGON STATUTE.

Under B. & C. Comp. Or. §§ 56, 57, relating to service by publication, which provide that the summons published shall state the time within which the defendant is required to answer; that the order shall direct the publication to be made not less than once a week for six weeks; that the defendant shall appear and answer on or before the last day of the time prescribed in the order; and that the service shall be deemed complete "at the expiration of the time prescribed for publication"—an order and published summons are sufficient where they state the day of first publication, and that defendant is required to appear and answer on or before the day of the last publication, giving the date.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 123, 129, 130.]

3. SAME—MAILING SUMMONS TO DEFENDANT.

The requirement of B. & C. Comp. Or. § 57, that in making an order for service by publication "the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant at his place of residence," is complied with in case of a foreign corporation defendant by directing the copies of the summons and complaint to be addressed to the corporation at the place

where it has its principal office, and it is not necessary that any shall be mailed to its officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 135; vol. 12, Corporations, §§ 2610–2623.]

4. SAME—PROOF OF PUBLICATION—AMENDMENT.

Under the law of Oregon proof of publication of a summons may be amended by leave of court at any time, with or without notice, to correct an error therein and to conform to the facts, and if, as amended, it shows jurisdiction in the court, the record will be sufficient to sustain a judgment previously rendered as against a collateral attack, where rights of third parties have not intervened; nor is it essential that the order permitting the amendment shall direct the amended return to be filed nunc pro tunc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 193, 249.]

5. JUDGMENT—COLLATERAL ATTACK—GROUNDS OF IMPEACHMENT.

That a mortgagee, after foreclosing his mortgage and selling the property, sued on the original note after crediting thereon the proceeds of the sale, instead of on the deficiency decree, if unauthorized, was matter of defense, but it did not constitute a fraud for which the judgment rendered may be impeached in a court of equity.

6. QUIETING TITLE—SUIT TO REMOVE CLOUD—DEFENSES.

That the defendant is in possession is a complete defense to a suit to remove a cloud on title under the Oregon statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 8–11, 44, 45.]

7. ATTACHMENT—VALIDITY—OREGON STATUTE.

It is not essential under the Oregon statute that a summons should be served and filed before the issuance of an attachment, but it is sufficient if it has been issued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 398.]

In Equity.

This is a suit to remove clouds from title to certain real property, situate in Coos county, Or. The complainant alleges ownership and title in himself, and that the property is clouded by certain proceedings, culminating in sheriff's deeds conveying the same, in pursuance of orders of court, to the defendant Werley. The complainant derives title from the defendant the Coos Bay Land Company through deed executed some time in the year 1905. The first of the proceedings complained against consists of a suit instituted by Werley in the circuit court of the state of Oregon for Coos county against the defendant the Coos Bay Land Company on July 26, 1901, to foreclose a mortgage given by the Coos Bay Land Company to him July 1, 1896. All the steps taken leading up to the decree of foreclosure are set out by the bill of complaint, and thereafter such as were had terminating in the execution of the sheriff's deed to Werley. It is further alleged that, by reason of certain irregularities attending such proceedings, the court failed to acquire jurisdiction to enter the decree, and hence that the sheriff's deed is inoperative to vest title in Werley, and constitutes a cloud upon complainant's title. It is further alleged that thereafter, to wit, on June 29, 1903, the defendant Werley instituted an action in the circuit court of the state of Oregon for Coos county against the Coos Bay Land Company, upon a pretended demand against said company, which was falsely and fraudulently alleged to consist of a promissory note executed by the said company to Werley, when in truth and in fact he (Werley) was not possessed of nor entitled to assert any such demand against said company; that in such action an attachment was issued and levied upon certain of the real property described in complainant's bill of complaint; that a judgment was subsequently rendered, and the property sold under execution to Werley, who acquired a sheriff's deed therefor; and that these proceedings, also, together with the said sheriff's deed, constitute

a cloud upon complainant's title. The defendant Werley pleads three defenses. By the first he also sets up all the steps taken in the foreclosure of his mortgage, culminating in the execution of the sheriff's deed to him; but, in addition, has disclosed a further proceeding had, intended as a correction of the printer's return touching the publication of summons in that suit. By the second he likewise sets out in detail all the steps taken touching the attachment action, and in this has disclosed nothing of substance further than that contained in the bill of complaint; but he asserts, in effect, that the demand sued on was the balance due upon the promissory note sued on in the foreclosure proceedings, after the application of the amount realized from the sale of the mortgaged property. And by the third he shows that he is a mortgagee, and sets up again the proceedings of foreclosure and those had in the attachment action, and that he is in possession. The complainant has interposed a motion to strike out each of these separate defenses as sham, frivolous, and irrelevant; and another for judgment on the pleadings in favor of complainant and against the defendant Werley.

T. O. Abbott, for complainant.
John T. Welsh and Martin C. Welsh, for defendant Werley.

WOLVERTON, District Judge (after stating the facts). In submitting this cause at the argument, counsel have not discriminated between the two motions, and have simply argued the points which the complainant has made, and which are relied upon as invalidating the proceedings of foreclosure and those by way of attachment, and ultimately the title of the defendant Werley, which he holds by virtue of such proceedings. I will therefore take up the questions as they arise in their natural or chronological order.

The first is touching the sufficiency of the affidavit for publication made in the foreclosure proceeding. It is submitted that such affidavit does not set forth the requisite facts to show that the defendant the Coos Bay Land Company, or any of its officers or agents upon whom legal service could be made, could not, after due diligence, be found within the county of Coos and state of Oregon. The affidavit in question was made by W. U. Douglas, the attorney for plaintiff in that suit, and, in so far as it is material, avers as follows:

"That the defendant Coos Bay Land Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has real property in this county and state, which are particularly described in the mortgage in the complaint in said suit, and a copy of which complaint is hereunto attached. That said corporation cannot after due diligence be found within this county and state, nor any president or other officer, secretary, cashier, managing agent, or any agent or clerk thereof, for the reason that to my personal knowledge said corporation has had no office or place of business within this county and state, nor any officer, president, secretary, cashier, managing, or any agent or clerk herein for several years last past, and I have made diligent search and inquiry of persons living on the lands of said corporation defendant in East Marshfield, Oregon, and of the assessor, John Lawrence, and of the supervisor, F. P. Norton, of the district in which said lands of said corporation are situated, and other persons likely to know, and am informed by them that they do not know of any office or place of business of said corporation, or of any officer, managing agent, or any agent or clerk of said defendant corporation within this county and state. * * * That on the 26th day of July, 1901, a summons herein was issued in the above-entitled suit and delivered to the sheriff of Coos county, Oregon, together with a certified copy of the complaint therein, and that said sheriff made return of said summons without service. * * * That the principal office and place of business of said Coos Bay Land Company is South Bend,

Washington, and that the place of residence of its president, F. L. Rice, is Seattle, Washington."

The question is whether this affidavit states facts sufficient to support the order of the judge of the county court directing that service of summons be made by publication upon the defendant the Coos Bay Land Company. A question of similar character arose in Cohen v. Portland Lodge No. 142 (C. C.) reported in 144 Fed. 266, and it is fully discussed by the opinion in that case. It is deemed sufficient, under the authorities, that facts be stated from which it shall appear, to the satisfaction of the court or judge making the order, that personal service cannot be had upon the defendant within the state, and, if the affidavit contains evidence legally competent upon which to support the order, the record will be deemed sufficient in any collateral attack whereby the proceeding complained of is sought to be overthrown. The affidavit under discussion shows that the Coos Bay Land Company was a nonresident corporation, organized and existing under the laws of the state of Washington, that its principal office and place of business was at South Bend, Wash., and that diligent search and inquiry had been made to ascertain whether or not any proper officer or agent of the corporation was to be found within Coos county or the state of Oregon upon whom service could be had. It sets out with much detail what effort was made to ascertain whether or not such an officer upon whom service could legally be made was within the county and state; and not only this. It sets out, further, that a summons was placed in the hands of the sheriff, and by him returned without service, which return shows that, after due and diligent search, he was unable to find a proper person within the county and state upon whom to make the service. Here is exhibited a considerable degree of diligence, and the result of the effort in that direction is aptly averred. I am of the opinion that the affidavit is quite sufficient to support the order of the judge. In this connection, the question is made by counsel for complainant that the return of the sheriff is insufficient, in that he recites that due and diligent search and inquiry have been made, without setting out the facts as to such search. But it must be remembered that the effort made by the sheriff, and his return, constitute part of the facts only recited in the affidavit to show that the complainant made the requisite search to find a proper person within the county and state upon whom to make service as it respects the defendant company, and that the question as to whether the sheriff made diligent search or not is not a matter to be determined in this cause. The sheriff's authority does not extend beyond the county. But the fact that summons was placed in his hands, and that he returned it without service, is some evidence of diligence, which, together with the other diligence shown, I hold to be sufficient to support the order.

The next question pertains to the sufficiency of the order of publication and of the summons published. The order runs, after reciting the preliminary matters, as follows:

"It is therefore ordered that service of the summons in the above-entitled suit upon said defendants Coos Bay Land Company * * * be made by publication thereof, in the 'Coast Mail,' a newspaper of general circulation, published weekly at Marshfield, Coos county, Oregon, for once a week for six

consecutive weeks, beginning July 27, 1901, and, it appearing that the residence of the president of said defendant Coos Bay Land Company is Seattle, state of Washington, and that the office and principal place of business of said corporation defendant is South Bend, Washington, * * * it is hereby directed that a copy of the summons, together with a copy of the complaint inclosed in an envelope, be deposited in the post office, directed to the Coos Bay Land Company at South Bend, Washington, and likewise a copy of said summons and complaint deposited in the post office and directed to the president of said defendant corporation at Seattle, Washington."

The summons published reads:

"You are hereby notified that you are required to appear in the above-entitled court and answer the complaint filed against you in the above-entitled suit within six weeks from July the 27th, 1901, the first day of publication of this summons, and if you fail so to appear and answer on or before the 7th day of September, 1901, the last day of the time prescribed in the order for publication of this summons, for want thereof plaintiff will take decree against you for the sale of certain lands [describing them] more particularly described in the mortgage in complaint herein set forth, for judgment against said defendant Coos Bay Land Company for $6,024.70 and interest thereon as prayed for in the complaint, and for such other relief as prayed for in the complaint and shall be deemed by the court proper."

The first question presented in this relation is whether the order and published summons contained a proper direction as to the time in which the defendant should appear and answer the complaint. This requires a statement of the provisions of the statute, as it relates to the present matter. Section 56 of Bellinger & Cotton's Compilation provides that:

"When service of summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, * * * and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, the court or judge thereof * * * shall grant an order that the service be made by publication of a summons in either of the following cases:

"(1) When the defendant is a foreign corporation and has property within the state, or the cause of action arose therein.

* * * * * * * * * * *

"(3) When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action.

"The summons published shall contain the name of the court and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication, and the time within which the defendant is required to answer the complaint."

Section 57 provides:

"The order shall direct the publication to be made * * * not less than once a week for six weeks. * * * The court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant at his place of residence. * * * In either case, the defendant shall appear and answer on or before the last day of the time prescribed in the order for publication, and if he does not, judgment may be taken against him for want thereof. The summons shall always specify the time prescribed in the order for publication, and, if published, the date of first publication. The time prescribed in the order shall begin to run from the day of first publication, or of personal service, as herein provided, and the service of such summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid."

It is objected, the defendant having been required to appear and answer on or before the last day of the six weeks, that sufficient time was not given under the statute, and that, therefore, the attempted service was void. It seems to me quite clear that the provision of the statute last above quoted, namely, "The service of such summons shall be deemed complete at the expiration of the time prescribed for publication," sets the matter entirely at rest. Under the general rule for the computation of time, and under the statute itself, it is requisite that the first day be excluded and the last included. It is essential, also, that there be full 42 days of publication in order to subserve the demands of the statute. By excluding the first day of service, namely, the 27th day of July, and including the last day, to wit, the 7th day of September, 1901, there will be full 42 days of service; and the defendant is required to appear and answer on or before the last day of such service. He has the whole of that day in which to make such appearance. By reference to the record it will be seen that a default and decree was not entered until three days thereafter, so that the defendant was not deprived of any of the statutory time in which to appear and answer. It is clear to my mind that the intendment of the statute is that the defendant may be required to appear, as in the present summons specified, on or before the last day of the publication thereof, and that that is a sufficient compliance with an order directing six weeks' service. Almost an identical order and summons was upheld in McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

The next question insisted upon is that the order does not direct a proper mailing of the summons. It is sufficient that the order required it to be mailed to the defendant company at South Bend, Wash. Where the corporation is a nonresident of the state, it is not necessary that the copies be mailed to the president, or secretary, or managing agent, etc., but the requirement of the statute is that it be mailed to the defendant; that is, the company itself. An analogous question has been recently decided in the case of Cohen v. Portland Lodge No. 142, supra. It is there held that a complete method is prescribed for service of summons by publication by sections 56, 57, Bellinger & Cotton's Compilation, and this without reference to the preceding section (55). So I hold here that the summons was properly required to be mailed to the defendant company at South Bend, Wash., and that it was properly so mailed as shown by the return as to the fact.

It is further urged that the summons published does not contain a succinct statement of the relief demanded, as required by statute. But this summons is very much like the one published in the case of George v. Nowlan, 38 Or. 537, 64 Pac. 1; and, without further discussion, that case may be considered as sustaining the validity of the summons in the present case.

Another question insisted upon is as to the sufficiency of the proof of service by publication. The proof was made by P. C. Levar, the foreman of the "Coast Mail," who avers:

"That the notice, of which the one hereto attached is a true and correct copy, was published in said newspaper once a week for six weeks, being published seven times—the first on the 27th day of July, 1901, and the last on the 7th day of August, 1901."

This return was subsequently amended, by leave of the court first had and obtained, namely, on September 12, 1903, so as to read: "The first on the 27th day of July, 1901, and the last on the 7th day of September, 1901." The application for leave to amend the return was made without notice to the defendant, and the order does not specify that the amended return should be filed nunc pro tunc. The real question is whether or not this amended return, made under the conditions recited, is sufficient. The question is not a new one in this court, as it was decided by Judge Deady in 1879, in the case of Rickards v. Ladd, 6 Sawy. 40, Fed. Cas. No. 11,804. That case involved an application, made without notice to the defendant, to amend a return nearly 11 years after the original was filed; and the court held that it was proper to permit the amendment to be made. The jurisdiction of the court to enter the decree is dependent upon the fact of service, and not upon whether the return shows proper service. If service has in reality been had, then jurisdiction attaches. It may be that the return is insufficient to show the fact of proper service, and, while the record remains in that condition, it will not support the judgment. But, whenever it transpires that the return has been so corrected, by proper authority, as to show adequate service, then the record will be sufficient in any collateral proceeding. These principles were announced by Judge Deady in the case above referred to, where, after a review of the authorities, he said:

"But the general rule seems to be that the court has the discretion to allow a return to be amended in all cases, with or without notice, but that such amended return cannot affect the right of third persons acquired in good faith prior thereto; and, whenever an amendment is so made, it cannot be questioned collaterally by the parties to the suit or those claiming under them as privies."

In further support of this view, see Weaver v. Southern Oregon Co., 30 Or. 348, 48 Pac. 167; Burr v. Seymour, 43 Minn. 401, 45 N. W. 715, 19 Am. St. Rep. 245; Frisk et al. v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198; Herman v. Santee et al., 37 Pac. 509, 103 Cal. 519, 52 Am. St. Rep. 145.

In the present case the amendment was permitted prior to the time when the Coos Bay Land Company conveyed to the complainant, so that the complainant, being privy to the land company, is bound by the rule cited, that the amendment can be made without notice.

It is suggested that the amended return is inoperative because it was not required to be filed nunc pro tunc; but I am unwilling to hold that such is the case. It would have been regular, no doubt, that the order should have so directed; but the fact remains that the return was corrected by leave of the court. It was filed in the cause, and is now a part of the record, and there appears to be no good reason why it may not relate back in support of the decree, with like force as if the regular nunc pro tunc order had been entered.

This disposes of all the objections made to the first further and separate answer; and, as it contains matter defensive to the bill of complaint, it will be allowed to stand.

As it relates to the attachment action, the record in which is complained of, some of the same questions just determined are again pre-

sented, and as to these it is unnecessary further to allude. It is the particular purpose of the bill of complaint to show that the institution of the action was a fraudulent proceeding, which was without any legal foundation for its support. Reference to the complaint set out in both the bill of complaint and the second separate defense proves that it was based upon a promissory note, executed by the Coos Bay Land Company to Werley, and that the complaint was amply sufficient to support the action. From the defensive matter interposed, it further appears that the note was the same as sued on in the foreclosure suit; the plaintiff in the action giving credit for what was realized from the premises foreclosed upon. This constitutes all there is of the fraud charged by the bill of complaint herein.

The question is urged: Could Werley legally sue upon the note to recover the balance due, or was he required to sue upon the deficiency decree left unsatisfied in the foreclosure suit? Werley certainly was guilty of no fraud in bringing the action as he did. If his demand, to wit, the note, had been satisfied or superseded by the decree in the foreclosure suit, that was a defense which should have been interposed in the action. I do not say that the note was so satisfied or superseded—as to this I do not wish to be understood as deciding—but, if it was, the fact should have been pleaded in the original action. There was ample opportunity for the Coos Bay Land Company to have so pleaded it, and, having suffered default, it is now beyond the power of a court of equity to grant relief. The second defense, therefore, should also be allowed to stand.

The crucial point of the third defense is that the defendant Werley is in possession. If this be so, he has a complete defense. Moore v. Shofner, 40 Or. 488, 67 Pac. 511. The matter pleaded, and the manner in which it is set out, is sufficient to show that the defendant is in actual possession, and the answer is therefore pertinent and relevant.

One other question submitted is that the attachment was prematurely issued. It is only necessary that the summons should first issue, not that it should be first served and filed, and the statute was here complied with. White v. Johnson, 27 Or. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Both the motion to strike and for judgment on the pleadings will therefore be denied, and such will be the order of the court.

THE SANTONA.

CLYDE COMMERCIAL STEAMSHIPS, Limited, v. UNITED STATES SHIPPING CO.

(District Court, S. D. New York. April 9, 1907.)

1. SHIPPING—TIME CHARTER—LIABILITY FOR CARGO SHORTAGE.

The "government form" of time charter party constitutes a hiring of the capacity of the vessel for carrying cargo and earning freight moneys and for the use of the vessel, master, and crew for the advancement of the charterers' gain. The ship remains the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel, but for all matters relating to the receipt and delivery of cargo, and to those

earnings of the vessel which flow into the pockets of the charterers, the crew are the servants of the charterers, and claims paid by the charterers for short delivery of cargo, arising from an error of the mate or some other member of the crew in tallying cargo, cannot be deducted from the hire.

2. SAME—CONSTRUCTION OF CHARTER—PAY OF WINCHMEN.

Under a provision of a time charter requiring the owners to provide men to work the winches both day and night as required, the ship's duty is fulfilled by providing sober and competent winchmen from among the crew, and, where the charterers for their own convenience employ shore winchmen, the wages of such winchmen cannot be deducted from the charter hire.

3. SAME—DEDUCTION FROM HIRE—TIME IN QUARANTINE.

Where a time charter party provided that the hire was to be paid after the vessel was placed at the charterers' disposal, and to continue until her redelivery, and provision was made under the usual breakdown clause that hire should be suspended in certain instances, among which time lost in quarantine was not included, a further provision that restraint of princes, peoples, etc., "shall excuse compliance with this charter," does not authorize a deduction from the charter hire while the vessel lay in quarantine for a period of 36 hours, where the detention was not shown to have been due to any violation by the owner of other provisions of the charter.

4. SAME.

Where it is specifically agreed by charter party that hire shall be suspended in certain instances, it cannot be suspended by implication for reasons not assigned in the contract.

In Admiralty. Suit to recover charter hire.

Convers & Kirlin, for libelant.

Wing, Putnam & Burlingham, for respondent.

HOUGH, District Judge. The libelants, having chartered their steamship Santona to the respondents for the term of four months, bring this libel for charter hire, and respondents seek to set off against the amount admittedly due certain items of alleged damage hereafter specifically to be considered. The time charter by which the rights of the parties must be measured contains (with differences material to but one of the set-offs advanced) all the clauses printed at length in Golcar S. S. Co. v. Tweedie Trading Co. (D. C.) 146 Fed. 564. The document is, indeed, the widely known "Government Form" of time charter, and declares in limine that the "owners agree to let and the said charterers agree to hire" the steamship for the agreed term, from the time of her "delivery" to the charterers. The charter here presented also substantially contains the clauses recited in the Endsleigh (D. C.) 124 Fed. 858.

1. The respondent issued bills of lading for certain cargo, which cargo turned out short at the port of delivery. Such bills of lading were issued "in pursuance of the provisions" of the charter party in suit, and were based, as to the quantity recited therein, upon the mate's tallies. Having paid the consignees' claims for shortage, respondent seeks to set off the amount thereof against the charter hire. It will be assumed arguendo that the tallies were incorrect, and the error that of the mate or some other member of the crew.

The case of the Golcar S. S. Co., supra, is decisively in favor of the shipowner on the question of shortage. In the result of that decision

I concur, but am unable to accept all of the conclusions of law there stated. The rule of law separating the letting of a ship from a contract for her services has been too often stated to admit of doubt. I perceive no difference in meaning between the language of Lord Esher, declaring that the letting or demise of a ship is a parting with the whole possession and control thereof, and the somewhat fuller phrase of Justice Clifford, stating the test to be whether the charterer assumes the exclusive possession, command, and navigation of the vessel. Baumvoll v. Furness, 1 Q. B. (1892) 258, A. C. (1893) 8; Reed v. United States, 11 Wall. 591, 20 L. Ed. 220; U. S. v. Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403—concurred in by Auten v. Bennett, 183 N. Y. 496, 76 N. E. 609. Cf. The Del Norte (D. C.) 111 Fed. 542; The City of Everett (D. C.) 107 Fed. 964, reversed on another point, 115 Fed. 669, 53 C. C. A. 301; Bramble v. Culmer, 78 Fed. 497, 24 C. C. A. 182.

Nor is there any difficulty in formulating the consequences flowing from a letting of the ship, as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee; whereas, in the latter, the relation is that of shipper and carrier. Carver (4th Ed.) § 112; The Barnstable, 181 U. S. 469, 21 Sup. Ct. 684, 45 L. Ed. 954. The difficulty lies, not in the statement of the rule or the recognition of the consequences thereof, but in its application to the infinitely varying circumstances of contract between shipowners and charterers. It appears to me that the best test of the applicability of the rule to any given state of facts is to inquire whose were the agents who wrought the injury out of which the controversy in hand arose. It is the same inquiry put by Lord Esher, in 1 Q. B. 258: "When is the captain the owner's captain?" That question, as applied to this case, is: Was the mate, when tallying cargo, the owner's mate? And the answer to that question must be ascertained by considering the provisions of the charter party affecting the receipt, carriage, and delivery of cargo as between owner and charterer.

Under the very ordinary form of time charter involved in this cause, it shocks knowledge common to all men acquainted with maritime business to say that the owner has surrendered the possession or control or command or navigation of his ship. But he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, master, and crew, for the advancement of the charterers' gains. It follows that, when the mate was tallying cargo, he was the charterer's mate, and the set-offs for shortage claimed by the respondent are disallowed.

2. It appears that, while the Santona was at Colon, the winches were operated by shore employés furnished and paid by the charterer. By the charter party, the owners agreed "to provide men to work" the winches "both day and night as required." See section 24 of Charter Party, quoted in Golcar S. S. Co. v. Tweedie Trading Co. (D. C.) 146 Fed. 565. The crew were competent for this purpose, and the master was ready to furnish the necessary winchmen. The stevedores of Colon were negroes, and it was preferred by the charterer, and acquiesced in by the captain, not to put the seamen at the winches and under the orders of foremen stevedores of a different color. I think the ship fulfilled her entire duty in providing sober and competent winchmen from among the crew, and I see no reason to depart from the opinion expressed in British Maritime Trust v. Munson Line (D. C.) 149 Fed. 533. The claim for winchmen's wages is disallowed.

3. The Santona left Colon for Daiquiri, and thence sailed to Baltimore. On arrival at that port, two cases of fever were found on board. The vessel was quarantined 36 hours, and the fever diagnosed as malarial. She was then discharged. On this point, the Santona charter party differs from that set forth in the case of the Golcar S. S. Co., supra. It is provided by clause 17 that "restraint of princes, people," etc., "shall excuse a compliance with this charter." And it is further provided:

"That whilst the steamer is in Central American ports the crew shall not be allowed on shore, and the steamer shall be liable for any delay and expense of quarantine and all other detention which may arise from a violation of this clause."

While the Santona was at Colon, the master posted notices forbidding the seamen to go on shore, and seems to have taken no other or more effective measures to prevent such action on their part. I do not think that this was a compliance with the charter requirements; but there is no evidence showing, or tending to show, that the quarantine detention at Baltimore was caused by this omission of the captain. It was held, in The Progreso, 50 Fed. 835, 2 C. C. A. 45, that enforced obedience to lawful quarantine regulations is a restraint proceeding from the people. And it must follow from that decision that during the 36 hours of lawful detention at Baltimore "compliance" with the Santona's charter party was "excused." But I do not think that it follows that the clause regarding restraints of peoples suspends the payment of charter hire during the ordinary course of a voyage undertaken for the charterer's gain, when some period of quarantine was ordinarily to be expected. It is specifically provided that the hire is to be paid after the vessel is "placed at charterer's disposal," and "to continue until her" redelivery. Deductions of hire are specifically provided for in the usual breakdown clause, and by the specific quarantine clause above quoted. It was held by a former judge of this court, sitting as arbitrator in The Steamship Hackney,[1] that, where it is specifically agreed by charter party that hire shall be suspended in certain instances, it cannot be suspended by

[1] See note at end of case.

implication, for reasons not assigned in the contract, and in that ruling I entirely concur. The set-off asked for under this head is exactly the charter rate for the period of 36 hours. No damages to the charterer are shown by the detention, and no connection between the detention and clause 21 of the charter party. As a claim for hire deduction, it is disallowed. Tweedie Trading Co. v. Emery Co. (D. C.) 143 Fed. 144, as affirmed in the Court of Appeals on March 26, 1907 (154 Fed. ——), cannot be used as authority for respondent's interpretation of the "restraint" clause of the charter party. The decision of the higher court was put entirely on the breakdown clause.

Decree for libelant, with interest and costs.

NOTE.—Following is the opinion of Ex-United States Judge Wm. G. Choate, as arbitrator, referred to by Judge Hough:

The matter in controversy arises on a time charter of the British steamship Hackney, entered into in New York in April, 1901. The charter was for six calendar months at the rate of £1,350 per month. The charterer has deducted the hire of the vessel for 21 days, and by agreement the amount has been deposited in a bank at Hamburg, subject to the decision in this matter. The charter recites that the vessel is tight, staunch, strong, and every way fitted for the service (and with full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage), and provides that she is to be so maintained during the continuance of the charter party to be employed in such lawful trades between specified ports as charterers or their agents shall direct, on the following conditions:

"(1) That the owners shall provide and pay for all the provisions and wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crews, shall pay for the insurance of the vessel, for all engine room stores and deck stores and maintain her in a thoroughly efficient state in hull and machinery for the service.

"(2) That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commissions and all other charges whatsoever, except those before stated, and shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall on expiration of this charter party pay for all coal left in the bunkers, each at the current market price at the respective ports, when she is delivered to them.

"(3) That the charterers shall pay for the use and hire of said vessel at the rate of £1,350, say—thirteen hundred and fifty pounds—Br. Stg. per calendar month, commencing on the day of delivery and at and after the same rates for any part of a month; hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) at a safe port, etc.

* * * * * * * * * *

"(6) That the whole reach, burthen and passenger accommodation of the ship (not being more than she can reasonably stow and carry) shall be at the charterer's disposal, reserving only proper and sufficient space for ships, officers, crew, tackle, apparel, furniture, provisions and stores.

"(7) The captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with ship's crew, tackle and boats.

"(8) That the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency or other arrangement, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or in otherwise complying with the same.

"(9) That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owner shall on receiving particulars of the complaint investigate the same, and if necessary make a change in the appointments.

* * * * * * * * * *

"(12) That in the event of loss of time from deficiency of men or stores, break-down of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service; and should she in consequence put into any other port other than that to which she is bound, the port charges and pilotages at such port shall be borne by the steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterer's risk and expense.

"(13) That should vessel be lost any hire paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers, with interest from date of loss. The act of God, the queen's enemies, fire, restraint of princes, rulers and people, and all and other dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, throughout the charter party always excepted."

* * * * * * * * * * *

On November 20th, the vessel sailed from New Orleans with a cargo of phosphate, cotton, cotton seed oil, and staves for Rotterdam and Nantes, via Norfolk. On November 28th she arrived at Norfolk and took on coal. On November 30th she passed out to sea. On December 3d, at 5:30 a. m., fire was discovered in No. 2 hold, in which was stowed cotton. Attempt was made to put out the fire by injecting steam into No. 2 hold through a hole cut for that purpose in the bulkhead separating that hold from the stokehold, and steam was so injected for 49 or 50 hours. On the morning of December 5th, the fire not being extinguished, the vessel's course was changed for Halifax, then about 300 miles distant. The captain's purpose was to proceed towards Halifax, and, if he succeeding in putting out the fire before reaching that port, to resume his voyage, otherwise to put into that port for help. When she got near Halifax, the fire was not subdued, and she went into that port, arriving on December 5th about 4 in the afternoon. At Halifax, by the aid of outside fire apparatus and the vessel's own steam, attempts were made unsuccessfully to subdue the fire, till finally it was extinguished by flooding No. 2 hold with water. The cotton and the oil were removed, and part of it remained at Halifax to be forwarded. Some bales of cotton were destroyed, and many were injured by fire and water. The effect of the fire on the vessel was that the bulkheads were buckled by the heat, and there was loss of tarpaulins, cordage, and some other articles, and by the strain to which the boilers were put in the efforts to put out the fire many of the boiler tubes leaked. Slight repairs were made to the engines and boilers at Halifax, while work was going on in discharging and reloading the cargo, and on December 19th the ship was ready to proceed on her voyage.

While the vessel was at Halifax, some of the ship's coals stowed in the between decks over No. 2 hold got on fire, as did also a wooden bulkhead behind which the coal was stowed. This fire was easily extinguished and the coal removed to the ship's bunkers. A difficulty arose, however, when the ship was ready for sea, as to the disbursing of the ship at Halifax. The charterer took the ground that it was the duty of the owners to supply funds for this purpose. The owners refused to do so, and claimed that under the charter party it was for the charterer to supply the funds. Neither party would give way, and on the 25th of December the vessel, cargo, and freight were libeled in the Admiralty Court for necessaries furnished the ship by parties in Halifax who had paid the expenses there and who were also the general agents of the charterer. The ship, being arrested, was released on bond given by or on behalf of the owners, and she then proceeded. In the following April the Admiralty Court gave a decree for the libelants, which was satisfied by the owners. The loss being clearly a general average loss, an adjustment took place after the arrival of the ship at Rotterdam. In accordance with the York-Antwerp rules, the wages and provisions during the stay at Halifax were allowed to the owners in the general average adjustment.

The principal question is whether the claim of the charterer that the hire of the vessel ceased during this deviation from the voyage, in going into and staying at the port of Halifax for the purpose of putting out the fire, should be allowed.

It is claimed on behalf of the charterer that the case comes within the twelfth condition of the charter party, as a loss of time from damage preventing the working of the vessel for more than 24 hours. I think, however, it is clear that that clause could come into operation only in the event of damage to the ship. It is very true, as pointed out by the learned counsel for the charterer, that it was necessary to put into a port of refuge for the safety of the ship, as well as the cargo, and that, if she had proceeded on her voyage, it is extremely probable, and may be assumed as a fact, that both ship and cargo would have been totally destroyed by fire at sea. Yet it clearly appears by the testimony that the ship was not so damaged by or in consequence of the fire that she was not at all times well fitted to continue the voyage. The slight repairs made at Halifax could safely have been postponed till she reached Rotterdam. The trifling nature of the repairs to the boilers is shown by the fact that they cost only $36. Nor is it shown that these repairs, if necessarily made there, would have required more than 24 hours nor that the ship was delayed at all thereby. The parties having in the charter party specified in what cases of disaster allowance shall be made of time lost to the charterer, the case must be fairly brought within that specification, which cannot be enlarged by implication or on a theory that a case not so specified is within its reason. Moreover, this was clearly a case of accident to the cargo, loss of time from which is by the same clause of the charter party at the risk of the charterer.

While it is possible, of course, that if the attention of the parties had been called to a case like this of threatened damage to the ship by fire in the cargo, making necessary the bearing off to a port of refuge, they might have expressly provided for it by throwing the loss on the ship or by dividing it between ship and cargo; yet, they have not done so, and they must both stand on the contract they have made, which makes damage to the ship causing delay a requisite for this time allowance. And in this respect the case differs entirely from that of The Yesso, decided by Mr. Wm. Allen Butler as arbitrator. There the fire not only attacked the cargo, but actually extended to the ship, as he expressly finds, so as to disable her from prosecuting her voyage. The decision of the Admiralty Court at Halifax has no bearing on this question. The learned judge simply held that the libelants had supplied necessaries to the vessel under circumstances which by the local law gave them a lien on the ship. He apparently takes pains to avoid determining the question which party was under obligation by the charter party to furnish the funds to disburse the ship. If the ship was bound for the necessaries furnished that was enough for the decision of the case before him, and he decided nothing else.

Nor is there any force in the point made on behalf of the charterer that by finally satisfying the decree or by giving bond for the release of the ship the owners admitted their liability to pay the port charges, etc., or that it was a case obliging them to do so under the twelfth clause of the charter party. They had the right to protect their property without being held to such consequences of their acts in doing so; and, the decree having gone against the ship, their satisfaction of the decree has no force as an admission of any liability to the charterer under this charter party.

Nor does the exception of "fire" in the thirteenth clause aid the charterer in this case. This exception is coupled with those of the act of God, restraint of princes, etc., which are the usual exceptions inserted in bills of lading for the protection of the carrier. In some charter parties it is provided that the bills of lading shall be issued with those exceptions, and this may be their intended application in this contract as a security to the owners, additional to the guaranty contained in the instrument. In this charter these exceptions are, however, declared to extend "throughout the charter party." It may be that this language is strong enough to extend their operation to any liability or obligation of either party to which they may be reasonably applied. It is obvious, however, there must be some limit on their application, or they would in effect annul the express terms of the contract, and be inconsistent with the clear intention of the parties. It is not necessary to determine to what particular cases these exceptions will apply beyond the usual case of protection to the shipowner, if any. The question is: Do they have the effect of enlarging the specific cases in which allowance is made for lost time to the charterer by the twelfth clause, so as to bring the case of fire in the cargo causing the delay

within that specification. I think it is clear that they do not. That specification, which is very clear in its terms, cannot be modified by other doubtful clauses in the contract nor by any other provision therein, unless the intent so to modify is clear. And it surely is not so here, where the very case of accident to the cargo (and fire is such an accident) is expressly declared to be at the risk of the charterer. Whatever application they may otherwise have, they cannot reasonably be applied to alter or annul what is elsewhere in the contract expressly agreed to.

It is, however, claimed for the charterer that it was the fault of the owners alone that the ship was delayed from the 20th to the 25th of December for want of funds, and that the charterer should be allowed for these five days. On this point, however, my opinion is that by the terms of the charter party the charterer undertook to pay in the first instance all charges except those enumerated as belonging to the owners. This enumeration does not include general average expenses in a port of refuge. And there is no authority cited to the effect that as between owners and charterer the former is bound to bear these expenses in the first instance. Therefore this claim is disallowed. If by the proper application of the principles of general average any of such charges would ultimately fall on other interests, this does not affect the obligation so imposed on the charterer.

There remains still a question of equitable set-off or allowance to the charterer by reason of the fact that the owners of this ship have received in the general average adjustment a certain amount for wages and provisions during the detention at Halifax which, as between them and the charterer, they were bound to supply to the ship by the terms of the charter party as part consideration for the stipulated hire of the vessel. There is a certain plausibility in this claim, and yet I think it is not well founded. The precise question arose in the case of Howden v. Steamship Nutfield Co., Lim., 3 Com. Cases, p. 56, and was decided adversely to the charterer by Mr. Justice Kennedy. The charter party in that case provided that general average should be according to York-Antwerp rules, but I do not perceive that that circumstance is material. In every maritime adventure the parties must be deemed to contemplate as possible a general average disaster, and the York-Antwerp rules have become so generally adopted that it was fairly within the liberty given to the charterer to issue bills of lading, that they should be made subject to those rules, and within the intention of the parties that in case of a general average disaster the adjustment might be in accordance with those rules.

While it may properly be assumed that, in fixing the rate of hire in a charter party by the terms of which the owners were to pay for wages and provisions, allowance was made for these items of expense to the owner in the calculation of the proper rate of hire, yet, as pointed out by Mr. Justice Kennedy, it cannot be assumed that some certain part of the hire exactly equivalent in amount to such expense is to be paid for that particular purpose, or, as the learned justice says, the court "cannot speculatively appropriate a part of the sum paid by the plaintiffs (charterers) for the hire of the ship to the cost of wages and provisions." Various inducements and considerations may have affected the rate of hire—the market for freights, the abundant or the short supply of ships adapted to a particular trade, many general trade conditions that may raise or depress the rates of hire—and the calculation would be disturbed by the difference in the cost of provisions in different parts of the world. In making such a contract, the parties must be deemed also to have known and foreseen that, if a general average loss should happen, the owners who actually paid for the wages and provisions might be allowed for these items in the general average adjustment, and it was open to the parties, if they wished to do so, to provide that in such case there should be an equivalent or some specified allowance made to the charterers. Not having done so, and having stipulated for the hire running on without interruption in such a case, it can hardly be said that an intention to allow such a deduction from the hire should be implied from the fact that as the result of the disaster the owner may make a profit. The introduction of such a provision into charter parties would be productive of confusion and inconvenience especially where, as here, the hire is to be paid at stated times, as monthly, because if such disaster should happen the exact amount to be paid could only be determined after

long delay, and it may well be that as such profit to the owner would ordinarily be small, and possibly might not come to him at all, it was not thought worth while to introduce this uncertain element into the contract. The case last cited is not only a decision of great authority, but, on the whole, I think it is founded in reason, and, so far as it is in conflict with the later decision of Mr. Walton, now Mr. Justice Walton, in determining the general average adjustment in the case of the steamship Doratea, I feel bound to follow it. The opinion in the latter case, however, seems to assume that in that particular case the cost of wages and provisions as part of the hire of the vessel was or could be apportioned with certainty. But whether this was so or not I think the Howden Case gives the better and the sounder rule.

For these reasons, I am of opinion that the owners of the Hackney, and not the charterers, are entitled to the fund deposited in the Hamburg branch of the German Bank.

As the question involved admitted of some doubt, and the parties have acted in good faith in making and prosecuting their respective claims, I think each party should bear his own costs and expenses, and that the fee of the arbitrator, which is fixed at $500, should be paid one-half by each party. And I accordingly award and determine, under and by virtue of the submission to arbitration in said matter dated January 27 and November, 1902, signed by Eeles, Ruston & McMullen and by H. Vogemann, as follows:

1. That the sum of £891 13s., now on deposit in the Hamburg branch of the German Bank to the joint credit of H. Vogemann and Eeles, Ruston & McMullen, together with all interest earned and due thereon, be paid to the said Eeles, Ruston & McMullen, the owners of the Hackney, and that the said H. Vogemann give an order to that effect to said bank or to said owners.

2. That each party to this arbitration bear his own costs and expenses, and that each of said parties pay one-half of the fee of the arbitrator, which is hereby fixed at $500.

In witness whereof, I have subscribed this decision and award in duplicate at the city of New York this 5th day of August, in the year 1903.

[Signed] Wm. G. Choate.

PECK v. UNITED STATES.

(Circuit Court, S. D. New York. April 1, 1907.)

1. SHIPPING—CHARTER PARTY—TIME FOR LOADING.

Where a charter party fixes no time for the loading by the shipper to begin or end, the law will presume that a reasonable time under all the circumstances known to the parties or presumed to have been within their contemplation was intended, and a provision for such reasonable time will be considered as agreed to by the parties.

2. SAME—CONSIGNMENT OF VESSEL TO THIRD PARTY FOR LOADING.

In the absence of some agreement to the contrary between owner and charterer or some evidence showing a contrary intent, the party who is to load the vessel will be deemed the agent of the charterer, and, when the charterer consigns the vessel to another for loading, it makes itself responsible for the acts or omissions of such consignee the same as though it had directed the vessel consigned to itself at the same place.

3. SAME—DEMURRAGE.

The United States chartered a vessel to carry a cargo of about 2,000 tons of bituminous coal from Philadelphia to a Philippine port, to be loaded in January or February. The vessel was to be consigned for loading to a contractor for supplying the coal to be designated after she was ready to load. The contract contained no provision as to time for loading or for demurrage for delay therein but did in respect to her discharging, which was to be done by the government at a specified rate, subject to a stated demurrage for delay. The vessel was delayed in fitting until February 18th, on which date the government was notified of her readiness to load. On the 20th the government notified a contractor with which it had pre-

viously contracted for a quantity of dry coal to load the ship, and on the 24th directed the vessel to report to such contractor for loading, but, owing to its inability to obtain shipments of coal by rail, the contractor could not obtain dry coal sufficient to load the cargo until March 11th. *Held*, that the inability of the contractor to obtain shipment to its docks sooner was not a cause which exonerated it or the government, whose agent it was, from liability for the delay in loading, but that the government was entitled to a reasonable time after notice of the readiness of the vessel in which to designate the contractor who was to load, and that the six days taken was not unreasonable; that the contractor was also entitled to a reasonable time after notice to it in which to supply the cargo; and that under all the circumstances the vessel owners were not entitled to recover for the delay prior to February 28th, but for the subsequent delay they were entitled to recover of the government damages in the nature of demurrage.

[Ed. Note.—Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

Action for Demurrage.

This is an action or proceeding on petition filed by Arza C. Peck and John A. Peck, doing business under the firm name of De Groot & Peck, to obtain judgment against the United States for the sum of $1,600 for damages, commonly denominated "demurrage," which petitioner claims the defendant became liable to pay by reason of its unreasonable and unwarranted delay in loading, or procuring to be loaded, the petitioner's American sailing ship Luzon with a cargo of coal at Philadelphia, Pa., as it was its duty and obligation to do under the provisions of a certain charter party or contract. The petition is filed under and pursuant to the provisions of an act of the Congress of the United States known as the "Tucker Act." Arza C. Peck died after the petition was filed, and John A. Peck is the surviving partner.

James T. Kilbreth, for petitioner.

Henry L. Stimson, U. S. Atty., and Winfred T. Denison and Francis W. Bird, Asst. U. S. Attys.

RAY, District Judge. About December 14, 1904, the petitioners made a proposal in writing to the United States to transport for it 1,900 to 2,000 tons of bituminous coal from Philadelphia, Pa., to Sangley Point, Philippine Islands, which, after some correspondence by letter and telegrams, the material parts of which will be stated, was accepted, as modified, January 3, 1905.

The proposal was, further:

"Shipment of the entire quantity made in one shipment. Shipments to commence January or February loading. Each ship to be consigned to the contractor for supplying the coal at point of loading, and when loaded to sail immediately."

On arrival at destination the ship was to report to the commandant and be subject to his orders in matter of discharge of cargo, "all expenses of loading to be borne by contractor," the government to discharge cargo at its expense. Then followed this provision as to demurrage:

"(5) Cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to wharf, and six hundred (600) tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel, for any detention caused by the Government

(through fault of its own), not discharging at the above named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo shall be given to the commandant before lay days commence, and further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving.

* * * * * * * * * *

"(9) Any question of demurrage to be settled at Washington."

Also the following:

"(12) Each ship loading under the contract to be nominated at least five (5) days prior to reporting to load."

The other provisions of the proposal have no bearing on the questions at issue. There was no provision as to demurrage or damage for delay in loading at the place of shipment. December 16, 1904, the government offered to accept on condition that vessel might be loaded at four different points named. This was rejected same day. December 17th the government inquired: "What is position of Luzon? when will she be ready to load if accepted?" The reply was: "Ship Luzon can be ready for January loading." The same day the government wrote:

"(2) When the bureau wired you yesterday that it would accept the ship, conditioned upon loading at other points than Philadelphia, the bureau was aware of a decided shortage of coal at Philadelphia, and had already ordered a 5,000 ton ship loaded at that place. This ship has been withdrawn however, and the Bureau will arrange to load the Luzon.

"(3) When the ship is about ready to report for cargo, please wire the bureau, and you will be informed as to her consignment for loading."

December 19th De Groot & Peck wrote the government:

"The Luzon is now at Philadelphia, and before she will be ready to load we have to put a new main water tank in, which the tank people say will take say three to four weeks to do; hence our proposal was January or February loading. It may be possible to make January loading, but, on reflection we doubt if she could do it. Please advise us, should Luzon be unable to make January loading, would February loading be satisfactory to you as per our proposals? As you know, vessels leaving here during February will reach the Phil. Is. as soon as those leaving here in January."

The answer of December 20th said:

"(2) The bureau's principal desire with reference to this ship is to get her with her cargo to Sangley Point at the earliest practicable date, and the bureau hopes that she will be put in a position to load as quickly as possible. If not ready for January loading, she will be accepted for February loading."

De Groot & Peck replied December 21st as follows:

"We are in receipt of your letter of Dec. 20, 1904, and refer to #103,906, in which you accept our ship Luzon, under our proposal to load coal at Philadelphia for Manila, Phil. Is., for January or February loading. We will proceed, at once, to put the ship in condition to carry out this proposal, and will report her ready as soon as possible. Will it be necessary for us to sign an additional contract, or is our proposal sufficient?"

The government replied that it had submitted requisition for the proposed service containing all the conditions agreed upon; that same would be submitted to them by purchasing pay officer of the Navy at

New York "for formal acceptance, and, if acceptable, you will sign the same, stating price and return it to that office. This accomplishes the contract."

The requisition containing the conditions, etc., is dated January 3, 1905, and is signed by L. G. Boggs, pay director United States Navy. This contained the following:

"(1) Transportation of from 1,900 to 2,000 tons bituminous coal from Philadelphia, Pa., to the U. S. Naval Coal Depot, Sangley Point, Manila Bay, Philippine Islands.

"(2) Shipment to be made in American sailing ship 'Luzon' (net registered tonnage 1,339 tons).

"(3) Shipment to be made during the month of January or February, 1905; ship to be consigned to the contractor for supplying coal at the point of loading (to be hereafter named), and when loaded to sail immediately. On arrival at Cavite to report to the commandant at that place, and be subject to his orders in the matter of discharge.

"(4) All expenses of loading to be borne by the contractors; the government discharges cargo at its expense.

"(5) The government guaranties but twenty (20) feet of water at coaling wharf, Sangley Point.

"(6) Cargo to be discharged at the rate of (400) four hundred tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to wharf, and (600) six hundred tons per day at wharf, Sundays and legal holidays excepted in each instance, or the government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel, for any detention caused by the government (through fault of its own) not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo shall be given to the commandant before lay days commence, and, further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving.

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"(10) Any question of demurrage to be settled at Washington."

There was no other reference to demurrage or responsibility for delays at any point.

The contract, therefore, as far as material, stood as follows: (1) De Groot & Peck were to transport from Philadelphia to Manila Bay, Philippine Islands, for the government, at price named, from 1,900 to 2,000 tons of bituminous coal in ship Luzon. (2) The shipment was to be made at Philadelphia, Pa., at some time during the months of January or February, 1905, by some contractor with the government for supplying coal, which contractor was to bear all the expenses of loading. (3) The government was to discharge the cargo at Manila Bay at its own expense at a certain rate, and within a stated time or pay demurrage at the rate of "eight cents per ton per day, * * * any question of demurrage to be settled at Washington." (4) By implication, and as drawn from the prior correspondence, De Groot & Peck were to report when their ship Luzon was ready for loading, and the government was then to name the party or contractor at Philadelphia who would load the vessel, thereupon the Luzon was to proceed to the loading point designated, receive the coal, and proceed on her voyage. The obligations of the parties under such an

indefinite contract as to time and place of loading will be considered later. February 1, 1905, De Groot & Peck wrote:

"Will you please inform us who is to load us at Philadelphia, or who will furnish the coal. We ask so as to arrange regarding the ballast that is in the ship, and to provide stiffening, if necessary."

The government telegraphed February 2d:

"Necessary to know when Luzon will be ready to load before determining who will load her please wire information."

The answer, dated February 2d, was:

"The Luzon now has 100 tons stone ballast in, and she cannot shift without about this weight. Our object in writing was to arrange regarding the ballast so as to be ready when she moves to the coal dock, and avoid delay. We have the new tank on board, and the men are putting it up and together, which will take this week and probably all of next week, so as to say just when Luzon will be ready is a little hard. The weather has been very much against us."

February 3d the government wrote De Groot & Peck as follows:

"(2) The bureau will endeavor to have the Luzon loaded by the Berwind-White Coal Mining Co., at the Greenwich Piers, Philadelphia. Please inform the bureau as soon as you know definitely the date she will be ready to report for loading."

February 4th the government wrote Berwind-White Coal Mining Company, which Company was to do the loading, as follows:

"(1) The bureau has entered into contract with Messrs. De Groot & Peck, of New York, to transport about 2,000 tons best quality Standard Eureka coal from Philadelphia to the coaling station Sangley Point, P. I., per American sailing ship Luzon.

"(2) This vessel will soon report for cargo, though the exact date is not known. You will be duly advised as soon as date is fixed.

"(3) Please be prepared to give prompt dispatch, and, if any unforeseen circumstances occur to prevent this, notify the bureau.

"(4) Please consign cargo to commandant, Naval Station, Cavite, P. I."

That company accepted the order as follows:

"We are in receipt of your favor of the 4th inst., and note that the bureau has chartered the sailing ship Luzon to load about 2,000 tons Standard Eureka coal at Philadelphia for Sangley Point, P. I. We also note that the vessel will soon report for cargo, but that you will advise us exact date. We will, as you request, notify the bureau should circumstances be such that we cannot give the vessel prompt dispatch. We will consign the cargo to the commandant, Naval Station, Cavite, P. I."

February 18th, two weeks later, De Groot & Peck wrote:

"The ship Luzon under contract to you, to load coal at Philadelphia for Manila, Phil. Is., is now at pier No. 30 South Wharf, Delaware avenue, Philadelphia, and is ready for cargo."

No reply being received, they wrote again February 23d:

"We wrote you on the 18th inst., tendering ship Luzon you, now at Philadelphia, as ready for cargo. As we have no acknowledgment from you of its receipt, and thinking it may have miscarried, we write to ask if you have received this letter, as you should have received it on the 20th inst."

But February 20th the government had telegraphed Berwind-White Coal Mining Company as follows:

"Please load Luzon. Now ready. Do not waive dry coal."

February 21st that company replied as follows:

"We beg to acknowledge receipt of your telegram, and confirmation of Feb. 20th, as follows: 'Please load Luzon, now ready. Do not waive dry coal.'"

February 24th the Government replied to De Groot & Peck.

"Consign Luzon Berwind-White Coal Mining Co., Greenwich Piers, Philadelphia, for loading. They have been notified."

March 8th De Groot & Peck wrote:

"According to your telegraphic instructions, Captain Pach of our ship Luzon has been applying to the Berwind-White Coal Mining Co. at Philadelphia regarding the loading of his vessel, under contract to you. This morning we received the following word from Captain Pach: 'That the Berwind-White Coal Co. have received no instructions to load ship Luzon.' Our vessel is and has been ready for loading since we tendered her to you on the 18th of February, 1905."

March 9th the government telegraphed the Berwind-White Company, as follows:

"Luzon ready to load since February eighteenth. Why do you not load her?"

The same day, March 9th, the government wrote De Groot & Peck as follows:

"(1) The bureau is in receipt of your letter of the 8th instant stating that the ship Luzon is now ready to load, and has been since the 18th of February; and that according to telegraphic information from Captain Pach, of the ship, the Berwind-White Coal Mining Co., at Philadelphia, have received no instructions to load her.

"(2) On February 4th the bureau informed the Berwind-White Company of the charter of the ship Luzon, and stated that she would soon report for cargo, requesting that the necessary steps be taken to give her prompt despatch.

"(3) On receipt of your letter of the 18th of February, the bureau telegraphed the Berwind-White Company that the Luzon was ready to load, and requested them to load, but with dry coal. The bureau does not consider, in view of the long distance the cargo is to be transported, that it is a safe proposition to load wet coal in her. The matter of the delay in loading her will be taken up with the Berwind-White Company at once."

The coal was loaded by the Berwind-White Company, commencing March 11, 1905, and was completed March 16, 1905. March 20th De Groot & Peck filed the claim in question, subsequently corrected. It was disallowed. January 9, 1905, the government made a contract with the Berwind-White Company for 10,000 tons of coal "for immediate use, * * * to be delivered f. o. b. at the piers at Philadelphia, Pa." As matter of fact, it was to be dry coal. It would be highly improper and unsafe to ship such a quantity of bituminous coal as the Luzon was to carry except in a dry condition, on account of liability to spontaneous combustion. During the delay on the part of the Berwind-White Coal Mining Company in loading the Luzon a representative of the petitioners called several times to ascertain the cause

of the delay, and was informed, in substance, it had no instructions. In truth, the company did not have sufficient dry coal to load the ship. From this statement of the facts it is evident that the defendant, the United States, was in no way negligent or at fault in the premises. The United States advised the Berwind-White Company in advance of the shipment to be made and had contracted for the coal. So soon as it knew the Luzon was ready to take on cargo, it notified that company. What more was required? What more could it have done? Having made the contract to deliver the coal, and have it ready for shipment, etc., the Berwind-White Company was bound to comply with the terms of its agreement unless relieved by some act of God, for which not responsible. It is also evident that the coal contractor, Berwind-White Coal Company, was wholly responsible for the delay in loading after the Luzon reported for that purpose. It is quite certain that on account of snows, wet weather, and delays in transportation, not within the control of the Berwind-White Company, that company was unable to have on hand sufficient dry coal for loading the Luzon at the time she reported for that purpose.

The question is this: Whether or not, under such circumstances and conditions, the government is liable to the petitioners for the delay in loading. Is the government liable for the delay of its agent the Berwind-White Company? Is the Berwind-White Company, under all the circumstances, liable to any one for the delay? No time was fixed by the charter party for the loading to begin or end, and there was no provision the Berwind-White Company should pay damages or demurrage arising from delay in loading. There was no time fixed by the contract between the United States and Berwind-White Company when it would commence to load any vessel. The law in such cases will presume a reasonable time under all the circumstances known to the parties or presumed to have been within their contemplation was intended, and a provision for such reasonable time will be considered as agreed to by the parties. Donnell et al. v. Amoskeag Mfg. Co., 118 Fed. 10, 12, 55 C. C. A. 178; Scrutton Charter Parties (4th Ed.) 74, 244; Carver on Carriage by Sea (4th Ed.) § 610; American & Eng. Ency. of Law (2d Ed.) p. 222, and cases cited. This rule is fundamental and old. In the absence of some agreement to the contrary between owner and charterer or some evidence showing a contrary intent, the party who is to load the vessel will be deemed the agent of the charterer. When the charterer of such a vessel, in the absence of an agreement to the contrary, consigns same to a party named for loading, it makes itself responsible for the acts or omissions of such consignee the same as though it had directed the vessel consigned to itself at the same place. Donnell et al. v. Amoskeag Mfg. Co., 118 Fed. 10, 11, 55 C. C. A. 178; Am. & Eng. Enc. of Law, p. 224, and cases cited. And see Benson v. Atwood, 13 Md. 20, 71 Am. Dec. 611. The petitioners had no control over the Berwind-White Company with which the government had its contract to load the coal, and the government did not exempt itself from liability for delay in loading, and as a necessary consequence the government, and not that company, is liable to the petitioners for any delay beyond a reasonable time for loading.

The excuse for the delay in loading offered by the Berwind-White Coal Mining Company is set forth by it in a letter to the Navy Department, Bureau of Equipment, under date of March 10, 1905, as follows:

"Berwind-White Coal Mining Co.

"New York, March 10, 1905.

"Bureau of Equipment, Navy Department, Washington, D. C.—Dear Sirs: Regarding your message and letter of yesterday, we regret exceedingly the delay of the ship Luzon in Philadelphia, but our failure to load her has been caused by conditions entirely beyond our control. We were under the impression that the bureau were made aware of the conditions brought about by the interruption of traffic on the Penn. R. R.; thus obliging us to keep vessels waiting from three to four weeks. We are still short of coal, but we hope to be able to commence loading the ship Luzon in Philadelphia tomorrow, and you may be assured that everything possible will be done by us to dispatch the cargo at the earliest possible date. The S. S. David was also delayed by the great scarcity of coal. We would explain that we have ample facilities for loading vessels in Philadelphia, but that the Penna. R. R., for some months past, have been unable to transport our coal in sufficient quantities from our collieries to meet our requirements.

"Very truly yours, Berwind-White Coal Mining Co."

These facts, if true, and I assume their truth, do not excuse that company or exonerate the government from liability to the petitioners. Hagerman v. Norton (C. C. A. 5th Circuit) 105 Fed. 996, 46 C. C. A. 1, and cases cited in note thereto; Manson et al. v. N. Y., N. H. & H. R. Co. (C. C.) 31 Fed. 297, and cases there cited; 9 Am. & Eng. Enc. of Law, p. 244, and cases cited. The charterer, not having exempted itself from responsibility for delays resulting from such causes, must be deemed to have assumed the risk. See cases cited.

The rule is, on the whole, just. The charterer contracts with the carrier to be at a certain place at a certain day, there to take a cargo in due course, and proceed on his voyage. He is advised that his vessel will be loaded by the agent of the charterer, or, what is the same thing, by a person with whom it has contracted. Over this contractor the carrier has no control whatever. For the contractor's acts of commission or omission the carrier is in no way responsible. It assumes no risk in that regard except by special provision of the contract. The carrier has the legal and moral right to expect that the cargo will be ready and put on board with reasonable dispatch. The charterer in legal effect contracts that it will be. It must answer if it is not ready, and put on board and assumes all risks of delay not caused by the fault of the carrier. The case is similar to that of the hiring of an employé by the day, or by the week, with directions to report and commence work on a day certain. If the person reports, it is immaterial that it rains or snows, or that other employés of the hirer have not furnished material to enable the work to go on. Such contingencies must be provided for in the contract of hire.

The next question is: What was a reasonable time for loading under all the circumstances of this case? The United States at first expected to ship the coal, but a portion of large quantities, in January, 1905. At the request of the petitioners, who could not be ready, it waived this and accepted tender for "February loading." This meant any time in February. The government informed its agent, Berwind-White Company. It asked to be advised when the Luzon

would be ready. Neither the government nor the Berwind-White Company could be expected to be ready on a moment's or a day's notice. Both were entitled to reasonable time after notice. Weather conditions; condition of coal; supply of coal on hand fit for such a shipment; these and other considerations were to be taken into account, and were within the contemplation of all the parties necessarily. The petitioners had no right to expect the Berwind-White Company would keep 20,000 tons of coal in readiness for them all through February. When they were ready, the company had the right under the circumstances stated to a reasonable time in which to prepare itself. It will be noted that the government did not direct De Groot & Peck to consign the Luzon to the Berwind-White Company until February 24th, and I do not think it is chargeable with unreasonable delay in not consigning her earlier. Business in the offices of the departments at Washington is often congested, and such matters must take their turn in routine work. The bureau having this matter in charge had been waiting the convenience of De Groot & Peck for 18 days, and I do not think a delay of 6 days was at all unreasonable under the circumstances.

I do not find any evidence that the government was advised of any delay on the part of the Berwind-White Company between February 24th and March 8th. Still De Groot & Peck had been directed to have the ship presented at the Berwind-White wharves for loading; and the question is: When did she present herself for that purpose? Mr. Park, the master of the Luzon, went to Philadelphia early in February to see to the repairs, and was there about a week. During that time, he says, he was informed by the Berwind-White people they had no instructions. This was true in a sense, as they had not been specifically directed to load the Luzon, and, indeed, she was not at that time ready for loading. Park went back to New York, or home, and on the 24th or 25th was directed by De Groot & Peck to return to Philadelphia. He reached there the 27th. He says that telephonic communications with the Berwind-White people were then had, but no definite information was obtained until March 7th. The ship was then at the South Wharf, but she had been trying to get orders since the 27th of February. March 7th the ship was taken to the Greenwich Pier for loading. In view of the directions to the Berwind-White Company on the 20th of February and the consignment of the ship on the 24th to the company, and its readiness on the 27th to go to the wharf and commence loading, and the failure of the Berwind-White Company to accept her and commence the loading, there was unreasonable delay and want of reasonable dispatch from and after the 28th day of February up to and including the 10th day of March, a period of 10 days, for which the company was responsible, and for which consequently the government as charterer was and is responsible. The damages in such a case are not strictly demurrage; there being no provision in the charter party for demurrage in case of such a delay, but damages in the nature of demurrage are allowable and recoverable. It is true no day was fixed on which to commence the loading in the proposal and acceptance, but the day was fixed as the 28th by the subsequent acts and correspondence of the parties jus-

recited. In law and equity it is the same as though that day had been specifically named in the proposal and acceptance. The rule of vis major does not apply here to exonerate the Berwind-White Company or the government. The facts recited in the letter of Berwind-White Company to the government do not bring the case within the rule. The case of Crossman v. Burrill, 179 U. S. 100–113, 21 Sup. Ct. 38, 45 L. Ed. 106, is instructive on this point as are the cases there cited and commented upon. Mr. Justice Gray, in delivering the opinion of the court, said:

"In the case at bar the defense of vis major, as pleaded in the answer, was that the shipowners were prevented from discharging the cargo, and the charterers were prevented from receiving it, any sooner than they did, by reason of acts of the public enemy, to wit, certain vessels of war, then in the harbor of Rio Janeiro, were engaged in firing upon the forts in the harbor and in making war upon the government of Brazil; that the firing between those vessels and those forts made it impossible to discharge or to receive the cargo from the vessel any sooner than it was discharged or received; and that the detention alleged in the libel was caused by those acts of the public enemy, and not by any default of the charterers. The vis major, so pleaded, was, in the words of opinions above cited, a 'superior force, acting directly upon the discharge of the cargo'; 'a direct and immediate vis major'; and 'unusual and extraordinary interruption that could not have been anticipated when the contract was made'; 'a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers'; and an 'interference on the part of an armed force, preventing the handling or moving of the cargo.' Upon principle, and according to the general current of authority, the detention alleged was not caused by default of the charterers, and did not render them responsible for demurrage, under this charter party."

But here the delay of the railroad company in transporting and delivering coal was not the act of "a public enemy," nor was it a superior force acting directly upon the loading of the coal, a force and contingency not within the contemplation of the parties when the contract was made. On the other hand, the delay in loading was indirectly caused by the operations of nature, rains, snows, storms, etc., all of which are liable to occur, and the occurrence of which must be presumed to have been within the contemplation of the parties. The government took the chances and assumed the risks of all these operations of nature, not having provided for nonliability in case of their intervention. And I find nothing in the contract between the government and the Berwind-White Company on that subject, except that the "coal must be of the best quality run of mine with fair proportion of lump, dry and free from slate," etc. This case is not within Corrigan et al. v. Iroquois Furnace Co., 100 Fed. 870, 41 C. C. A. 102, as the Luzon was chartered January 3, 1905, for one cargo only of the February loading, and was subsequently consigned by the government for loading at a time certain, and the owners did not contract with reference to delays of government contractors in supplying coal to it. They are, however, presumed to have known the government did not own railroads or mines, and were dependent on contractors for its supply. But they had the right to assume the government would have coal ready for loading within a reasonable time after notice that the Luzon was ready, and especially on receiving notice to report for loading.

But it is contended by the government that the Berwind-White Company was not in legal effect its agent for the loading of the Luzon; that the company was an independent contractor and the agent of both parties. I do not regard this contention as sound. The government contracted with the Berwind-White Company and selected it to do the loading for the government. The government had contracted to do the loading and the petitioners had no control of the agent selected by it.

I think the evidence establishes that the damage in the nature of demurrage were fairly $80 per day, and I so find, making the total amount which petitioners are entitled to recover $800.

There will be judgment for that sum.

SKEWIS v. BARTHELL.

(District Court, N. D. Iowa, Eastern Division. March 19, 1907.)

No. 646.

BANKRUPTCY—FRAUDULENT CONVEYANCES — VACATION — JURISDICTION — CONSENT.

Bankr. Act July 1, 1898, c. 541, § 70e. 30 Stat. 565 [U. S. Comp. St. 1901, p. 3452], authorizes the trustee to avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and provides that the trustee may recover the property so transferred, or its value, unless the transferee is a bona fide holder for value, prior to the date of the adjudication. Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690], amends such section by adding a provision that, for the purpose of such recovery, any court of bankruptcy as previously defined, and any state court, which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. *Held* that, where a suit was brought by the trustee of a bankrupt estate to recover certain real estate from one to whom the bankrupt had conveyed the same in fraud of his creditors more than four months prior to the bankruptcy, the court of bankruptcy had no jurisdiction of such suit, in the absence of the defendant's consent thereto.

In Equity. On plea to the jurisdiction of the court.

The bill alleges that John W. Barthell, of Lyon county, this state, was adjudged bankrupt by this court March 12, 1904, and that complainant is the duly appointed trustee of his estate; that on October 31, 1903, the bankrupt was the owner in fee of 180 acres of land in Allamakee county, in this state, and on that date conveyed the same to the defendant, M. J. Barthell, a resident of said Allamakee county, with intent to hinder, delay, and defraud the creditors of said bankrupt. The prayer is that the conveyance be set aside, and that complainant recover said land or its value from the defendant for the benefit of the bankrupt estate. The defendant appears specially and objects to the jurisdiction of the court, upon the grounds, in substance, that the suit is not one to recover property conveyed by the bankrupt while insolvent, as a preference or in fraud of creditors within the four months prior to the institution of the bankruptcy proceedings, but is one to avoid a transfer of property made by the bankrupt more than four months prior thereto, which any creditor of the bankrupt might have avoided; and that defendant has not consented, and does not consent, that the suit may be brought or prosecuted against him in this court, and asks that it be dismissed for want of jurisdiction.

E. C. Roach and C. J. Miller, for complainant.

Hurd, Lenehan & Kiesel and Stillwell & Stillwell, for defendant.

REED, District Judge (after stating the facts). In argument, the sufficiency of the facts alleged in the bill of complaint, as grounds of recovery, was challenged by the defendant; but this goes to the merits, and, if the court has jurisdiction of the suit, the bill might be amended to cure its alleged defects in this respect. The principal question, therefore, is that of the jurisdiction of this court to entertain the suit without the consent of the defendant.

The suit is not brought under section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), to recover a preference, nor under section 67e (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), to recover property transferred in fraud of creditors within the four months next preceding the bankruptcy proceedings, and, if it can be maintained in this court, it must be under section 70e (30 Stat. 565 [U. S. Comp. St. 1901, p. 3452]) of the act as amended. Prior to the amendment of February 5, 1903, it seems quite certain that the court of bankruptcy would have had jurisdiction of a suit under section 70e, if at all, only with the consent of the proposed defendant. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. That case involved a transfer of property made by the bankrupt either under section 60b, as a preference, or under section 67e, in fraud of creditors, while insolvent and within the four months immediately prior to the bankruptcy proceedings, and it was held that a suit by the trustee to recover the property, or its value from a third party who has possession thereof, claiming it adversely to the bankrupt, is a suit at law or in equity, as distinguished from proceedings in bankruptcy, and could be prosecuted in a court of bankruptcy only with the consent of the proposed defendant. It may be that, whether or not a suit by the trustee to recover property transferred under section 70e could have been maintained prior to the amendment in a court of bankruptcy, with the consent of the defendant, was not definitely determined in that case; but, after pointing out that the act of 1898 did not confer upon the bankruptcy courts the concurrent jurisdiction given to them under the acts of 1841 and 1867, the opinion continues:

"Congress, by the second clause of section 23 of the present bankrupt act (23b), appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustees in bankruptcy to assert a title to money or property as assets of the bankrupt, against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant.' One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the state, to the greater economy and convenience of litigants and witnesses."

This reasoning is as clearly applicable to suits under section 70e as to those under sections 60b, or 67e (Bush v. Elliott, 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114); and yet it may well be said that the facts upon which the opinion rests do not call for a decision of any question arising under section 70e, and that no such question is determined (Bryan v. Bernheimer, 181 U. S. 188–197, 21 Sup. Ct. 557, 45 L. Ed. 814; York Manufacturing Co. v. Cassell, 201 U. S. 344–353, 26 Sup. Ct. 481, 50 L. Ed. 782).

The obvious purpose, then, of the amendment of these three sections, was to more clearly designate what courts should have jurisdiction of suits by the trustee arising under them respectively, and the contention now is that, since the amendment, the courts of bankruptcy have jurisdiction of such suits arising under section 70e, as well as of those arising under section 60b, and section 67e, without the consent of the proposed defendants. This question was urged upon the Supreme Court in Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; but the bankruptcy court in that case had acquired the custody of the property, and its right to determine controversies in relation thereto was sustained upon that ground, and the question was not determined. In Gregory v. Atkinson (D. C.) 127 Fed. 183, it is held that the courts of bankruptcy have jurisdiction of a suit by the trustee under section 70e, as amended, with the consent of the proposed defendant, and not otherwise; but in Hurley v. Devlin (D. C.) 149 Fed. 268, it is held that they have jurisdiction without the defendant's consent. These decisions are in direct conflict, and cannot be reconciled. The question does not seem to have been considered in any other reported case, unless it be in Re Grissler, 136 Fed. 754, 69 C. C. A. 406, where it seems to be held by the Court of Appeals, Second Circuit, that, without the defendant's consent, the court of bankruptcy does not have jurisdiction of such a suit since the amendment. In Blake v. Nesbet (D. C.) 144 Fed. 279, the property was transferred within the four months preceding the bankruptcy proceedings. If by what is said of section 70e, as amended, at page 283 of the opinion, it is intended to hold that the court would have jurisdiction of the suit without consent of the defendant, such holding is not based upon any facts calling for a determination of that question.

By section 13 of the Amendatory Act of February 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], section 60b of the act of 1898 is amended so as to read as follows:

"(b) 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.*"

—the words in italics being added by the amendment.

By section 16 (32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690]) the same words are added as an amendment to sections 67e, and 70e, respectively. Section 8 of the amendatory act (32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 686]) amends section 23b, and, as that amendment first passed the House, it adds to that section the following: "Except suits for the recovery of property under section sixty, subdivision b, section sixty-seven, subdivision e, and section seventy, subdivision e." When this came before the Senate, it was amended by striking out the words "subdivision e, and section seventy," and inserting the word "and" before the words "section sixty-seven," so as to make section 8 of the amendatory act read as follows:

"Sec. 8. That subdivision b of section twenty-three of said act be, and the same is hereby, amended so as to read as follows:

"(b) 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.*"

Some further changes were made in other sections, and as so changed the amendment passed the Senate, and these changes were agreed to by the House, and as so amended it was finally passed and approved. Congressional Record, vol. 36, pt. 1, pp. 1034, 1035, 1036, under date of January 21, 1903. Collier on Bankruptcy (5th Ed.) pp. 266–573; Brandenburg on Bankruptcy (3d Ed.) p. 369, § 578.

The omission of section 70e, as amended, from the amendment to section 23b, therefore, was not accidental but was designedly done. That the state courts of general jurisdiction may, in proper cases, exercise their jurisdiction over a defendant without his consent, is, no doubt, true; but the national courts have and can exercise only such jurisdiction as Congress sees fit to confer upon them, and it does not follow that, because jurisdiction of the subject-matter of a suit is conferred upon a court of the United States, concurrent with that of a state court, that it may exercise that jurisdiction without the consent of the defendant in the suit. This appears from the recent decision of the Supreme Court in Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. ——, where it is held that a Circuit Court of the United States may not take jurisdiction under the present judiciary act of a suit between citizens of different states, other than that in which suit is brought, without the consent of both parties to the suit, when the jurisdiction is founded only upon the fact that the action is between citizens of different states, though jurisdiction of the subject-matter of the suit may be complete. If the amendment of section 70e has the effect claimed for it, of conferring jurisdiction upon the bankruptcy courts of suits by the trustee under that section without the consent of the defendant, the same effect should be given to sections 60b and 67e, as amended, for the amendment of each is identical with that of section 70e, and the purpose obviously the same, and the amendment of section 23b was wholly unnecessary and is without effect; but after conferring upon the courts of bankruptcy jurisdiction, concurrent with that of the specified state courts, of the subject-matter of suits arising under sections 60b, 67e, and 70e, the amendment of 23b is apparent, and its plain purpose is to declare that suits arising under sections 60b and 67e may be brought by the trustee in the courts of bankruptcy, without the consent of the proposed defendants, while those arising under section 70e may be there prosecuted, only with the consent of the defendants. As so construed, each of these amendments is given the effect manifestly intended by the plain language thereof.

The conclusion, therefore, is that the bankruptcy courts have jurisdiction of suits by the trustee to recover property under section 70e, as amended, with the consent of the proposed defendant, and not otherwise; and, as the defendant in this suit has not so consented, the suit must be dismissed, without prejudice, and at complainant's costs.

It is so ordered.

In re FULLER & BENNETT.

(District Court, S. D. West Virginia. March 5, 1907.)

1. BANKRUPTCY—PREFERENCES—WAGES OF EMPLOYÉS—ASSIGNMENT.
One to whom wage claims of employés of bankrupt are assigned before commencement of the bankruptcy proceedings is, in respect thereto, entitled to the benefit of Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], giving preference to workmen, clerks, and servants for wages earned within three months before commencement of the bankruptcy proceedings.

2. SAME—NOVATION.
Where one to whom wage claims of employés of bankrupts are assigned exchanges them with the bankrupts for their note and duebill, there is a novation of the wage claims, extinguishing the preference given by Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], to claims for wages.

In Bankruptcy.

Payne & Payne, for Charleston Hardware Co.
C. W. Dillon, for W. B. Blake.

DAYTON, District Judge (sitting specially). This cause comes before me upon the petition of the Charleston Hardware Company to review the action of the referee in allowing a claim of W. B. Blake to have preference as an alleged "labor" one. The facts are substantially as follows: Blake filed before the referee his proof of claim for $1,325.23, and the referee ascertained $1,296.25 to have priority over other debts as a "labor" one. This $1,296.25 consisted of a note executed by the bankrupt firm to Blake, May 23, 1906, for $700, a duebill executed by the firm, June 5, 1906, to Blake for $357.95, and some 23 other duebills and "labor scrip checks" issued by the bankrupt firm to various laborers in their employ for wages, and by them assigned to said Blake. It is substantially agreed that said note for $700 and the duebill for $357.95 were executed to Blake for these "labor scrip checks" issued by the firm to its workmen and purchased by him before the institution of the bankruptcy proceeding. These "checks" were substantially cards, marked "not transferable," issued to these laborers for wages, and declaring on their face that they were good for specified amounts at the commissary of Fuller & Bennett. The petitioner, a creditor of said bankrupt firm, insists that the referee erred in allowing preference to Blake for the amount of these notes and assigned duebills and labor checks. The referee based his action upon the ruling in Re Harmon (D. C.) 128 Fed. 170, a decision by Keller, J., of this district, dated November 21, 1903, confirming the finding of this same referee, wherein it was held under the bankrupt act (Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), giving preference to workmen, clerks, and servants for wages earned within three months before commencement of bankruptcy proceedings, not to exceed $300 to each claimant, the fact that a large number of laborers holding claims for labor performed for the bankrupt assigned such claims to two of their number, who were also laborers, and who held claims of their own, in order to save

costs in prosecuting suits against the bankrupt to recover such wages, the assignees agreeing to account to their assignors for the amounts due each when collected, did not deprive the claims so assigned of their right to priority.

As to the broad proposition of whether an assignee, before bankruptcy proceeding commenced, of a labor claim, is entitled to the preference provided his assignor as such laborer, decided conflict of authority has arisen. Under a similar provision of the act of 1867, Act March 2, 1867, c. 176, 14 Stat. 517, in Re Harthorn, Fed. Cas. No. 6,162, a father was held entitled to preference for wages due his minor son.

In Re Erie Rolling Mill Company (D. C.) 1 Fed. 585, the company had issued orders to its employés for wages, in form following:

"No. 573. "Erie, Pa., October 12, 1875.

"Pay to Mr. J. Heffner, or bearer, five dollars in goods and charge to Erie Rolling Co."

"$5.00

These orders had been taken by merchants from such laborers, and preference was claimed, but it was held they were not entitled thereto.

In Re Brown, Fed. Cas. No. 1,974, a claim for a balance of laborers' wages in the hands of one who had advanced a part before bankruptcy of the employer, and who had taken an assignment of such claims as security, with the understanding that he was to collect the whole amount and repay himself, was held to have preference.

Under our act of 1898 (section 64b) in Re Westlund (D. C.) 99 Fed. 399, it is expressly held that an assignee, under assignment made before bankruptcy proceeding commenced, of such labor claim, is not entitled to priority. The language of Lochren, J., in this last case very clearly presents one view of the question. He says:

"No right to priority arises or exists until the proceeding in bankruptcy is instituted, and then the wages assigned are not 'due to workmen, clerks or servants,' but to their assignees, and are outside the language of this clause."

In Re Campbell (D. C.) 102 Fed. 686, the laborers' claims were assigned after commencement of bankruptcy proceeding, and the case on this ground is distinguished from In re Westlund, supra, and the priority allowed.

In Re North Carolina Car Co. (D. C.) 127 Fed. 178, Purnell, J., one of the judges of this circuit, in discussing this question, says:

"To give a claim priority under this section, it must be due the wage-earner. Should such wage-earner prove his claim and establish his priority, he could then assign the claim, and the assignee would be subrogated to this priority. But if assigned before being thus proved, the assignee would acquire no more right to priority than the assignee of any other unsecured debt."

The only Circuit Court of Appeals case I have found that touches the question is that of Browder & Co. v. Hill, 69 C. C. A. 499, 136 Fed. 821 (Sixth Circuit), where it was held:

"A bankrupt corporation gave to its employés orders on claimants for goods, and charged the same against the current wages of the men. Claimants filled such orders and charged the amount to the corporation, which paid the same from time to time, either in cash, or by note or credits on its books. Under the statute (of Tennessee) the employés were entitled to laborers' liens on the property of the corporation for wages earned within three months prior

to the bankruptcy. Held, that no right of subrogation to such liens arose in favor of claimants from such transactions, nor to the priority given labor claims by the bankruptcy act, and that such subrogation would not be accorded them where it appeared that, if it were, the estate would not be sufficient to pay the preferred claims in full."

It is to be noted, however, in this case, that the orders were given directly to claimants, as merchants, by the bankrupt, in favor of the laborers, and the finding is that they constituted not assignment, but payment, of their wages; therefore it is not in point here, except so far as its general result may tend to refute the position, taken in Re Harmon, that the status of a claim "depends upon the nature of the claim, and not upon who proves it in the bankruptcy proceeding."

Thus it will be seen that two judges of this circuit, Judges Keller and Purnell, have decided this question directly opposite to each other, and that a decided conflict upon the question exists among the outside authorities. Under such circumstances, it becomes decidedly embarrassing for me to determine the matter, and in doing so I earnestly suggest that final appeal be made to the Circuit Court of Appeals of this circuit, so that we may have an authoritative ruling in regard to it.

That section 64b of the bankrupt act was designed to protect the wage-earner, dependent for his living upon his daily wage, cannot be questioned. That it gave a preferential lien for the wages earned three months prior to bankruptcy proceeding, without requiring notice, by recordation or otherwise, of such lien, is also true. Common experience tells us that laboringmen, owing to their financial exigencies, constantly find it necessary in some way to forestall the securing the benefit of their wages prior to the time fixed for them to become due and payable by their employers. Thus, nothing is more common than for them to secure a certificate of some kind or form, showing that they have earned or are entitled to a sum for such wages, which they can assign to another and thereby secure money or supplies necessary for their immediate needs. To say that a person cannot take an assignment of such wages without losing the lien which the laborer by law clearly has, would in very many cases militate against the interests of the laborer and not in his favor. It would in many cases cause him to sell such demands at ruinous discounts. Certainly this was exactly the opposite of the humane purpose of the statute. To say that he may, after proving his claim for wages in the bankruptcy proceeding, which necessarily causes delay, assign it and preserve the lien to the assignor, but cannot do so before such proof in bankruptcy or before bankruptcy proceeding commenced against his employer, seems to me to be a narrow and technical construction, nor warranted. Suppose his claim be wholly undisputed and admitted; what possible reason is there why he should be required to either starve or suffer, awaiting the law's delays, before realizing, by assignment, upon it? Both before and after proof in bankruptcy, it is the claim for the same labor performed, and supported by the same equities, and in either case he has derived the same relief from the assignment. It therefore seems to me that one who takes by assignment from a wage-earner such claim, who has in this way aided and relieved the wage-earner in realizing without delay the means required by his necessities, ought not to be in a sense discrimi-

nated against and punished for so doing. Therefore it seems to me that the assignee of such labor claim who presents it as such, in its original form and subject to its original equities, should be held to take by such assignment all the rights of the assignor, including the right to preference given by this section 64b.

But this, it seems to me, should always be subject to this important condition and limitation: That, after having so acquired by assignment, he must not novate the debt nor merge it with other debts, or take from the debtor new obligations and securities therefor wholly due and payable to himself. It is not to be forgotten that the liens of this kind are not recorded, and the outside creditors can obtain no notice of them in that way. When presented in their original form, either by the wage-earner or by his assignee, it is easy enough for other creditors to ascertain whether the claim is just and comes within the limits of the statute; but on the other hand, suppose one takes by assignment from say 50 or 100 different laborers their several claims and merges them together and secures from the employer a new obligation for the total amounts, made to himself, does he not novate the debt? Is it not clear that he intends by such act to release the several wage-earners of all right to recourse upon them in case he does not collect? Does he not clearly, by such act, deprive such wage-earners of the common-law and statutory right of assignors to require him to sue and collect? Does he not thereby substitute a new and single contract for the many old ones, wholly under his own control? Does he not extinguish the numerous old obligations? Does he not, in short, by such act, clearly show his purpose to be to take the employer as his personal debtor and hold him alone responsible? I think so.

A novation is the substitution of a new obligation for an old one, which is thereby extinguished. The requisites of a novation are a valid prior obligation to be displaced, consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one. The substitution may be in the debt or contract, in the debtor or in the creditor. 4 Current Law, 838. Under the law, when Blake took from Fuller & Bennett the note for $700, was not a complete novation consummated under this definition? In the first place, not only was there a substitution of a new obligation for an old one, which was thereby extinguished, but stronger still, a single new obligation was substituted for many old ones, the number of which and with whom made we do not know, and it is doubtful if it could be ascertained. It was with the consent of parties, it was based upon sufficient consideration, it substituted a new creditor, Blake, for many old ones in the persons of the wage-earners, and it extinguished the old obligations, which are not attempted to be relied on, and, so far as the record discloses, may not be in existence. In Clough v. Giles, 64 N. H. 73, 5 Atl. 835, it has been expressly held that when the acceptor of an assignment of future wages informs the assignee, after the wages are earned and due, that he will pay them to him, the assignment is completed, and there is a novation of parties and debt. The case here is much stronger. Fuller & Bennett not only accepted the assignment of these wage claims after due and verbally promised to pay, but actually executed their written obligation therefor to the assignee person-

ally. In Morriss v. Harvey, 75 Va. 726, it is held, where the transaction amounts to a novation of the debt by a mere exchange of securities, the new contract, accepted in satisfaction of the old, becomes an accord executed, and discharges the original cause of action, whether the new contract is ever performed or not.

Many additional authorities could be cited and the discussion extended, but I have made clear, I think, the grounds upon which I hold in this case:

First. That for the 23 duebills and "labor scrip checks" presented and proved, in their original forms, by Blake, as assignee of the several wage-workers to whom they were executed and issued by the bankrupt firm, Fuller & Bennett, he is entitled, as assignee, to the preference provided for in section 64b of the bankruptcy act, and Referee Mathews did not err in so holding.

Second. That the execution of the note for $700 and the duebill for $357.95 by Fuller & Bennett to said Blake for numerous labor scrip checks and duebills issued to wage-workers in the employ of said firm, and assigned to said Blake, operated as a complete novation of the original contracts to said wage-workers, and such novation entirely extinquished the preference held by the original claims under said section 64b, and that therefore said Referee Mathews erred in holding said $700 note and said $357.95 duebill as having such preference, instead of being simply unsecured debts.

UNITED STATES v. SMITH.

(District Court, W. D. Kentucky. March 26, 1907.)

1. BANKS—MISAPPLICATION OF FUNDS BY NATIONAL BANK OFFICER—STATUTE CONSTRUED.

In Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], which makes it a criminal offense for any officer or agent of a national bank to embezzle, abstract, or willfully misapply "any of the moneys, funds, or credits of the association," the word "moneys" refers to the currency or circulating medium of the country, the word "funds" refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made, and the word "credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 964.]

2. SAME—SUFFICIENCY OF INDICTMENT—DESCRIPTION OF OFFENSE.

An indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging that defendant, as president of a national bank, willfully misapplied a certain sum of the "funds and credits" of the bank by discounting the note of a person known to be insolvent, the proceeds of which were divided between such person and defendant, is insufficient in its description of the offense, where it does not use the word "moneys," nor in any way describe the funds or credits charged to have been so misapplied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 673.]

3. SAME—DUPLICITY.

An indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], is bad, both for duplicity and for insufficient description of the offense,

where it charges the embezzlement, as well as the misapplication, of the "funds and credits" of a national bank by defendant as president, without setting forth any particular description of either, and without any separate statement as to the amount, either of "funds" or of "credits," so embezzled or misapplied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 973.]

4. SAME.

An indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging an officer of a national bank with the willful misapplication of its "money, funds, and credits," must contain a particular description of the funds and of the credits charged to have been so misapplied, and show how much there was of money and of funds and of credits separately.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 973.]

5. SAME.

An indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging the defendant, as president and director, with having willfully misapplied certain credits of the bank, "by procuring the authority of the board of directors * * * to an acceptance of an assignment" of an interest in a partnership in satisfaction of an indebtedness due the bank, and charging the amount of such indebtedness to the account of stocks and bonds, knowing that the assignor had in fact no interest in such partnership, does not state an offense under the statute, since what was done appears to have been by authority of the board of directors, and the facts set out do not show a misapplication of credits by defendant, nor is it averred that such misapplication was made to his own use, benefit, or gain, nor to that of any person other than the bank.

On Demurrer to Indictment.

George Du Relle, U. S. Atty.
Wm. M. Smith, for defendant.

EVANS, District Judge. Section 5209 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3497] is as follows:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment in this case is based on the provisions of this section, and embraces eleven counts. The defendant has demurred to each of them. The first six counts cover that many false entries charged to have been made or caused to have been made by the defendant on the books of the Western National Bank of Louisville, while he was employed as its president, each with the intent to injure or defraud the bank or certain of its customers, and with the further intent to deceive its officers and any agent appointed to examine its

affairs. A careful examination of these counts leaves no doubt upon the mind of the court that each of them is sufficient, and the demurrer to them will be overruled. United States v. Britton, 107 U. S. 662, 2 Sup. Ct. 512, 27 L. Ed. 520.

The remaining five counts, however, require us to ascertain, if possible, the proper signification of the words "moneys, funds and credits" used in the statute, and this, in some respects, is not without difficulty. The word "money" is doubtless equivalent to "currency," and its meaning is apparent. But Congress could not have intended that the word "funds" or the word "credits" should be construed to mean the same thing as the word "money," or its equivalent, "currency," or that the word "funds" should be regarded as synonymous with the word "credits." The three words do not mean, and evidently were not expected to be construed as meaning, the same thing, as mere tautology was not designed. As used in the financial world, and, indeed, in ordinary affairs, the word "funds" means something less flexible than "currency." When we speak of funding an indebtedness, we understand that it is to be put into a more permanent form. In England "the funds" are considered to be the government's bonded indebtedness, and not its mere currency or money; and so it is also in the United States. At any rate, a careful consideration induces the court to agree with Judge Priest, in his opinion in the case of United States v. Greve (D. C.) 65 Fed. 489, that the word "funds" has a different meaning from the word "moneys" as used in the statute. In the opinion of the court the word refers to forms of somewhat permanent indebtedness and to a class of securities in which permanent investments are likely to be made.

The remaining word, "credits," refers to something nearer to the bank's daily business transactions, and should be given a different meaning from that of either of its associate words. We have not found in any of the dictionaries or encyclopedias to which we have access the word "credits" in the plural form as used in the statute, nor have we found anywhere any precise definition of it as used in section 5209; but in many cases noted under the word in 2 Words and Phrases, p. 1728 et seq., we find it construed as used in the revenue laws of the states, and those cases have been instructive. Certainly, as used in section 5209, it does not mean something which is merely the opposite of the word "debit," commonly used in bookkeeping. But, without further enlarging upon the reasons for doing so, the court has reached the conclusion that the word "credits," used in the statute, means debts due the bank or promises to it to pay money, namely, such as its notes and bills receivable, as distinguished from more permanent investment securities, like government or other bonds, not payable to the bank, and not evidencing an indebtedness created by its loans to customers. Stated shortly, the court is of opinion that the word "money" refers to the currency or circulating medium of the country; that the word "funds" refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made; and that the word "credits" refers to notes and bills payable to the bank, and to other

forms of direct promises to pay money to it. This section, in respect to the clause forbidding willful misapplications, was under consideration in the case of United States v. Britton, 107 U. S. 669, 2 Sup. Ct. 512, 27 L. Ed. 520; but the court did not there consider nor determine the meaning of the words "funds and credits" of the bank.

If the conclusions stated approximate accuracy, we are prepared to determine the questions arising upon the demurrer to each of the remaining counts in the indictment.

The seventh count charges that the defendant willfully misapplied $2,930.60 of the "funds and credits" of the bank with the various intents denounced by the statute. It is charged that this was done by the defendant, while acting as president of the bank, by discounting the note of one Toof for $3,000, the net proceeds of which Toof, who alone gave the note and who was at the time known by the defendant to be insolvent, divided between himself and the defendant. The word "money" is not mentioned in this count, and there is no description either of the "funds" or of the "credits" so charged to have been misapplied. If the word "money" alone had been used, it is difficult to see how there could have been any difficulty about the question; but that word was not used at all, and if the court has correctly ascertained or approximated the proper meaning and signification of the words "funds" and "credits," then there should have been such a particular description of the "funds" and of the "credits" as would have enabled the accused to prepare his defense, and so that the judgment here would bar another prosecution. This result is manifest from the cases of United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, Evans v. United States, 153 U. S. 586, 14 Sup. Ct. 934, 38 L. Ed. 830, and Keck v. United States, 172 U. S. 436, 19 Sup. Ct. 254, 43 L. Ed. 505, and cases cited. In Batchelor v. United States, 156 U. S., at page 429, 15 Sup. Ct., at page 447, 39 L. Ed. 478, the court said:

"By the settled rules of criminal pleading, and by the previous decisions of this court, the words 'willfully misapplies,' having no settled technical meaning (such as the word 'embezzle' has in the statutes, or the words 'steal, take, and carry away' have at common law), do not of themselves fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments, showing how the misapplication was made and that it was an unlawful one. Without such averments there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause." United States v. Britton, 107 U. S. 655, 661, 669, 2 Sup. Ct. 512, 27 L. Ed. 520; United States v. Northway, 120 U. S. 327, 332, 334, 7 Sup. Ct. 580, 30 L. Ed. 664; Evans v. United States, 153 U. S. 584, 587, 588, 14 Sup. Ct. 934, 38 L. Ed. 830.

The same considerations must control in disposing of the demurrer to the eighth count of the indictment.

The ninth count is open to similar objections, with the additional one of duplicity, as this count charges the embezzlement, as well as the willful misapplication, of the "funds and credits" of the bank, without setting forth any particular description of either, and without any

separate statement as to the amount either of the "funds" or of the "credits" which had thus been embezzled or misapplied.

The tenth count is equally, if not more, faulty, inasmuch as it charges the willful misapplication of "money, funds, and credits," without any particular description either of the funds or of the credits alleged to have been misapplied, and without showing how much there was of money and of funds and of credits separately.

The eleventh count charges that the defendant, while employed and acting as the president and as director of the bank—

"did of the credits of said association, then intrusted to his custody and under his control as said president and director, unlawfully, knowingly, and willfully misapply the sum of $30,000, then a part of the indebtedness of Edgar D. Martin, M. T. Martin, and E. L. Martin, and standing as a charge against said Edgar D. Martin, M. T. Martin, and E. L. Martin upon the books of said association, and said W. B. Smith did misapply said sum of $30,000 by procuring authority of the board of directors of said association to the acceptance of an assignment of Edgar D. Martin to said W. B. Smith of his (said Edgar D. Martin's) right, title, and interest in and to the firm of Kahn, Martin & Co., of Louisville, Ky., as an asset of the full value of $30,000, and by charging said sum of $30,000 to the account of stocks and bonds, which said assignment was then and there falsely dated May 2, 1905, and was of the tenor following, to wit:

"'May 2, 1905.

"'In consideration of $30,000 this day paid to me by W. B. Smith, I herewith sell, assign, transfer, and set over to said W. B. Smith all my right, title, and interest in and to the firm of Kahn, Martin & Co. of Louisville, Ky. This company is now in process of incorporation, and the above interest is represented in the name of E. D. Martin, but as soon as the stock is delivered to E. D. Martin same is to be delivered to said W. B. Smith, having been paid for by him in full. In testimony whereof, witness my signature this May second, 1905. Edgar D. Martin.

"'Attest: T. E. Shinnick.'

"Whereas, in fact and in truth the said Edgar D. Martin then had no right, title, or interest in or to the firm of Kahn, Martin & Co., or in or to any of the assets or property of said firm, as he (the said W. B. Smith) then very well knew.

"And so the grand jurors aforesaid, upon their oaths aforesaid, present that the said W. B. Smith unlawfully, willfully, and knowingly did fraudulently misapply $30,000 of the credits of said association, with the intent upon the part of said W. B. Smith to injure and defraud said association."

Under the rule laid down in Batchelor v. United States, supra, this count must be held to be insufficient, unless the alleged acts of the defendant amount to a willful misapplication of $30,000 of the indebtedness of the three Martins, within the meaning of the statute. The mere conclusion of the pleader that the defendant misapplied the credits of the bank is not sufficient. The willful misapplication must appear from acts alleged to have been done. No such acts are charged, unless by recital somewhat in the language of the statute. On the contrary, it appears that the application of the credit or indebtedness was made by authority of the board of directors, and consisted of using it to obtain the transfer from Edgar D. Martin. The $30,000 was then charged to the account of stocks and bonds, but whether by order of the directors does not clearly appear. But no act of misapplication, or of any application whatever, is shown of the indebtedness of the Martins, except to obtain the transfer from Edgar

D. Martin. The transfer itself does not show it to have been that credit or indebtedness which was applied by the defendant to the payment of the consideration for the transfer copied into the count, though for this occasion the fair inference may be that it was. But, if so, the defendant was carrying into effect the order of the directors. We need not, on this hearing, consider whether there was any false entry on the account of stocks and bonds, nor whether the defendant had intentionally imposed upon and deceived the board of directors, because neither of those things is charged. And, however those matters may be, this count in the indictment does not show any act of willful misapplication of the "credits" of the bank, assuming that the book indebtedness of the three Martins was such. What was done by the defendant in applying that indebtedness to obtain the transfer, instead of being wrongful, appears to have been done by the authority of the board of directors; and, in the absence of any further showing, that fact, per se, negatives any idea of intent to injure or defraud the bank, which is also an essential element of the offense charged.

But even stronger reasons apply. In the Britton Case it was said (107 U. S. 669, 2 Sup. Ct. 517, 27 L. Ed. 520) that:

"The words 'willfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzled' as used in the statutes, or the words 'steal, take, and carry away,' as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'willfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made and that it was an unlawful one."

In Evans v. United States, 153 U. S. 587, 14 Sup. Ct. 934, 38 L. Ed. 830, it was stated that:

"The section in question in this case was before this court in United States v. Britton, 107 U. S. 655, 669, 2 Sup. Ct. 517, 522, 27 L. Ed. 520, in which the willful misapplication made an offense by this statute was defined to be 'a misapplication for the use, benefit, or gain of the party charged or of some company or person other than the association,' and that to constitute such an offense there must be a conversion to the use of the offender, or of some one else, of the moneys or funds of the association by the party charged."

Tested by these rules, and especially the last, this count in the indictment must be regarded as wholly insufficient, inasmuch as it is nowhere averred that the defendant misapplied the credits of the bank to his own use, benefit, or gain, nor to that of any person other than the bank.

It results that the demurrer must be sustained to the seventh, eighth, ninth, tenth, and eleventh counts in the indictment, and overruled as to the first, second, third, fourth, fifth, and sixth counts thereof.

THE SCOW NO. 9.

THE MINOT I. WILCOX.

(District Court, D. Massachusetts. March 20, 1907.)

Nos. 1,820, 1,821.

1. NAVIGABLE WATERS—DEPOSITING REFUSE IN—LIABILITY OF VESSEL.
Act March 3, 1899, c. 425, §§ 13, 16, 30 Stat. 1152, 1153 [U. S. Comp. St. 1901, pp. 3542, 3544], prohibiting the deposit of refuse matter in any navigable water of the United States, and making any vessel used in such illegal act liable for the pecuniary penalties imposed therefor, are within the constitutional powers of Congress, and to render a vessel subject to such penalties it is not essential that some person or corporation should have previously been convicted thereunder.

2. SAME.
Where the owners of a dumping scow placed a man in sole charge with power to dump her load, and he becoming unnecessarily alarmed at the roughness of the sea while being towed to the dumping grounds dumped a part of her load into the waters of a harbor in violation of Act March 3, 1899, c. 425, § 13, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3542], the scow is subject to the penalty imposed by section 16 of the act, although the action of the scowman was contrary to the orders of the owner; but the towing tug, although the property of the same owner, where the master had no reason to anticipate the violation of the statute, cannot be said to have been "used or employed" in such violation, and is not subject to the penalty therefor.

In Admiralty.

William H. Garland, Asst. U. S. Atty.
Carver & Blodgett, for claimants.

DODGE, District Judge. The two vessels proceeded against by way of libel in these cases belonged to the same owners, who were engaged in dredging operations in Boston Harbor under contract with the United States. On November 1, 1906, the tug was engaged in towing the scow, which had on board a load consisting of refuse material brought up from the bottom in the course of the dredging work, toward a place outside the harbor where it is contended that dumping had been duly permitted by the War Department, according to Act March 3, 1899, c. 425, § 13, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3542]. A part of the scow's load was dumped before the intended destination was reached, within the harbor, at a place where dumping had never been permitted, and where it was unlawful under the act referred to. This happened while the scow was being towed by the tug. The above facts are not disputed, and the government contends that by reason of them, both vessels, the tug as well as the scow, have become liable for the pecuniary penalties established by section 16 of the act, because both have been "used or employed in violating" the provisions of section 13 against discharging such material into navigable water of the United States.

The owners of the tug and scow have appeared as claimants in each case and have excepted to each libel, alleging as reasons why the proceedings cannot be maintained that a vessel can be held liable under the act only when some person or corporation has first been

convicted of a violation of its provisions, whereas in neither of these suits does the government allege any such previous conviction; also that the act itself is one which Congress had no power to pass, and which in various respects specified violates the provisions of the Constitution, or of the fourth, fifth, and sixth amendments thereof. I find it impossible in view of the decision of the Court of Appeals for this circuit in New England Dredging Co. v. United States, 144 Fed. 932, 75 C. C. A. 572, to sustain the construction of the statute for which the claimants contend, or to allow any weight to the constitutional objections which they raise. All the exceptions were overruled, as were also motions filed by the claimants for jury trial. The proceedings against vessels for which the statute provides are proceedings in admiralty, and they are to be conducted in all respects as other proceedings in admiralty are conducted. Upon answers to the libels filed by the claimants without waiving their exceptions, there has now been a hearing before the court.

The evidence at the trial showed that the scow had one man only on board, and that the discharge of part of her load which is complained of was by his voluntary act, without orders from the owners or from the captain of the tugboat, and contrary to general instructions given him not to discharge without orders. In these respects the case is like New England Dredging Co. v. United States above referred to. In that case there was no evidence as to the motive for the scowman's act. In this case the evidence tended to show his motive to have been an apprehension that the scow would sink under him unless relieved of part of her load.

The scow had six pockets arranged for the carriage and dumping of mud. Her capacity when all were fully loaded was 747 cubic yards. She had on board at the time 517 yards in all. One of her pockets (No. 2) was empty. All the others were partly loaded, though none of them was loaded to its full capacity. She had been thus loaded on October 30th, and left at her mooring in the upper harbor to wait for the tug to take her to the dumping ground. The wind on October 31st was strong northeast, and it was too rough to go out. During the following night the direction of the wind changed to north and northwest and it lessened in force. About 4 o'clock in the morning of November 1st the tugboat went to the mooring, took the scow in tow, and started for the dumping ground, after putting the scowman on board her. Within the harbor, where the mooring was, there was no rough water, and in the judgment of the captain of the tug it was suitable to "go down to the outside to see whether it was too rough or not" to proceed further. The scow had been previously used in transporting dredged mud to the dumping ground, and had always been found, so far as appeared, a proper and sufficient vessel for the purpose. As she had been loaded on this occasion, she was higher out of water by a foot or more than she would have been with a full load. At a point a little inside No. 4 buoy, in what is known as the slough in Ram Head Channel, heavy seas were for the first time encountered, so heavy as to convince the captain of the tugboat that it would be too rough further out for the scow and for the tugboat as well. He therefore turned the tugboat around, in-

tending to take the scow back to the mooring. While the scow was turning and was in the trough of the sea several waves washed over her deck, the scowman became frightened, and in the fear that she would go under and he would be drowned he emptied two of the pockets by operating the mechanism which opened them at the bottom. The pockets emptied contained 196 cubic yards in all. Relieved of this portion of her load, the scow rode considerably higher out of water than before, and no more waves washed over her. The scowman opened the pockets wholly upon his own responsibility, and without any previous intimation that he intended to do so, or that he apprehended any danger. His instructions were not to dump without signal from the tug, unless to save life or property.

Proof that the scowman's act in thus emptying the pockets was really compelled by an emergency which made it necessary to open them in order to save life or property would raise the question how far such an emergency could prevent his act from being regarded as a violation of the statute, and for the purposes of this question it might be important to inquire whether or not the scow had been properly loaded and adequately equipped in every respect for all such emergencies as she might be expected to encounter, and whether or not the master of the tugboat had exercised proper care to avoid exposing her to seas so rough as to endanger her. I do not find it necessary to consider any of these questions. The scowman testified in person before me, as did all the other witnesses in the case. The evidence does not satisfy me that there was any danger to life or property which justified him in opening the pockets without orders from the tugboat, or that he had reasonable ground to apprehend such danger. I find that he was unnecessarily alarmed, and that the rough water into which the scow was brought while turning neither excused the dumping of the contents of the pockets nor required the captain of the tugboat to anticipate that they might have to be dumped for the safety of the scow.

This conclusion, however, cannot save the scow from the statutory penalty. Her owners left the discharge of her load within the sole power of this scowman. The scow was "used" by him in a violation of the act. Such "use" was within the scope of his employment. She is therefore liable under section 16. This is settled by New England Dredging Co. v. United States, 144 Fed. 932, 75 C. C. A. 572, already cited.

If the unlawful act of the scowman could be ascribed to any design or neglect on the part of the owners of both craft, or on the part of the captain of the tugboat, the tugboat as well as the scow might properly be held to have been "used" in the violation of the statute which was committed. As the case stands, I do not think I am required to construe the language of the statute so broadly as to include the tugboat. There was no violation of the statute on board her, or by any person to whom the owners had entrusted any duty on board her. All that can be said is that she was being used and employed in towing the scow at the time the man in charge of the scow unexpectedly made use of that vessel in a violation of the act. The act does not impose a penalty upon every vessel engaged in the transportation

of material dumped in violation of law, as Rev. St. § 3062 [U. S. Comp. St. 1901, p. 2007], subjects to forfeiture every team or other motive power used in drawing or propelling a vehicle containing smuggled goods. Act June 29, 1888, c. 496, 25 Stat. 209 [U. S. Comp. St. 1901, p. 3533], for the prevention of dumping in New York harbor, contained provisions similar in character to those of the act under which these proceedings are brought, and imposed penalties in like manner upon vessels used or employed in its violation. Under this act it was held that a tug was not "used or employed" in the illegal act of scowmen, who without the knowledge of those on the tug dumped the contents of a scow she was towing at a forbidden place. The Emperor (D. C.) 49 Fed. 751. The act of June 29, 1888, was amended in 1894, after the decision referred to, and as amended it makes the persons in charge of a tugboat towing a scow liable to equal punishment with the persons in charge of the scow for any illegal dumping. These provisions, it has been held, subject all the persons assisting in the general undertaking in the course of which the forbidden act is done to the penalties of the statute. Jaycox v. United States, 107 Fed. 938, 47 C. C. A. 83. But no such provisions are contained in the statute with which we are here concerned.

The penalty incurred by the scow is fixed at $500, for which amount a decree is to be entered in the proceeding against her. The libel against the tugboat is to be dismissed.

INTERNATIONAL COAL MINING CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. March 4, 1907.)

No. 25.

CORPORATIONS—EFFECT OF SALE OF PROPERTY UNDER PENNSYLVANIA STATUTE —CHOSE IN ACTION.

A sale of the property of a corporation by a sheriff under a special writ of fieri facias, under the provisions of Act Pa. April 7, 1870 (P. L. 58), which authorizes the issuance of such writ on the return of an execution unsatisfied, and the sale thereunder of "any personal, mixed, or real property franchises and rights of such corporation" as such statute has been construed by the Supreme Court of the state, does not pass title to a claim for damages existing in favor of the corporation, and, on its subsequent adjudication as a bankrupt, a pending action on such a claim may be prosecuted to judgment by its trustee.

On Demurrer to Replication.

J. W. M. Newlin, for plaintiff.
Sellers & Rhoads and Francis I. Gowen, for defendant.

HOLLAND, District Judge. This suit was instituted May 13, 1905, for damages resulting in an unlawful discrimination against the plaintiff by the defendant in the shipment of coal over the latter's road. On July 11, 1905, the defendant pleaded not guilty and the statute of limitations. On October 7, 1905, by leave of court, the further plea was filed, as follows:

"And for a further plea in this behalf the defendant, by leave of court, says that the plaintiff ought not to have or maintain its said action, because, since the institution of the same, to wit, on September 29, A. D. 1905, in a certain action at law, in which the Cresson & Clearfield Coal & Coke Company was plaintiff, and the plaintiff herein, the International Coal Mining Company, was defendant, pending in the court of common pleas No. 1 for the county of Philadelphia to No. 3,588 June term, 1901, of which said action the said court of common pleas had jurisdiction, there duly issued, upon a judgment obtained therein by the plaintiff against the defendant, a writ of fieri facias, under and by virtue of which the sheriff of the county of Philadelphia duly and lawfully exposed to public sale or vendue on said September 29, 1905, all and singular the chartered rights, privileges, and franchises of the said International Coal Mining Company, plaintiff herein, including the franchise and right to be a corporation, together with all property, real, personal, and mixed, and all book accounts, claims, choses in action, causes in action, whether arising out of contracts, torts, or penalties, and assets of every description, belonging to, or in any way appertaining to said International Coal Mining Company, plaintiff herein, excepting only lands in fee, and thereupon sold the same to one Patrick H. Walls, all of which appears upon the records of the said court of common pleas No. 1 for the county of Philadelphia, as will appear by an inspection of the same."

To the latter plea, the plaintiff replied, March 13, 1906, that no title to the suit in question passed to Patrick H. Walls under the sheriff's sale set forth in the plea, because subsequent to the sale, but within four months thereafter, the plaintiff corporation had been adjudged a bankrupt, and Edward D. McLaughlin appointed trustee in bankruptcy, who had, with leave of court, intervened as plaintiff in this suit and is entitled to prosecute the same to judgment for the benefit of the creditors of the bankrupt estate. There were other matters set forth in this replication, which need not now be considered.

The defendant, on March 17, 1906, demurred to the plaintiff's replication, and assigned the following reasons therefor:

"(1) Because the plaintiff by its replication neither traverses the facts averred in the defendant's plea nor admits and avoids the same, but merely takes issue as to the legal effect of these facts and as to the conclusion to be deduced or drawn therefrom.

"(2) Because the adjudication of bankruptcy set forth and referred to in said replication cannot have the effect of annulling or voiding the sale previously made of the franchises of the plaintiff under the execution issued out of the court of common pleas No. 1 for the county of Philadelphia.

"(3) Because the facts set forth in said replication affecting the regularity of the proceedings of said court of common pleas No. 1 for the county of Philadelphia, which preceded the said sale of the franchises of the plaintiff, cannot be inquired of by this court, but are exclusively for the consideration of said court of common pleas No. 1 for the county of Philadelphia in a proceeding to set aside said sale."

This demurrer, technically speaking, raises the question as to whether whatever right or title Patrick H. Walls took to the claim in suit under the sheriff's sale was destroyed by reason of the bankruptcy proceedings. This question need not be considered, because in our judgment Patrick H. Walls acquired no interest whatever in this claim by virtue of the sheriff's sale.

The procedure mentioned in the above plea, under which the property was sold, was instituted under the Pennsylvania act of April 7, 1870 (P. L. 58). This act authorizes "the sheriff" or other officer to levy the amount of the judgment, with interest and costs of suit, on

"any personal, mixed or real property, franchises and rights of such corporation and thereupon proceed and sell the same." There is nothing in this act which authorizes the sale of a "claim for damages" such as is involved in this suit. In fact we do not think this kind of a claim or choses in action can be sold under this proceeding, and we are sustained in this view of the case by the Supreme Court of the state of Pennsylvania, in the case of Hogg's Appeal, 88 Pa. 195–197. In that case, it was urged upon the court that "the unpaid subscriptions to the stock of the company passed to the purchaser at sheriff's sale by virtue of the sale of the road and its franchises, free from any and all claims that the delinquent subscribers might have against the company." The court, in a per curiam opinion, held otherwise, and said: "The sale of the railroad property and franchises did not pass to the purchaser the debts or mere choses in action due to the company from others."

And again, so late as April 9, 1906, the Supreme Court of the state of Pennsylvania, in an opinion filed by Justice Mestrezat, in Pocono Ice Co. v. American Ice Co., 214 Pa. 640, 64 Atl. 398, holds that the sale of the property and franchises of a corporation does not dissolve or extinguish the existence of mining, manufacturing, and trading companies, since the Pennsylvania act of May 21, 1881 (P. L. 30), which expressly provides that:

"All corporations for mining, manufacturing or trading purposes, whose charters may have expired, or may hereafter expire, may bring suit and maintain and defend suits already brought for the protection and possession of their property and the collection of debts and obligations owing to them or any of them, and sell, convey and dispose of their property, and make title therefor as fully and effectually as if the charter had not expired."

The act authorizes the officers last elected to represent the corporation for such purpose, and declares that its purpose is to enable the corporations "to realize and divide their assets and wind up their affairs." The court holding the act applies to corporations whose property and franchises have been sold on execution, and although the property and franchises of the Pocono Company had been sold, it existed for the purpose of instituting suit against the American Ice Company to recover damages for breach of contract. The plaintiff did recover the judgment, and it was sustained.

The case in effect, therefore, holds that a claim, such as the one in the suit at bar, did not pass to the purchaser at the sheriff's sale of the property and franchises of the International Coal Mining Company on an execution against it. But whether or not the International Coal Mining Company could have maintained this suit after the sheriff's sale of its property and franchises on an execution authorized by the act of April 7, 1870, as an existing corporation, kept alive by virtue of the act of May 21, 1881, as suggested by the decision of the Supreme Court in Pocono Co. v. American Ice Co., supra, we need not consider, because it has been settled by the state court. This court has held that the International Coal Mining Company was not dissolved by the sheriff's sale, and on the involuntary petition properly adjudged a bankrupt. In re International Coal Mining Co. (D. C.) 143 Fed 665. This decision has been affirmed by the Circuit Court of Appeals in this

district in the case of Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981. Edward D. McLaughlin, trustee in bankruptcy, has, with leave of court, intervened, and is the present plaintiff, claiming the right to prosecute this suit to judgment.

Following the view taken by the court of last resort in the state of Pennsylvania, we hold that title to the claim involved in this suit did not pass to Patrick H. Walls by virtue of the sheriff's sale set forth in the special plea of the defendant, and that the trustee in bankruptcy properly appears as the plaintiff in this case.

The demurrer to the replication is overruled.

INTERNATIONAL COAL MINING CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. March 25, 1907.)

No. 69.

1. EXECUTION—PROPERTY SUBJECT TO EXECUTION—CHOSES IN ACTION.

Choses in action are subject to execution only when made so by statute or voluntarily given up to be sold on execution, and in Pennsylvania they are only subject to seizure and sale on an attachment execution provided for by Act June 16, 1836, § 32 (P. L. 767).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 117, 118.]

2. CORPORATIONS—SALE OF PROPERTY ON SPECIAL WRIT—PENNSYLVANIA STATUTE.

Act Pa. June 7, 1870 (P. L. 58), providing for the issuance of a special writ of fieri facias on a judgment against a corporation after return of execution unsatisfied and the sale thereunder of "the personal, mixed or real property, franchises and rights of such corporation," as construed by the Supreme Court of the state, does not authorize the sale under such writ of a chose in action or claim in tort belonging to the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2120.]

On Rule to Strike from Trial List.

J. W. M. Newlin, for plaintiff.

Francis I. Gowen, for defendant.

HOLLAND, District Judge. The reasons for the motion to strike this case from the April trial list are the same as those raised by the demurrer, decided against defendant, in an opinion filed March 4, 1907. 152 Fed. 551. We have, however, permitted a reargument of the whole question, and after a patient re-examination of the questions raised, taking into consideration the new matters introduced, we still think the conclusion reached on the demurrer is just and sound, and that the rule to strike the case from the trial list must be dismissed. If the claim in suit be not included in the property sold under the special fi. fa., and no title to it passed to Walls, then the plaintiff still holds it and has a right to maintain the suit. Choses in action are subject to execution only when made so by statute, or are voluntarily given up to be sold on execution. 11 Am. & Eng. Ency. of Law, p. 623; 17 Cyc. 971. In Pennsylvania, a chose in action cannot be

taken in execution and sold on a fi. fa. Troubat & Haly's Practice, § 975; Rhoads v. Megonigal, 2 Pa. 39; Tradesmen's B. & L. Ass'n v. Maher, 9 Pa. Super. Ct. 340.

Prior to Act June 16, 1836, § 32 (P. L. 767), a judgment creditor had no means of reaching that large class of property known as choses in action, and to remedy this the Legislature, by this act of 1836, provided a new writ, called an attachment execution, by which debts or claims in suit may be attached. The law in Pennsylvania affords no means by which a judgment creditor could reach this claim in suit except by attachment. It could not be levied upon and sold on a fi. fa., unless such a disposition of it was authorized by Act June 7, 1870 (P. L. 58). By this act the Legislature authorized the officer to seize under this special fi. fa. and sell the "personal, mixed or real property, franchises and rights of such corporation," etc. The language used in Act June 16, 1836, § 19 (P. L. 764), authorizing execution for the satisfaction of debt, is this: "May have execution * * * against * * * the estate * * * in the following order, to wit: (1) upon the personal estate of the defendant; (2) upon the real estate," etc. It will be noticed that the words "personal estate" are used in this act, and the words "personal property" are used in the act of 1870. "Choses in action" are not included in the first, and the latter cannot be regarded as a more comprehensive phrase. The act of 1870 specifies in general terms what may be sold beside franchises. It cannot be supposed the Legislature intended to include any other kind of property in the list to be sold on a fi. fa. in the act of 1870 by the use of the words "personal property" than it included by the use of the words "personal estate" in the act of 1836, and, in fact, the Supreme Court has said, in effect, that in neither case was it intended that a chose in action should be taken in execution and sold on a fi. fa. There is the ordinary and the special fi. fa. authorized by the act of 1870, both of which serve a particular purpose under the act, and the different purpose for which each is used is clearly pointed out in an opinion of the state court, reported in 170 Pa. 1, 32 Atl. 539. On page 8 of 170 Pa., the following appears:

"In the light of these cases, it seems quite clear that all the property of a corporation which can be properly considered to be goods, chattels, lands, or tenements is subject to execution in the ordinary way. That such of its property, real or personal, as is necessary to the exercise of some public franchise, is to be regarded as forming a part of that franchise and is not subject to execution in the ordinary way, but can only be taken in the lump under the special writ provided by the act of 1870, and sold together to a purchaser or purchasers, whom the law now at least authorizes to exercise the franchises possessed by the corporation."

See, also, Reynolds v. Reynolds L. Co., 169 Pa. 626, 32 Atl. 537, 47 Am. St. Rep. 935.

A chose in action or claim in tort cannot be regarded in any sense as necessary to the exercise of a franchise of a mining company. It belongs to the creditors of an insolvent corporation after its property, properly regarded as forming a part of the franchise, has been sold in lump, and in Pocono Ice Co. v. American Ice Co., 214 Pa. 640, 64 Atl. 398, the court says Act May 21, 1881 (P. L. 30), keeps the corporation in existence for the collection of these claims. It is very easy

to see the reason for this view. Tangible and visible personal property can be sold with some degree of intelligence. The purchaser can ascertain with some certainty what he is buying, and he will bid the value, or near the value, of the property sold; but a "chose in action," and especially a claim for damages arising out of a tort, can in no way be valued by a purchaser, and, of course, could not be sold on a fi. fa. only at the greatest sacrifice. It would, indeed, be the sale of a "pig in the poke," and the purchaser would bid accordingly. The result would be a sacrifice of the property because of the uncertainty of value. This proceeding is a fair illustration of what injury may be done to creditors of an insolvent corporation, if the contention of the defendant be correct. Walls purchased the entire property sold for $40. This property, in addition to the franchises, according to the proceedings, and as finally returned by the sheriff, included the sale of "all choses in action, claims arising out of contract, tort, or penalties," etc., and upon this general description it is claimed this claim for damage arising out of an alleged violation of a United States statute at the time in suit in the federal courts passed to Walls, the purchaser at the sheriff's sale. The trustee in bankruptcy of plaintiff has recently collected more than $6,000 of "choses in action" existing at the time the sale was made, and, if the defendant's contention here be correct, these claims which have been collected, together with the claim in this suit, would belong to Walls, and all for $40. The creditors of the plaintiff, who, even with the $6,000, are not paid in full, would in that case get nothing. A construction of this act, working such a gross injustice to creditors, will not be adopted by this court, in the absence of a decision of the Supreme Court of the state giving it that force and effect. On the other hand, the court of last resort in Pennsylvania, in Hogg's Appeal, 88 Pa. 195, has said that a sale under this act of the "property and franchises" does not pass a "chose in action," and, since the sale in this case was had in the state court, the Supreme Court, in the case of Pocono Ice Co. v. American Ice Co., 214 Pa. 640, 64 Atl. 398, held that a corporation, after a sale of its "property and franchises" under this act, still exists for the collection of any debts due it.

It is urged that this is an attempt by a federal court in a collateral proceeding to review the action of the court of common pleas of Philadelphia, a state court. We do not so regard it. The proceeding, judgment, and records of the state court are entitled to full faith and credit in the federal courts, and cannot be reviewed collaterally here; but this is in no sense a review of the proceeding of the action of the state court, nor a collateral attack upon its proceeding or judgment. There is a question as to whether this claim in suit in the United States court could be levied upon and sold in the state court under a special fi. fa., authorized by the act of 1870, upon which "any personal, mixed or real property, franchises and rights" of a corporation may be sold, and we are following the decisions of the Supreme Court of the state in holding that this claim could not be so levied upon and sold.

Motion to strike this suit from the trial list must therefore be refused, and it is so ordered.

INTERNATIONAL COAL MINING CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. March 25, 1907. On Making Rule Absolute, April 3, 1907.)

No. 69.

1. EVIDENCE—PRODUCTION OF BOOKS—CORPORATIONS.
A corporation cannot refuse to produce its books in an action against it to recover damages for a violation of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], on the ground the evidence therein may incriminate it.

2. SAME.
Books and papers required by an order of court to be produced by a party on the trial of a cause remain subject to objections to their relevancy as evidence which must be passed upon at the trial.

On Rule for Production of Books and Papers.

J. W. M. Newlin, for plaintiff.
Francis I. Gowen, for defendant.

HOLLAND, District Judge. A petition was presented January 30, 1907, and a rule granted on the defendant to show cause why the books and papers set forth in the petition and statement should not be produced at the trial of the cause. The defendant makes answer: (1) That it should not be required to produce these books and papers because of facts averred and set forth in the third plea filed; (2) that, the action being one for the recovery of damages in the nature of a penalty under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], the motion should be denied.

The first question, which raises the right of the plaintiff to continue the suit, has been decided against the defendant in an opinion filed March 4, 1907.

As to the second, we think that has practically been disposed of by Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. In that case a subpœna duces tecum was served upon the witness Hale to produce certain books and papers belonging to certain corporations. The witness refused to produce the books, for the reason, among others, that the production of the books would incriminate the corporations. In the court below the objection was overruled and the witness required to produce the books. This view was sustained by the Supreme Court in an elaborate opinion by Judge Brown, where, on page 74 of 201 U. S., page 378 of 26 Sup. Ct. (50 L. Ed. 652), he uses the following language:

"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 individ-

ual and a corporation, and that the latter has no right to refuse to submit 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 him, 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."

The government was investigating the actions of certain corporations for a violation of the Sherman act to protect trade and commerce against unlawful restraints and monopolies, and the court said that a corporation "has no right to refuse (in such case) to submit its books and papers for examination at the suit of the state"; but the principle is the same when there is an application for the production of books at the suit of an individual, who claims to have been injured by a violation of the interstate commerce act. The corporation cannot refuse to produce its books in a claim for damages resulting from a violation of this act. Nelson v. U. S., 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673, to the same effect.

The plaintiff in this case is entitled to the production of such books and papers as are relevant and pertinent to the issues involved; but the court will not make the rule absolute, as the question of the relevancy of whatever books and papers are called for must be passed upon at the trial. Bas v. Steele, Fed. Cas. No. 1,088, 3 Wash. C. C. 381; Dunham v. Riley, Fed. Cas. No. 4,155, 4 Wash. C. C. 126; Iasigi v. Brown, Fed. Cas. No. 6,993, 1 Curt. 401; Cassett et al. v. Mitchell Coal & Coke Co. (decided in this circuit) 150 Fed. 32.

It is ordered therefore that the defendant be required to produce the books and papers specified in the petition at the trial of the cause, unless it shows cause at the trial why the same should not be produced.

On Making Rule Absolute.

On March 25, 1907, an order was made on the defendant in this case to produce books and papers at the trial of the case. A petition had been presented, under section 724, Rev. St. [U. S. Comp. St. 1901, p. 583], by the plaintiff for the production of books and papers. The defendant made answer, with other matters, that the action being one for the recovery of damages, in the nature of a penalty under the interstate commerce act, the motion should be denied. The order to produce was not made absolute, but the question of requiring the production was left open for settlement at the trial. In this I think the order was not in proper form. It was the intention of the court to require the production of the books, for the reason that the action is not for a penalty in a sense to exempt the defendant from the production of books in an action of this kind, and even if it be regarded as a suit for the recovery of damages as a penalty, or in the nature of a penalty, the defendant, being a corporation, is not entitled to the privilege of refusing to produce its books and papers in a suit of this kind. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Nelson v. U. S., 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673.

And now, April 2, 1907, on motion of James W. M. Newlin, for the plaintiff, and the answer, filed by the defendant to the rule returnable February 13, 1907, on the defendant to show cause why it should not produce upon the trial the documentary evidence set forth in the affidavit of J. Chester Wilson, the secretary of the plaintiff, upon which the rule to show cause was granted, having been determined by the court to be insufficient, it is ordered that the defendant shall produce the said documentary evidence at the trial of the cause, and the rule to show cause is made absolute.

UNITED STATES, to Use of PHŒNIX IRON CO., v. CALIFORNIA BRIDGE & CONSTRUCTION CO. et al.

(Circuit Court, E. D. Pennsylvania. March 28, 1907.)

No. 14.

1. COURTS—JURISDICTION OF FEDERAL COURTS—ACTION AGAINST SURETY COMPANY.

Conceding that a surety company which has furnished a bond for a contractor for government work is given the privilege of being sued thereon only in the district in which the bond was made, or in that where it has its principal office, by Act Aug. 13, 1894, c. 282, § 5, 28 Stat. 280 [U. S. Comp. St. 1901, p. 2316], which provides that it may be sued in the federal courts in either of such districts, yet a company waived such privilege where it entered appearance, pleaded to the merits, and took depositions before moving to dismiss.

2. UNITED STATES—BOND OF CONTRACTOR FOR PUBLIC WORK—LIABILITY OF SURETY.

A bond given by a contractor for government work, conditioned as provided by Act Aug. 13, 1894, c. 282, 28 Stat. 279 [U. S. Comp. St. 1901, p. 2315], is in effect two separate instruments; one securing performance of the contract to the United States, and the other the payment by the contractor of bills for labor and materials furnished, and in the latter aspect

the surety is not discharged from liability by a variation of the contract which might relieve it from liability to the United States, as by a change in the site of a building.

At Law. On motion to dismiss for want of jurisdiction, motion for new trial, and motion for judgment for American Surety Company notwithstanding the verdict.

Harris S. Sparhawk, Samuel Scoville, Jr., and Charles H. Edmunds, for Phœnix Iron Co.

Dickson, McCouch & Glasgow, for American Surety Co.

J. B. McPHERSON, District Judge. This is a suit brought to the use of the Phœnix Iron Company upon a contractor's bond given under Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278; 2 Supp. Rev. St. p. 236 [U. S. Comp. St. 1901, p. 2523]. The American Surety Company is the only defendant that was served, and the trial resulted in a verdict in favor of the use plaintiff. A motion to dismiss the suit for want of jurisdiction was made on November 19, 1906, three days after the trial. This was the renewal of a similar motion that was made on May 17, 1905, and denied in the following August. Both motions depend upon these facts: The California Bridge Company is a corporation organized under the laws of the state of California, and was a resident of the Northern district of that state at the time when the contract in question was entered into. The American Surety Company is a corporation of the state of New York, and has now, and has always had, its principal office in that state. This suit was begun in the common pleas court of Philadelphia county within the territorial area of the Eastern district of Pennsylvania, and service was made upon an agent of the surety company, who had been duly appointed for that purpose in obedience to the laws of the state of Pennsylvania. The case was afterwards removed to the Circuit Court, and these motions to dismiss were subsequently made.

What effect would have been given to a motion to dismiss, if it had been seasonably made, need not be declared, in view of the following additional facts, all of which appear on the record: The suit having been originally brought in the common pleas of Philadelphia county on September 17, 1900, a general appearance for the surety company was entered shortly afterward by R. C. Dale, and at his instance the case was removed to the Circuit Court in February, 1901. Mr. Dale's name was duly entered on the docket of the Circuit Court as counsel for the surety company, and on March 27, 1901, he filed an affidavit of defense to the merits of the plaintiff's claim. On March 12, 1902, he put the case at issue by pleading non assumpsit, and on October 25, 1902, depositions on behalf of the surety company, to be used at the trial, were filed in the office of the clerk. In February, 1905, Mr. Dale having died meanwhile, the present counsel for the surety company entered a general appearance for his client, and on May 17, 1905, made the first motion to dismiss for want of jurisdiction; the second motion, which is now pending, having been made a few days after the trial. Under these facts, I think it is clear that, if section 5 of the Act of August 13, 1894, c. 282, 28 Stat. 280 [U. S.

Comp. St. 1901, p. 2316], gives to the surety company the exclusive privilege of being sued either in the district in which the bond was made or guarantied, or in the district in which its principal office is located—that is to say, either in California or New York—the privilege was waived by the entry of general appearances, the filing of an affidavit of defense upon the merits, the taking of depositions in preparation for trial, and the filing of a general issue plea, before the motion to dismiss was made. This is the ground on which the first motion to dismiss was denied, and I have seen no reason to change my opinion since that decision was made. The pending motion to dismiss is therefore refused. I do not wish to be understood as assenting to the proposition that section 5 of the act of 1894 is to be construed as the surety company contends. That proposition will be considered when its decision is properly involved. The ruling now is that, if its correctness be assumed, the company's privilege was waived.

The motions for a new trial, and for judgment notwithstanding the verdict, must also be dismissed. Both are based upon the averment that the contract, as originally entered into by the bridge company, the principal contractor, contemplated the erection of a building upon a particular site; and therefore that, as this site was afterwards changed by the government, the contract was thereby so materially varied as to discharge the surety. The contention overlooks the fact, I think, that a suit such as this is not governed by the ordinary rules that are applicable to a surety's obligation. Under these rules he may sometimes escape the payment of what is justly and equitably due, because his contract has been so varied as to enable him to set up successfully a legal defense to the action; but the present suit is peculiar in its nature, because it is founded upon the act of 1894, to which reference has already been made in the first sentence of this opinion. The bond given under that statute is in effect two separate instruments; one given to the United States to insure the faithful performance by the contractor of his obligations to the government, and the other given to the United States as a merely nominal plaintiff for the purpose of insuring the faithful discharge of the contractor's obligations to his subcontractors. It is "the usual penal bond with good and sufficient sureties" that is given to the United States; but to this undertaking is added "the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." This is an agreement as distinct as if it were contained in a separate instrument, and it is this agreement which the bridge company violated, and the surety company is now asked to make good. That the Phœnix Iron Company did supply the contractor with materials for the prosecution of the work provided for in the contract cannot be denied. These materials were shipped to, and were received by, the contractor, and were inspected and accepted by the government. They were also paid for by the government, and were afterwards used in the building that was erected upon the second site by another contractor. In my opinion, these facts establish, beyond question, the surety's liability. It is,

perhaps, a doubtful question whether the change of site was a variation of the agreement. The bridge company's undertaking was to do certain work at "the United States navy yard, Mare Island, Cal."; no particular site being pointed out in the contract or in the specifications, and both sites being within the descriptive words just quoted. But, assuming that the change of site varied the agreement so that the government thereby lost the protection of the surety's obligation, it does not follow that the protection of the separate and additional obligation was also lost, so far as the Phœnix Iron Company is concerned. This additional obligation has not been varied in any respect with the consent or acquiescence of the iron company. This company has fulfilled its subcontract to furnish material for the prosecution of the work, and, in my opinion, the surety has not even a technical defense to the claim. The point has been squarely decided by the Circuit Court of Appeals for the Eighth Circuit, in United States, for Use, etc., v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526, and I refer to the opinion of the court, delivered by Judge Thayer, as a thoroughly satisfactory discussion of the question now under consideration.

To the refusal of judgment notwithstanding the verdict and to the refusal to dismiss, an exception is sealed to the surety company.

In re FRITZ.

(District Court, E. D. New York. March 23, 1907.)

BANKRUPTCY—EXEMPTION OF BANKRUPT FROM ARREST—COMMITMENT FOR CONTEMPT.

An order of a court of bankruptcy restraining a sheriff from arresting a bankrupt on civil process, following the language of Bankr. Act July 1, 1898, c. 541, § 9a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], does not prevent the commitment of the bankrupt by a state court for a contempt, where such commitment is intended as a punishment, and not for the collection of a debt.

In Bankruptcy. On motion to modify restraining order.

A. Frank Cowen, for bankrupt.
Louis B. Brodsky, for petitioner.

CHATFIELD, District Judge. It appears from the motion papers that Samuel Fritz, the bankrupt, was the defendant in a suit in the Supreme Court of Kings county, where he was sued under the name of Simon Fritz, in which a judgment was entered apparently on the 25th day of June, 1903, for the sum of $271. There is some dispute as to whether the cause of action on which this judgment was obtained arose from a debt which was dischargeable in bankruptcy. Subsequently a supplementary examination was held, but the defendant did not appear for examination. Thereupon an order to show cause was obtained, why the judgment debtor (called "Simon" Fritz) should not be punished for such misconduct, and upon the entire record an order was made by Mr. Justice Jaycox, in the Supreme Court of the state of New York, on November 19, 1906, adjudging said Simon

Fritz guilty of contempt of court in having willfully disobeyed an order of October 25, 1906, in the proceedings supplementary to execution. The said order of Mr. Justice Jaycox also further adjudged that the misconduct of said Simon Fritz impaired, impeded, and prejudiced the rights and remedies of the judgment creditor to his actual loss or injury in the sum of $271, with interest, amounting in all to the sum of $325.20, and further ordered that the said Simon Fritz be committed by the sheriff of the county of Kings, to be detained in close custody until he should pay the said sum or be discharged according to law, and that a warrant issue for the execution of that order.

The judgment debtor filed a petition in bankruptcy, under the name of "Samuel" Fritz, on or about the 1st day of December, 1906, and obtained an order, dated December 3, 1906, restraining the sheriff of the county of Kings and others from interfering with the property of the bankrupt, and enjoining and restraining the said sheriff and others "from arresting the said bankrupt on civil process save in the cases specified in subdivisions 1 and 2 of section 9a of the bankruptcy law of 1898." Act July 1, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]. The judgment creditor on March 6, 1907, obtained an order directing the bankrupt or his attorney to show cause why the restraining order of December 3, 1906, should not be modified, by permitting the sheriff of the county of Kings to execute the order committing the bankrupt and judgment debtor for contempt which was made by Mr. Justice Jaycox on November 19, 1906.

The restraining order of December 3, 1906, followed the language of the bankruptcy statute, and left open the question whether it was to be applied to the enforcement of the order directing the punishment of the bankrupt for contempt. The sheriff seems to have considered himself stayed, and the Supreme Court has made no further order for the punishment of the judgment debtor. This court could stay the collection of a judgment for a dischargeable debt by means of a contempt proceeding, ostensibly intended only to aid such collection.

No authorities are cited on behalf of either party which are conclusive upon this question. All the authorities cited fall upon one side of the line or the other, accordingly as the matter of punishment is held to be a proceeding for the collection of a debt, or to punish a person for contempt of the court's authority as such.

It would appear from the order of Mr. Justice Jaycox, dated November 19, 1906, that because of the failure of the judgment debtor to appear for examination, as required, he was adjudged in contempt, and directed to pay the amount of the judgment, with interest. If the original debt was one dischargeable in bankruptcy, the contempt proceedings would therefore seem to have been considered by the court merely in aid of the collection of the judgment, and not solely as punishment for disregard of the court's authority. The bankrupt and judgment debtor was not directed to be imprisoned for any particular time, nor fined any ordinary sum, but he was directed to be committed until he should pay to the judgment creditor the face of the judgment, with interest, and no costs of the motion were added thereto. The restraining order of December 3, 1906, stayed the collection of

all dischargeable debts, and by section 17, subd. 2, of the bankruptcy act, liabilities for willful and malicious injuries to the person or property of another are not dischargeable. So far as can be learned from the papers submitted, the action on which the original judgment was recovered against Fritz was brought in the Municipal Court of the city of New York, upon oral pleadings, for injuries to personal property. The answer was a general denial, and the plaintiff obtained a judgment.

If this action was for "willful and malicious injury to personal property," the restraining order of December 3, 1906, did not affect this judgment. Further, if the order of Mr. Justice Jaycox, directing the defendant's punishment for contempt, was intended as a punishment, and not to assist merely in the collection of the debt, the commitment of the debtor was not stayed by the order of December 3, 1906. The Supreme Court can decide as to the scope of its own order, and determine the duty of the sheriff. Until the questions above suggested are cleared up, and until some conflict arises from the effects of the restraining order, there is no necessity for any modification of its terms.

The motion is therefore denied.

THE SENTINEL.

(District Court, E. D. New York. March 23, 1907.)

1. SEAMEN—WAGES—EFFECT OF DISCHARGE FOR CAUSE.

A seaman is entitled to recover wages for the time served, although discharged because of fault on his part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 83.]

2. SAME.

Conflicting evidence considered, and *held* to sustain the claim of a seaman for wages, but not to show that they were withheld without sufficient cause, so as to subject the owner to the penalty provided by Rev. St. § 4529 [U. S. Comp. St. 1901, p. 3077].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 150.]

In Admiralty. Suit by seamen for wages.

James J. Macklin, for claimant.
F. A. Acer, for libelants.

CHATFIELD, District Judge. The libelant Peterson claims wages to the amount of $93.33 for services as engineer upon the yacht Sentinel during the month of May and up to the 2d of June, 1905, and the further sum of $475, wages at the rate of $1 a day, under the provisions of section 4529, Rev. St. [U. S. Comp. St. 1901, p. 3077], computing the time from the date when the alleged wages of $93.33 became due. The libelant Evje claims wages in the amount of $100, for the month of June, 1905.

The testimony in the case shows that the libelant Peterson was discharged upon the 2d day of June, 1905, at the request of the officers of the Engineer Corps of the United States Army, who were operating the yacht Sentinel under a charter with the owner at that time. The

claimant produces a receipt for the sum of $75 (alleged by the libelant Peterson to have been altered from a receipt for $5), which it is stated by the claimant covered the wages of the libelant Peterson for the month of May. On behalf of Peterson a check for the sum of $90 is produced, which he received at the end of the month of May, and upon which payment was stopped. The claimant offers proof to the effect that this check was made out on information furnished by one Edwards, then mate of the vessel, but that payment on this check was stopped, inasmuch as information was obtained that the $75 referred to in the receipt had already been paid.

It is impossible to determine from the testimony what the exact situation was. Edwards, the mate of the vessel, who was a witness throughout the whole transaction, and by whom the $75 was paid to Peterson, if paid at all, is in Australia. Upon the testimony it is apparent that Peterson rendered services for the time alleged. Without the testimony of the man Edwards, it seems to the court that Peterson is entitled to his wages for the month of May, and for two days in June. The check on which payment was stopped was testified to be in Edwards' handwriting, and was given upon information as to the services of Peterson furnished by Edwards. This makes it unreasonable to suppose that within a few days afterwards payment was stopped upon the check upon information also furnished by Edwards, to the effect that he had already paid $75 of the wages represented by the check, and that at an interview between Edwards, Peterson, and William Garner, agent for the owner, Peterson should sign a receipt admitting that fact, after attempting to collect the amount of the check which had been stopped. William Garner is afflicted with cataracts, and is apparently unable to see, except close at hand, and when objects are held at an angle to his line of vision. Peterson showed on the trial that script writing in English was not read by him with much facility, and it would appear that, if any deception was practiced, it was connected with the action of the missing Edwards. The story of Peterson as given on the stand is sufficient to entitle him to recover wages for the month of May at the rate of $100 per month, less $10 cash advanced, and $5 paid in the month of June, making the net amount of $85, together with $3.33, for one day's service in June.

In the case of Evje, who was hired at the rate of $100 per month, and discharged upon the 14th of June, a serious issue of fact arises over the circumstances of his discharge, and the condition in which he left the boilers of the boat. It may be that the owner of the boat suffered serious damage resulting from the acts of Evje, but no counterclaim to offset the claim for wages has been filed. On the authority of Moore v. Neafie (D. C.) 3 Fed. 650, The Pacific (D. C.) 18 Fed. 703, and The Belle of the Coast (D. C.) 56 Fed. 251, it would appear that Evje is entitled to his wages for the 14 days of June, even if discharged because of fault on his part. The testimony of Evje and his witnesses as to his discharge does not bear scrutiny; while the testimony offered on the part of the claimant seems to the court to sustain the contention that Evje left the vessel in the manner alleged by the claimant. In the absence of any proof as to the value of his

services, except as to the hiring of Evje at $100 a month, his claim will be disallowed beyond the sum of 14 days' pay, at $3.33 per day.

Under the Peterson libel, the claimant shows reasonable grounds for disputing the claim, even if not able to make out a defense sufficient to prevent any recovery on the part of the libelant; and therefore the additional penal damages provided for in section 4529 will not be allowed.

A decree may be entered allowing the libelant Peterson $88.33, and the libelant Evje $46.67, with one bill of costs.

UNITED STATES v. DOMINGO et al.

(District Court, D. Idaho, C. D. March 14, 1907.)

No. 443.

1. WOODS AND FORESTS—FOREST RESERVATIONS—VALIDITY OF REGULATIONS EXCLUDING STOCK.

That portion of rule 72 promulgated by the Secretary of the Interior which forbids the grazing upon or driving across a forest reservation of any live stock without a permit, except as otherwise allowed by regulation, and declares that such acts shall "constitute trespass, punishable by fine and imprisonment," so far as relates to the prohibition, is within the authority conferred on the Secretary by Act June 4, 1897, c. 2, § 1, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1540], which provides that he "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violations of the provisions of this act, or of such rules and regulations, shall be punished as is provided for in" Act June 4, 1888. Such rule is not a law, and for that reason an exercise of power which Congress could not delegate, but merely a regulation proper for making the law of Congress effective; and, while the part prescribing the punishment is beyond the authority conferred, it may be treated as surplusage, and does not invalidate the remaining portion, for a violation of which the offender may be prosecuted and punished as provided by the statute.

2. SAME—PENALTY FOR VIOLATION.

The fact that the statute defines the penalty for its violation as the same prescribed by another statute does not require that the offenses should be the same to render the penalty applicable.

On Demurrer to Indictment.

N. M. Ruick, U. S. Dist. Atty.
Edgar Wilson, for defendants.

BEATTY, District Judge. The indictment is for trespass upon a forest reserve by driving and grazing sheep thereon without a permit. To this indictment the defendants have demurred. By Act June 4, 1897, c. 2, § 1, 30 Stat. 34–36 [U. S. Comp. St. 1901, p. 1540], in modification of a prior act for the creation of forest reserves, it is, among other provisions, enacted, that:

"The Secretary of the Interior * * * may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violations of the provisions of this act,

or of such rules and regulations, shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight."

Said last act provides as follows:

"Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys, or procures to be wantonly destroyed, any timber standing upon the land of the United States * * * shall pay a fine of not more than five hundred dollars or be imprisoned no more than twelve months, or both, in the discretion of the court."

By reason of such statutes the Secretary promulgated certain rules and regulations, a part of No. 72 of which, is that:

"The following acts are hereby forbidden and declared to constitute trespass, punishable by fine and imprisonment: (a) Grazing upon or driving across a forest reserve any live stock without a permit, except as otherwise allowed by regulation. * * *"

The defendants claim that the Secretary is not authorized by Congress to make the above rule, and that, if it intended to grant such authority, it was an attempt to delegate legislative power, which is ultra vires. It is too well settled to admit any doubt that Congress cannot delegate to any other body or person any authority to legislate; but it is also as well settled that it may authorize an executive officer to formulate rules and regulations for the full and explicit enforcement of the law enacted, and according to its full intent and spirit. To discuss either of these questions would be a wasteful use of time. Very many of the acts of Congress contain such delegation of authority. Had it not the power to do so, many of its statutes would be largely nugatory; for it is impossible for it to anticipate the various questions that may arise in the enforcement of its laws and to provide for them. The objection made in this case to the rule is the same that is usually made to other like rules. The solution of the question must in each case be reached by determining whether the rule is an attempt to create a law, or simply a regulation or means of enforcing a law already enacted. If the former, it is void; if the latter, it is as valid as the law itself.

There is no doubt as to the rule of decision; but in some instances the question is so close that it is difficult to conclude how the rule should be construed. In this instance the statute says that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation." But it does not leave him to determine what such objects are. It states them: First, "to regulate their occupancy and use"; and, second, "to preserve the forests thereon from destruction." Clearly Congress contemplated that these reserves should be occupied and used, but in what manner, by whom, and for what purposes it leaves the Secretary to regulate by rules. Rules to prevent any occupation or use would be contrary to the statute, but those simply to regulate such occupation and use are what the statute expressly authorizes, and are valid. While the provision of the statute for the preservation of the forests from destruction probably refers to the wanton destruction of the timber, yet the occupancy has an important effect upon such preservation. If the occupation by animals or otherwise is such as to destroy the growing, tender trees, the final deterioration and destruction of the forest must follow.

My conclusion is that, in so far as this regulation 72 forbids any

grazing or driving of live stock upon on or across the reservation without a permit, it is not legislation, but is only a rule, within the authority of Congress to regulate the occupation and use, and is valid. But the rule goes further, and directs a fine and imprisonment for such unpermitted acts. It must be doubted that the Secretary can direct any punishment that is not directly provided for or distinctly implied by the act. The most that can be held against this portion of the regulation is that it is surplusage, but which does not invalidate the balance of the rule. If no punishment were provided by the act, he could not direct any; if the act does provide a punishment, he cannot modify it. The act does, however, provide a punishment by applying to the offenses in this act—the penalty provided for offenses named in the act of June 4, 1888. By this latter act a punishment of not over $500 fine, or imprisonment of not over 12 months, or both, is provided. But the regulation, in directing fine and imprisonment, is obnoxious to the statute, which provides for fine or imprisonment. This statute of 1897 distinctly defines the penalty as the same prescribed by the statute of 1888.

But defendants' counsel argues that as the penalty provided by the act of 1888 is for the cutting of timber and other offenses therein named, and does not provide for the offense charged in this indictment, it follows that there is no penalty provided for this offense. Careful examination of the statute cannot lead to such conclusion. It—the act of 1897—says that "any violation of the provisions of this act, or such rules and regulations, shall be punished as provided for in the act of June 4, 1888." This is not a statement that the penalty prescribed by the former act can be applied only to the class of offenses therein named, but it is a direction that such penalty shall be applied also to the offenses described in the later act. Congress very often, in defining an offense, applies to it the same penalty provided for some other offense, described in some other act. Clearly that is all that is done in this case.

My conclusion, then, is that the Secretary in making the rule referred to was duly authorized, and that the statute itself has prescribed the penalty for its violation.

The demurrer is overruled.

NOTE. Since preparing the above, counsel have called attention to the telegraphic report of a decision by the appellate court, which may determine the questions here involved. The authority to modify this is reserved, should it later be found that it is not in harmony with such appellate court decision.

UNITED STATES v. DEGUIRRO et al.

(District Court, N. D. California. October 2, 1906.)

WOODS AND FORESTS—FOREST RESERVATIONS—VIOLATION OF REGULATIONS.

The violation of the rule of the Secretary of the Interior forbidding the pasturing of live stock on a forest reservation without a permit is punishable criminally, under Act June 4, 1897, 30 Stat. 35 [U. S. Comp. St.

1901, p. 1540], which authorizes the making of such regulations and prescribes the punishment for their violation.

On Motion in Arrest of Judgment.

This action was begun upon an indictment filed February 2, 1906, charging the defendants with unlawfully pasturing sheep over the Stanislaus forest reserve without having secured permit. A motion in arrest of judgment was interposed. The motion was denied by the court on October 2, 1906, and each of the defendants was fined the sum of $20. The motion in arrest of judgment was made upon the ground that the violation of the regulation in question was not a crime, and that it was beyond the authority of Congress and the Secretary of the Interior to make violation of the said regulation punishable.

DE HAVEN, District Judge. The general reasoning found in the opinion of the Circuit Court of Appeals for this circuit in the case of Dastervignes v. United States, 122 Fed. 30, 58 C. C. A. 346, has created in my mind such doubt of the correctness of my prior decision in the case of United States v. Peter Camou, filed June 24, 1902 (not reported), that I deem it proper at this time to overrule the motion to defendants for an arrest of judgment; and if dissatisfied with this ruling, the defendants have the right to bring the question involved before the Circuit Court of Appeals for decision.

The motion in arrest of judgment will be denied, and each of the defendants fined in the sum of $20.

CITY OF NEW CASTLE v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, W. D. Pennsylvania. March 23, 1907.)

No. 4.

REMOVAL OF CAUSES—MOTION TO REMAND—BURDEN OF PROOF.

On a motion to remand a cause to the state court where the amount in controversy in the suit is put in issue, the burden of proving that it is sufficient to give the federal court jurisdiction rests on the defendant, and the mere allegation of such fact in the petition for removal is not sufficient as against a sworn denial by the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 230.]

In Equity. On motion to remand to state court.

Jas. A. Gardner, for complainant.
J. S. & E. G. Ferguson, for respondent.

EWING, District Judge. On May 21, 1906, the plaintiff filed its bill in equity in the court of common pleas of Lawrence county, Pa., against the defendant, setting forth that the plaintiff is a city of the third class of Pennsylvania, having full police power and the regulation and control of its streets and highways, and that, in pursuance of such power, it has constructed and established through a small part of its territory, being the closely built-up portions of said city, and that

part on which the poles and wires most numerously exist and where the public travel is greatest, a certain underground conduit system, and has, by ordinance duly enacted, required the placing therein of electric wires and cables which heretofore have been suspended on poles along the said streets and highways; that the defendant company has certain lines of poles and wires occupying a portion of the streets of said city in which the conduit system has been established, and after due notice from the authorities to place the said wires within said conduits has refused to do so, and asking that the defendant be required to remove its said line of poles and wires and place said wires in said conduit, and be restrained from maintaining its said aerial line or system on and along the streets and highways where said conduit system has been established. The bill was duly served on the 22d of May, and on the 4th of June the defendant presented its petition to said court, setting forth that the plaintiff is a citizen and resident of the state of Pennsylvania and the defendant a citizen and resident of the state of New York, that the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs, and presenting its bond conditioned for the filing of the record of said case in the Circuit Court of the United States for the Western District of Pennsylvania, and for paying all costs that may be awarded by said court, etc., and praying that the petition and bond be accepted and approved and said cause removed to said Circuit Court, which request was granted by the court, and the record of said cause was thereupon removed into this court.

On September 7, 1906, the plaintiff moved to have the case remanded to the court of common pleas of Lawrence county, Pa., because, inter alia, the matter in dispute between the parties does not exceed the sum of $2,000, exclusive of interest and costs, and because the matter in controversy is not capable of being valued in money, and therefore this court has no jurisdiction. Upon this petition a rule was granted by this court, to which the defendant answered on November 21, 1906, alleging, inter alia, "that the right of this defendent to maintain its poles and wires, and operate the same within the said district of said city of New Castle, is of the value of not less than two thousand dollars," and that "the cost and expense of removing its said poles and wires, and placing the same in the said municipal conduits or subways of said city of New Castle, would exceed the sum of two thousand dollars." Both the motion to remand and the answer to the rule granted thereon are verified by affidavit. The defendant has filed no answer to the bill.

It thus appears that the question before the court is one of jurisdiction, viz., whether the matter in controversy exceeds in value the sum of $2,000, exclusive of interest and costs, or whether it is capable of being valued in money. The petition for removal of the cause having alleged that the matter in controversy does exceed said sum, that the plaintiff and defendant are citizens of different states, and having been made in time, accompanied by proper bond, the court of common pleas of Lawrence county could not do otherwise than accept said petition and approve said bond. But that was a proceeding wholly ex parte. Now, by the motion made here to remand the cause and the reasons assigned in support of that motion, the question of the amount

in controversy in this case is put at issue, and the disposition of this rule depends upon whether or not the defendant has here shown that that amount does exceed the sum of $2,000, exclusive of interest and costs. Under the authorities the burden of showing this jurisdictional fact rests upon the defendant, and it has offered no proof in support of its allegation of the amount in controversy here, but relies wholly upon the statement in its petition for removal, which statement is nothing more than the simple allegation necessary to obtain that order, when there was no controversy as to the amount involved in the case. The statement in its answer to this rule, that its right to maintain and operate its pole line of wires "is of the value of not less than two thousand dollars," is insufficient, even if proved.

The question here is really as to the right of the defendant company to maintain its aerial line of poles and wires in the portions of the city of New Castle now occupied by it in which the conduit system has been established, and consequently the amount in controversy is to be determined by the value of that right. The plaintiff is seeking no recovery against the defendant, has no demand against it for either money or property, but simply asks that it change the character of its telegraph line from that of poles and wires to the conduit system, and thus does not seek to deprive the defendant of any of its franchise rights in said city, but merely to change and control the manner of the exercise of its rights. If this is a correct statement of the question involved in this proceeding and of the manner in which the amount in dispute is to be ascertained, it is evidently incorrect to determine that amount, as the defendant has endeavored to do in one statement of its answer, by a calculation of the cost to the defendant company of making the change from one system to the other. Indeed, it may be that the conduit system will prove more valuable and less expensive to the defendant company than its present one, as is alleged by the plaintiff in the reasons assigned in the motion to remand. But, in any event, the burden of showing the jurisdictional facts is upon the defendant, and it has failed to do more than make the allegation in its petition aforesaid. Moon on the Removal of Causes, § 201; Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992.

As the matter thus appears, there is considerable doubt as to whether the amount in dispute here is sufficient to give this court jurisdiction, and, indeed, whether the amount is capable of anything like correct estimate or ascertainment, and therefore the cause should be remanded and this rule made absolute. Hutchenson v. Bigbee (C. C.) 56 Fed. 329; Fitzgerald v. Railway Company (C. C.) 45 Fed. 812; Winnemans v. Edgington (C. C.) 27 Fed. 324; Huntingdon v. Saunders, 163 U. S. 318, 16 Sup. Ct. 1120, 41 L. Ed. 174.

Other matters set out in the petition and answer do not appear pertinent to this inquiry, and therefore are not commented upon.

The rule is made absolute, and the cause remanded.

CITY OF NEW CASTLE v. POSTAL TELEGRAPH-CABLE CO.

(Circuit Court, W. D. Pennsylvania. March 23, 1907.)

No. 9.

REMOVAL OF CAUSES—MOTION TO REMAND—BURDEN OF PROOF.

On a motion to remand a cause to the state court, a mere allegation by defendant in an answer filed to the rule that the case involves a construction of the Constitution or laws of the United States is not sufficient to show jurisdiction in the federal court, without a statement of facts showing how such question can arise, and the nature and character of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 230.]

In Equity. On motion to remand to state court.

James A. Gardner, for complainant.
B. A. Winternitz and Rodgers, Blakely & Calvert, for respondent.

EWING, District Judge. This case is similar in all respects to that of the City of New Castle v. Western Union Telegraph Company, 152 Fed. 569, in which an opinion has just been filed, except that in the answer on the rule to show cause why the cause should not be remanded the defendant denies that the matter in dispute does not exceed the sum or value of $2,000, exclusive of interest and costs, and avers that a decree granting the relief prayed for by the plaintiff would subject the defendant to expense and damage greatly in excess of the sum of $2,000, exclusive of interest and costs, and that the value of the defendant's rights affected by this suit largely exceeds the sum of $2,000, exclusive of interest and costs; and, in addition, states that the defendant maintains many thousand offices throughout the United States for receiving and transmitting messages, from each and every of which intercommunication is had with each and every other office in the United States, including each and every such office in the state of Pennsylvania; that the defendant is therefore engaged in interstate commerce, and its poles and wires in the said city of New Castle form a part of the equipment of a through system of telegraph lines over which it transmits messages, not only throughout the United States, but to and from all parts of the civilized world; that by virtue of its compliance with the act of Congress approved July 24, 1866 (14 Stat. 221, c. 230), it is authorized to construct, maintain, and operate its lines of telegraph over and along any of the post roads of the United States, and that by the Act Cong. March 1, 1884, c. 9, § 1, 23 Stat. 3 [U. S. Comp. St. 1901, p. 2708], all public roads and highways kept up and maintained are declared to be post roads, and that the said highways passing in and through the said city of New Castle are post roads within the meaning of the act of Congress aforesaid, and therefore that the matter in dispute in this suit arises under the Constitution and laws of the United States, and for that reason alone the case is within the jurisdiction of this court.

Regarding the allegations as to the amount here in controversy, although stated in somewhat different language from that employed by the Western Union Telegraph Company in the case referred to,

they amount substantially to the same thing, and rise no higher than an allegation of that jurisdictional fact, without any evidence in support thereof, and are therefore met by the allegations of the plaintiff to the contrary. What has therefore been said in the case against the Western Union Telegraph Company is equally applicable here. The burden rests on the defendant and it has not produced the necessary evidence to support its contention.

Its allegations as to interstate commerce and its occupation of post roads are here introduced for the first time, and formed no part of the ground upon which it based its petition for the removal of the cause from the courts of Lawrence county, and, moreover, are not supported by any facts which show in what way any question does arise in this case involving any construction of the Constitution or laws of the United States. A mere allegation to that effect, without a statement of facts showing how such question can arise, and the nature and character of it, but rather giving only a legal conclusion, is insufficient. Gold-Washing & Water Company v. Keyes, 96 U. S. 199, 24 L. Ed. 656; Carson v. Dunham, 121 U. S. 426, 7 Sup. Ct. 1030, 30 L. Ed. 992.

It does not appear, therefore, that there is any better cause in this case for supporting the jurisdiction of this court than in that against the Western Union Telegraph Company, and for the reasons above given, in addition to those stated in the opinion filed in the case against the Western Union Telegraph Company above referred to, the rule is made absolute, and the case is remanded.

GEORGE NASH & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1907.)

No. 4,244.

1. CUSTOMS DUTIES—CLASSIFICATION—SCREW RODS.
   Construing the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], for iron rods cold, drawn, or polished in any way in addition to the process of hot rolling, *held*, that it does not include wire screw rods which have been cold rolled to facilitate their use in screw-making machines, and which have incidentally acquired a polish, but that such articles are dutiable as wire screw rods under paragraph 141, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640.]

2. SAME—CONSTRUCTION—SPECIFIC DESIGNATION—GENERAL PROVISIONS.
   When Congress has designated an article by a specific name, and by such name imposes a duty upon it, general terms in a subsequent act or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable.

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

For decision below, see G. A. 6,338 (T. D. 27,288), relating to importations at the port of New York.

Kammerlohr & Duffy (Joseph G. Kammerlohr, of counsel), for the importers.

J. Osgood Nichols, Asst. U. S. Atty.

HAZEL, District Judge. Screws are manufactured by machinery from screw rods; and, in order not to injure the machine, the screw rod must be smooth and have a round, even surface. Accordingly, raw iron rods, which are ordinarily uneven or scaly, are cold drawn through a die to give them the required smoothness or polish, so as to readily enable their insertion into the screw-making machine. The polish or bright appearance produced by the process of cold drawing is not necessary to the purpose for which the wire-screw rods in question were imported. The proofs show that there were two shipments of merchandise, the first being classified by the collector as round steel bars, and duty was assessed thereon at the rate of nine-tenths cent per pound under the provisions of paragraph 135, Act of July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638]. The later shipments were returned by the collector as cold-rolled and brightened screw rods; duty being assessed at four-tenths cent plus one-half cent per pound under paragraph 136 of said act, which provides that all iron or steel wire rods which have been tempered or treated in any manner or partly manufactured shall pay an additional duty of one-half of 1 cent per pound.

The importers protested, claiming the merchandise to be dutiable at only four-tenths cent per pound under paragraph 136 as wire screw rods valued at 4 cents or less per pound. The board decided that the collector was in error in assessing an additional duty of one-half cent per pound, and that the assessment should have been under paragraph 136, with the additional duty under paragraph 141, which provides for payment of one-fourth cent per pound upon iron or steel bars or rods which are cold rolled or cold drawn or polished in any way in addition to the usual process of hot rolling specifically described in paragraph 136.

The question presented by the record is whether the cold rolling of the rods to make them smooth and facilitate their use in the screw-making machine is the cold drawing specified in paragraph 141 of the act. In my opinion the rods in question have not been advanced by tempering or treating them to such an extent as to carry them beyond what is understood in the trade as wire screw rods. The testimony given in this court, and which was not before the board, indicates that such screw rods are not subject to the additional duty under the provisions of paragraph 141, which specifically provides for the payment of duty on iron or steel bars or rods of whatever shape or section, which are cold rolled, cold drawn, or polished. Brightening of the surface of the screw rod is subordinate and incidental to the smoothing or cold-rolling process which is essential to the production of the screw rod.

In this respect, I think the case is similar to United States v. Crucible Steel Company (C. C.) 147 Fed. 537, T. D. 27,446. There it was specifically held that cold-rolled steel strips, the brightening thereof being incidentally acquired in the process of cold rolling, are not subject to the additional duty provided in paragraph 141. Moreover, wire screw rods are enumerated eo nomine in paragraph 136, and they are not thought to be covered or included in the general language of paragraph 141. In Arthur v. Lahey, 96 U. S. 112, 24 L. Ed. 766, the rule is laid down that when Congress has designated an article by a specific

name, and by such name imposes a duty upon it, the general terms in a subsequent act or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable. For the foregoing reasons the merchandise, in my judgment, was dutiable under paragraph 136 at four-tenths cent per pound, and not subject to the imposition of any additional duty. It is not necessary to pass upon the question of the sufficiency of the protest.

The decision of the board is reversed.

UNITED STATES v. MULLER, MACLEAN & CO.

(Circuit Court, S. D. New York. January 28, 1907.)

No. 4,417.

CUSTOMS DUTIES—APPRAISEMENT—ACTUAL MARKET VALUE—PRO FORMA INVOICE.

Merchandise was entered on a pro forma invoice which erroneously stated its value to be greatly in excess of its real value. On appraisement the appraiser approved the value so stated, because it was found to be sufficiently high, but did not find its real value. *Held*, that the appraisement was invalid because not in compliance with Customs Administrative Act June 10, 1890, c. 407, § 10, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922], prescribing that it should be the duty of appraisers to find "the actual market value" of imported merchandise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, §§ 181, 183.]

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

The decision in question sustained the importers' protest against the assessment of duty by the collector of customs at the port of New York.

J. Osgood Nichols, Asst. U. S. Atty.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.

HAZEL, District Judge. The merchandise (mica) was assessed for duty by the collector at its entry value indicated in the pro forma invoice. Subsequently the importer claimed that a clerical mistake had been made, and that, according to the consular invoice the mica should have been valued at the sum of $204, instead of the sum of $632, as shown in the pro forma invoice. There was no reappraisement of the merchandise by the collector. Neither did the importer give notice of dissatisfaction upon which a reappraisement could have been had in conformity with section 13 of the tariff act of 1897. Therefore the government contends that the importer cannot now be heard to claim a less valuation of the merchandise.

It is urged, however, by the importer that there was no valid appraisement of the mica; that the valuation as a result of appraisement never became final and conclusive; and, therefore no reappraisement upon notice of the importer was necessary. By the provisions of section 10 of the act of June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922], it was the duty of the appraiser by all reasonable ways and means in his power "to ascertain, estimate, and appraise

(any invoice or affidavit thereto, or statement of cost, or of cost of production, to the contrary, notwithstanding), the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported."

There is no dispute as to the value of the merchandise; for the government practically concedes that a clerical mistake was made, and that the consular invoice correctly stated the value of the same. The examiner inspected the shipment, but I incline to the opinion that an appraisement such as contemplated by the tariff act was not made. The examiner evidently based his appraisement largely if not altogether upon the pro forma invoice, the value of the goods as therein stated, and not with the degree of care and the exercise of power that is required by the act. Upon that point the testimony of the witness Hyder, the official examiner in the appraisers' office, after stating that he inspected and appraised the goods, is as follows:

"Q. When you say that you appraised it, do you mean that you determined its value from such information as you had apart from the pro forma invoice? A. Yes, sir; that is, I determined the value was sufficient.

"Q. You did not inquire whether the value was too high? A. No, sir.

"Q. So when you say you appraised, you mean simply that you were satisfied that the pro forma invoice value was not too low? A. Yes; not too low.

"Q. You did not fix the market value of the merchandise? A. No, sir; did not fix a positive price."

The contention of the government that the appraisement of the merchandise as made is final and conclusive, has no application to a case where the appraisement was evidently made contrary to law and not within the provisions of the tariff act. United States v. Beer (T. D. 27,753). See, also, United States v. Commercial Cable Company, G. A. 5,856 (T. D. 25,801), affirmed by the Circuit Court for this district, reported in T. D. 26,494 (141 Fed. 473). And the distinction made by the United States attorney is inapplicable to a case where no valid appraisement has been made.

It sufficiently appears that there was error in relation to the value of the merchandise; and, as the bona fides of the importers is unquestioned, the action of the Board of General Appraisers in reversing the collector was proper, and must be affirmed.

N. ERLANGER, BLUMGART & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1907.)

No. 3,989.

1. CUSTOMS DUTIES—APPRAISEMENT—CONVERTERS' COMMISSIONS.

Merchandise was bought from so-called converters, who, after receiving the order, had the goods manufactured, dyed, and finished, and forwarded them, invoicing them at a certain price plus a commission. *Held* that the converters were in fact the vendors of the merchandise, and that the amount of the commission should be included in the dutiable value of the goods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 187.]

2. SAME—LEGALITY—REVIEWABILITY.

A so-called converters' commission was contended to have been improperly included by the appraising officers in the dutiable value of merchandise. *Held* that the appraisement might be re-examined, and that evidence was admissible to show the nature of such commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 196.]

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

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

J. Osgood Nichols, Asst. U. S. Atty.

HAZEL, District Judge. In this controversy it is claimed that the refusal of the Board of General Appraisers to receive evidence to show the illegality of the appraisement proceedings was error. According to the importers they had paid a commission of 2½ per cent. to a commissionnaire in the purchase of the goods. The appraising officers, however, advanced the actual value of the merchandise by disallowing any deduction for commissions. The United States Attorney contends that the invoices do not show the payment of a commission, that the payment of the percentage was in fact paid to the vendor of the merchandise, and therefore, the collector, under the provisions of the tariff act, correctly treated the alleged commission as part of the invoiced value, and subject to duty. Evidence was given to show that, in arriving at the amount of duty, the collector considered the market value or wholesale price at the time of exportation in the country from whence the merchandise was imported, and that, in arriving at such value, he complied with the provisions of sections 10, 13, and 19 of the customs administrative act of June 10, 1890 (Act June 10, 1890, c. 407, 26 Stat. 136, 139 [U. S. Comp. St. 1901, pp. 1922, 1924, 1932]) which required him to take into consideration the costs and charges to complete the shipment.

The importers offered to show before the board the payment of a commission for services rendered in the purchase and shipment of the goods; but to this evidence the government objected. The board sustained the objection, and the case was submitted. An application has been made to this court for a review of the decision of the board subsequently rendered. The testimony of five witnesses is printed in the record showing that the merchandise was bought from so-called converters at the price stated in the invoice plus 2½ per cent. commission. It also appears that customarily the converter after receiving an order has the goods manufactured, then dyed and finished, and, when ready for transportation, he forwards them, and charges an agreed price, including the commission. The board decided that the action of the appraising officers holding that the item for commissions was not independent of the market value of the goods was final and conclusive in the absence of fraud or illegality in the proceeding, and accordingly the testimony referred to was excluded. Upon the authorities of Muser v. Magone, 155 U. S. 240, 15 Sup. Ct. 77, 39 L. Ed. 135; United States v. Herrman, 91 Fed. 116, 33 C. C. A. 400;

Robertson v. Frank Bros. Co., 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236; Oberteuffer v. Robertson, 116 U. S. 499, 6 Sup. Ct. 462, 29 L. Ed. 706, and United States v. Beer (C. C. A.) 150 Fed. 566, I think the evidence should have been received and considered. In the Muser Case, the Supreme Court substantially held that, although the valuation as fixed by the appraisers is final it may, nevertheless, be attacked for want of power to make it, or where the appraisers are disqualified from acting or items have been included independent of the actual value. In United States v. Beer, supra, the Circuit Court says:

"As was pointed out in Robertson v. Frank Bros., 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236, the general rule that the decision of the local appraiser is final and conclusive unless reviewed by proceedings for reappraisement is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable."

Hence, I conceive the rule to be that market values returned by the appraisers, though ordinarily not subject to attack, may nevertheless be re-examined, and the importers' remedy is by protest, whenever a nondutiable amount is included in such market value, or an independent item has been improperly considered, or where the appraiser omitted to make an inspection and examination upon which he based his appraisal. But it is contended by the government that the payment of the commission by the importers in the circumstances is wholly immaterial, inasmuch as the appraisers have clearly found the price charged for commission was in fact a part of the purchase price, and was included in the foreign market value. The evidence upon this point taken in this court is not persuasive of the claim that the appraisers erred in their action to ascertain the real market value. Although the proofs indicate that a commission is customarily paid to a so-called converter, and was paid in this case, yet the invoice indicates that such converter or agent was in fact the vendor of the merchandise. It does not clearly appear that the market value in the foreign country from where the goods were exported was different than that fixed by the appraisers.

The decision of the Board of General Appraisers is affirmed.

UNITED STATES v. HENSEL, BRUCKMANN & LORBACHER.

(Circuit Court, S. D. New York. January 18, 1907.)

No. 4,181.

1. CUSTOMS DUTIES—CLASSIFICATION—LACE PAPER—PRINTED MATTER—INCIDENTAL PRINTING.

So-called lace paper, which is used in decoratively packing confectionery, etc., is not brought within the provision for printed matter in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], by reason of having names and addresses of merchants printed thereon. Said provision does not cover matter on which the printing is but a subordinate feature.

2. SAME—MANUFACTURES OF PAPER.

So-called lace paper doilies, covers, tops, etc., used in packing confectionery, etc., which are composed of paper perforated with ornamental

designs and printed with the names and addresses of merchants, are not dutiable as paper, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 402, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672], but as manufactures of paper, under paragraph 407, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673.]

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

For decision below, see G. A. 6,260 (T. D. 26,992), which reversed the assessment of duty by the collector of customs at the port of New York.

J. Osgood Nichols, Asst. U. S. Atty.
William B. Dungan, for importers.

HAZEL, District Judge. The merchandise consists of sheets of paper of different sizes, the centers of some of which are plain, with perforated and embossed border in resemblance of a lace pattern, sheets of perforated paper with the name and address of a merchant printed thereon, perforated paper for decorating raisin boxes, and confetti stamped from large sheets of paper. Duty was assessed thereon by the collector at 35 per centum ad valorem, under paragraph 407 of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]), as manufactures of paper, or of which paper is the component material of chief value. The importers protested and claimed that the goods were dutiable at 25 per centum, under paragraph 402, as paper not specially provided for, or as printed matter, under paragraph 403, or as surface-coated paper, under paragraph 398. The Board of General Appraisers decided that the doilies, lace tops, and vinetas, which have no printing thereon, and the confetti, were articles manufactured from paper, and dutiable under paragraph 407, while the so-called lace paper, top and side pieces for raisin boxes or cartons, and doilies, with printing thereon, were dutiable, under paragraph 403, as printed matter. The government has made application for review to this court.

Reliance is placed by the United States Attorney upon the case of Kraut v. United States (C. C.) 134 Fed. 701, affirmed 142 Fed. 1037, 71 C. C. A. 684, in support of the contention that the articles are in fact manufactures of paper, and not printed matter. The importers urge that the printing on the paper bags in the Kraut Case was merely incidental, and did not to any extent affect their usefulness as bags, while in this case the purpose of printing upon the lace papers the name of the merchant using the same was to advertise the commodity to which they were applied as wrappers, covers, or side pieces of wrappers. The facts, however, do not sustain this contention. The primal object of the lace paper is the ornamentation or decorative feature. The proofs show that the articles are manufactured by placing sheets of the desired quality of paper under a steel die, and the figures, designs, or lace patterns are produced by being stamped or cut with the press. This operation is not thought to come within the category of "printing," as that term is defined in Arthur v. Moller, 97 U. S. 365, 24 L. Ed. 1046. The facts show that the raw paper is the article of chief cost in the finished product; the cost of stamping being about 25 per cent., and the market price of the importation is estimated at treble the cost of manu-

facture. The finished articles are used as doilies, covers, wrappers for raisins, side and end pieces of raisin wrappers or confectioners' supplies. The articles have been materially changed from paper. They have in fact lost their character of paper, and the printing on the exhibits, considering their primal purpose, is a subordinate feature. They are essentially different from labels or visiting cards having printed matter, ornamentation, or finished borders thereon, which manifestly serve an entirely different purpose, and the printing unquestionably is the important feature. Hence, this case is thought to be controlled by the principle of the Kraut Case.

The decision of the board, therefore, is modified, and the conclusion of the collector on the specified articles approved.

UNITED STATES v. THREE PACKAGES OF DISTILLED SPIRITS.

(District Court, E. D. Pennsylvania. March 22, 1907.)

No. 7 of 1904.

INTERNAL REVENUE—FORFEITURE OF SPIRITS—INFORMATION.

An information for a forfeiture of distilled spirits for violation of Rev. St. §§ 3289, 3455 [U. S. Comp. St. 1901, pp. 2132, 2279], *held* bad on demurrer, as not sufficiently definite to disclose to the court or claimant the precise nature of the act charged to be a violation of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, § 133.]

On Demurrer to Amended Information for Forfeiture.

J. Whitaker Thompson and Walter C. Douglas, Jr., for the United States.

Furth & Singer, for claimants.

J. B. McPHERSON, District Judge. The amended information now before the court, which seeks to forfeit three packages of distilled spirits for alleged violation of the revenue laws, contains three counts, of which the first count need not be considered, since the government concedes it to be demurrable. The second and third counts are as follows:

"(2) For that heretofore, to wit, prior to the seizure of the said three packages, they and each of them were then and there so stamped, branded, and marked as to show that their contents were distilled spirits manufactured by the Philadelphia Pure Rye Whisky Distilling Company, and had been duly inspected, and that all the provisions of the internal revenue laws in respect to the same had been complied with; whereas the said packages then and there contained something else than the contents which were therein when the said packages had been so lawfully stamped, branded, and marked by an officer of the revenue, to wit, compound liquor, manufactured by the mixing and compounding of distilled spirits with caramel, also called burnt sugar, and the said packages, then and there stamped, marked, and branded as aforesaid, with their contents as aforesaid, were on the 2d day of March, A. D. 1904, sold and shipped by the said Abe Strouse and Elias Wineland, trading as aforesaid, unto one John Birkman. Wherefore the said three packages and their contents are forfeitable to the United States by virtue of section 3455 of the Revised Statutes.

"(3) For that heretofore, to wit, prior to the seizure of the said three packages, certain distilled spirits, to wit, a compound liquor manufactured by the mixing and compounding of distilled spirits with caramel, also called burnt sugar, were found in each of said three packages, each of said packages then and there containing five gallons or more of said compound distilled spirits, without having thereon the marks and stamps required therefor by law, to wit, the stamps and marks for rectified spirits. Wherefore said packages are forfeitable to the United States by virtue of section 3289 of the Revised Statutes."

To these counts the claimants have assigned the following grounds of demurrer:

"(2) That the second article of said amended information is indefinite, obscure, vague, and uncertain, in that it is not made clear whether the 'something else' which is alleged to have been in the packages aforesaid at the time they were sold and shipped by the said Abe Strouse and Elias Wineland, trading as aforesaid, was a compound liquor manufactured by the mixing with caramel, or burnt sugar, of other distilled spirits than the distilled spirits which were originally inspected in said packages, or whether the 'something else' referred to, and alleged to be a compound liquor, consisted only of the distilled spirits which had originally been inspected in said packages, to which there had been added caramel, or burnt sugar.

"(3) That the third article in said amended information is indefinite, obscure, vague, and uncertain, in that it is not made clear whether the compound liquor alleged to have been manufactured by the mixing of distilled spirits with caramel, or burnt sugar, and charged to have been found in each of said three packages, consisted of other distilled spirits than the distilled spirits which were originally inspected in said packages, to which burnt sugar or caramel had been added, or whether it referred to the distilled spirits which were originally inspected in said packages, to which caramel or burnt sugar had been added."

It is apparent, I think, that the demurrer must be sustained. The information is certainly capable of being construed to charge that the claimants mixed caramel or burnt sugar with other spirits than the liquor received from the distilling company, using for this purpose the packages in which the spirits that came from the distillery had been, or were, contained. The claimants admit that, if the proof sustained this charge, a good ground for forfeiture would be established. But the information is also capable of being construed to charge that the liquor found in the packages when they were seized was compounded by mixing caramel or burnt sugar with the very spirits that were received from the distilling company, and that the compounding took place in the packages thus received. It is clear, from the argument of the United States attorney, that the government desires to raise the question whether the mixing of caramel or burnt sugar with distilled spirits, without affixing the stamps required when liquor is rectified, comes within the purview of the third paragraph of section 3244 of the Revised Statutes [U. S. Comp. St. 1901, p. 2096], and especially within the final clause of the paragraph, which declares that:

"* * * Every person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors for sale, under the name of whiskey, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying."

In the information as it stands, I agree with the claimants that this question is not raised with sufficient distinctness to justify the court in deciding it, or to enable the claimants to be certain that they will not be called upon at the trial to meet any other charge than this.

It is therefore ordered that the demurrer be sustained, but leave is granted to the government to file an amended information within 10 days.

In re MARTIN.

(District Court, E. D. New York. March 25, 1907.)

1. BANKRUPTCY—COMPOSITION.
   A composition offered by a bankrupt and accepted by the requisite number of creditors considered and confirmed.
2. SAME—COSTS—ATTORNEY'S FEES.
   Where a composition offered by a bankrupt which includes the payment of all costs is confirmed after opposition, the bankrupt's attorney will not be allowed fees from the estate for his services in securing the confirmation.

In Bankruptcy. On motion to confirm composition.

Bernard G. Barton, for bankrupt.
Abr. A. Silberberg, opposed.

CHATFIELD, District Judge. A composition on a certain basis has been proposed, and between 50 and 60 per cent. of the creditors in amount have consented. Over 90 per cent. in number have consented; but, with one or two exceptions, the consenting creditors are creditors in small amounts. One of the two largest creditors is opposed. It may be questioned whether small creditors generally oppose as quickly as large, both because there is not so much involved, and because a large creditor can afford to pay the cost of opposition, as his saving, if any, would be greater. But the chief items about which argument is presented show an entirely different method of computation by the special commissioner and by the objecting creditors. The difference in the amount of the estate as estimated by the opposing parties arises as follows:

	Special Commissioner.	Objecting Creditors.
Outstanding accounts stated to be		$2,192 66
Of which bankrupt and special commissioner consider collectible	$1,137 70	
Sales made by trustee and receiver		3,843 43
Of which receiver has on hand, net	900 00	
Stock of paints, wall paper, etc		2,669 60
Furniture, horse, and wagon		850 00
For which bankrupt and special master estimate amount to be realized	2,000 00	
	$4,037 70	$9,555 69

The bankrupt makes an offer aggregating $3,772.49, together with the expenses and compensation of the various parties and officers who are entitled to compensation out of the estate. The largest item of

difference, that between the amount of sales and the cash now in the hands of the trustee, is a matter to be considered at the time of the submission of the trustee's account. If the trustee has but $900, net, on hand, the balance must have been paid out by the trustee during the continuance of the business, and cannot be charged against the bankrupt on an offer of compromise. Perhaps more could have been realized by an earlier sale, but this is not an objection to the composition.

As to the difference in bills receivable, the objecting creditors show nothing except that they state generally that the accounts were owed by the same persons to whom the receiver and trustee is now giving credit, and the bankrupt testified that these accounts were not closed up by the trustee. The evidence on which the report was made seems to have been the statements of the bankrupt and trustee that approximately $1,130 of these accounts were good; and general criticism of the estimate, without pointing out any errors, is not convincing.

The other item, viz., $2,000 for the sales value of goods appraised by Mr. Fitzsimmons at $3,519.60, including the fixtures and horse and wagon, on its face appears to be small; but an examination of the testimony shows that most of this stock consists of broken lots of wall paper, paint, etc., which (especially the wall paper) have been in stock since last year, and even at auction would not find a ready sale. It seems reasonable that small lots of wall paper, of patterns not like patterns in present use, would bring greatly reduced prices at any kind of a sale.

Under these circumstances, and taking all of the items into consideration, and considering also that the business has been conducted since this question of a composition was first suggested, so that the value of the stock has certainly not increased, it seems that the report of the special commissioner should be confirmed, the specifications of objection dismissed, and the composition approved.

The attorney for the bankrupt has asked for an allowance in lieu of costs, in case he should prevail in having the composition confirmed. There is abundant authority to show that the court can allow costs in its discretion; but when the bankrupt offered a composition, under the circumstances, he must have known that he might meet with opposition, and on all the record it is impossible to hold that the opposition was unreasonable and without foundation.

The bankrupt must therefore pay his own attorney for his services with respect to these objections, and the application for costs will be denied.

PARKES v. SEASONGOOD.

(Circuit Court, D. Rhode Island. March 26, 1907.)

No. 2,760.

1. INNKEEPERS—LIABILITY OF GUESTS—WRONGFUL USE OF ROOMS.

A guest occupying rooms in a hotel with his family cannot be held liable to the landlord for permitting a nurse in his employ to remain in such rooms and to be there delivered of an illegitimate child; any scandal arising from the affair, which may have resulted in injury to the land-

lord's business, not being the proximate result of the delivery itself, or of the action of the guest in permitting it in his apartments.

2. SAME—CAUSING OR PERMITTING NUISANCE.

A guest of a hotel, who knowingly permits the body of a dead infant to be concealed in the rooms occupied by him, or causes it to be concealed in any other part of the building, and in either case to remain until it becomes offensive to other guests, commits a nuisance, and may be chargeable with liability for damages resulting to the landlord's business; but, unless he actively causes or participates in the concealment in a place not under his control, he is not chargeable with liability unless the act was done by one for whom he is responsible.

3. MASTER AND SERVANT—EMPLOYMENT CREATING THE RELATION—TRAINED NURSE.

A trained nurse, performing her usual duties and exercising the skill which is the result of training in that profession, does not come within the definition of a servant, but rather is one who renders personal services to an employer in the pursuit of an independent calling, and the employer is not liable as master for her acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1210-1216.]

At Law. On demurrer to declaration.

Albert B. Crafts, for plaintiff.

W. W. Moss and Gardner, Pirce & Thornley, for defendant.

BROWN, District Judge. The declaration states, in substance, that the plaintiff kept a summer hotel; that the defendant engaged board and rooms for himself and his wife, and a trained nurse, who was to take care of his wife and who occupied the same room with his wife; that on August 6, 1904, said nurse gave birth to a stillborn, illegitimate child in said room; that on August 1, 1904, the defendant knew of the nurse's condition, and that she was about to be delivered, but did not make the same known to the plaintiff, and knowingly allowed her to be delivered in said room, and knowingly allowed the body of said child to be hidden in a closet opening out of said room, thereby creating offensive odors; that certain beds and bedclothing were ruined; that on August 11, 1904, the defendant knowingly "allowed and caused" the body to be hidden in a closet used by boarders opening out of a hallway, causing odors and a nuisance to the patrons of the hotel; that on August 11th the body was discovered by employés of the plaintiff, and notice given to the authorities; that the facts became public, and were published in newspapers, in consequence whereof patrons left the hotel and intending patrons were kept away; that the plaintiff lost profits, and was put to expense for bed, bedclothes, and disinfecting.

As the defendant urges, the declaration seems to be based upon various theories of wrong. No authority has been presented to show that, in permitting the use of a room for the delivery of a child, the defendant was guilty of violation of duty to the plaintiff. Much stress is laid upon the scandal resulting from the illegitimacy of the child The delivery of a child in itself, whether it be legitimate or illegitimate in its parentage, is not an unlawful act; and such scandal as may have resulted from the delivery can hardly be attributable to the delivery itself. No authority has been produced which in any degree tends to

show that the defendant was liable either for harboring a pregnant woman or for suffering her to be delivered in apartments hired by him. While it is not improbable that an occurrence of this kind may have been regarded by guests as a sufficient cause for leaving the hotel, and while it may have deterred persons from going to the hotel, yet it cannot be said that this was such a proximate result of the delivery of an illegitimate child that the defendant was under any obligation to guard against such scandal.

The allegations that the defendant knowingly allowed the body to be hidden and to create odors presents a case of nuisance for which the defendant might be responsible if he knowingly suffered it to continue in rooms hired by him and under his control. While the declaration alleges that the trained nurse was a servant of the defendant to take care of and wait upon his said wife, ordinarily a trained nurse, performing her usual duties with the skill which is the result of training in that profession, does not come within the definition of a servant, but rather is one who renders personal services to an employer in the pursuit of an independent calling. Any liability of the defendant in this case could not rest upon the responsibility of a master for the acts of a servant.

The declaration states that the defendant "knowingly allowed and caused" the body to be hidden in a closet opening out of a hallway. If the defendant were merely passive in suffering a person to conceal the body outside of the rooms under his control, it is doubtful if he would be guilty of an actionable wrong in neglecting the requirement of ordinary decency to inform the plaintiff.

The defendant contends that, upon the allegations of the declaration, the nurse alone caused the plaintiff's injury, and was alone responsible for her actions. This is true unless, as has been said, there was either active participation in the concealment of the body outside of the rooms under the defendant's control, or a failure to remove the body from the rooms under the defendant's control, and suffering it to become offensive, having knowledge of its presence.

The defendant criticises this declaration as an attempt to throw responsibility upon the defendant for acts for which a third person alone was responsible; but, as the case stands on demurrer, effect must be given to the allegations of the declaration as they are framed. It would be manifestly unfair to the defendant to permit the case to go to trial upon the present declaration.

Demurrer sustained on the first and second grounds.

In re NATHANSON.

(District Court, E. D. New York. March 14, 1907.)

BANKRUPTCY—APPLICATION FOR DISCHARGE—AMENDMENT OF SPECIFICATIONS OF OBJECTION.

Rule 32 in bankruptcy does not operate as a statute of limitations to prevent the court from permitting creditors to file amended specifications of objection to a bankrupt's discharge after the expiration of 10 days, in its discretion.

In Bankruptcy. On motion for leave to file amended specifications of objection to discharge.

Joseph S. Rosalsky, for objecting creditors.
Slade & Slade, for bankrupt.

CHATFIELD, District Judge. Jacob Nathanson was adjudicated a bankrupt in February, 1906. At various times thereafter the bankrupt attended before the referee in bankruptcy, and was examined by the attorney for the creditors, and on the 20th of November, 1906, filed an application for discharge. On the return day objections were filed by certain of the creditors, and specifications thereunder were referred to the referee in bankruptcy as special master for hearing.

Counsel for the bankrupt has objected in writing and orally to the various specifications, and has submitted a brief to the special master. Two of the specifications have been withdrawn, and the special master has not passed upon the objections to the others now before him for consideration.

At this stage in the proceeding the attorney for the objecting creditors has made a motion for leave to file amended specifications, a copy of which he has submitted with his moving papers. The attorney for the bankrupt opposes the application to file amended specifications, upon the ground that, under rule 32, creditors opposing a bankrupt's discharge must file their specifications in writing within 10 days, unless such time is extended by a special order of the judge. No such order having been made, and the 10 days having expired, it is now claimed that the court has no jurisdiction to allow the amended specifications to be filed; and the attorneys for the bankrupt set forth generally various reasons why, in their opinion, the proposed amended specifications are insufficient and lacking in persuasiveness. It does not seem to the court that the latter questions should be considered at the present time. If the amended specifications are to be held no better than the original, the referee in bankruptcy as special master is the proper person to consider the various reasons urged therefor. Inasmuch as he has not reported, and inasmuch as justice to the creditors, as well as to the bankrupt, is the purpose of the law, all valid objections should be presented to the special master. There has been no such laches on the part of the objecting creditors as to make it appear that they were disregardful of or waived their grounds of objection, and it does not seem to the court that the rights of any one will be prejudiced if the amended specifications should be sent to the master. If a separate order extending the time to file specifications should be necessary, this could be entered nunc pro tunc. It does not seem that rule 32 is intended to have the effect of a statute of limitations, and to put the matter beyond the court's control.

The application for leave to file amended specifications will be granted, and they will be referred to the referee, as special master, to hear and report, in conjunction with those heretofore filed.

In re KANE et al.

(District Court, E. D. Pennsylvania. April 2, 1907.)

No. 2,416.

BANKRUPTCY—JURISDICTION OF COURT—FUNDS IN HANDS OF STATE COURT.

Where, at the time of the filing of a petition in bankruptcy, an attachment suit was pending in a state court in which a fund claimed by the bankrupts and also by others had been brought under the control of the court by a garnishment, such court is the proper tribunal to determine the rights of the several claimants thereto, and the bankruptcy court is without jurisdiction to make such determination, except by consent of all parties in interest.

In Bankruptcy. On certificate from referee.

David Lavis, for claimant.
James B. Givin, for bankrupts.

J. B. McPHERSON, District Judge. I do not think the referee gave sufficient weight to the attachment proceedings in the common pleas of Philadelphia County. These were begun nearly three months before the petition in bankruptcy was filed, and J. Joseph Murphy was summoned as garnishee. He then held in his hands, and still holds, the sum of $500, to which, either in whole or in part, there are several claimants, including each of the bankrupts. The money has never been in the control of the District Court, and its ownership is a fairly disputable question. Clearly, as it seems to me, the court of common pleas is the proper tribunal to settle this controversy, unless all parties in interest have submitted themselves to the court in bankruptcy. The referee thought that such submission had been made, and therefore decided the case on the merits, and entered an order directing the garnishee to pay over to Mary Murphy the $500 now in his hands. In making this order, I think the referee was in error. It may be that Mary Murphy, Kane, and Sweeney did submit themselves to the jurisdiction of the District Court; but it is plain that the garnishee declined to follow this course, and that he has an individual claim upon part of the fund. He set up the pendency of the attachment proceedings at an early stage of the hearing before the referee, and duly renewed the objection after the referee had made his report, thus preserving his rights and bringing the question before the court for determination.

The Court of Appeals of this circuit has, I think, in effect decided the point in Tennessee, etc., Co. v. Grant, 14 Am. Bankr. R. 288, 135 Fed. 322, 67 C. C. A. 676. It may be that Metcalf v. Barker, 187 U. S. 175, 23 Sup. Ct. 67, 47 L. Ed. 122, cited by the Circuit Court of Appeals, and apparently relied upon, in some degree at least, to support the decision of that court, should be regarded as somewhat more restricted in scope than may be indicated by the opinion in Tennessee, etc., Co. v. Grant. The later case of Clarke v. Larremore, 188 U. S. 488, 23 Sup. Ct. 363, 47 L. Ed. 55, in which Metcalf v. Barker is referred to and distinguished, may in effect have qualified Tennessee, etc., Co. v. Grant to some extent; but I do not think that it is for

this court to pronounce with positiveness upon that question. If the Circuit Court of Appeals thinks that its ruling should be modified, it will no doubt take a fitting occasion to declare its opinion.

If the trustee sees proper to urge his claim against the fund in the common pleas, that court will no doubt permit him to intervene for the protection of the bankrupts' interests, whatever they may be.

The order directing J. Joseph Murphy to pay $500 to Mary Murphy is set aside.

THE CURTIN.

(District Court, E. D. Pennsylvania. March 20, 1907.)

No. 25.

ADMIRALTY—JURISDICTION—ACTION FOR INJURY TO PIER.

Semble, that an action for injury to a pier by a moving vessel is not cognizable in admiralty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, §§ 222–234.]

In Admiralty. On exceptions to libel and petition to amend libel.

John F. Lewis and Francis S. Laws, for libelant.

John A. Toomey, for respondent.

J. B. McPHERSON, District Judge. The amendments prayed for by the petition presented on October 12, 1906, are hereby allowed. As thus amended, the libel seeks to recover damages from the tug and its tow, not only for injury done by collision with the libelant's pier—which projects from the bank of the Delaware river into the navigable waters of the stream—but also for injury done by the same collision to certain barges, also belonging to the libelant, that were lying on the surface of the river alongside the pier. The defendants' principal exception to the unamended libel denied the court's jurisdiction upon the ground that injury to a pier was not cognizable in admiralty (The Plymouth, 3 Wall. [U. S.] 20, 18 L. Ed. 125; The Haxby [D. C.] 94 Fed. 1016; The Haxby [D. C.] No. 2, 95 Fed. 170); but this exception is no longer applicable to the libel as a whole, now that the amendment setting forth the injury to the barges has been allowed.

So far as the damage to the pier is concerned, the libelant's claim to recover in this action is based solely upon the case of The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, or, to be more accurate, upon certain language used by Mr. Justice Brown in his concurring opinion. In order to prevent the libelant from going to unnecessary labor and expense, it is proper for me to say now that I do not understand The Blackheath to overrule The Plymouth, or to qualify it in any degree. Indeed, the court is at pains to point out that the authority of The Plymouth has not been disturbed. Mr. Justice Holmes, speaking for the court, concludes as follows (page 367 of 195 U. S., page 48 of 25 Sup. Ct. [46 L. Ed. 236]):

"It is unnecessary to determine the relative weight of the different elements of distinction between The Plymouth and the case at bar. It is enough to say that we now are dealing with an injury to a government aid to naviga-

tion from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea. In such a case jurisdiction may be taken without transcending the limits of the Constitution or encountering The Plymouth or any other authority binding on this court. As to the present English law, see The Uhla, L. R. 2 Ad. & Ec. 29, note; The Swift, [1901] L. R. Prob. 168."

As at present advised, therefore, I feel bound to hold that the damage done to the pier is not recoverable in this court, and, if the libelant goes on to take testimony concerning such damage, it must be clearly understood that the question is likely to be decided against the libelant's right to recover for that particular injury.

The amendments having been allowed, the exceptions to the libel are overruled.

HERMANN BOKER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 8, 1907.)

No. 4,238.

CUSTOMS DUTIES—CLASSIFICATION—NICKEL ANODES—"SHEETS."

In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 185, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], relating to nickel, nickel oxide, and nickel alloy, "in pigs, ingots, bars, or sheets," *held* (1) that only nickel in one of the forms enumerated is included; (2) that the provision for "sheets," therefore, does not include anodes consisting of nickel plates about 12 inches long, 6½ inches wide, and less than a half inch thick, a "sheet" being broad, thin, and expanded; and (3) that such anodes are dutiable as manufactures of nickel under paragraph 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

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

For decision below, see G. A. 6,335, T. D. 27,277, in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.

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

HAZEL, District Judge. The merchandise in question, invoiced as rolled anodes, consists of plates of pure nickel about 12 inches long, 6½ inches wide, and 7/16 of an inch thick, which are cut from sheets of nickel and chiefly used for suspension in a bath for nickel plating. They were assessed for duty under paragraph 193 of the present tariff act of July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], as a manufacture of nickel. The importers claim the classification should have been at 6 cents per pound under paragraph 185, reading as follows:

"Nickel, nickel oxide, alloy of any kind in which nickel is a component material of chief value, in pigs, ingots, bars, or sheets, six cents per pound."

The board held that the nickel must be shown to be either "pigs, ingots, bars, or sheets," and inasmuch as the facts of this case do not

bring the importation within the evident language of paragraph 185, the collector's classification was correct. The importers contend that the words last quoted refer and are restrictive only as to forms of nickel alloys, as evidenced by the fact that nickel oxide, nickel cubes and nickel in grains cannot be included in any of such restricted forms, and therefore the importation in question is clearly included in said paragraph as "nickel." But in this contention, I do not agree, as it is proven that the nickel has been advanced by cutting and the plates are made capable of practical use by the mere drilling of holes in their upper ends.

The board expressed the opinion that the merchandise had a distinctive name, purpose, and use; and accordingly testimony was given in this court in opposition thereto. Such testimony indicates that although the articles are chiefly used as anodes they are not precisely like the commercial anodes which have hooks or ears at their upper ends by which they may be suspended in a bath for plating. The evidence offered by the importers, however, to differentiate the imported article from the anode known to the trade is unimportant, in view of the fact that the plates properly belong to a variety or class desired by some users who prefer to drill holes in a plate or supply their own hanging device; and that given tending to show that the articles are commercially known as nickel sheets and not plates is unsatisfactory and inconclusive. Ordinarily a sheet of metal is comprehended to be broad, thin, and expanded, while the dimensions of a plate are appreciably less.

The decision of the Board of General Appraisers is affirmed.

UNITED STATES v. KNIPSCHER & MAAS SILK DYEING CO. (two cases).

(Circuit Court, S. D. New York. January 18, 1907.)

Nos. 4,249, 4,250.

1. CUSTOMS DUTIES—CLASSIFICATION—DYERS' STICKS—BAMBOO.

Bamboo dyers' sticks, rounded at the ends and smoothed off at the joints, are covered by the enumeration of bamboo in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 700, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], rather than by the provision for wood, unmanufactured, in section 1, Schedule D, par. 198, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646].

2. SAME—WOOD "UNMANUFACTURED."

Dyers' sticks of hard wood, which have been trimmed and peeled, and had the rough edges removed, and the ends rounded, are not dutiable as manufactures of wood, under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], but as wood, unmanufactured, under paragraph 198, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646].

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

The decisions in question reversed the assessment of duty by the collector of customs at the port of New York on articles of two classes, consisting (1) of bamboo sticks of the description given in the opinion following, and (2) of

hard wood sticks about one inch in diameter, which had been trimmed and peeled, and had the rough places removed, and the ends rounded. On the authority of G. A. 6,031 (T. D. 26,350). the Board held the former class to have been erroneously classified as wood, unmanufactured, under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 198, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646], and to be within the provision for bamboo, in section 2, Free List, par. 700, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]; and, on the authority of G. A. 578 (T. D. 11,219), the Board held that the latter class had been improperly classified as manufactures of wood, under section 1, Schedule D, par. 208, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], and should have been classified under said provision for wood, unmanufactured.

J. Osgood Nichols, Asst. U. S. Atty.
Everit Brown, for importers.

HAZEL, District Judge. The conclusions of the Board of General Appraisers that the bamboo sticks in question, which are about 4 feet in length, are entitled to free entry, under the provisions of paragraph 700 of the Act of July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], is affirmed. The bamboo sticks, which were invoiced in bundles, are commercially known as "dyers' sticks," and are used by dyers for hanging on dyeing material. It appears that the ends of the bamboo sticks are rounded, and that their rough joints have been smoothed. In Brauss v. United States (C. C.) 120 Fed. 1017, it was held that splitting bamboo sticks and cutting them into lengths for use in making brooms does not change their character; they still being bamboo sticks. The government claims the Brauss Case is distinguishable, in that there the article was not a manufacture, while in this case the rounding of the ends and the smoothing of the joints clearly constitute a manufacture. Upon this point it is sufficient to say that I agree with the Board that the identity as bamboo has not been destroyed by the work done upon them.

As to the hard wood sticks, duty was assessed by the collector at 35 per cent. ad valorem, under paragraph 208 of the present tariff act. The importers claim that the classification should have been at 20 per cent. ad valorem, under paragraph 198. The articles are used for dyers' sticks. The decision of the Board that the merchandise was dutiable under paragraph 198, as wood, unmanufactured, is thought to be correct.

The decision of the Board is sustained.

UNITED STATES v. ALBERT LORSCH & CO.

(Circuit Court, S. D. New York. January 8, 1907.)

No. 3,774.

CUSTOMS DUTIES—CLASSIFICATION—AGATE BEARINGS—PRECIOUS STONES.

The provision for precious stones cut, but not set, in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], is not limited to stones used otherwise than for industrial purposes; and cut pieces of agate used as scale bearings are dutiable under said provision rather than as manufactures of agate under Schedule B, par. 115, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636].

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

For decision below, see G. A. 5,875 (T. D. 25,865), which reversed the assessment of duty by the collector of customs at the port of New York, on the authority of U. S. v. American Express Co. (C. C.) 147 Fed. 894. Note Smith v. Computing Scale Co. (C. C.) 147 Fed. 890.

J. Osgood Nichols, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

HAZEL, District Judge. Small pieces of agate, concededly a precious stone, sawed, cut, and polished, useful for jewelers' and assayers' scales, are here involved. An assessment of duty by the collector at 50 per centum ad valorem under paragraph 115 of the present tariff act (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp St. 1901, p. 1636]), for manufactures of agate not specially provided for, was not sustained by the Board of General Appraisers; the latter being of the opinion that under the ruling in the case of Hahn v. United States, 100 Fed. 635, 40 C. C. A. 622, paragraph 435, which provides for precious stones cut, but not set, was more specific, and accordingly directed an assessment of duty at the rate of 10 per centum ad valorem. The proofs show that the article in question, when imported, has been suitably cut, polished, and prepared for mounting in the frame of the scales. The scales are of superior quality, and the mounting of the agate bearing in the metal groove is accomplished according to some of the witnesses without difficulty, and requires no skill in its adjustment. The lapidary, one Fox, called by the importers, however, swore that the agate bearings are set in the frame similarly to the setting of certain stones in a ring; this being necessary to insure absolute accuracy of the scales. Notwithstanding this apparent conflict of testimony regarding the setting of the bearings, I am satisfied by the record that the agate bearings were cut, polished, and prepared for use, and were completed, salable articles. That they had regard to industrial utility rather than beauty, as manifested in the display of precious stones, is not thought important.

The case of Benedict & Warner v. United States (C. C. A.) 145 Fed. 914, is thought in point. In that case the article consisted of rock crystal, a precious stone which was advanced in value by painting. I quote:

"The fact that these unset precious stones have been advanced in value by being cut and ornamented with various designs in an expensive manner brings them specifically within the provisions of paragraph 435, regardless of the subsequent advance in value by painting. They are therefore not dutiable as manufactures of rock crystal not specially provided for under the act."

The decision of the Board of General Appraisers, holding that paragraph 435 for precious stones is more specific than the provision of paragraph 115, is approved.

THE CITY OF LOWELL.

(Circuit Court of Appeals, Second Circuit. March 5, 1907. On Rehearing, March 23, 1907.)

No. 161.

1. COLLISION—NAVIGATION OF EAST RIVER IN FOG—CARE REQUIRED.

While a large steamship passing out from East river after 7 o'clock in the morning is not required to stop and anchor in the fairway because a dense fog closes in, it is her duty to navigate with great care, and not only to reduce speed, but also to keep sufficiently near the center of the river to avoid dangerous proximity to piers and ferry slips.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 184–186.

Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

2. SAME—STEAMER AND FERRYBOAT CROSSING—MUTUAL FAULT.

A large sound steamer when passing down the East river about 7 o'clock in the morning entered a dense fog when some distance above the Brooklyn Bridge, being at that time about the center of the channel. She continued at slow speed, and after passing the bridge, and when off the Wall Street ferry slip and near the ends of the piers, came into collision with a steam ferryboat crossing from Brooklyn. *Held*, that she was in fault for allowing herself to vary from the compass course which would have kept her in or near the center of the channel; that the ferryboat was also in fault for failing to stop when, being then near the center of the river, she heard the whistles of the steamer on her starboard hand, and apparently forward of her beam, but was unable to see the steamer because of the fog, since, if the starboard hand crossing rule was not applicable, the situation was governed by article 16 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2880]), which required her under such circumstances to stop and navigate with caution until danger of collision was over.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 194, 195.]

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York holding the City of Lowell solely in fault for a collision with the ferryboat Columbia in the East river off the Wall Street ferry slip a little after 7 a. m. November 4, 1904, in an extremely dense fog. The ferryboat was bound across the river from Brooklyn; the steamer coming down to round the Battery for her pier in the North river. The opinion below is reported in 139 Fed. 901.

Harrington Putnam, Henry E. Mattison, and Wing, Putnam & Burlingham, for appellant.

La Roy S. Gore and James J. Macklin, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The presentation of the facts in the opinion of the district judge is most exhaustive, and need not be repeated. We concur with him in the conclusion that the Lowell was in fault. The suggestion of counsel for the appellee that a steamer 322

feet long should have anchored at 7 a. m. in a dense fog in the fairway of the East river near the Brooklyn Bridge does not commend itself. The distance was not great from the place below the Williamsburg Bridge where the fog closed in to the more open water beyond the river's mouth, and the bells on successive ferry slips were guides by which the navigators could note their progress and determine when they had reached the point where the necessary change of compass course should be made; but in thus proceeding the utmost precautions were necessary, not only to reduce speed, but also to keep sufficiently near the center of the river to avoid dangerous proximity to piers and ferry slips. A careful study of the testimony satisfies us that in the matter of speed the navigators of the Lowell were doing all they could to keep her speed down to barely steerageway while moving on to get out of that dangerous locality; but we are also forced to the conclusion that they made a serious miscalculation as to their course, which resulted in bringing her but a little ways off the Columbia's Manhattan slip. By reason of the bend in the river, it is necessary for a vessel coming down to change her compass course about the time she passes Brooklyn Bridge, and the usual course there laid by a vessel navigating in midriver is S. W. by W. ½ W.

Of the four persons in the pilot house of the Lowell, two testify that glancing aloft through the fog they saw the Brooklyn Bridge. The wheelman testifies that he did not see it, but, being told by the others that they were passing it, he changed the compass course to the one named. Of the two witnesses who saw the bridge through the fog, one says that they passed under about the center of the span, the other "a good deal nearer to the Brooklyn tower than to the middle of the bridge." Neither of these statements can be made to harmonize with the other testimony in the case. Taking even the center of the span as a starting point, the compass course would carry the Lowell several hundred feet clear of the Wall Street ferry slip; but the testimony given by those on the ferryboat, who heard the sound of voices, hoisting engines, etc., on shore, clearly sustains the proposition that the collision took place but a short distance from the slip. Moreover, the testimony of the pilot of the Fulton ferryboat to whom the district judge refers is most persuasive, since it is conceded that the Lowell passed between her and the New York shore. His story is that he just missed making his New York slip, finding himself close up to the white spiles of the Mallory Line Pier. Thereupon he backed out, navigating from the Brooklyn end of his boat, sufficiently in his judgment to enable him to make the slip on his second attempt. But a small amount of clearance was needed, since it was the first of the ebb and the tide barely half a mile an hour. His estimate that he went back about two lengths seems altogether reasonable. There is no conceivable reason why he should have gone further. But, if the Lowell were where her two witnesses say she was, he must have backed about half way across the East river to enable the Lowell to pass him to the westward—a supposition too highly improbable to be accepted. We are entirely satisfied that, when the Lowell passed the Brooklyn Bridge, she was a considerable distance to the westward of the center of the span. And we conclude that her navigation was faulty, in that she did not lay

a course which would have brought her to the line of the bridge so near to the center of the span that the new course (S. W. by W. ½ W.) would have brought her down substantially in midchannel, or at least so near it as not to interfere with ingress to the ferry slip. The chart shows that there is a bend in the river at Corlaer's Hook, which, of course, necessitated a change of course. This was where the fog closed in. "We ran into the fog there at Corlaer's Hook," says the wheelsman, "after we turned around under the [Williamsburg] bridge." The Lowell was at that time in the middle of the river, both shores visible, and, if a proper compass course were then laid and held to carefully, it should have brought her down midriver to the Brooklyn Bridge. The record does not disclose what compass course was laid, so we cannot tell whether a miscalculation in that respect was the cause of the subsequent trouble. The Lowell after rounding Corlaer's Hook, backed to check her headway on entering the fog and backed again to allow a Catherine Street ferryboat to pass; but she has two propellers and backs straight, not like a single-screw boat. There is some evidence from the wheelsman (the only witness to compass course) that at one time while above the Brooklyn Bridge she had lost steerageway and her head was swinging off the course, and that he brought her back by porting the wheel. We cannot say what particular act of commission or omission brought her to the lower bridge so far west of its center as the evidence shows she was, but we are satisfied that some miscalculation amounting to a fault put her so far from midriver that the new course brought her at the time of collision close to the ferry slip.

We are unable, however, to concur in the finding that the ferryboat was free from fault. According to the narrative of her master, he blew a four-whistle blast to the bellman at the New York slip when she was in midriver. Immediately after he heard three whistles (the Lowell, as the event proved) on his starboard hand well up the river. He did not stop then, but ran on until he was near his dock, when the Lowell's second three blasts were heard, and immediately thereafter the vessels came in sight of each other and into collision. Had the Columbia stopped her engines when the first whistles were heard, and not resumed navigation until the position and movements of each boat was understood by the other so that it might be conducted without danger of collision, this accident would not have happened. Upon cross-examination the master admitted that he gave attention to those first three whistles by trying "to get under the dock out of that boat's way if possible"; that he judged it was a vessel coming down; supposed it was one of the big boats; knew he had her on the starboard hand (the Columbia was heading north at the time and the other was therefore forward of her beam); and knew that it was his duty to avoid her. The district judge held that the starboard-hand rule did not apply because the Columbia was near her Manhattan slip; but her failure to stop her engines when the first signal was heard occurred when she was only a little way past midriver. The privilege accorded to ferryboats attempting to effect an entrance into their slips is not extended to cover their navigation in the main river. N. Y. & Norwalk S. Boat Co. v. The Columbia (D. C.) 92 Fed. 939. Her counsel argues that it should not apply because the vessels were unable to see each

other's location and heading. It is not necessary to express any opinion upon this proposition which seems rather broadly expressed. See The Oceanic (D. C.) 61 Fed. 338; The Newport News, 105 Fed. 389, 44 C. C. A. 541. If it be held that the starboard-hand rule is inapplicable when the position of the other vessel is not ascertained because of fog, then the situation is governed by article 16 of the Act June 7, 1897 (30 Stat. 96, c. 4 [U. S. Comp. St. 1901, p. 2880]), which provides that:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

In our opinion, when from hearing the first three whistles of the Lowell the navigator of the Columbia, while still but a little past mid-river, had good reason to suppose (as he says he did) that one of the large Sound steamers was coming down on his starboard hand and forward of his beam, it was reckless navigation to keep on across what he should have supposed might be her course, instead of at once stopping and sounding alarm signals.

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to divide the damages, with interest, but without costs.

On Rehearing.

Counsel is in error in supposing that the court was ignorant of the East river statute of 1848, since embodied in the New York City consolidation act—it has been before us many times—or that it "overlooked" the fact that the whistle blown by the Lowell near the bridge was a three-blast whistle. Although one of the witnesses testified that it was customary with steamers navigating in a fog as the Lowell was to sound such a signal, it was nevertheless a fault to do so, certainly whenever the engines were not in fact going full speed astern. But we did not discuss that fault because it was manifest from the testimony that the three-blast signal in no way misled the pilot of the ferryboat.

The petition for reargument is denied.

UNITED STATES v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

(Circuit Court of Appeals, Second Circuit. March 5, 1907.)

No. 59.

1. EVIDENCE—CONTRACTS—VARIATION BY PAROL EVIDENCE—IMPLIED CONDITIONS.

The rule that, where parties have deliberately put their engagements into writing, in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagements, the writing is presumed to contain the entire contract, and all the prior and contemporaneous negotiations are merged therein, and cannot be shown by parol evidence to modify the terms of the writing, applies as well to its implied as to its expressed conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1756-1771.]

2. SAME—ACTION FOR BREACH.

The United States entered into a contract, by which the other party was to furnish and place in position, for the purposes of the construction of a breakwater, 88,000 tons more or less of riprap stone. The proposals on which the contract was let required bids to state the location of the quarry from which it was proposed to obtain the stone, and to be accompanied by a sample, and the contractor's bid stated that the quarry was located "at Spuyten Duyvil, New York." The contractor had previously purchased from the United States, and agreed to remove, a large quantity of stone which the government had deposited on leased premises at Spuyten Duyvil; but, before the riprap contract was completed, he was dispossessed and prevented from removing any more of such stone by reason of the failure of the government to renew its lease, and thereupon he abandoned the contract. *Held*, in an action against him and the surety on his bond for breach of the contract, that it could not be shown by the surety, as a defense, that it was understood by the parties that the stone to be used was that so purchased by the contractor, and that performance was prevented by the act or default of the government, which precluded its recovery, since the effect of such evidence would be to add a term to the written contract which did not specify such stone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1756-1772.]

Coxe, Circuit Judge, dissenting.

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

Writ of error by the United States, plaintiff in the court below, to review a judgment for the defendant rendered upon a verdict by the direction of the court.

W. T. Dennison, Felix Frankfurter, and Henry L. Stimson, for the United States.

A. B. Boardman and O'Brien, Boardman, Platt & Dunning, for defendants in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The action was brought by the government to recover of the defendant, as surety for one Conkling, damages alleged to have been sustained by the breach by Conkling of his contract with the government. The defendant undertook that Conkling would perform and observe all and singular the agreements on his part contained in a written contract bearing date September 26, 1899, made by him with the government for furnishing, delivering, and placing in position, for the purposes of the construction of a breakwater, "88,000 tons, more or less, of riprap stone." The contract provided that Conkling should commence the work within 30 days from the time of the approval of the contract by the chief engineer of the United States army, and should complete the same on or before October 1, 1900, and, if he failed to prosecute the work faithfully and diligently, the government should be at liberty to annul the contract by giving notice to that effect, and should be entitled to retain as its own all money due or to become due under the contract. It also provided that Conkling should be paid 51 cents per ton for the stone when placed in position; "payments to be made monthly, when the work contracted for shall have been delivered and accepted." The

contract refers to annexed specifications as forming a part of it. The specifications contained this provision:

"Bidders will state in their proposals the location of the quarries from which it is proposed to obtain the stone. These statements in the accepted proposals will constitute a part of the contract. A sample of the stone to be used will be submitted wih the proposal as a standard for comparison."

Conkling's proposal stated:

"The quarry from which I propose to obtain the stone, sample submitted, is located at Spuyten Duyvil, New York."

The contract was approved October 14, 1899, and about the 1st of November following Conkling commenced delivering the stone. During November he delivered and placed in position 3,362 tons of the stone. The work had been reported by the inspector in charge, but had not been formally accepted or rejected by the engineer in charge, when Conkling temporarily suspended work. This occurred on or about November 27th. In the previous May, Conkling had entered into a contract with the government to purchase and remove a large deposit of stone belonging to the government, located upon premises at Spuyten Duyvil, which the government had leased from one Dykeman, and by which contract Conkling was to have until June 17, 1900, to remove the stone. Owing to the neglect of the government to obtain an extension of the lease, the government's right of possession to the premises expired December 1, 1899, and thereupon the owner of the premises commenced proceedings to dispossess the government, and notified Conkling that he must not enter upon the premises to remove the stone. December 8th Conkling was notified to resume work without delay. He did not resume, alleging as a reason that, because of the neglect of the government to procure an extension of the lease, he was prevented from obtaining the stone. The government did not obtain an extension of the lease for several months, and in the meantime notified Conkling, after repeated requests to Conkling to resume the work, that his contract was annulled. Conkling was never paid for his work; but, so far as appears, he never requested an estimate thereof or payment therefor. The increased cost incurred by the government on completing the work covered by Conkling's contract was about $2,500.

Upon the trial the court directed a verdict for the defendant upon the ground that the government by its acts had made it impossible for Conkling to perform the contract, and the defendant as surety was thereby released.

The only question that requires consideration is whether it was competent for the defendant to show by extraneous evidence that the "88,000 tons, more or less, of riprap stone," mentioned in the contract, was according to the contemplation of the parties thereto the stone which Conkling was to procure from the leased premises at Spuyten Duyvil. If the contract was in effect one to furnish and deliver that stone, the government by its own act prevented Conkling from performing his contract, as we held in a former controversy between the present parties (137 Fed. 866, 70 C. C. A. 204). Speaking of the May contract, we said:

That contract, "by necessary implication, included an obligation on the part of the government to permit Conkling to remove the stone, and in this behalf to secure to him the privilege of access to the premises during the necessary period of his performance."

If, however, the contract permitted Conkling to furnish any riprap stone of the quality and dimensions specified, or like the sample accompanying his bid, it is quite immaterial that he may have been prevented by the government from furnishing the particular stone which he had in contemplation.

The rule is elementary that, where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagements, the writing is presumed to contain the entire contract, and all the prior and contemporaneous negotiations are merged therein, and cannot be shown by parol evidence. The writing, it is true, may be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted it to be the only and final expression of their meaning, no words can be added to it, or others substituted in place of words it already contains. The rule which precludes a resort to parol evidence to modify the terms of a written contract in particulars, in respect to which its language is unequivocal, applies as well to the implied as to the expressed conditions. Indeed, that which is a part by implication is as much a part of the contract as though it had been fully expressed in its words. These familiar rules control the present question. The contract was unambiguous, and the court below erred in making a contract between the parties by parol evidence which obligated Conkling to furnish the particular stone which he had contracted to purchase from the government, instead of any other stone which might be of the quality of the sample submitted with his bid coming from the locality of Spuyten Duyvil.

We have not overlooked the case of United States v. Peck, 102 U. S. 64, 26 L. Ed. 46, which is relied upon as an authority in point by the defendants in error. That was a case in which the claimant had entered into a contract with the government to furnish and deliver a certain quantity of hay on or before a specified day, and the contract made no mention of the source from which it was to be obtained, and the question was whether it was competent for him to show by the surrounding facts that the hay within the contemplation of the contracting parties was to be procured at the Big Meadows, a place under the control of the government. The court decided that the evidence was competent, and that, because the government had deprived the claimant from obtaining the hay from that place, the latter was not liable for a breach of the contract in failing to deliver it. That case was peculiar in the fact that both of the contracting parties knew, at the time of entering into the contract, that the only hay which could possibly be supplied in fulfillment of the contract was that which could be obtained from the particular place. If it encroaches upon the rules to which we have adverted, its authority ought not to be extended to cases in which the facts are not practically identical.

The judgment is reversed.

COXE, Circuit Judge (dissenting). I think the judgment should be affirmed upon the authority of United States v. Peck, 102 U. S. 64, 26 L. Ed. 46, which cannot be distinguished from the case at bar upon any rational theory. In one case the contract related to hay and in the other to stone, but the only material variation favors the contention of the defendant in error, for in the Peck Case the contract made no mention of the source from which the contractor was to secure the hay. In the case at bar, on the contrary, the contract expressly states that the quarry from which the riprap stone is to be furnished is located at Spuyten Duyvil and it is admitted that the United States, through its duly authorized agent, knew that this statement related to the pile of stone on Dyckman Meadow.

This court decided (137 Fed. 866, 70 C. C. A. 204) that the United States by its conduct in permitting its lease to expire prevented the defendant in error from using the stone from this pile.

It is only necessary to substitute the word "stone" for the word "hay" in Mr. Justice Bradley's opinion to demonstrate the exact similarity of the two cases, as follows:

"The supply of stone which he (the contractor) depended on, and which under the circumstances he had a right to depend on, was taken away by the defendants themselves. In other words, the defendants prevented and hindered the claimant from performing his part of the contract. * * *

"It is a sound principle that he who prevents a thing being done shall not avail himself of the nonperformance he has occasioned."

DU BOIS v. SEYMOUR.

(Circuit Court of Appeals. Third Circuit. March 4, 1907. On Rehearing, April 22, 1907.)

No. 39.

1. JUDGMENT—ACTION ON JUDGMENT—FORM.

The appropriate form of action at common law to recover an amount due on a judgment is an action of debt, and, although under a state practice such an action may be brought in assumpsit, the principles applicable thereto are those applicable to a common-law action of debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1720, 1721.]

2. SAME—JUDGMENT WHICH WILL SUPPORT ACTION—DECREE IN EQUITY.

While an action at law may be maintained on a final decree in equity to recover a sum adjudged by such decree to be due and owing, to support such an action the decree must be unconditional, and the sum adjudged to be due must be payable, in any event.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1719–1723.]

3. SAME—CONDITIONAL DECREE.

A decree in equity entered upon a petition of complainant for leave to substitute attorneys, which granted such leave on condition that he pay the attorneys originally employed certain sums for fees and disbursements, is not a final adjudication which is conclusive between the complainant and his counsel with respect to the amount due from him for their services and disbursements, and will not support an action at law to recover the sums therein conditionally required to be paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1719–1723.]

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

See 145 Fed. 1003.

Thomas H. Murray, for plaintiff in error.

Judson Harmon, for defendant in error.

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

LANNING, District Judge. The proceedings on this writ of error require, first, a determination of the exact nature of the action prosecuted in the court below. It is styled an action of assumpsit. In his declaration the plaintiff avers that in March, 1899, a cause in equity was pending in the Circuit Court of the United States for the Southern District of New York, in which John Du Bois was the complainant and the mayor, aldermen, and commonalty of the city of New York and others were defendants; that while the cause was pending John Du Bois died; that John E. Du Bois, the plaintiff in error here and the defendant below, was substituted, in his own right and as executor of the last will and testament of John Du Bois, deceased, as complainant in the cause; that John E. Du Bois, as sole devisee and executor, employed Henry Clark Johnson as solicitor in the cause, and John S. Seymour, the defendant in error here, and Eugene M. Harmon, who constituted the firm of Seymour & Harmon, and Judson Harmon, associate counsel; that Henry Clark Johnson, Seymour & Harmon, and Judson Harmon, in pursuance of their employment, began and continued actively the preparation and prosecution of the equity cause until on or about April 26, 1901, when John E. Du Bois, in his own right and as executor of the will of John Du Bois, deceased, presented to the court in which the equity cause was pending a petition praying for leave to discharge his then counsel and to substitute others in the cause; that on June 25, 1901, the cause was referred to a master of the court "to take testimony and report what was a fair and reasonable amount of counsel fees for the said solicitor and counsel, to wit, Henry Clark Johnson, Seymour & Harmon, and Judson Harmon"; that the master subsequently made a report to the court concerning the matters referred to him; and that the court, on November 24, 1902, entered the following decree:

"This cause having come on to be heard in May, 1901, upon a petition by the complainant for a substitution of attorneys, and being thereupon on June 25, 1901, referred to Arthur H. Masten, Esq., one of the standing masters of this court, to take testimony and report promptly what is the fair and reasonable amount of counsel fees (including disbursements) for all services of complainant's solicitor and counsel to date, and the report of said standing master, dated August 19, 1902, being now before the court, and all exceptions to the same overruled by order of November 21, 1902, and the court being satisfied with the reasonableness and propriety of said master's report, it is ordered and adjudged that the fair and reasonable amount of counsel fees, including disbursements, for all services of complainant's solicitor and counsel to June 25, 1901, the date of the order of reference, is as follows: To Judson Harmon, $1,000; to Henry C. Johnson, $2,500; to Seymour & Harmon, $7,500; and $1,450 incurred as disbursements by complainant's authority in the employment of Edward E. Quimby as a patent expert—and the order of substitution is made conditional upon the payment of said sums with interest on each item from June

25, 1901. It is further ordered and adjudged that there is due from complainant to Seymour & Harmon the sum of $674.50, paid by them for account of master's and stenographer's fees in this proceeding. It is further ordered and adjudged that there is due to Arthur H. Masten the sum of $387.50, the balance of his fees as master in this proceeding. It is further ordered and adjudged that, upon payment of the foregoing sums, the complainant may substitute other solicitors and counsel in the place of his present solicitor and counsel."

It is also averred that an appeal was taken from the above decree to the United States Circuit Court of Appeals for the Second Circuit by the complainant John E. Du Bois (134 Fed. 570, 69 C. C. A. 112); that the decree was subsequently affirmed by the Court of Appeals, and that on November 21, 1904, the United States Circuit Court for the Southern District of New York, after receiving the mandate of the Court of Appeals, entered a decree in accordance with that mandate. It is further averred that "subsequent to the date of said final judgment" John S. Seymour, by the death of his partner, Eugene M. Harmon, and by deeds of assignments, became entitled to the interests of Eugene M. Harmon, Henry Clark Johnson, and Judson Harmon, in the decree, and that the amounts named in the decree were just and reasonable sums for the services rendered and for disbursements. The final averment is:

"That said final decree and judgment entered by the Circuit Court of the United States for the Southern District of New York against said John E. Du Bois, in his own right and as executor of the last will, etc., of John Du Bois, deceased, as aforesaid, for the sums aggregating $13,124.50, is unsatisfied and unpaid, and the whole thereof, with interest from June 25, 1901, is still due and owing, and for the same plaintiff claims judgment with costs, etc., against said John E. Du Bois, individually and as executor of the last will and testament of John Du Bois, deceased."

To the above declaration the defendant filed pleas in the following words: "And now, August 29, 1905, the above-named defendant pleads two pleas, to wit: (1) Nonassumpsit; (2) payment with leave."

By the common-law procedure, the appropriate form of an action at law to recover an amount due upon a judgment is an action of debt. Such an action lies for the recovery of a fixed and definite sum due upon a contract, whether it be a contract of record, like a judgment, or a contract by specialty or a simple contract. In such a form of action, therefore, the plaintiff must declare on a contract and must claim the amount alleged to be due on that contract. It differs from an action of assumpsit, in that the latter is for the recovery of damages for the nonperformance of a parol or simple contract. With this distinction in view, an examination of the declaration before us shows that the present action is not, according to the rules of the common law, an action of assumpsit. No parol or simple contract is set forth. No breach of such a contract is alleged. No damages for the nonperformance of such a contract are demanded. What the plaintiff has done is to set forth in his declaration a proceeding in equity, and a decree of a court of equity, which he calls a "final judgment and decree," and which he says "is unsatisfied and unpaid" and "is still due and owing." The averments throughout the declaration relate

to an alleged contract of record—that is, to a judgment or decree—on which the plaintiff declares a certain definite sum is due to him. While, therefore, counsel for the plaintiff have not denied that the action is, under the practice established in the state of Pennsylvania, properly styled an action of assumpsit, or that the plea of nonassumpsit is by that practice allowable, the action is clearly one for the recovery of a debt, a sum certain, alleged to be due and owing from the defendant below to the plaintiff below upon a certain decree rendered by the United States Circuit Court for the Southern District of New York in a cause on the equity side of that court. It was so treated on the trial of the action, for, in addition to the proofs to show that the titles to the several sums named in the decree are now vested in John S. Seymour, no evidence was offered except exemplified copies of the proceedings in the Circuit Court of the United States for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit. The defendants offered no proofs whatever. The course pursued was consistent with an attempt to prove a judgment or decree, and not damages. The principles to be applied to the present case must therefore be those that are applicable to a common-law action of debt on a judgment record.

In earlier days there was doubt whether a decree in equity should be allowed to rank with a judgment at law, or whether it could be the basis of an action of debt in a court of law; but there is no doubt on that question now. Final decrees of courts of equity have the same conclusive effect as to questions of fact determined by them as judgments at law. If a final decree adjudges a fixed and certain sum to be due and owing from the defendant to the complainant, and nothing more, an action at law may be maintained on it for the recovery of the sum so adjudged to be due and owing; but the decree must be an unconditional one. The specific sum of money adjudged to be due must be payable, in all events. If there be a condition annexed to the decree which renders it uncertain whether payment shall ever be obligatory, the decree is not a record on which the common-law action of debt, or any other action at law instituted for the purpose of recovering a debt, can be founded. We think these principles are established by Post v. Neafie, 3 Caines (N. Y.) 22; Pennington v. Gibson, 57 U. S. 65, 14 L. Ed. 847; Mutual Fire Ins. Co. v. Newton, 50 N. J. Law, 571, 14 Atl. 756; Cord v. Newlin, 71 N. J. Law, 438, 59 Atl. 22; Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

The record of the present case shows that, while the equity suit was pending in the United States Circuit Court for the Southern District of New York, the complainant became dissatisfied with his counsel, and filed a petition praying for leave to discharge his counsel and to substitute others in their places. That petition was referred to a master "to take testimony and report promptly what is the fair and reasonable amount of counsel fees (including disbursements) for all services of complainant's solicitor and counsel to date." It also provided that, "upon the coming in of said report, order of substitution will be made conditional upon the payment of said fees." The reference to the master was for the mere purpose of enabling the court to determine the condition on which the complainant should be allowed an order of

substitution. The master took testimony and subsequently reported to the court the amounts he deemed "fair and reasonable" for counsel fees and disbursements. This report having been confirmed, the decree on which the present action is based was made. The primary object of the petition was to obtain an order of substitution. The decree was a provisional one only. It could not be successfully pleaded in bar of an action at law for the recovery of the value of the services of counsel or the amount of their disbursements. The power exercised by the court in making the decree was purely discretionary, and its discretion, judicially and not arbitrarily exercised, was not reviewable by the Circuit Court of Appeals. That such was the view of that court is made clear by its language when the decree was before it on appeal in Du Bois v. Mayor, 134 Fed. 570, 69 C. C. A. 112. It said:

"The only question presented upon this review is whether or not the Circuit Court erred in requiring, as a condition of the substitution of attorneys, that the complainant should pay the attorneys originally employed by him a fair and reasonable compensation for the services actually rendered and disbursements made by them. We are of the opinion that the most favorable view which can be invoked by the complainant is that the matter was discretionary with the Circuit Court."

The decree on which the present action is founded was not in any sense a decree finally and conclusively adjudging a sum of money to be due and owing from the complainant to his counsel. It was simply a decree declaring the condition on which the court would give to the petitioner an order of substitution. If anything is due from the plaintiff in error to the defendant in error, redress must be sought in some other form of action.

Having reached this conclusion, it follows that the judgment rendered below against the plaintiff in error must be reversed. It is unnecessary to consider the other questions presented by the specifications of error.

On Petition for Rehearing.

PER CURIAM. In his petition for a rehearing of this case the defendant in error misapprehends the purport of the opinion heretofore filed. The case was not disposed of on the ground that the form of the action was in debt. It was admitted that under the Pennsylvania statute it was properly styled an action in assumpsit; but it was stated that the principles applicable to the case, since the action was one to recover a sum certain alleged to be due on a decree or judgment, were the same as those that are applicable to an action in debt at common law instituted for a like purpose. The conclusion was that, as the decree was a conditional one, it could not be the basis of a common-law action in any form whatever. To that conclusion we adhere for the reasons stated in the opinion filed. The petition will therefore be dismissed.

The plaintiff in error also filed a petition praying that this court, instead of remanding the case to the court below for further procedure there, enter final judgment in favor of the plaintiff in error. We think this petition also should be dismissed. It may be that after

the case is remanded to the Circuit Court the plaintiff there may desire to apply for leave to amend his declaration, so as to permit a jury to pass upon the question as to what, if anything, is due to him, and that that court may think such amendment ought to be allowed. For this reason we decline to enter final judgment in this court.

Both petitions will be dismissed, and it is so ordered.

In re GILLIGAN.

TROY WAGON WORKS CO. v. HANCOCK.

(Circuit Court of Appeals, Seventh Circuit. October 24, 1906.)

No. 1,281.

1. SALES—CONDITIONAL SALES—RESERVATION OF TITLE—VALIDITY.

Under the Indiana law a conditional sale of personal property by a manufacturer to a retailer for the purposes of resale with an agreement reserving title in the seller until the goods are paid for was fraudulent and void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1352.]

2. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Acts Ind. 1901, p. 565, c. 247, § 1, provides that the jurisdiction of the Appellate Court shall be final except where the case is transferred to the Supreme Court, or the Supreme Court, on application, shall order the case certified to it, or in cases involving a sum exceeding $6,000. *Held* that, where a decision of the Appellate Court was not plainly in conflict with the decisions of the Supreme Court of the state, it was the duty of a federal court sitting in such state in applying the state law to follow such decision.

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

The order of the District Court appealed from was the denial of the petition of the appellant asking for the return to appellant of a certain lot of wagons sold by appellant to the bankrupt, upon an alleged conditional sale, that on the adjudication of bankruptcy went into the possession of the trustee.

The petition recites, and the court found, that on the 20th of July, 1905, the bankrupt ordered of appellant twelve farm wagons to be paid for in three, six, and nine months, at the price of seven hundred and two dollars, and fifty-three cents, the sale and delivery being upon this condition: "The title to all goods under this or any subsequent order is to remain in the Troy Wagon Works Company (unless at their option it shall be waived), and the goods are to be held at all times subject to their order until paid for; and if sales are made before payment the proceeds of all such sales, whether cash, book accounts, or notes, are to be held subject to the order of the Troy Wagon Works Company, until all the obligations arising under this contract are fully paid in money. It is further agreed that notes taken by the Troy Wagon Works Company in settlement are not accepted as payment, but only as evidence of liability."

The further facts are stated in the opinion.

Chas. Martindale, for appellant.

Chas. A. Dryer, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

There being no creditors having special equities in the bankrupt estate, the sole question presented by this record is, whether under the Indiana law, the conditional sale of personal property by a manufacturer to a retailer, for the purposes of resale, with an agreement to reserve title in the original vendor until paid for, is valid or not; and to determine such question we go to the Indiana law, in force at the time that the order appealed from was entered, as interpreted by her own courts.

The chief cases relied upon by appellant are Lanman v. McGregor, 94 Ind. 301; McGirr v. Sell, 60 Ind. 249; Kiefer v. Klinsick, 144 Ind. 46, 42 N. E. 447. In McGirr v. Sell, it does not appear that the transaction was a sale at all. Judge Anderson in the District Court, regarded it as a bailment, and we are disposed to agree with his judgment; and what the Supreme Court of Indiana said in Kiefer v. Klinsick does not change our view in that respect.

Lanman v. McGregor was a case where the owner of timber allowed a party to cut down and manufacture staves, the staves to remain on the land, and the title not to pass until paid for, to be paid for upon delivery. Such a transaction is wide of one involving the sale of completed articles to be resold, and does not involve the principles, that under the decisions of New York and other states, make invalid the conditional sale of articles delivered to the vendee, to be by him resold.

With these cases before it—the only ones tending to support appellant's contention—and with other cases of the Supreme Court of Indiana, notably Winchester v. Carman, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382, in which the court indicates, though perhaps by obiter dicta, that the possession of property held by the retailer, for sale, would be inconsistent with continued ownership by the vendor, the Appellate Court of Indiana in West v. Fulling (Ind. App.) 76 N. E. 325, passed squarely upon the proposition under review, holding that an alleged contract under which the vendor sold groceries to another, authorizing the buyer to sell the same in the ordinary course of business, but reserving title until the goods were paid for, was fraudulent —the court reviewing all the Indiana cases, and some of the New York cases on the subject.

Under the statute creating the Indiana Appellate Court (Section 10, Indiana Acts 1901, p. 567, c. 247), it is provided that the jurisdiction of the Appellate Court shall be final, except in the event that the case is transferred to the Supreme Court; or in case that the Supreme Court, upon application, shall order the case certified to it; or in cases involving a sum exceeding six thousand dollars.

West v. Fulling was the interpretation, by the Appellate Court, of the law of Indiana. It purported to declare the law in the light of the previous declarations of the Supreme Court, as far as those decisions went. Unquestionably it was an interpretation, the Appellate Court decision being in fact final, that the nisi prius courts of Indiana would feel bound to follow; for whatever may be the limitation on the rights of the Appellate Court, contrary to the judgment of the Supreme Court, to change the interpretation of Indiana law, the decision in West v. Fulling cannot be said to be plainly contrary to the

decisions of the Supreme Court. The most that could be said would be, that the Appellate Court, seeking to follow the decisions of the Supreme Court, had possibly misinterpreted them—an assumption that would not relieve the nisi prius courts of Indiana, or the United States District Court sitting for that District, from the duty of following the decision. Upon the authority of West v. Fulling, therefore, unmolested by the Supreme Court of Indiana, we feel ourselves bound to affirm the order appealed from.

NOTE.—The following is the opinion of Anderson, District Judge, in the court below:

ANDERSON, District Judge, On January 10, 1905, in the Matter of Warren H. Needham, Bankrupt on Petition of Mishawaka Woolen Company, this court filed the following memorandum:

"In the case of In re Garcewich, 115 Fed. 87, 89, 53 C. C. A. 510, 512, the Circuit Court of Appeals for the Second Circuit used the following language: 'It is the settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear; but when the purpose for which the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable and the title to have vested absolutely in the buyer. Ludden v. Hazen, 31 Barb. (N. Y.) 650; Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705; Bonesteel v. Flack, 41 Barb. (N. Y.) 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee.'"

In the case of the Winchester Wagon Works & Manufacturing Company v. Carmen, 109 Ind. 31, 34, 9 N. E. 707, 58 Am. Rep. 382, the Supreme Court of Indiana said: "The law seems to be well settled in this state, that where the owner of personal property sells and delivers it to a purchaser, not for the purpose of consumption or resale, at an agreed price payable at a future day, upon the express agreement that the title to such property should remain in the vendor thereof until the purchase price was fully paid, the vendee of such property, prior to such payment, can neither sell nor encumber the property in such manner as to defeat the title of the original owner and vendor thereof. Thomas v. Winters, 12 Ind. 322; Dunbar v. Rawles, 28 Ind. 225, 92 Am. Dec. 311; Bradshaw v. Warner, 54 Ind. 58; McGirr v. Sell, 60 Ind. 249; Domestic S. M. Co. v. Arthurholtz, 63 Ind. 322; Payne v. June, 92 Ind. 252; Lanman v. McGregor, 94 Ind. 301; Baals v. Stewart, 109 Ind. 371, 9 N. E. 403. But where, as here, it appears that a manufacturer and wholesale vendor of articles of personal property sells upon credit, and delivers a lot of such articles to a retail dealer therein, for the apparent or implied purpose of resale by such vendee, it is clear, we think, that the doctrine in relation to conditional sales cannot apply to or govern such a sale in a controversy as to such articles between the original vendor and the purchasers thereof from the original vendee. For, in such a case, the purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition upon which the sale and delivery was made must be deemed fraudulent and void as against purchasers from the original vendee of the property. In Devlin v. O'Neill, 6 Daly (N. Y.) 305, it was held that a sale of goods, to be disposed of by the vendee at retail, cannot be conditional, and that an attempt to make it conditional is fraudulent and void as to creditors of the vendee. So, also, in Ludden v. Hazen, 31 Barb. (N. Y.) 650, it was held by the Supreme

Court of New York that a conditional sale of goods to be resold by the vendee at retail was fraudulent as against purchasers and creditors, and that the form of transaction should be deemed to be colorable, and the title to have vested absolutely in such vendee. See, also, Griswold v. Sheldon, 4 N. Y. 581, 591; Benj. Sales (3d Am. Ed.) section 319, note e."

It is plain from the foregoing that in such a sale as is shown in the case at bar the condition is void as to purchasers. It has not yet been held by the Indiana Supreme or Appellate Courts that such conditional sale is void as to creditors, but the reasoning upon which the Winchester Wagon Works Case is based applies with as much force to creditors as to purchasers. In that case the condition was held to be fraudulent and void as to the purchaser, upon the ground that "the purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition * * * must be deemed fraudulent and void as against purchasers," etc. The decision is put upon the ground that a sale of goods for the purpose of resale, and a retention of title in the vendor cannot stand together; that they are inconsistent with each other, and therefore the condition fails. If, by the very logic of the situation, the condition fails in such a sale, it necessarily follows that the title of the vendee becomes absolute. The cases cited by the Supreme Court of Indiana in the Winchester Wagon Works Case, in support of it, hold that the attempt to make such a sale conditional is fraudulent and void as to creditors as well as purchasers. The decision of the referee, is affirmed."

Since the foregoing decision was made, the Appellate Court of this state, on December 5, 1905, in the case of Fulling et al. v. West et al., 76 N. E. 325. 36 Ind. App. 617, has decided this question in the same way it was decided by this court. It is conceded by counsel for petitioner that the case of Fulling v. West controls this court, and rules this case, unless the Supreme Court of Indiana has held otherwise; and counsel for petitioner claims that the Supreme Court has held otherwise in McGirr v. Sell, 60 Ind. 294. An examination of McGirr v. Sell discloses the fact that that case did not involve a conditional sale at all. The only question raised and decided was as to the sufficiency of an answer in which it was attempted to set up an estoppel. The two barrels of whisky involved in that suit had never been sold by Sell to McCoy. They were purchased by McCoy from a firm in Cincinnati (see bottom of page 251), and never were and never could have been sold by Sell to McCoy by conditional or absolute sale.

The decision of the referee is affirmed.

MISSOURI, K. & T. RY. CO. v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,384.

1. APPEAL—RECORD—MOTION FOR NEW TRIAL—COURT RULES.

Where rulings and instructions objected to, with exceptions thereto, were particularly set out and asserted to be erroneous in the assignments of error contained in appellant's brief, as required by Court of Appeals Rule 10, par. 3 (Ind. T. Ann. St. 1899, p. 937), and at the time the motion for a new trial was presented and ruled on, rule 3, declaring that exceptions shown in the record would be considered on appeal, irrespective of whether the ruling or action of the court was specifically set out in the motion for a new trial, if it was properly set out in the assignments of error, appellant was entitled to a consideration of such rulings, notwithstanding the subsequent amendment of rule 3, requiring the objections to be specifically set out in a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1743, 1744.]

2. CARRIERS—PASSENGERS—EJECTION.
In the absence of a regulatory statute, when a passenger refuses or fails to produce evidence of his right to transportation or pay the lawful fare after demand and being accorded a reasonable time for compliance, he forfeits his rights as a passenger, and subjects himself to ejection from the train.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1416, 1417, 1421.]

3. SAME—TENDER OF FARE BY THIRD PERSON.
Tender of fare by a third person, with the passenger's consent, is effective, or otherwise, to prevent a rightful ejection in the same manner as if the tender had been made by the passenger himself.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1437.]

4. SAME—RECANTING—TENDERING COMPLIANCE.
Where a passenger wilfully refused to establish his right to transportation or pay fare, his ejection from the train was not rendered wrongful because of a tender of his fare by a third person, with the passenger's consent, after the process of ejection had begun.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1435.]

5. SAME—DAMAGES—INSTRUCTIONS.
Plaintiff, a passenger on defendant's train, refused to establish his right to transportation or pay fare, and during the process of ejection a third person, with plaintiff's consent, tendered plaintiff's fare to the next station which was not plaintiff's destination. *Held* that, if the ejection was wrongful, plaintiff was only entitled to recover damages for loss of time and inconvenience in reaching the station to which his fare was tendered, and that an instruction authorizing a recovery for inconvenience in being compelled to reach his "destination" by other means was erroneous.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1483, 1485.]

In Error to the United States Court of Appeals in the Indian Territory.

See 89 S. W. 668.

Clifford L. Jackson, for plaintiff in error.

Preston S. Davis and William P. Thompson (Dennis H. Wilson, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. This was an action against a railroad company for the wrongful ejection of a passenger from one of its trains. Briefly stated, the case presented by the evidence was this: The plaintiff, while riding upon a north-bound passenger train of the defendant, was ejected therefrom, between the stations of Choteau and Pryor Creek, upon his failure to produce a ticket, or other evidence of a right to transportation, or to pay his fare, when requested to do so by the conductor. He had entered the train at Choteau, or at Eufaula, a more southerly station, and his destination was Adair, a station north of Prior Creek. He had no ticket or other evidence of a right to transportation, and was not intending or prepared to pay his fare. After the process of ejection had begun, and before its completion, a third person volunteered, with the plaintiff's assent, to pay his fare from the point at which he had entered the train to Pryor Creek. The conductor rejected this offer, saying, in

substance, that he had given the signal for the train to stop, which it was then doing, and that the plaintiff was an impostor and had been put off several times before. There was conflicting evidence from which either of two conclusions could be reasonably drawn: One, that the plaintiff entered the train under the mistaken but honest belief, engendered by matters which need not be recited, that he could properly, and would be, carried to his destination, notwithstanding he was without a ticket or other evidence of a right to transportation and was not intending or prepared to pay his fare; and the other, that he was attempting fraudulently to secure transportation and to evade paying therefor, when he knew that he was not otherwise entitled thereto. In the course of the trial specific exceptions were reserved by the defendant to rulings of the court in the admission and rejection of evidence and to portions of the charge to the jury. A verdict was returned for the plaintiff, and the judgment entered thereon was subsequently affirmed upon the defendant's appeal to the Court of Appeals of the Indian Territory. 89 S. W. 668. The case was then brought to this court upon a writ of error.

Upon the ground that they had not been set out with sufficient detail or precision in the motion for a new trial in the trial court, the Court of Appeals declined to consider some of the rulings and instructions to which exceptions were reserved, as before stated. In this we think there was error. When the motion for a new trial was presented and ruled upon, and when the appeal was perfected, rule 3 of the Court of Appeals provided:

"And this court will consider any and every ruling or action of any of the district courts of this territory to which objection or exception was made or taken at the time of the trial, as the same is shown in the record in any given cause, irrespective of the fact whether such ruling or action of the court be set out especially in the motion for a new trial or not, provided that such ruling or action be set out in the assignment of errors, as required in paragraph 3 of rule 10." Ind. T. Ann. St. 1899, p. 937.

The rulings and instructions before named, with the exceptions thereto, were shown in the record by a proper bill of exceptions and were particularly and separately set out and asserted to be erroneous in the assignment of errors contained in the appellant's brief, as required by paragraph 3 of rule 10. True, after the appeal was perfected, rule 3 was changed in respect of the manner in which errors claimed to have been committed at the trial should be specified in the motion for a new trial; but this change, whatever may be its prospective operation, did not and could not affect cases in which it was not possible to comply therewith by reason of their having theretofore passed beyond the stage of a motion for a new trial. This case was in that situation, and the Court of Appeals should have considered and disposed of it in conformity with the original rule.

Two of the instructions to which exceptions were reserved were treated by the Court of Appeals as properly presented for its consideration, and it was held that neither gave cause for reversal. One of these was as follows:

"The court instructs the jury that if they find from the evidence that, before the train was stopped, some other person or persons offered to pay the

fare of the plaintiff due to defendant, to the conductor in charge of the train of the defendant company, that said fare so offered cannot be refused, no matter who makes it, and you should find for the plaintiff and against the defendant."

In the absence of a regulatory statute—and there is none here—when a passenger refuses or fails to produce evidence of his right to transportation or to pay the lawful fare, after due demand therefor, and after being accorded reasonable time and opportunity for compliance, he forfeits the rights of a passenger, and subjects himself to ejection from the train. And while there is some contrariety of opinion respecting the effect of a subsequent tender of compliance, the better and prevailing rule is that, when the refusal is willful, persistent, or capricious, or proceeds from a fraudulent purpose to evade paying for transportation to which he knows he is not otherwise entitled, the passenger cannot, by recanting and tendering compliance, after the process of ejection has begun, entitle himself to transportation and render the completion of the ejection wrongful. State v. Campbell, 32 N. J. Law, 309; Railroad Co. v. Skillman, 39 Ohio St. 444; Pease v. Railway Co., 101 N. Y. 367, 5 N. E. 37, 54 Am. St. Rep. 699; Clark v. Railroad Co., 91 N. C. 506, 49 Am. Rep. 647; Railroad Co. v. Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53; Railroad Co. v. Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640; Railroad Co. v. Harris, 9 Lea (Tenn.) 180, 42 Am. Rep. 668; Garrison v. Railway Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452; Harrison v. Fink (C. C.) 42 Fed. 787; 2 Hutchinson on Carriers (3d Ed.) § 1085; 4 Elliott on Railroads, § 1637. When the tender is made by a third person, with the passenger's assent, it will be effective, or otherwise, in like manner as if made by him. Railroad Co. v. Garrett, 8 Lea (Tenn.) 438, 445, 41 Am. Rep. 640.

Tested by these rules, the instruction not only did not contain a correct statement of the law, but, when applied to the case made by the evidence, as before recited, was calculated to operate prejudicially to the defendant, because it erroneously gave the jury to understand that, even though the plaintiff's refusal or failure to comply with the conductor's lawful demand proceeded from a fraudulent purpose to evade paying for transportation to which he knew he was not otherwise entitled, a subsequent offer by a third person to pay his fare, made after the process of ejection had begun and before the train was brought to a stop, would entitle him to transportation, and would render the completion of the ejection wrongful.

The other instruction related to the measure of damages, and was as follows:

"The elements that go to make up the damages which the jury is to consider in this case, and which the plaintiff may be entitled to receive, are: Loss of time, humiliation in being put off of the train of the defendant company, and the inconvenience of being compelled to reach his destination by other means, together with any suffering of mind and of body that he was compelled to undergo by reason thereof, and any and all damages sustained by him as the direct and natural consequence of the fault of the said defendant company, in the event that you find from the evidence that the plaintiff was wrongfully and unlawfully evicted from the train."

As before stated, the plaintiff's destination was Adair, but in no permissible view of the evidence was he entitled to transportation to that place. The tender which was made in his behalf did not include the fair to Adair, but only that to Pryor Creek, the next station beyond the point where he was ejected. So, if the ejection was wrongful, he was entitled to damages for loss of time and inconvenience in reaching Pryor Creek by other means, but not in reaching Adair, his destination.

As there was prejudicial error in each of these instructions, the judgment of the Court of Appeals and that of the trial court are reversed, and the case is remanded to the trial court, with a direction to grant a new trial.

HOUCK v. CHRISTY et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,350.

1. APPEAL—FINDING OF MASTER—CONCURRENCE BY TRIAL COURT—REVIEW.
   Finding of a master, concurred in by the trial court, will be taken as presumptively correct, and will be permitted to stand, unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence; but such findings are not conclusive on the appellate court.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3996-4005.]

2. BANKRUPTCY—BONA FIDE PURCHASER—EVIDENCE.
   Evidence *held* sufficient to charge purchasers of a bankrupt's property, out of the regular course of business and shortly before he became a bankrupt, with notice that the sale was being made by him in fraud of creditors, and that such purchasers were therefore not entitled to protection against an action by the bankrupt's trustee to recover the property or its value as bona fide purchasers for value.

3. SAME—PRIMA FACIE EVIDENCE.
   In the absence of a statutory provision in a bankruptcy act that a sale not made in the ordinary course of business of the debtor shall be prima facie evidence of fraud, the fact that a sale or conveyance is made out of the usual course of business does not, without more, render it prima facie fraudulent; but it may be a badge of fraud, depending for its effect on the surrounding facts. Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674, explained and limited.

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

W. G. Fairchild, for appellant.

David Ritchie and Kos Harris, for appellees.

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

VAN DEVANTER, Circuit Judge. This is an appeal from a decree dismissing a bill by a trustee in bankruptcy to recover property, or the value thereof, which, it is conceded, was transferred to the appellees by the bankrupt with the intent and purpose on his part to hinder, delay, and defraud his creditors, and within four

months prior to the filing of the petition in bankruptcy. The master, to whom the case was referred, with instructions to take and report the evidence with findings of fact, found that the appellees were purchasers in good faith and for a present fair consideration. An exception by the trustee to this finding was overruled by the court, and the finding approved.

Without any conflict the evidence discloses these facts: Stephenson, the bankrupt, was a country merchant at Scott, Kan. Christy, one of the appellees, was the cashier of a small bank at Scott, and Cover, the other appellee, owned and conducted a small hotel at that place. Stephenson's property consisted of a store building and lot, a stock of general merchandise, book accounts, and a homestead. The homestead was of very little value by reason of the uncertain nature of the title, was exempt from execution, and is not in controversy. Stephenson approached Christy one morning with a proposal to sell the entire property. During the day brief negotiations were had between Stephenson and Christy, and between Christy and Cover, in which no difficulty was experienced in agreeing on satisfactory terms, and that evening between 9 and 10 o'clock the transfer was effected; the homestead and book accounts going to Christy, and the store building and lot, with the stock of merchandise, going to Cover. All three were present when the transfer was effected, and participated therein; it being understood that Christy was primarily the purchaser of the entire property, and that Cover was a subpurchaser of what was transferred to him. For the entire property Christy was to pay Stephenson $2,200 in cash, which was 75 per cent. of its fair value, if allowance be made for two mortgages on the store building and lot, the payment of which was assumed by the purchaser. For the property transferred to him, Cover conveyed his hotel to Christy, executed a note to him for $750, and assumed the payment of the two mortgages. The next morning Christy paid Stephenson $2,200 in this way: He handed him $1,280 in currency, $720 in six drafts made payable to persons living in Scott, placed $48 to the credit of Christy's brother in the bank, and applied $152 in payment of a note of Stephenson's held by the bank. The largest draft was for $400, and was made payable to Stephenson's wife. Although Stephenson was accustomed to deposit his money in the bank and to pay it out by checks, there was no explanation of why this money was not placed to his credit in the usual way, or of why drafts were taken in favor of his wife and other residents of Scott; and, although only $2,200 was paid, or intended to be paid, Christy wrote out a check to Stephenson for $2,700, which was indorsed by him and retained by Christy. Stephenson was insolvent at the time; his obligations to nonresident creditors, such as wholesale merchants, being in excess of the fair value of his property. Some time before he had mortgaged the store building and lot to a local creditor for $300, and shortly thereafter had again mortgaged it to the same person for the further sum of $200. He had also given a chattel mortgage for $50 upon the stock of merchandise two or three months before. These mortgages were shown upon the public records at Scott, which

were examined by both Christy and Cover. Within 40 days Christy's bank had returned unpaid two drafts drawn on Stephenson by mercantile creditors for $102.34 and $126.94 actually due them, and another such draft for $170.44 was in the bank for collection at the time of the transfer. For over four months Stephenson's balance in the bank had been very small, and practically all of his deposits had been checked out soon after they were made. His balance was $5.40 at the time of the transfer. The bank also held his note for $152, which was long past due. A surety thereon had asked to be relieved of his obligation, saying that the note had run as long as it ought to, and, acting upon this, Christy had obtained from Stephenson and his wife, as additional security, a deed for the store building and lot and another for the homestead; the name of the grantee being left blank in each. When the transfer was made, Christy, in the presence of Stephenson and Cover, inserted Cover's name in one deed and his own in the other. Before the transfer Christy and Cover made only a cursory examination of the stock of merchandise, as by walking through the store, and a new consignment of goods amounting to $375, which was then unopened, was not noticed. Christy merely glanced at the book accounts, and made no calculation of their amount, or of what proportion of them was collectible. No inventory of the merchandise was made; nor was there an examination of the original invoices, or of the books, to ascertain the terms on which Stephenson had purchased, or the extent of his mercantile obligations. When interrogated four days thereafter by a representative of one of Stephenson's creditors, Christy said he had paid $3,000 in cash for the property, and Cover said he had paid partly in property and partly in cash, both statements being materially false; and still later Christy, when being examined under oath in respect of the transaction, repeatedly and falsely stated that he had paid $2,700 in money and drafts.

Upon the hearing before the master Cover did not testify, nor was his failure to do so explained. Christy, whose testimony was in some respects unsatisfactory and contradictory, testified that, at the time of the transfer he had no knowledge of Stephenson's insolvency, or of his intention to hinder, delay, or defraud his creditors, and that Stephenson had been usually very prompt in making payments. To the question, "did you ask Stephenson anything about his indebtedness?" he answered:

"No, sir; I did not, with the exception, I believe, when the sale was made, I asked him if he had any indebtedness. He said: 'No, with the exception of a few sundry accounts.' Something to that effect."

Probably referring to Christy's testimony just recited, the appellees insist that, as there was some competent evidence to sustain the finding that they were purchasers in good faith, this question is not open for re-examination by us. The true rule, however, in such cases as this, is that the findings of the master, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the

consideration of the evidence, but are not conclusive. Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Girard Ins. Co. v. Cooper, 162 U. S. 529, 538, 16 Sup. Ct. 879, 40 L. Ed. 1062; Moffatt v. Blake, 75 C. C. A. 265, 145 Fed. 40. We have no disposition to depart from this rule. With it well in mind, we have attentively examined all the evidence, and in our opinion that which stands uncontradicted forbids that the finding of good faith on the part of the appellees should be permitted to stand.

One is not a purchaser in good faith, if he purchases with knowledge of the fraudulent intent of the vendor, or under such circumstances as should put him upon inquiry as to the object for which the vendor sells. Jones v. Simpson, 116 U. S. 609, 614, 6 Sup. Ct. 538, 29 L. Ed. 742. Apart from what Christy had learned through his connection with the bank, he and Cover knew that Stephenson was engaged in a business in which men usually have creditors, that he had been recently incumbering his property for small amounts, that he was hastily disposing of all of it for much less than its fair value, that he was insisting that he be paid in cash, which it is easy to conceal from creditors, and that the transaction was altogether unusual. Plainly, therefore, they had knowledge of what reasonably should have put them, as prudent men, upon inquiry as to his solvency and purpose, and were chargeable with all the knowledge which would have been acquired by prosecuting the inquiry with reasonable diligence; which they did not do. Wager v. Hall, 16 Wall. 584, 601, 21 L. Ed. 504; Shauer v. Alterton, 151 U. S. 607, 621, 14 Sup. Ct. 442, 38 L. Ed. 286; Walker v. Collins, 1 C. C. A. 642, 50 Fed. 737; Brittain v. Crowther, 4 C. C. A. 341, 54 Fed. 295; Phillips v. Reitz, 16 Kan. 396; Kurtz v. Miller, 26 Kan. 314; Gollober v. Martin, 33 Kan. 252, 6 Pac. 267. Moreover, we think the evidence before recited brings the case well within the rule that badges of fraud altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof of fraudulent intent on the part of both vendor and vendee. Castle v. Bullard, 23 How. 172, 187, 16 L. Ed. 424; Wager v. Hall, 16 Wall. 584, 601, 21 L. Ed. 504.

We have not failed to consider the appellant's contention that this case is necessarily ruled by Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489, where it was held that a sale, assignment, transfer, or conveyance made out of the usual and ordinary course of business of the debtor, as a sale by a retail merchant of his entire stock of goods, is, without more, prima facie fraudulent, and puts upon the vendee the burden of proving that he purchased in good faith. But, as that decision turned upon the provision in the former bankruptcy act, "and if such sale, assignment, transfer, or other conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud," and as the present act contains no such provision, we do not assent to the contention. In the absence of such a statutory provision, the fact that a sale, assignment, transfer, or conveyance is made out of the usual and ordinary course of business does not, without more, render it prima facie fraudulent; but it may be a badge of fraud, of little or considerable influence, de-

pending upon the surrounding facts. 2 Bigelow on Fraud, p. 439; Bump on Fraudulent Conveyances (4th Ed.) § 47; 20 Cyc. 485; Bigelow v. Doolittle, 36 Wis. 115; Sexton v. Wheaton, 8 Wheat. 229, 250, 5 L. Ed. 603. It may be that, in the recent case of Dokken v. Page (C. C. A.) 147 Fed. 438, involving a sale by a retail merchant of his entire stock of goods, we gave undue prominence to the language of the court in Walbrun v. Babbitt; but it was not our intention to say that the fact that the sale was out of the usual and ordinary course of business was, when taken alone, prima facie evidence of fraud under the present bankruptcy act, but only that it was a circumstance which, in connection with the surrounding facts disclosed in the opinion, vitiated the sale there under consideration.

The decree is reversed, with instructions to enter a decree against Christy and Cover for the store building and lot and the stock of merchandise, or their value, and against Christy for the book accounts, or their value.

BRADFORD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1907. On Rehearing, April 9, 1907.)

No. 1,564.

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

Edgar H. Farrar, Frank L. Richardson, and Thos. J. Kernan (Richardson & Soule, on the brief), for plaintiffs in error.

W. W. Howe, U. S. Atty., and Rufus E. Foster, Asst. U. S. Atty.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. In this case Bradford and Wright were tried together in the Circuit Court and found guilty on certain counts of the indictment. They reserved a bill of exceptions, and sued out a writ of error to this court. The trial judge, Hon. Charles Parlange, annexed to the bill of exceptions an elaborate statement of the case, and of his reasons for his several rulings complained of and to which exceptions were reserved. Those reasons are given in United States v. Bradford et al. (C. C.) 148 Fed. 413, 430. The opinion there reported deals with and decides all the material questions argued at the bar and in the briefs submitted in this court. After careful consideration of the argument and the briefs, we have reached the same conclusions announced by the learned trial judge. We are of opinion, therefore, that there is no reversible error in the record.

The judgment of the Circuit Court is affirmed.

On Rehearing.

In this case the plaintiffs in error present applications for rehearing. They do not show any ground therefor that induces us to believe that

a rehearing might result in our changing the views announced in the decision of the case heretofore rendered.

The application for rehearing is therefore denied.

BRADFORD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1907. On Rehearing, April 9, 1907.)

No. 1,570.

1. PUBLIC LANDS—CONSPIRACY—INDICTMENT—"ENTRY" OF PUBLIC LANDS.
   In an indictment for conspiracy to defraud the United States by means of a false and fraudulent entry of public lands under the homestead law, the word "entry" may properly be used and construed as applying to any or all of the steps necessary to acquire title under such law.

2. CONSPIRACY—INDICTMENT—AVERMENT OF DATE.
   An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for conspiracy to defraud the United States, need not aver with exact accuracy the date of the formation or beginning of the conspiracy, nor, if the date is alleged, need it be proved as laid, but it is sufficient if the conspiracy is proved to have existed prior to the commission of the overt act charged, and that it continued to exist at that time.

3. CRIMINAL LAW—LIMITATION—CONSPIRACY.
   A prosecution for conspiracy to defraud the United States under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], is maintainable if instituted within three years of the commission of the last, or of any, overt act.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 275.]

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

Edgar H. Farrar, Frank L. Richardson, and Thos. J. Kernan, for plaintiffs in error.

W. W. Howe, U. S. Atty., and Rufus E. Foster, Asst. U. S. Atty.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. On April 26, 1906, the plaintiffs in error, James L. Bradford and William H. Wright, were indicted in the United States Circuit Court, at New Orleans, on an indictment containing this count:

"That James L. Bradford and William H. Wright, late of the district and division aforesaid, heretofore, to wit, on the 10th day of December, A. D. one thousand nine hundred and two, in the city of New Orleans, Eastern district of Louisiana, New Orleans division and within the jurisdiction of this court, did combine, conspire, and confederate together and with each other to defraud the United States of the title and possession of large tracts of land in the parish of Ascension, Eastern district of Louisiana, of great value, by means of false, feigned and 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 the homestead laws, at the local land office of the United States in the city of New Orleans, state of Louisiana, by unlawfully, knowingly, and willfully causing and procuring one Joseph D. Lodwick, of the parish of Ascension, to make a false and fraudulent homestead entry of certain public lands of the United States, situated

in the parish of Ascension, state of Louisiana, and subject to entry under the homestead laws of the United States, and to obtain from the United States a patent to said public lands, by means of said false and fraudulent homestead entry, and thereafter to transfer to the said William H. Wright and the said James L. Bradford for the use and benefit of said James L. Bradford and William H. Wright, the title and possession of one-half of the said public lands of the United States entered by the said Joseph D. Lodwick, as aforesaid, the said transfer of one-half of said lands, so entered by the said Joseph D. Lodwick to be made by said Joseph D. Lodwick to the said William H. Wright and the said James L. Bradford, for the use and benefit of the said James L. Bradford and the said William H. Wright, under and in accordance with an unlawful and corrupt agreement, made by the said Bradford and the said Wright and the said Lodwick, whereby the said Joseph D. Lodwick was to transfer one-half of said lands so entered to the said William H. Wright and said James L. Bradford, for the use and benefit of said William H. Wright and said James L. Bradford, for and in consideration of the payment by the said James L. Bradford and the said William H. Wright of all costs and fees for making said entry and for thereafter commuting the same, and of the payment of all costs and expenses incidental to and in connection with the final proof made in support of said entry, and thereafter, to wit, on the 11th day of December, A. D. one thousand nine hundred and two, in the city of New Orleans, Eastern district of Louisiana, and within the jurisdiction of this court, to effect and in pursuance of the objects of said combination, conspiracy, and confederation to defraud the United States out of the title and possession of the lands aforesaid, the said James L. Bradford and the said William H. Wright did unlawfully, knowingly, and willfully file and cause to be filed in the local land office of the United States, at New Orleans, a certain homestead proof which the said James L. Bradford and the said William H. Wright caused and procured the said Joseph D. Lodwick to make and execute before J. F. Fernandez, deputy clerk of the district court of the parish of Ascension, state of Louisiana, an officer authorized under the laws of the state of Louisiana to administer oaths, in support of the said homestead entry of the said Joseph D. Lodwick, being entry No. 18,324, New Orleans Land Office, for the southwest quarter, section twenty-six, township ten south, range three east, southeast district, east of river, containing one hundred, fifty-nine and thirty-two one-hundredths acres (159.32), which said homestead proof contained, among others, the statement that said Joseph D. Lodwick had not sold, mortgaged or contracted to sell the said land, or any part thereof, which statement the said James L. Bradford and the said William H. Wright then and there well knew to be false and fraudulent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

Bills of particulars were called for and denied. Demurrers, general and special, were interposed to the indictment, which were overruled. The subject-matter of these demurrers was renewed by objections presented at the time the first testimony was offered, which were overruled and exceptions taken. Various objections to the introduction of evidence and to the refusal of the court to admit evidence were taken at the trial. Exceptions were taken to instructions to the jury, given, and refused. The defendants were found guilty, and motion for new trial was made, and refused. Motion in arrest of judgment was made and overruled. The defendants were sentenced and thereafter prosecuted their several writs of error in due form. The errors assigned are substantially the same. We therefore notice only those presented on behalf of the defendant Bradford. Of these, those insisted on in this court resolve themselves into three questions: First. Does the indictment sufficiently and properly describe and set forth any offense against the United States? Second. Was the offense

proven barred by the statute of limitations of three years at the time the indictment was found? Third. Should the defendants have been permitted to show that the lands entered by Lodwick as a homestead were in 1849 and 1850 swamp or overflowed lands, unfit for cultivation, and therefore not the property of the United States, because granted by the United States to the State of Louisiana?

In reference to the first question, we deem it only necessary to say that the indictment substantially follows the lines of Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, and Wright v. United States, 108 Fed. 805, 48 C. C. A. 37. The first of the cases just cited sufficiently answers the suggestions of counsel in reference to the use of the word "entry" in the technical sense in this indictment. Counsel often indulge in too great refinement of construction. This is not a case where the date of the formation or beginning of the conspiracy must be plead with exact accuracy. It need not be proven that the conspiracy was formed and begun at the date given in the indictment. The essential point is that the conspiracy existed before the date of the overt act alleged, and continued to exist at the time the overt act was committed.

The second question is answered by our announcement just made in another case (No. 1564) between these parties. 152 Fed. 616.

The third question we think is fully answered by the terms of the statutes of 1849 and 1850, to which it refers, and which, in our opinion, show that the proof the defendants sought to make on this subject was properly excluded.

We are of opinion, therefore, that there is no reversible error in the record.

The judgment of the Circuit Court is affirmed.

On Rehearing.

In this case the plaintiffs in error present applications for rehearing. They do not show any ground therefor that induces us to believe that a rehearing might result in our changing the views announced in the decision of the case heretofore rendered.

The application for rehearing is therefore denied.

In re SULLY et al.

(Circuit Court of Appeals, Second Circuit. February 6, 1907.)

Nos. 46, 47, 48, 49, 149, 150.

1. BANKRUPTCY—RIGHT TO OBJECT TO CLAIMS—PARTIES IN INTEREST.
The term "parties in interest," as used in Bankr. Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], which permits parties in interest to object to the allowance of claims against the estate, applies only to those who have an interest in the res which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt.

2. SAME—RE-EXAMINING OF CLAIMS.
The element of motive cannot prejudice the assertion of a clear legal right or a statutory privilege, and the right to have a re-examination of claims allowed against a bankrupt estate as provided for by Bankr. Act

July 1, 1898, c. 541, § 57k, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], should not be denied to creditors who clearly have an interest therein because they seek such re-examination chiefly or solely in the interest of a third party.

Petitions to Review and Appeals from the District Court of the United States for the Southern District of New York.

On petitions for review (one by Hawley and Ray, and the other by creditors McCormick, Berg, and Cahn, whose claims have been proved and allowed in the bankruptcy court) of orders made by the District Court reversing orders of the referee. 142 Fed. 895. Under the orders of the referee Hawley and Ray, as parties in interest under sections 57d and 57k of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, pp. 3443, 3444]), were permitted to file and prosecute in their own names, and at their own expense, objections to the claims of 65 creditors, all members of the New York Cotton Exchange, whose claims had been proved and allowed, commonly designated as the "Cotton Exchange creditors," and similar leave was given to the creditors McCormick, Berg, and Cahn.

Davies, Stone & Auerback (Julian T. Davies, A. I. Elkus and Garrard Glenn, of counsel), for appellants.

Boothby & Baldwin (John W. Boothby, of counsel), for the trustee.

Henry W. Taft and Turner, Rolston & Horan, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The orders under review upon the petitions of Hawley and Ray should be affirmed because these petitioners were not "parties in interest" to the bankruptcy proceeding within the meaning of section 57 (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), and therefore had no standing in court to ask for the orders granted by the referee. It is true that the trustee in bankruptcy was about to bring an action against them to recover a considerable sum of money, and it is argued that their defense will be seriously prejudiced by the adjudication in the bankruptcy proceeding fixing the amount of the claims of the Cotton Exchange creditors. However this may be, they are not parties in interest in the proceeding itself in any legal sense, or within the meaning of the bankruptcy act. It is not enough that their rights may be incidentally affected by the proceeding. The term "parties in interest" applies to those who have an interest in the res which is to be administered and distributed in the proceeding; and does not include those who are merely debtors or alleged debtors of the bankrupt.

The orders under review upon the petitions of McCormick, Berg, and Cahn should be reversed. In denying them leave to re-examine the claims of the Cotton Exchange creditors, the decision of the district judge proceeded upon two considerations. He was of the opinion, first, that the petitioners had been guilty of laches; and, secondly, that the application was not made in their own interests, but was made in the interests of Hawley and Ray. The facts are not in controversy which bear upon the questions involved, and whether there was an unreasonable delay on their part in making the application, or whether the application should have been denied because it was made in the interests of Hawley and Ray, are purely questions of law. The facts upon which laches have been suggested are fully set forth in the opin-

ion of the referee, and more particularly in his opinion in considering the application of Hawley and Ray, and we fully agree with his conclusion that under the circumstances the application was made with sufficient diligence, and adopt his opinion.

Is the fact that their application was made in the interests of Hawley, and Ray, instead of their own, a sufficient reason for denying it, when it does not appear that in other respects the application was not a meritorious one? If the claims are expunged, or diminished, larger dividends will accrue to the petitioners, as well as to the other creditors of the bankrupt. The petitioners are creditors to the amount of over $3,700, and their interest in the result of a re-examination is clear. It is doubtless true that they would not have intervened merely in order to protect themselves, and that they were mainly and perhaps solely influenced by a desire to assist Hawley and Ray. But, if they had reasonable grounds for asserting the right secured to them by the bankrupt act, whether they chose to do so for their own advantage or for that of third persons is quite immaterial. The element of motive cannot prejudice the assertion of a clear legal right or statutory privilege. They have been deprived of the right reserved to them by section 57 merely because they would have been willing to forego it, or would not have asserted it, if they had not been moved by friendly consideration for Hawley and Ray. This was a matter which concerned only themselves. There was nothing censurable in the motive which induced them to proceed. Indeed, if they believed that unfounded or exaggerated claims of certain other creditors were to be used by the trustee and those creditors to the harm of Hawley and Ray, they were commendable in lending the latter their assistance. As their application was a legitimate one, we see no reason why it should be denied upon a consideration of motive. As we intimated during the argument, we are disposed to consider their application as though it had been made by Hawley and Ray, in their names; Hawley and Ray having acquired the petitioners' claims for that purpose. We are aware of no rule of law or equity which would interdict such a purchase by Hawley and Ray, or preclude the assertion of any right derived from it. The order made by the referee was broader than was necessary; but, although the District Court would have been justified in modifying it, it ought not to have been wholly reversed.

The order of the referee should be modified so as to provide for a re-examination instituted and conducted by the petitioners in the name of the trustee, through attorneys and counsel selected by them, and at their expense. See In re Lewensohn, 121 Fed. 538, 57 C. C. A. 600. Counsel may prepare and submit orders.

W. T. CARTER & BRO. v. KIRBY LUMBER CO. et al.*

(Circuit Court of Appeals, Fifth Circuit. April 2, 1907.)

No. 1,580.

BOUNDARIES—RETRACING OLD SURVEY—REVERSAL OF CALLS.

In a case of disputed boundary, where the proof goes to the extent of showing that part of the survey was made on the ground, the calls may be reversed and the lines traced the other way, whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 52, 66-69.]

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

Geo. A. Byers and C. L. Carter, for appellants.
Frank Andrews and Sam Streetman, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The question involved on this appeal is as to the proper location of the north line of section 4, a school section of railroad land in Tyler county, Tex., originally surveyed August 4, 1874, by M. L. McAlister, deputy surveyor of Tyler county. The field notes are:

"Field notes of a survey of (640) six hundred and forty acres of land made for the B. B. B. & C. R. R. Company, it being the quantity of land to which they were entitled by virtue of certificate No. 647 issued to said company by W. S. Hotchkiss, Com. Claims, March 30th, 1860. Said survey is No. 4 in block No. 1, situated in Tyler county on the waters of Billums creek, a tributary of the Neches river, about 15 miles N. 12° W. of Woodville. Beginning on the N. line of Sect. No. 1 at the S. W. cor. of Sect. No. 2, a stake, from which a pine brs. N. 6 vrs. Thence N. on W. line of Sect. No. 2. at 1,312 vrs. S. line of J. Crews survey, a rock for cor. from which a pine brs. S. 10° E. 2 vrs. Thence W., at 164 vrs. S. W. cor. of the same, a stake, from which a pine brs. N. 55° E. 14 vrs. and a pine brs. S. 66° W. 8 vrs. Thence N. with W. line of same, at 1,150 vrs. its N. W. cor. on S. line of C. C. Tarver's survey, a stake, from which an elm brs. N. 4° E. 5 vrs. and a sweet gum brs. S. 55° E. 11 vrs. Thence W., at 450 vrs. C. C. Tarver's S. W. cor., a stake, from which a red oak brs. S. 35° E. 5 vrs. and a pine brs. N. 15° W. 6 vrs. Thence S. 310 vrs., cor. stake, from which a pine brs. S. 23° E. 7 vrs. and a pine brs. N. 7° W. 8 vrs. Thence W., at 1,064 vrs. cor. stake, from which a sweet gum brs. S. 12° E. 5 vrs. and a pine brs. S. 45° E. 3 vrs. Thence S., at 2,152 vrs. the N. line of Sect. No. 3, a cor. stake, from which a pine brs. S. 55° W. 6 vrs. and a pine brs. N. 58° E. 8 vrs. Thence E., at 1,083 vrs. N. E. cor. Sect. No. 3 and N. W. cor. Sect. No. 1, and at 1,678 vrs. place of beginning. Bearings marked "X." Surveyed August 4th, 1874.

"M. L. McAlister, Dept. Surveyor T. Co.

"W. Coopwood,
"R. Dell,
"Chainmen."

On August 3, 1874, McAlister surveyed sections 1 and 2 adjoining on the south and east, and on the 4th and following day sections 3 and 5 adjoining on the south and west, and on the 5th of August he surveyed section 6, lying immediately west of section 5. Of course,

*Rehearing denied May 20, 1907.

these sections were surveyed and located with reference to each other, and sections 6, 5, and 4 had the same north header line, to wit, a line due east from the extreme eastern corner of the B. Smart survey. Some of the field notes of the survey of section 4, particularly as to distances, are in conflict; but according to the undisputed evidence in the case the southeast corner, south line, southwest corner, west line, northwest corner, and north line were measured and established on the ground, and the landmarks are there. The east line may have been surveyed on the ground, but that line is controlled by older surveys, and there is a probability that it was laid off as to course and distance from data in the office of the surveyor.

The section as surveyed calls for square corners, the courses are all north and south, east and west, and the angles are all right angles, so that we may infer that the length north and south of the east line was intended to be the same as in the west line. The west line is given as 2,152 varas, and the north and south distance of the east line, made up of 1,312 varas to the south line of the Crews survey and 1,150 varas from southwest corner of Crews survey to the Tarver survey, amounting to 2,462 varas, is exactly 310 varas longer than the west line as given in the field notes, and 310 varas is the exact distance given in the first call south, and this call makes the trouble in the case. The actual distance from the conceded southeast corner of section 4 to the Crews survey, as shown by subsequent survey is 977 varas. Therefore the first mistake in the field notes is in the first call for distance north on west line of section No. 2, at 1,312 varas south line of Crews survey, which was too much over by some 300 varas; and it is fair to presume that, if this mistake had not been made, the call from Tarver's southwest corner south at 310 varas would not have been given in the field notes.

April 30, 1903, the deputy county surveyor of Tyler county, Tex., made a resurvey of section 4, and his corrected field notes are as follows:

"Beginning at the S. W. corner of section No. 2, B. B. B. & C. Ry. Co., on the N. line of section No. 1 of the B. B. B. & C. Ry. Co., a stake, from which a line brs. N. 6 vrs. Thence W., on N. line of section 1 and 3. 1,566 vrs., a stake, from which a pine brs. N. 58° E. 8 vrs., a pine brs. S. 36° 30' E. 6¾. Thence N. 43' W. on old marked line 2,232 vrs., the same being the E. line of section No. 5, B. B. B. & C. Ry. Co., a stake, from which a sweet gum brs. S. 12° E. 5 vrs., a pine brs. S. 45° E. 3 vrs. (These bearings have original marks and are the bearing trees called for in original notes of this survey.) Thence E. 975 vrs., C. C. Tarver's W. line, a stake, from which a black gum, with old corner marks and the letters 'R. R.' or 'R. B.' on it, brs. N. 12° E. 5 vrs. (This corner stands on the N. bank of McGraw's creek.) Thence S., with Tarver's west line, 102 vrs., S. W. corner of same, a stake, from which a pine (with old mark called for in original notes) brs. N. 15° W. 6 vrs. The red oak called for in notes is gone, but a portion of the stump remains, and brs. S. 35° E. 5 vrs. Thence E., with Tarver's S. line, 457 vrs., John Crews' W. line fell in field 20 vrs. S. of Crews' N. W. corner (corner obliterated). Set stake for this corner. Thence S., with Crews' W. line, from his N. W. corner, 1,150 vrs., his S. W. corner, a stake, from which a pine brs. S. 66° W. 8 vrs., another pine called for in old notes gone, marked a sweet gum 12 inches in dia. brs. S. 30° E. 13 vrs. Thence E. 162 vrs., rock corner on said Crews' S. line, and the most western N. W. corner of section No. 2. Thence S., with the W. line of section No. 29, 77 vrs., to the place of beginning. Bearings marked 'X.' Surveyed April 30th, 1903."

To the survey is attached the following certificate:

"I, M. L. McAlister, surveyor Tyler county, Texas, do hereby certify that I have examined the plat and field notes of the above survey and find them correct, and that they are recorded in my office in Book 1 of Transcript from old R. R. Book E., pages 142 and 143.

"Given under my hand, at Woodville, on the 2d day of May, 1903.

"M. L. McAlister, County Surveyor, Tyler Co., Texas."

We take it that the M. L. McAlister making the above certificate is the same M. L. McAlister who, as deputy surveyor of Tyler county, made the original survey August 4, 1874.

It is objected that these corrected field notes cannot be considered, because the calls are not followed as in the original survey, but are reversed. There have been some conflicting decisions in regard to the right to reverse the calls in surveys not proved to have been made upon the ground; but we think that in cases of conflicting boundary, where the proof goes to the extent of showing that part of the survey was on the ground, the calls may be reversed, and the lines traced the other way, "whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant." See Platt v. Vermillion, 99 Fed. 356, 39 C. C. A. 555, where the matter of reversing calls in a survey is fully discussed and authorities considered. In these corrected field notes the north line is from the northwest corner of section 4, "E. 975 vrs., C. C. Tarver's W. line, a stake, from which a black gum, with old corner marks and the letters 'R. R.' or 'R. B.' on it, brs. N. 12° E. 5 vrs." We understand this to be the same line claimed by the appellants and shown to have been run on the ground in the original survey, and we conclude, from this and the other facts proved, that this line is the north line of section 4.

The court below, following the master, having rejected this line and found the north line of section 4 to be further south by some 400 varas, we are constrained to reverse the decree of the court below and remand the case, with instructions to sustain the exceptions to the master's report so far as to hold that the north line of section 4 is a line running due east from the northwest corner of section 4 to the Tarver survey, as given in the corrected field notes of the survey in April, 1903, and thereupon to decree in favor of the interveners for the sum of $2,210.41, with interest from June 1, 1903, the value of timber belonging to the interveners and cut by the Kirby Lumber Company, as shown by facts given in the master's report.

And it is so ordered.

ST. LOUIS SOUTHWESTERN RY. CO. v. WAINWRIGHT.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1907.)

No. 2,385.

1. CARRIERS—INJURY TO PASSENGERS—PREMATURE STARTING OF TRAIN—QUESTION FOR JURY.

In an action against a railroad company to recover for a personal injury, the evidence was conflicting, but in one aspect tended to show that, while a vestibuled train of defendant was stopped to let off and take on passengers at a station platform where there was no depot or agent, plain-

tiff, after waiting until passengers came out, as required by defendant's rules, immediately started to go up the steps while the train was yet stationary and the vestibule doors open, intending and prepared to pay his fare and become a passenger; that, as he placed one foot on the step, the train suddenly started, and his other foot struck against a pile of freight on the platform in close proximity to the cars, and he was dragged from the steps under the car and injured. *Held*, that such evidence, if believed, warranted a finding that plaintiff was intending to take passage on the train, in which case he was entitled to the same protection as an accepted passenger and to a reasonable time to enter after the other passengers had alighted; that he acted with due care, and his injury was due solely to the negligence of defendant's servants in starting the train before he could do so; and that therefore it was not error to refuse to direct a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1322. Who are passengers, see note to Chamberlain v. Pierson, 31 C. C. A. 164.]

2. WRIT OF ERROR—REVIEW—DISCRETION OF COURT—RULING ON MOTION FOR NEW TRIAL.

A motion for a new trial in a federal court is addressed to the sound discretion of the court, and its ruling thereon cannot be assigned as error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860–3876.]

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

J. C. Hawthorne (S. H. West, on the brief), for plaintiff in error.

J. W. House (H. A. Parker and M. House, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. This was an action to recover for injuries sustained by the plaintiff below while he was in the act of entering a passenger train of the railway company at Keevil, Ark., with the purpose of becoming a passenger. The negligence charged against the defendant was that freight was piled upon the station platform too near the track, that the train was not stopped long enough to permit intending passengers to enter in safety, and that after the plaintiff had placed one foot upon the steps to the car, and when he was lifting the other thereto, the train was suddenly started, and he was quickly carried against the freight upon the platform, and was thereby pulled off the steps and thrown under the train. In its answer the defendant denied that the plaintiff intended to become a passenger, and that it was guilty of any of the negligence charged, and alleged that the plaintiff's injuries were occasioned by his own negligence. The trial resulted in a verdict and judgment for the plaintiff.

Complaint is made of the court's refusal to direct a verdict for the defendant. The evidence was conflicting, and, in one view, tended persuasively to show these facts: The train in question was a vestibule passenger train and stopped at Keevil to let off and take on passengers. There was no depot or agent there, and a portion of the platform had become incumbered by freight which was piled thereon to within 17

inches of the train and to a height of 4 feet. After the train came to a stop, the plaintiff presented himself on the platform, at the place where the vestibule doors were open and passengers were alighting. He intended to take passage to a near-by station, at which the train regularly stopped, and was prepared and expected to pay his fare. A rule of the defendant, of which he had knowledge, forbade intending passengers to enter until after those who were debarking had alighted. Immediately after the passengers for that station had alighted, and while the train was yet stationary and the vestibule doors open, he took hold of the handrails, placed one foot upon the steps to the car, and was in the act of raising his other foot thereto, when the train suddenly started, and the foot which he was raising was quickly carried against the projecting pile of freight, whereby he was pulled off the steps, thrown under the train, and sustained severe injuries. The trainmen did not observe that he was intending or attempting to enter the train, but they could readily have done so had they been attentive to their duties. As before stated, the evidence was conflicting; but, putting upon it the construction most favorable to the plaintiff, as must be done in considering the present complaint, we think it amply justified the jury in finding that the plaintiff intended to take passage upon the defendant's train and presented himself in the proper place, at the proper time, and in a proper manner to do so; that he was impliedly invited to enter the train as a passenger, and was impliedly assured that he would have a reasonable time in which to do so after those who were debarking had alighted; that he was acting upon this invitation and assurance and was proceeding with reasonable prudence and promptness when the train was started; that the defendant was negligent in the respects charged, and that its negligence was the proximate and sole cause of the plaintiff's injuries. And as, upon such a state of facts, he would plainly be entitled to recover, in like manner as if he had been expressly accepted as a passenger, the request for a directed verdict was rightly denied. Hutchinson on Carriers (3d Ed.) §§ 1005, 1111; 4 Elliott on Railroads, § 1628; 5 Am. and Eng. Enc. (2d Ed.) 488, 576; 6 Cyc. 538, 612; Cohen v. West Chicago St. Ry. Co., 9 C. C. A. 223, 60 Fed. 698; Texas & Pacific Ry. Co. v. Gardner, 52 C. C. A. 142, 114 Fed. 186; Washington, etc., Co. v. Patterson, 9 App. D. C. 423; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Curtis v. Detroit & Milwaukee R. R. Co., 27 Wis. 158, 168; Webster v. Fitchburg R. R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; Cleveland, etc., Co. v. Wade, 18 Ind. App. 346, 48 N. E. 12; Western & A. Ry. Co. v. Voils, 98 Ga. 446, 26 S. E. 4[illegible] 35 L. R. A. 655; St. Louis Southwestern Ry. Co. v. Cannon (Tex. Civ. App.) 81 S. W. 778; Hatch v. Ry. Co., 212 Pa. 29, 61 Atl. 480.

Complaint is also made of the denial of a motion for a new trial, but it has long been settled that in the federal courts such a motion is addressed to the sound discretion of the court, and that the ruling thereon cannot be assigned as error. Southern Pacific Ry. Co. v. Maloney, 69 C. C. A. 83, 136 Fed. 171; City of Manning v. German Ins. Co., 46 C. C. A. 144, 107 Fed. 52; Van Stone v. Stilwell & Bierce

Mfg. Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085.

No error being disclosed by the record, the judgment is affirmed.

SASS & CRAWFORD v. THOMAS et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,393.

LANDLORD AND TENANT—REPUDIATION OF TENANCY—DENIAL OF TITLE—UNLAWFUL DETAINER—TIME TO SUE.

Where tenants repudiate their tenancy, deny the title of their landlord and assert title in themselves, the landlord is entitled to commence and maintain an action of unlawful detainer, without awaiting the expiration of the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 336, 1209.]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 89 S. W. 656.

Minnie Thomas and her husband sued Sass & Crawford in unlawful detainer for the possession of real property in Ardmore, I. T. It was averred in the complaint that Mrs. Thomas, being the owner of the property, had executed a lease for a three years' term to a firm by the name of Munzesheimer & Daub; that defendants acquired the leasehold interest and became her tenants; that the term had expired and that defendants refused to surrender possession after due notice; also, that in the month preceding the commencement of the action the defendants denied the title of Mrs. Thomas, and repudiated any tenancy by setting up in an injunction suit which they instituted against her that before the making of the lease she had given a quitclaim deed, and that her title was thereby devested and had passed to defendants.

The defendants, in answering, denied the making of the particular lease described in the complaint, but averred that the lease she did make and under which they claimed was for a longer term which had not expired, and that they had tendered the rent and were lawfully in possession. They admitted in their answer that in the injunction suit referred to they had denied her title, had asserted title in themselves, and had endeavored to substantiate the same by evidence. They sought to excuse this repudiation of their tenancy by averring that in their injunction suit they also relied upon the lease, and that their assertion of title in themselves was to show "that in any event" they were entitled to possession and to prevent Mrs. Thomas from trespassing. There was no reply to the answer. Under the laws of Arkansas in force in this particular in the Indian Territory averments of new matter in an answer not amounting to a counterclaim or set-off are considered as denied without reply. Mansfield's Dig. §§ 5025, 5043 [Ind. T. Ann. St. 1899, §§ 3230, 3248].

At the trial it was shown conclusively, and without contradiction, that defendants' predecessors went into possession as tenants of Mrs. Thomas under the three years' lease described in her complaint, and that soon afterwards, and whilst she was confined to her bed by illness, they obtained her signature to the lease for the longer term set up in the answer by falsely and fraudulently representing to her that it was the same as the one first executed excepting as to the joinder therein of her first husband, who had recently died. The verdict of the jury and the judgment of the trial court were for Mrs. Thomas. The judgment was affirmed by the Court of Appeals in the Indian Territory (89 S. W. 656), and this writ of error was prosecuted. As to the history of this case, see Sass v. Thomas, 64 S. W. 528, 3 Ind. T. 545, and 69 S. W. 893, 4 Ind. T. 336, and of the injunction suit of Sass & Craw-

ford, see Thomas v. Sass, 64 S. W. 531, 3 Ind. T. 545, and 69 S. W. 894, 4 Ind. T. 336.

Ledbetter & Bledsoe, for plaintiffs in error.
W. I. Cruce and A. C. Cruce, for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

If a tenant repudiate his tenancy, deny the title of his landlord, and assert title in himself, may the landlord at once commence and maintain an action in unlawful detainer without awaiting the expiration of the term of the lease? In Willison v. Watkins, 3 Pet. (U. S.) 42, 7 L. Ed. 596, it was held that, when a tenant repudiates his tenure and claims adversely to his landlord, his term at once comes to an end; that his possession is then as much the subject of action by the landlord as a possession originally acquired by wrong; that the relation of landlord and tenant is dissolved and each party is thenceforth to stand upon his own right. Though that was a case of trespass to try title in which it appeared that the statute of limitations had run against the landlord after the repudiation by the tenant, the principle declared is fully applicable to the case at bar. There is nothing exceptional or peculiar about the relation existing between landlord and tenant that prevents them from putting an end to it at any time though the term originally fixed may still endure. The legal consequences of acts committed are as effectual for that purpose as the formal convention of the parties. When one having obtained possession as a tenant disclaims holding as such and denies the title of his landlord, he has broken the tenure and his term has come to an end. It is then his duty to surrender the property, and, failing to do so, the remedy of the landlord to sue in unlawful detainer is as available as it would be in case of holding over after the natural expiration of the contract term. Tobin v. Young, 124 Ind. 507, 24 N. E. 121; Buckner v. Warren, 41 Ark. 532; Barnewell v. Stephens, 38 So. 662, 142 Ala. 609; Fusselman v. Worthington, 14 Ill. 135; Wall v. Goodenough, 16 Ill. 415; Doty v. Burdick, 83 Ill. 473; Douglass v. Anderson, 32 Kan. 353, 4 Pac. 283. That Sass & Crawford disclaimed the tenancy, denied the title of Mrs. Thomas, and asserted title in themselves stood admitted upon the face of the complaint and answer. There being no issue raised, no evidence concerning the matter was necessary and judgment could well have followed upon the pleadings.

Another question was presented and elaborately argued. When a defendant in an action at law puts forward as a defense a written instrument executed by the plaintiff, may the latter overthrow it by proof that his signature was obtained by false and fraudulent representations as to the character of the instrument, though there is no averment thereof in his complaint? In other words, may the attack upon the writing executed under such circumstances be deferred until rights are asserted under it in an action at law, or must the aid of a court of equity be sought for its cancellation?

The conclusion reached upon the other feature of the case is sufficient for its disposition.

The judgment is affirmed.

LACLEDE GASLIGHT CO. v. COTTONE.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1907.)

No. 2,410.

1. GAS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
In an action for injuries, to plaintiff by being overcome by gas, caused by defendant's servant making an improper connection in a rooming house, evidence of defendant's negligence and plaintiff's contributory negligence *held* to require submission of the case to the jury.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gas, § 16.
Liability of innkeepers for personal injuries to guest, see note to Clancy v. Barker, 66 C. C. A. 483.]

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
In order to justify a conclusion that plaintiff was guilty of contributory negligence as a matter of law, the evidence must be such as to require a finding that all reasonable men in the exercise of an honest and impartial judgment must draw the conclusion under the facts that he did not exercise ordinary care.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 83.]

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

I. H. Lionberger, for plaintiff in error.

F. H. Sullivan (Joseph Wheless, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. A patron of the gas company who kept a lodging house in St. Louis during the season of the Louisiana Purchase Exposition converted her kitchen and dining rooms into lodging rooms. These rooms were not intercommunicating, except through a common hallway. The former was occupied by one Russo and the latter by the plaintiff, Giovanni Cottone, both Italians who were in St. Louis representing exhibitors at the Exposition. There was a gas stove in the kitchen with a pipe leading from it to a disused meter in the basement. It was desired to make use of that stove, and the mistress of the house requested the gas company to connect it with the supply pipe either by the use of the old meter or by supplying a new one. The company undertook to conform to this request, but the operative sent to do the work in some way, not necessary now to state, connected an old abandoned pipe with the meter. This pipe had formerly extended through the kitchen to the room over the kitchen, and for some reason had come into disuse, had been cut near the ceiling of the kitchen, and the exposed end had been plugged only with paper. The operator, in doing the work, in some way connected this abandoned pipe with an operating meter, and left the house exposed to such effusion of gas as could escape through the paper plug. Proper test on his part would have made the danger apparent and would have called his attention to his mistake, but he left the house obviously without making such test. This was about 3 o'clock in the afternoon, while most of the inmates, excepting the plaintiff, were attending the Exposition. During the following night plaintiff, who occupied

the room adjacent to the room in which the gas was escaping, was overcome and seriously injured. He recovered in an action brought in the circuit court against the gas company the sum of $1,650. The circuit court refused on the request of defendant to instruct the jury to find in its favor, and that action of the court is alone assigned for error.

The negligence of the company was so apparent from the proof adduced that the counsel for the company now candidly concede it, and rests his defense solely on the ground of contributory negligence on the part of the plaintiff. The law required the plaintiff to exercise ordinary care for his own safety; that is, that degree of care which ordinarily prudent persons usually exercise under like circumstances. The jury having found the issue of contributory negligence in favor of the plaintiff and against the defendant, we cannot weigh the evidence fairly tending to establish either side of the issue and pronounce upon its comparative force or value, but can only consider whether there was any substantial evidence to support the finding as made.

The plaintiff was a foreigner, only moderately familiar with our language. He was alone in the house at the time the company's agent went there to make the required connection, and out of curiosity, probably, went with him into the basement of the house where he was required to go to do his work. He saw the manipulation of the pipes, and observed some apparent testing of them by blowing into them; but whether he was familiar with the significance of those acts is not clear. He certainly did not know enough about gas fitting to have any appreciation of the serious mistake that was made. Soon after the workman left the house plaintiff noticed an odor of gas, which continued for two or three hours, but all the windows of the house were open, and, although plaintiff smelled the gas, he did not consider it dangerous. He then, about 6 o'clock in the evening, went out and did not return until about 10 o'clock. He testified that as he entered the house the gas was not so strong as when he went out; that he went into his room, tried to light the gas, and found that he could not do so, and according to his repeated statement on the witness stand did not smell any gas in the room. For these reasons, thinking there was no danger, he closed his windows and retired for the night. Plaintiff frankly testified that he was familiar with the smell of gas, and knew of its dangerous qualities when inhaled. When the mistress of the house returned soon after plaintiff had arrived, she smelled the gas and asked plaintiff what was the matter, and he said: "Your man, your gas man did it." It would be profitless to detail all the evidence, but the substantial features are as just stated. After a careful consideration of it all we are strongly impressed with the fact that the plaintiff, who was a foreigner, unfamiliar with our ways and not shown to have had any knowledge of the gas fitter's work, might reasonably suppose that the effusion of gas which he first noticed was temporary, the usual result of the disturbance of pipes in doing the work by the agent of the company which he had witnessed, and that, being unable to smell any gas in his room after finding by actual personal test that the illuminating gas was not even flowing through

the pipe to his room, he might reasonably enough have concluded that, if any leak continued, it was slight, and not in or about his room, and that he was in no danger. We think there was sufficient evidence to warrant the jury in finding that plaintiff used ordinary care for his own protection. Certainly we cannot say that on the evidence adduced all reasonable men in the exercise of an honest and impartial judgment must have drawn the conclusion that he did not exercise ordinary care. Such must have been the state of the proof before we can say as a matter of law that the trial court erred in not instructing a verdict as requested. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, 358, 16 Sup. Ct. 1104, 41 L. Ed. 186; Crookston Lumber Co. v. Boutin (C. C. A.) 149 Fed. 680.

Finding no error in the proceedings below, the judgment is affirmed.

THOMSON-HOUSTON ELECTRIC CO. v. ILLINOIS TELEPHONE CONSTRUCTION CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1907.)

No. 1,321.

PATENTS—INFRINGEMENT—ESTOPPEL BY IMPLIED LICENSE.

The sale of electric engines, which could only be used by the purchaser in connection with a trolley switch or device covered by a patent owned by the seller, without any restriction in the contract, carried with it an implied license to use such device, not only with the engines so sold, but as well with others bought from other makers, and the seller cannot claim such use to be an infringement; nor is it material that it usually restricted the right to a use in connection with its own engines or cars, where no notice of such custom was given to the purchaser.

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

For opinion below, see 143 Fed. 534.

The appeal is from a final decree of the court below, dismissing the bill brought by the appellant against the appellees for the infringement of letters patent No. 424,695, issued April 1st, 1890, to Charles J. Van Depoele, for improvements in suspended switches and traveling contacts for electric railways.

The further facts necessary to the determination of the case, are stated in the opinion.

L. F. H. Betts and Edward Rector, for appellant.

Thos. F. Sheridan and Nathaniel C. Sears, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

Appellant, assignee of the patent in suit, was the nominal complainant in the court below—the real party in interest being the General Electric Company, successor to the Edison General Electric Company, that in 1892 united in interest with the appellant.

Appellees defended in the court below on the several grounds, that in view of the prior art, the claims of the patent sued upon were in-

valid; that in view of certain earlier patents then expired (Nos. 393,278 and 397,451) the patent in suit was an attempt at double patenting; that the specific structures used by appellees are described and claimed in these two earlier patents; and that by reason of the purchase, by the Illinois Telephone Construction Company, of the General Electric Company, the owner and exclusive licensee of said patent, of certain electrical locomotives which can be used only in connection with the devices complained of (such purchase having been made with the knowledge, upon the part of the General Electric Company, that the locomotives could not be used except in such connection) appellant is estopped from questioning the right of appellees to make use of the devices in controversy, for the purpose of operating, not only the electric locomotives thus purchased of the General Electric Company, but of its other locomotives, purchased from other manufacturers.

In the view we take of the defense last named, it is unnecessary to consider the questions raised by the other defenses. The patent in suit relates to electric railways of the class in which a suspended conductor is used to convey the working current—the invention consisting in certain devices, and their relative arrangement, by means of which a contact device carried by a rod or pole extending from the car, and pressed upwardly into contact with the conductor, is automatically switched from one line to another, correspondingly with the switching of the car. The appellees operate, in tunnels under the streets of the city of Chicago, cars moved by electric locomotives of the class named—locomotives that would be entirely useless (unless the trolleys were switched by hand) except for the switching parts and crossing frogs that constitute the devices said to be covered by the patent in suit.

Sometime between December, 1903, and May, 1904, the Illinois Telephone Construction Company purchased of the General Electric Company, twenty-two electric locomotives, to be operated in connection with the trolley switching device covered by the patent, for which the General Electric Company was paid thirty-five thousand dollars, which locomotives were duly installed and put into operation under the following circumstances: The first system of electrical railways installed was known as the Morgan Third Rail Gear and Electric System. While this system was on trial, the tunnel company people were told by an employé of the General Electric Company, that the General Electric Company were in a position to furnish overhead trolley electric locomotives that would be practical for operation; but upon the delivery of one of these locomotives, the discovery was made that there was no practical overhead switch. After conferences with the engineers of the General Electric Company, the engineer of the tunnel company, a series of experiments having been made, hit upon a practical design from which the switches now in use, said to be the infringing devices, were manufactured and installed—the engineers of the General Electric Company being present at different times during the experimentation necessary to arrive at a switch that would make practicable the operation of the locomotives thus purchased. The switches themselves were made and installed by J. J. Ryan & Co. Without doubt, this purchase of locomotives licensed the Tunnel Com-

pany to use the switching devices without which the locomotives could not be automatically operated. Such is the doctrine of the cases—Edison Electric Light Company v. Peninsular Light, Power and Heat Company (C. C.) 95 Fed. 678; affirmed on appeal 101 Fed. 836, 43 C. C. A. 479, wherein it was said:

"But there may be circumstances under which the sale by a patentee of one patented article will carry with it the right to use another in co-operation with the first, although the thing be covered by a second patent. Thus, if the article sold be of such peculiar construction as that it is of no practical use unless it be used in combination with some subordinate part covered by another patent of the vendor, the right to use the latter in co-operation with the former might be implied from circumstances. It is a general principle of law that a grant necessarily carries with it that without which the thing granted cannot be enjoyed. The limitation upon this is that the things which pass by implication only must be incident to the grant, and directly necessary to the enjoyment of the thing granted. The foundation of the maxim lies in the presumption that the grantor intended to make his grant enjoyable. This presumption has been employed in the construction of licenses granted by patentees, as in other branches of the law."

And such practically is the admission of appellant's counsel in the oral argument of this cause.

But prior, and subsequent, to the purchase of these locomotives of the General Electric Company, the Illinois Tunnel Company purchased other locomotives, the larger part from the Jeffery Manufacturing Company—locomotives that the company is now operating in connection with these trolley switching devices, and that could not be operated automatically but for these devices; and it is to restrain the operation of these other locomotives in connection with these trolley switching devices that this suit is urged; the contention being that the switching devices are within the patent in suit, and that appellant habitually places upon the use of such switches the restriction, that they shall be used only in connection with appellant's locomotives and equipment.

That appellant habitually imposes this restriction, in the sale of the switching devices covered by the patent in suit, may be true; but there is nothing in the record showing that notice of that fact was brought to the appellees. And, as a matter of fact, at the time of the purchase of the locomotives of appellant, appellant knew that at least one locomotive, not purchased of appellant, was adjusted in its trolley connections to the trolley switching devices said to be covered by the patent in suit; so that whether the restriction in question would have been one that would have been enforceable or not, in case the appellees and appellant had consciously entered into it, as a part of a transaction in which appellee was purchasing trolley switching apparatus of appellant, it cannot be said to be a restriction applicable to the circumstances of this case; for appellee having, so far as this record discloses, no notice of the restriction, and not having, so far as this record discloses, dealt for the purchase of the locomotives with such restriction in mind, the license that the law raises upon the transactions between the parties is as broad as if no such restriction usually entered into the dealings of appellant with the purchasing world. The sole transaction disclosed here is the sale of thirty-five thousand dollars worth of electric locomotives, to be operated without royalty, restriction (express or implied), or further license, in connection with the trolley

switching devices already installed—a transaction, that in the very nature of the tunnel company's situation, must be held to permit the use of the same devices in connection with other locomotives, unless, though there be no stipulation to that effect, the tunnel company have no general right to operate locomotives other than those purchased of appellant; a proposition that we cannot, of course, hold.

For the reasons above stated, the Circuit Court properly dismissed the bill, and the decree appealed from is

Affirmed.

BATES MACHINE CO. v. WILLIAM A. FORCE & CO.

(Circuit Court of Appeals, Second Circuit. February 26, 1907.)

No. 158.

PATENTS—INFRINGEMENT—NUMBERING MACHINES.

The Bates patent, No. 721,276, for a typographic numbering machine, 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.

Appeal from decree dismissing bill.

For opinion below, see 145 Fed. 526.

F. W. Wright, for appellant.

W. S. Warland, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We fully concur in the conclusion of the circuit court that the patentee was in no sense a pioneer, and must be limited to the specific construction described and claimed. Defendant was entitled to use the recess, larger than the drop-block, the drop-block, and the cam or other device on the shaft for moving it in and out; also to a drop-block susceptible of a slight sidewise motion, since we are satisfied that there was such motion disclosed in Rheinhardt, 1890. The only thing left to be done to organize a working structure was to employ means for guiding and holding the drop-block in proper position when pressed outwards from the shaft. We are clearly of the opinion that the means employed by defendant to accomplish this purpose, viz., the straight edge, n, and the face of the recess, m^2, more nearly resemble the device in Rheinhardt, 1890, viz., the straight edge of the wheel body (not lettered), and the face of the recess on the opposite side with which the projection, w', engages, than it does the "shoulders" described and made an element of the three claims sued upon.

The decree is affirmed, with costs.

STANDARD SANITARY MFG. CO. v. J. L. MOTT IRON WORKS.

(Circuit Court, D. New Jersey. April 8, 1907.)

1. PATENTS—PRIOR USE—EVIDENCE TO ESTABLISH.

Evidence considered, and *held* insufficient to establish prior invention of a patented device, in the absence of the testimony of the alleged inventor, or any showing that it could not be obtained, and where the device itself was not produced, and appeared from the testimony to have been at most an abandoned experiment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 104.

Priority and continuance of public use of invention as affecting patentability, see note to Eastman v. City of New York, 69 C. C. A. 646.]

2. SAME—VALIDITY AND INFRINGEMENT—DREDGER FOR ENAMELING.

The Arrott patent, No. 633,941, for a dredger for pulverulent material, used in the enameling of bath tubs, having a pneumatic agitator contained in the hollow handle, adapted to vibrate the sieve to secure a uniform distribution of the material, was not anticipated and discloses patentable invention; also *held* valid as against a claim of prior use, and infringed.

In Equity. On final hearing.

George R. Beach and Christy & Christy (Marshall A. Christy and George H. Christy, of counsel), for complainant.

W. P. Preble, Jr., for defendant.

CROSS, District Judge. The bill of complaint charges the defendant with infringing a patent issued to one James W. Arrott, Jr., dated September 26, 1899, known as No. 633,941, and which by assignment subsequently became, and is now, the property of the complainant. The device covered by the patent is a "dredger for pulverulent material," and the patentee, in describing it, says:

"This invention has relation to articles used for sifting and distributing powdered enameling material on the surface of bath tubs and other vessels, commonly known to the trade as 'dredgers.'"

The answer sets up the invalidity of the patent for want of novelty and invention, and also denies infringement.

There are three claims in the patent, all of which it is contended have been infringed. They are as follows:

"(1) A dredger or sifter, consisting of a screen or sieve and a supporting handle, in combination with a pneumatic agitator attached to the dredger and adapted to vibrate the sieve, substantially as described.

"(2) A dredger or sifter, consisting of a sieve and a handle, in combination with an automatic agitator secured to and carried by the dredger and adapted to agitate or vibrate the same, substantially as described.

"(3) A dredger or sifter, comprising a sieve and handle and an automatic agitator secured thereto, with means for controlling the operation of said agitator, substantially as described."

This patent was before the Circuit Court for the Western District of Pennsylvania, in cross-suits between the patentee and the present complainant, and was therein adjudged to be good and valid in law. It appears from the opinion of Judge Acheson that an alleged prior use of the patented article was considered by him and disallowed. However, he states that the patentability of the improvement was not denied. Arrott v. Standard Sanitary Mfg. Co. (C. C.) 131 Fed. 457.

The decrees entered in those suits were subsequently affirmed by the Circuit Court of Appeals for the Third Circuit. 135 Fed. 750, 68 C. C. A. 388.

As already indicated, the dredger is used for distributing powdered enamel over cast-iron sanitary ware, while the ware is heated to a red heat. The process may be briefly described as follows: After the casting has been prepared for the enameling, a first coat, commonly called "slush or base," is applied to the article in liquid form. After this coating has dried, the article is placed in the enameling furnace until the same is burned or fused into the iron, and the casting itself has been raised to a bright red heat. When thus heated, the article, generally a bath tub, is withdrawn from the furnace and placed in a holder or cradle resting upon a table, and the powdered enamel dusted by a dredger over the hot surface of the tub as evenly as possible, until the tub has cooled to such a degree that it will not readily hold the enamel, whereupon it is reheated, whereby the enamel deposited thereon is fused into a uniform homogeneous layer. The reheated tub is then withdrawn from the furnace and given a second coat of the powdered enamel, and this operation is repeated as often as is necessary to obtain a smooth and even coating of the enamel. While the casting is resting upon the holder or cradle, it is turned from time to time in different directions and at different angles, in order that the powdered enamel may fall as nearly as may be at right angles to that portion of the surface upon which it is then being distributed. The enamel as used is an extremely fine powder, like ordinary flour in that respect, although considerably heavier. In order that the enameling operation should be completely successful, the powder must be distributed evenly and uniformly over the surface of the tub, and it must be applied as speedily as possible, since the powder will not adhere to the casting when its temperature is lowered beyond a certain degree. Unless the enamel has been evenly distributed over the article, its surface, when finished, will have a lumpy or wavy appearance, which, if glaring, renders the article worthless, and, if barely apparent, makes it what is called a "second"; and an article of that grade is of considerably diminished value. In order to produce an even coating of the enamel, there must be uniformity and continuity in the flow of the powdered enamel, and under these conditions all that the operator has to do, to insure success, is to move the dredger over the surface to be covered at a uniform rate of movement. On the contrary, when the flow of the enamel from the dredger is not uniform or continuous, an even distribution of the enamel is rendered much more difficult, if not impossible.

The condition of the prior art and the object which the inventor by his patent sought to attain will be stated in his own language:

"The ordinary dredger consists simply of a sieve or other screen of proper mesh having a handle of convenient length by which it is held and manipulated. As the pulverulent material does not freely pass through the sieve or evenly distribute itself spontaneously, it is necessary in dredging to continually agitate the dredger with the hand, or with some instrument held in the hand, by tapping or striking the dredger, or by striking the dredger against the edge of the article to be enameled. This renders the labor of dredging or sifting very tiresome and slow, and requires considerable skill in manipulating

the dredger so as to insure an even delivery of the enameling material. The object of this invention is to provide an automatic tapper or agitator, which will deliver a succession of rapid blows against the side or end of the dredger, and, while relieving the workman of a great deal of labor, causes the pulverulent material or powder to be evenly distributed and to be uniformly discharged. The device which I employ for this purpose is preferably a pneumatic hammer, the piston or plunger of which is elongated and fitted to the hollow handle of the dredger, so as to reciprocate within the latter and strike the end or side of the dredger with every forward stroke."

The hand dredger of the prior art consisted of an ordinary tin cup or measure, holding 10 or 12 pounds of the powdered enamel, and having a fine-meshed sieve bottom, a wooden handle 4 or 5 feet long attached to the cup or measure, and a detached beater. The handle of the dredger was ordinarily grasped by the workman with his left hand, the end of the handle projecting back under his elbow for support, and while the dredger was thus supported it was moved around over the surface of the article to be enameled and its handle constantly beaten above and below by a beater held and operated by the right hand of the workman. This was obviously a somewhat crude and certainly a laborious operation, and it was necessarily performed in immediate proximity to a red-hot tub. Speaking of the labor involved in the use of a hand-tapped dredger, complainant's manager says:

"The operation of handling a hand-tapping dredger is not only difficult, but laborious, and before a man could become expert in his work he was compelled to master the knack of depositing the enamel evenly upon the surface of the casting. It was always necessary to not only have a man of good judgment, but a man of physical strength. The constant tapping, and standing in front of a hot casting at the same time, was very exhausting. During the summer months it was almost an impossibility to keep the furnaces fully manned, by reason of the men becoming exhausted at their work, largely on account of the labor connected with the applying of the enamel to the casting."

Another witness, a practical enameler says:

"This operation of holding the dredger with one hand and rapping with the other was very hard labor. Continuous rapping with one hand for a certain length of time cramped your arm, so that you could not rap any further or proceed with enameling."

The disadvantages and labor of this method were so apparent that the complainant's witnesses testify that considerable effort had been made to overcome them. By the pneumatic method of the patent in suit what was before laborious, slow, and uncertain has been rendered comparatively easy, rapid, and successful. The testimony shows that the operation of enameling bath tubs under this patent has been so accelerated that, whereas, by the hand beater a workman could enamel but a single tub an hour, he can now enamel from 2½ to 4 tubs an hour. The pneumatic hammer strikes several thousand graded and uniform taps a minute, and the blows are communicated by a rod from the hammer through the hollow handle of the dredger to the sieve bottom of the vessel holding the enamel, without agitating to any appreciable extent the handle itself, thus maintaining an even and constant flow of the powder. In its use the workman has both hands free to support the dredger, and can move it quietly and quickly over the article being enameled, without any disturbing jar from the motion of his arm in

striking or from the blows struck by him, which was unavoidable under the old method. The testimony clearly shows that by the pneumatic method the powdered enamel flows evenly and continuously from its receptacle, while by the hand method it is discharged in varying volume by intermittent puffs.

It seems to me that the prior art requires very little attention. It is true that pneumatic hammers were used for certain purposes prior to the complainant's patent, but they were not used in the art under consideration, or, indeed, in any analogous art. The Boyer patent, No. 575,589, is one of this class, but is so far removed from the patent under discussion as not to require serious consideration. Hammers of that character were used for heading rivets, cutting stone, and work of like character. The Hyde patent, No. 91,849, is for a pneumatic dental plugger, and of this nothing more need be said. The Babbitt patent, No. 454,149, is used for embossing work in sheet metal. Many other patents are cited, but the idea of the patent in suit is entirely foreign to each of them. They were mostly designed for screening sand, coal, ashes, grain, bran, and other like materials. Their purpose was to separate larger particles from smaller, and in their operation the screen moves speedily back and forth, or peripherally, and the substance screened is by its own weight caused to slide back and forth over the surface of the screen, whereby the finer particles are dropped through, and the coarser are retained or distributed apart from the finer. There is nothing in any of them which would be at all likely to suggest what Arrott accomplished. They are in a different art, of different construction, and used for entirely different purposes. His idea was the use of a pneumatic or automatic agitator, attached to the dredger and adapted to vibrate the sieve through a hollow handle. As already stated, all of the appliances known to the art prior to his patent were hand vibrators of some sort. None of them approximated or claimed to approximate what Arrott did, and their consideration would be unprofitable. It is true all of the elements in his patent are old, but they are combined in a new way to produce a new and useful result. By it the hand beater has been eliminated, and with it, to a great extent, the personal equation. His invention is useful, successful, and economical, and in my judgment discloses novelty and invention. Although simple, it was not obvious.

The defendant, however, alleges that the patent is invalid because of the prior use of an unpatented pneumatic device of a like character to accomplish the same purpose. In support of this contention considerable evidence has been produced, from which it appears that a few bath tubs were enameled with some degree of success by the defendant in the fall of 1896 by a device in some respects similar to that defined in the complainant's patent; but I think that the evidence, considered as a whole, discloses nothing more than an abandoned experiment. The device—there was but one—was in operation, so the workmen who used it say, off and on for about a week or ten days, although one or two other witnesses intimate that it was used for a somewhat longer period. It was then unquestionably dismantled, and was not again used; nor was anything like it used for several years afterwards, and not until after the defendant had removed its works

from Mott Haven, N. Y., to Trenton, N. J. In attempting to describe the apparatus, two of the witnesses say that the pneumatic hammer was placed under the outer end of the handle; one that it was at the sieve end, right up against the sieve; and still another that it was at about the middle of the length of the handle and on top thereof. The uncertainties and discrepancies of their testimony are apparent, and can only be reconciled upon the theory that the hammer was being changed hourly or daily from one position to another, which tends strongly to show that the device was purely experimental. Furthermore, it probably was a failure. It certainly was used but a very short time, and was then abandoned. The superintendent of the defendant gives, as a reason for such abandonment, insufficiency of the boiler capacity of the plant to furnish the requisite power over and above what was required for other purposes; and, being asked what the boiler capacity of the plant was, he said that it was 60 horse power. The engineer of the defendant, however, being asked the same question, said that it was 120 horse power. This would seem to dispose of the reason for abandonment alleged by the superintendent. The only other reason for its abandonment, and this by a different witness, was that the alleged inventor left the defendant's factory and employment. This reason is as improbable as the other, since the testimony shows that the device, whatever it was, was used in November, 1896; whereas, its inventor did not leave the factory until May 11, 1897. Furthermore workmen who used the device say that they made more money by the old way of enameling; that the new method was not fast enough; that they used it because they were ordered to; that it did not distribute the enamel any better or any faster, nor was it any easier to move around over the tub; and that the old hand method of Lefferts' patent dredger did just as good work and was just as easy to handle.

The alleged device was not produced, nor was any part of it, unless it be the pneumatic hammer. While the testimony was being taken, the workmen who mainly used the device were shown a pneumatic hammer which they said they recognized as the one used in November, 1896. One of them, when asked how he identified it, answered, "By its make-up, and where the rod enters, and size of valve used for the air to let the air into the tool"; and the other unhesitatingly recognized it by its number, which was "3817 C. C." The first witness does not pretend that the characteristics which he describes, and by which he claimed to identify the hammer, were in any wise peculiar to that particular hammer; while the second, who admitted that he made no memorandum of the number, nevertheless claimed to remember it by its number after the lapse of 10 years. The prodigious feat of memory involved in this identification is apparent and requires no comment. To my mind, however, it trenches so far on the improbable as to greatly affect the credibility of the testimony.

There is one other matter in this connection which requires mention. The man who is alleged to have invented the pneumatic dredger used by the defendant in 1896 was one Harry Lefferts. His father, Leffert Lefferts, was a witness in the case. He was formerly, and for about 25 years, a superintendent of the defendant's plant, but left the com-

pany's employment in May, 1896. His testimony in this case was given last October, and, upon being asked the present address of his son, replied:

"I have received no communication from him for the last seven or eight months. Do not know where he is at present, but suppose that he is at his old address, at No. 8 Gould street, San Francisco."

And upon cross-examination he added that when he last heard from him he was in the employment of the Southern Pacific Construction Company. He of all others was apparently the one who could have told the most about the construction and operation of the device alleged to have been in use in 1896. He was the superintendent of the defendant's enameling department at the time, and the alleged inventor of the device. He is not produced, however, nor is any evidence offered to show that he could not have been. His absence is entirely unaccounted for, although his address was presumably known. I think this circumstance very strongly militates against the defense of prior use. In the case of Simmons et al. v. Standard Oil Co. et al. (C. C.) 62 Fed. 928, Judge Coxe, at page 930, commenting upon the absence of a witness under somewhat similar circumstances, said:

"The complainants have introduced a mass of testimony to show that Glankler conceived the invention in the autumn of 1888, months prior to the alleged use at Cincinnati and Chicago. This testimony, notwithstanding numerous contradictions and discrepancies, is upon the whole so full and circumstantial that it would be accepted as conclusive, were it not for the fact that Glankler himself failed to appear as a witness. No sufficient reason is given for his nonappearance. It was apparently without excuse, and leaves room to doubt the accuracy of the complainant's dates and the correctness of their conclusions. No matter from what point of view the question is approached, there is always the suspicion that, if Glankler could have corroborated this testimony, he would have done so."

In the present case Lefferts' testimony was so important, and its unexplained absence so suspicious, that I think Judge Coxe's remarks are eminently pertinent and applicable. If the witness could not have been found, that fact could have been easily shown; but, if found, his testimony would in all probability have been more illuminative of the point under consideration than the combined testimony of all the other witnesses. His absence, unaccounted for, is suspicious, and opens the entire defense of prior use to suspicion. The rule of law applicable to the defense of prior use is well settled and renders any extensive citation of authorities unnecessary. It may be found laid down in Coffin v. Ogden, 18 Wall. 120, 124, 21 L. Ed. 821, and the Barbed Wire Patent Case, 143 U. S. 275, 285, 12 Sup. Ct. 443, 36 L. Ed. 154. In the case at bar the testimony is unsupported by any patents, drawings, or exhibits, and a case thus made is always open to grave suspicion. In Deering v. Winona Harvester Works, 155 U. S. 286, 300, 15 Sup. Ct. 118, 39 L. Ed. 153, Mr. Justice Brown says:

"Oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented, is in the nature of the case open to grave suspicion."

He then cites the Barbed Wire Patent Case, and adds considerable matter pertinent to the case at bar, but which it is unnecessary to quote.

I think the prior use which has been set up as a defense, was experimental, as, indeed, some of the defendant's witnesses called it, and the general superintendent of the defendant's plant, near the close of his testimony plainly admits that, after the workmen who used the machine had abandoned its use, Lefferts, its inventor, was still working at it.

There is one other circumstance in this connection which should be alluded to. After the abandonment by the defendant of the single article used in the fall of 1896, it does not pretend that it again used a pneumatic dredger until about December 1, 1905. Shortly prior to this latter date, it had bought several thousand of enameled bath tubs of the complainant, and in the course of these transactions its superintendent frequently visited the complainant's works, and had ample opportunity to, and did in fact, as he admits, observe the operations of their plant, and became "very familiar" with the operation of their pneumatic dredger, although this, as he says, was not the object of his visits. Not long thereafter, however, the defendant adopted and put into general use in its factory the alleged infringing devices.

Upon the question of infringement there is little to be said. The defendant has adopted the complainant's device and used it. In its use, however, it partially supports the weight of the pneumatic dredger by a chain attached to and suspended from the ceiling of the factory. This, perhaps, makes it easier for the operator, but does not in any way alter the character of the device or its method of operation. The defendant claims, however, that this support by a chain affixed to the ceiling makes the device stationary, and that, since Arrott, the patentee of complainant's device, disclaimed its application to stationary apparatus, the defendant does not infringe. What the patentee said, and all that he said, in this connection, was:

"I am aware that jarring or vibrating devices have been used in stationary apparatus used for sifting material."

It is quite evident to what he there refers. That the defendant's infringing device was not a stationary apparatus, within the terms of this disclaimer, is apparent. The dredger was merely supported, or partially supported, by a cord or rope, to take some of its weight from the workmen. It was not, however, stationary in any proper sense of the word. It was movable, and had, while in use, to be moved constantly back and forth over the ware which was being enameled, exactly as it would have been if unsupported. This support was of the same character as that afforded by a strap over the neck or shoulder of the operator, as disclosed in the hand-beater dredger in the prior art.

The complainant is entitled to a decree of the usual form in like cases, with costs.

COMMERCIAL ACETYLENE CO. v. AVERY PORTABLE LIGHTING CO.

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

1. INJUNCTIONS—SUBJECTS OF INJUNCTION—SUITS IN OTHER JURISDICTIONS.
A federal court of equity has power to enjoin either party to a suit before it from prosecuting other suits subsequently brought relating to the same subject-matter, where it would be contrary to equity and good conscience, although such suits may be in foreign jurisdictions.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 69, 72, 73.]

2. SAME—PATENTS—INFRINGEMENT—RESTRAINING MULTIPLICITY OF SUITS.
Where the owner of an unadjudicated patent has brought suit against a rival manufacturer to enjoin infringement of such patent and to recover profits and damages on account of the manufacture and sale of an alleged infringing device, in which suit both the validity of the patent and infringement are put in issue, the court may, and should, on a proper showing, enjoin the complainant from instituting a multiplicity of suits in different parts of the country against customers of the defendant, who are charged with infringement solely by reason of the sale or use of defendant's device, until the issues are determined in the principal suit before it. As to such suits which were commenced before the application for injunction was made, however, the defendant will be left to his remedy by applying for a stay to the courts before which they are pending.

In Equity. On petition by defendant for injunction.

This is a suit in equity commenced on the 24th day of July, 1906, based upon United States letters patent No. 664,383 and No. 727,609, for acetylene gas tanks. An answer was filed September 29th, in which the invalidity of the complainant's patents is asserted on various grounds, and infringement is denied. At the same time the complainant filed another bill in this court against the Pressed Steel Tank Company of Milwaukee, Wis., based on the same patents. The averments of the two bills are identical, except that the Pressed Steel Tank Company is charged with being the manufacturer of all the tanks sold and distributed by this defendant, and with confederating with this defendant to enable it to sell and put upon the market tanks that were known to infringe complainant's patents. An answer in such last-named suit was promptly interposed, setting up substantially the same defenses. Thus it appears that this court acquired original jurisdiction of the subject-matter of said two suits, wherein the two chief alleged infringers are made defendants and this happened before any other court acquired jurisdiction over such subject-matter.

On the 4th day of October, 1906, the defendant filed a petition in this court setting up the facts above stated, and further alleging:

"That, shortly after the commencement of the two suits above enumerated, suit was commenced in the United States Circuit Court, Northern District of Illinois, Eastern Division, by the complainant herein against Excelsior Supply Company, of Chicago, Ill., the bill of complaint in the last-named suit being substantially identical with the bill of complaint herein; and that the answer in said suit was filed on October 1, 1906, the day it was due under the rules.

"(5) That since the commencement of the present cause the following suits have been begun by the Commercial Acetylene Company, the complainant herein, against the following: In the United States Circuit Court, Southern District of New York, against the Motor Car Equipment Company. In the United States Circuit Court, Southern District of New York, against Wyckoff, Church & Partridge, Inc. In the United States Circuit Court, Northern District of Ohio, against W. D. Strong Company. In the United States Circuit Court, Southern District of Ohio, against the Curtin-Williams Auto Company. In the United States Circuit Court, Western District of New York, against the Centaur Motor Company. In the United States Circuit Court, District of

Minnesota, against the Pence Automobile Company. In the United States Circuit Court, Western District of Missouri, against Brick Motor Car Company.

"(6) That, as your petitioner is informed and believes, the bills of complaint in each of the above cases are substantially identical with the bill of complaint herein.

"(7) That each of the defendants named in paragraph 5 hereof is a purchaser of petitioner's gas tanks, and is in fact a customer of petitioner's, each one handling petitioner's goods in the respective locality in which each is located.

"(8) That petitioner is informed and believes that each of the defendants named in paragraph 5 hereof handles no other gas tanks except those manufactured by your petitioner, unless it be the gas tanks manufactured by the Concentrated Acetylene Company of Indianapolis, Indiana, and known as 'Presto-Lite Tanks,' and that the said Concentrated Acetylene Company is a licensee of the Commercial Acetylene Company, the complainant herein, so that the only reason for suing each of the defendants above referred to for patent infringement is for the purpose of reaching the tanks which said defendant has purchased from your petitioner, and which are of your petitioner's manufacture.

"(9) That your petitioner manufactures only one form or style of tanks (although in different sizes), and has sold to the above defendants only one particular form or style of tank, a sample thereof being herewith produced in court and marked 'Exhibit A.'

"(10) That your petitioner believes, and therefore charges the fact to be, that the complainant herein has begun said suits against your petitioner's customers for the purpose of annoying and harassing your petitioner and its customers, and for the purpose of putting your petitioner to unnecessary and burdensome expense in defending each of the suits above mentioned, whereas the entire question of the validity of the patents, of infringement thereof by the tanks of petitioner's manufacture, and the question of recovery of profits and damages could be tried in the present cause without the burden of defending a multiplicity of suits scattered all over the United States.

"(11) That your petitioner is financially responsible and amply able to respond to any amount which may be taxed by this court against your petitioner as profits or damages arising out of infringement on complainant's patents by the manufacture and sale of all of petitioner's product, should the court in the present cause hold your petitioner to be an infringer."

Prayer for an order restraining complainants from commencing any further actions, either at law or in equity, against any purchaser or user of tanks manufactured or sold by defendant, for infringement of said patents pending the final hearing of this cause; and that complainant be enjoined from prosecuting any of such later suits against customers of defendant, etc.

This petition was supported by an affidavit of P. C. Avery, president of the defendant corporation, showing that on March 27, 1906, he obtained United States letters patent No. 816,059, for a gas tank to handle acetylene gas; that, as he has been advised by his attorneys and believes, his invention does not infringe the claims of the complainant's patents or either of them; and that the defendant is operating as a licensee under his patent, and is shipping tanks over the United States, and that it had before the bringing of this suit built up an extensive and increasing business in the sale of such tanks. Complainant filed an answer to such petition, admitting the bringing of the suits in various circuits, but expressly denying any purpose of annoying or harassing defendant or its customers, contending that it was not able to recover in the two suits instituted in this court all the damages to which it is entitled for the unlawful invasion of its monopoly. Thereupon, on the 25th of October, the defendant filed a second affidavit of P. C. Avery, and gave notice to complainant that it would be used on the hearing of the petition for injunction. This affidavit sets forth the fact that complainant was giving out to the trade certain circulars, and the court is asked to enjoin the complainant from sending out or causing to be distributed said trade circulars. The first circular complained of is dated August 1st, signed by the complainant, and sets out the fact that complainant is the owner of the two patents named in the bill; that the tanks manufactured at Milwaukee by defendant are believed to be in-

fringements of said letters patent; and notifies all persons to abstain from the use or sale of same, and that all who use or sell infringing tanks will be liable to damages. The second circular, dated October 18, 1906, is addressed to the automobile trade, refers to the former circular of August 1st, above described, and then proceeds to give a list of suits already brought by it, whereby it appears that, aside from the suits brought in this court, ten later suits in equity, based upon the complainant's patents, have been brought in other circuits. Then follows a statement that the papers are being prepared for suits against numerous other concerns in different cities, and that the Presto-Lite gas tank is the only one licensed by complainant.

It appears that three or four additional suits were brought by complainants after the petitioin was filed and before the hearing thereon.

F. A. Geiger and Chamberlin & Wilkinson, for the motion.

Bartlett, Brownell & Mitchell, opposed.

QUARLES, District Judge (after stating the facts). It is undisputed that the defendants in the ten suits brought by complainant in other circuits are the vendees of the defendant, whom defendant is morally, not legally, bound to protect and defend in this litigation. It further appears that the defendant is manufacturing only one type of gas tank, although of various sizes. So that the issues raised in all the suits will be practically identical. That complainant's patent No. 664,383 was granted on the 25th of December, 1900, which, by mesne assignments, became the property of complainant on the 3d day of June, 1901. The other of complainant's patents, numbered 727,609, was issued on the 12th day of May, 1903, and by assignment became the property of complainant on the 19th day of April, 1904. That, prior to the bringing of the suits in this court, neither of the complainant's patents had been subjected to the test of legal adjudication.

Complainant challenges the power of the court to make the order prayed for. This is naturally the first proposition requiring attention. It is contended that jurisdiction here is limited to the making of such order or decree as may determine the issues raised by the pleadings and that it has no authority to make any order whose purpose is to control the action of either party beyond the territorial limits of the court. The complainant has come into this tribunal seeking equitable relief and has submitted itself to the jurisdiction of the court. The power in such case to proceed in personam against either litigant to protect the jurisdiction, or the subject-matter, or to prevent either party from doing with regard to the subject-matter of the suit what is contrary to equity and good conscience has always been assumed and exercised by the chancery courts of England as well as by the several courts of chancery in the states. Either party may in a proper case be enjoined from prosecuting another suit although it may be pending in a foreign state or country. 1 High on Injunction, §§ 106 to 111, and cases cited; Story's Eq. Juris. §§ 899, 900; 1 Bates' Federal Eq. Procedure, § 454; Home Ins. Co. v. Howell, 24 N. J. Eq. 238; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Akerly v. Vilas, 15 Wis. 402; Berliner Gramophone v. Seaman, 113 Fed. 750, 753, 51 C. C. A. 440; Lord Portarlington v. Soulby, 3 Mylne & K. 104.

While the doctrine of exclusive jurisdiction in the court first obtaining jurisdiction of the subject-matter does not apply to a case where

complainant brings independent suits in several courts involving the same question, it is nevertheless true that the main issue involving the validity of a patent and the question of infringement ought to be litigated between the patentee and the principal infringer in the jurisdiction where such supposed infringement is centered, and, where the first suit brought is against that principal infringer, such suit is properly regarded as a parent suit where the leading issues in controversy should, for obvious reasons, be tried. Other suits may be brought against vendees or users, if that be done in good faith, for the sole purpose of protecting the rights of the complainant. But if, before any adjudication, the patentee shall bring a multiplicity of suits for the purpose of harassing and annoying a rival manufacturer, for the purpose of subjecting him to burdensome expense, and to destroy his business by exciting terror among his customers, it would seem that there must reside somewhere the power to intervene and protect the defendant against such a crusade until the validity of the patents already challenged may be established in the courts. Instances are not wanting where patentees make illicit use of the courts as instrumentalities of oppression; bring a multiplicity of suits, purposely scattered through the circuits, not for the honest purpose of securing an adjudication in support of the patent, but to crush a rival manufacturer by creating a stampede among his customers; alarming them by circulars breathing threats of prosecution, denouncing the product of the rival concern as an infringing device, at the same time taking no step to bring any of the numerous suits to final hearing.

Judge Blodgett refers to this practice in Emack v. Kane (C. C.) 34 Fed. 46, and cites an instance where a patentee, having excited general consternation in the trade, which he turned to his commercial advantage, dismissed his suits where the validity of his patent had been put in issue. In such a case the defendant is powerless. He may be prepared to demonstrate that the complainant's patent is invalid, or that his own structure does not infringe; but, during the considerable period which must elapse before the vital questions can be brought to final hearing, his customers may desert him through fear of litigation, and he may be driven to the wall. It cannot be that a court of equity is powerless to prevent such a wrong. In Emack v. Kane, supra, referring to circulars distributed by the patentee among the trade, Judge Blodgett says:

"It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this by one man upon another's property rights."

Perhaps the leading case cited by complainant is Kelley v. Ypsilanti Dress Stay Company (C. C.) 44 Fed. 19, 10 L. R. A. 686. A careful perusal of this case discloses that the application for the injunction was there made in one of the later cases to enjoin proceedings in the earlier case. The learned judge says that he never before heard of such a case, for presumably the earlier case had been brought against the principal infringer. Although holding that relief should be withheld in that particular case, Judge Brown in his opinion says:

"In this view of the law it was held that to prevent a multiplicity of suits the court might, in a proper case and on a proper showing, require the prosecution of suits between a patentee and a mere user of a patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine—a doctrine in which we fully concur, although we think the application should be made to the courts in which these suits are pending."

In Allis v. Stowell (C. C.) 16 Fed. 783, 787, Judge Dyer says:

"But apart from this phase of the question, I am of opinion that to prevent a multiplicity of suits the court may, in a proper case and upon a proper showing, require the prosecution of suits between the patentee and a mere user of a patented machine to be suspended, and await the result of a suit between the patentee and the principal infringer from whom the user purchased the machine. Undoubtedly the court has the power to exercise restraining control over the litigation where the principal parties are before it."

The learned judge also in his opinion refers to an unreported case, Barnum v. Goodrich, decided in the Northern District of Illinois by Judge Drummond, Circuit Judge, wherein it was held that complainant should be enjoined from prosecuting numerous suits until the principal controversy in Illinois between the patentee and the manufacturer should be first determined.

In Ide v. Ball Engine Co. (C. C.) 31 Fed. 901, 904, the court holds that public policy would seem to favor the rule that litigation for the purpose of ascertaining and sustaining the validity of a patent should be between the patentee and the alleged infringing manufacturer.

The same doctrine was held in National Cash Register Co. v. Boston Cash Co. (C. C.) 41 Fed. 51, the opinion being by Judge Colt.

In New York Filter Co. v. Schwarzwalder (C. C.) 58 Fed. 577, Judge Lacombe, though denying the relief sought, says:

"As to the proposition that the court will interfere on any theory of preventing multiplicity of suits, there is nothing now submitted to show that such multiplicity is to be apprehended, even if a motion of this kind be the proper remedy. There is only one suit now pending, and nothing to indicate that suits are about to be brought against other users until there has been some adjudication of the rights of the owner of the patent in its suit with the manufacturer. If, when complainant has prevailed in that suit (should he so prevail), has established the validity of his patent and shown that the infringing apparatus which defendant makes and sells is an infringement, users of such infringing machines refuse to accept that result and individually insist upon continuing their use, complainant may sue each and all of them, though they number 10,000, without thereby instituting such a multiplicity of actions as the courts will enjoin."

See, also, Birdsell v. Manufacturing Co., 1 Hughes (U. S.) 64, Fed. Cas. No. 1437, citing two unreported cases.

In Farquhar v. National Harrow Co., 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755, the Circuit Court of Appeals for the Third Circuit held that equitable relief might be granted against a party who was in bad faith sending notices and trade circulars among the customers of a rival, solely for the purpose of destroying the business of such manufacturer. The same doctrine was held in Adriance Platt v. National Harrow Co., 121 Fed. 827, 58 C. C. A. 163, by the Circuit Court of Appeals, Second Circuit.

In Warren Featherbone Co. v. Landauer et al., 151 Fed. 130, there is an opinion by Judge Bunn, then District Judge of the Western Dis-

trict of Wisconsin, concurred in by his honor, Judge Seaman, wherein the doctrine of Emack v. Kane, supra, Farquhar v. National Harrow Company, and Adriance Platt v. National Harrow Co., are cited with approval.

Complainant cites the case of Rumford Chemical Works v. Hecker, 11 Blatchf. 552, Fed. Cas. No. 12,132. While an excerpt from the opinion might seem favorable to complainant's contention, an examination of the case will differentiate it in two important particulars. First, there had been in March, 1873, a final adjudication holding certain claims of the complainant's patent valid, and an accounting had been completed in the main case before the other suits were brought, the earlier of which was commenced in September, 1873. Second, the court concludes the opinion with the suggestion:

"Moreover, the application, to be entertained at all in respect to the New Jersey and South Carolina suits, should have been made before plaintiffs had been put to the trouble and expense of taking their proofs for final hearing."

The complainant contends that these several authorities above cited are overruled by the Supreme Court in Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768. A question arises how far the doctrine of that case is applicable to the case at bar. In Birdsell v. Shaliol the question for determination was the effect of a prior judgment for nominal damages, and no reference is made to the effect of a complete recovery by a patentee of gains and profits as well as damages. In the present bill complainant charges that defendant has been guilty of making or causing to be made, using or causing to be used, selling or causing to be sold, the alleged infringing devices, in Milwaukee and elsewhere within the United States. In its prayer the bill asks that the defendant may be decreed to account for and pay over the gains and profits realized by the said defendant by its unlawful acts, and, in addition, the damages sustained by the complainant. It is contended that an accounting under such a bill will completely compensate the complainant for the invasion of the three elements of his monopoly; and that, such decree having been complied with, the infringing device would be released from the monopoly. In support of this position, defendant cites United States Printing Company v. American Company (C. C.) 70 Fed. 50, 53. I shall not now stop to consider this question, because in my judgment Birdsell v. Shaliol, even as construed by complainant, is not decisive of the present application. If complainant's interpretation of the Birdsell Case be correct, it has simply demolished one of the principal grounds upon which injunctive aid has been granted in the earlier cases; but it does not exclude the power of the court in a proper case to prevent oppression wrought by means of multiplicity of suits brought for a commercial advantage rather than honest adjudication. In my judgment no additional suit, either at law or in equity, should be brought by complainant against the purchasers or users of the defendant's tanks, for infringement of complainant's patents, until the validity of such patents and the question of infringement have been adjudicated. I direct that an order be prepared to that effect.

I am asked to restrain the further prosecution of the 10 suits brought by complainant in other courts. In view of the decision in Birdsell v. Shaliol, I think the better practice is to allow the defendants in those suits, or this defendant in their behalf, to make suitable application to the courts where such suits are pending, to stay proceedings until these principal questions have been adjudicated. There may be urgent and proper reasons why some further proceeding may justly be had in some of them. I therefore decline to enjoin complainant from all further proceeding therein.

Complainant insists that the injunction asked for will not prevent the running of the statute of limitations against actions to recover damages. That is undoubtedly a sound proposition, and on that account I deem it my duty to speed this case, and to that end I direct the clerk of this court to enter an order giving the complainant 10 days after January 1, 1907, within which to make its prima facie proofs. Thereupon the defendant may have 40 days to submit its proofs, and thereafter the complainant to have 30 days to present its proofs in rebuttal. I will hear the case promptly as soon as the proofs have been taken, so that a conclusion may be speedily reached.

As to the circulars distributed by the complainant, I do not think they disclose upon their face any evidence of bad faith or malice. The language is temperate, and I do not think they have thus far exceeded the extent to which the patentee is permitted to go in advising the public of the complainant's rights under his patent, and to warn them of the consequences of infringement. One clause in the second circular is open to criticism, but complainant's counsel assures the court that it was inserted without his knowledge or advice. If, however, the complainant shall continue to memorialize the trade with further literature, a new application may be made for suitable relief, and this decision is without prejudice to a renewal of such application.

WESTERN WHEELED SCRAPER CO. v. GAHAGAN et al.

(Circuit Court, E. D. New York. March 30, 1907.)

1. PLEADING—AMENDMENT—EFFECT OF GENERAL APPEARANCE BY DEFENDANT.
   The rule that the filing of a notice of appearance or of a general pleading, such as an answer, is equivalent to a general appearance for all purposes of the case, is limited in its application by the scope of the action in which such appearance or pleading is filed; and such an appearance does not authorize an amendment of plaintiff's pleading, so as to state a new or different cause of action upon which the defendant could not originally have been sued in that jurisdiction.

2. EQUITY—PLEADING—AMENDMENT OF BILL—PATENTS—SUIT FOR INFRINGEMENT.
   In a suit in equity against two defendants, one of which was a nonresident corporation, for infringement of patents, the bill alleged a conspiracy and a joint infringement by defendants within the district of suit; the corporation by selling to its codefendant, and the latter by buying and using the infringing article in said district. Both defendants appeared, and filed a joint and several answer, denying the alleged infringement. *Held*, that such appearance by the corporation was limited to the cause of action stated in the bill, and did not empower the court to permit

its amendment by dismissing as to the other defendant and alleging infringement generally by the corporation in said district "and elsewhere in the United States," and that it had conspired "with others" to infringe.

In Equity. On motion for leave to amend bill.

Philip B. Adams, for complainant.

Philipp, Sawyer, Rice & Kennedy, for defendants.

CHATFIELD, District Judge. The complainant has filed a bill in equity alleging the infringement of two certain patents for improvements in dump cars, of which letters patents and the rights thereunder complainant claims to be the sole and exclusive owner, in the following terms:

"(9) And your orator further avers that the said defendants, well knowing the premises and the rights and privileges secured unto your orator in and by the said letters patent, and contriving to injure your orator and to deprive it of the profits, benefits, and advantages which might, and otherwise would, accrue to it from the said letters patent, and each of them, prior to the commencement of this suit and within six years last past, have, without the license and authority of your orator and against its will, infringed upon the aforesaid letters patent Nos. 612,263 and 668,927, at the borough of Brooklyn, in the district aforesaid, and elsewhere in the United States; that is to say, the defendant William J. Oliver Manufacturing Company has furnished to the defendant Walter H. Gahagan at and within said district, and the said Walter H. Gahagan has purchased from the said defendant William J. Oliver Manufacturing Company within said district, and has used and caused to be used, large numbers of dump cars containing and embodying the improvements and inventions described in said letters patent," etc.

"(10) And your orator, further complaining, upon information and belief avers that the said defendants have conspired and confederated together to infringe upon your orator's said letters patents, and each of them, by using and causing to be used, within the Eastern district of New York, and elsewhere within the United States, dump cars containing and embodying the inventions and improvements covered and secured by said letters patent, and each of them, and threaten to continue so to do."

"(11) And your orator further avers that the said defendants have received and enjoyed, and are still receiving and enjoying, great gains, profits, and advantages from the unlawful use of the said invention set forth in said letters patent, and each of them," etc.

The defendants appeared in the action generally and jointly, and upon the 8th day of October, 1906, filed an answer, in which they set forth jointly and severally that they deny the various allegations of the complainant's bill of complaint and contest the validity of the patents on which the action is brought. The defendants also allege in their answer that the defendant Walter H. Gahagan purchased certain scrapers of the defendant company, and that the said company sold the said cars to said defendant Gahagan, and that the cars were used by Gahagan in his regular business; and the defendants then allege that these cars contained no infringement of the two letters patent. The defendants also deny conspiring or confederating together to infringe these patents, by causing the said cars to be used in the Eastern district of New York.

The present motion is made by the complainant for leave to file an amendment to the complaint, as follows: First, by dismissing the said

bill against the defendant Walter H. Gahagan; and, second, by substituting, in the place of the paragraphs of the complaint above set forth, a paragraph, numbered 9, averring that "the defendant corporation, in the Eastern district of New York and elsewhere in the United States, made, sold, and used, and caused to be used, large numbers of dump cars containing and embodying the inventions and improvements described in the letters patents, and threaten to continue so to do," etc., and by substituting a paragraph, numbered 10, for paragraph 10 above set forth, in which the complainant alleges that the defendant company has conspired and confederated "with others" to infringe upon the said letters patent, "by selling and causing to be used within the Eastern district of New York and elsewhere in the United States dump cars," etc., and by striking from the prayer for relief any claim against the said Walter H. Gahagan.

The first proposition advanced is that the filing of a general notice of appearance, or of a general pleading, such as an answer, in an action, is equivalent to an appearance for all purposes. While this is a well-recognized principle of law, its application in any particular instance is limited by the scope of the action in which the appearance or pleading is filed. If this were not so, a pleading in a cause of action for infringement of a patent in equity could be amended and continued for damages for personal injuries sounding in tort. In the United States courts much broader freedom of action in the way of amendments, under the authority of section 954, Rev. St. [U. S. Comp. St. 1901, p. 696], is allowable, than under the state rules and Codes of Procedure; but even in the United States courts the authorities hold that an amendment to a bill may be allowed only—

"when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself or for putting in issue new matter to meet allegations in the answer. Shields et al. v. Barrow, 58 U. S. 143, 15 L. Ed. 158, following Verplank v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 46, and Story's Eq. Pl. 884. To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, * * * is not properly an amendment, and should not be considered within the rules on that subject. * * * It is apparent that, if it were in the power of a Circuit Court of the United States to make and enforce orders like this, both the article of the Constitution respecting the judicial power and the act of Congress conferring jurisdiction on the Circuit Courts would be practically disregarded in a most important particular. Id."

The last sentence, while referring to a different order than that asked for on this motion, is exactly applicable to the present situation.

In the case of Neale v. Neales, 76 U. S. 1, 9, 19 L. Ed. 590, an amendment to a bill in equity was allowed, and the court says:

"It is unnecessary, in the view we have taken of the power of the court over amendments at the hearing, to discuss the question whether the amended bill is materially different from the original bill. It is enough to know, if different, that the subject-matter of both bills is the same."

In Brainard v. Buck, 184 U. S. 99, 22 Sup. Ct. 458, 46 L. Ed. 449, exception to the action of the court below in allowing an amendment of an original bill was taken on the ground, as asserted by the appellants, that the cause of action set forth in the amendment is new,

different, and distinct from that set forth in the original bill. The Supreme Court, as it did in the case of Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685, 32 L. Ed. 1077, determined that the amendment was within the discretion of the court, as the purpose of both bills was the same, they arose from the same transaction, and were based upon the same general rule of law applicable to resulting trusts.

It cannot be contended in the case at bar that the cause of action for an infringement of a patent in the Eastern district of New York is the same as a cause of action for an infringement of the same patent in some other state of the United States, or that the various causes of action could arise from the same state of facts. The various transactions out of which these alleged causes of action arise involve different parties; and under the rule of the cases above stated the amendment asked cannot be allowed.

But, as a matter of fact, the purpose of the amendment asked here is not merely to substitute a different cause of action, with additional parties. It is an attempt to bring in alleged causes of action which could not have been brought for lack of jurisdiction in the district where this suit was begun. The sole ground for this attempt to try other suits than the one stated is the argument that the defendant in the particular action has waived his right to object to the jurisdiction of that action by a general appearance. The effect of granting the present motion would be to remove the defendant Gahagan from the action, and to allow every infringement by the defendant company of the two patents claimed by the complainant to be tried in this district and in this suit. The words "and others," in the tenth paragraph as proposed, would include all sales made in every part of the United States, in which the defendant company in Tennessee had sold to any one scrapers embodying or employing the alleged inventions referred to in the claims of the patents in suit. Such an amendment would seem to be clearly beyond the power of the court.

A further objection to the amendment is that the language of the proposed amendment is broad enough to cover alleged infringements subsequent to the filing of the bill of complaint. But this objection does not go to the merits, and, if the amendments should be allowed at all, would be provided for in the order of the court. If the complainant were asking leave to amend its pleadings merely by discontinuing as to the defendant Gahagan, and to amend its prayer for relief so as to ask for an injunction and damages for the alleged infringement in this district against the defendant corporation alone, the motion might properly be granted. The infringement might still be joint, and the other allegations of the pleadings could stand; but proof would be limited to the acts of the defendant corporation in this district in connection with the sales to Gahagan. The relief asked for on the present application seems to be very much broader, and beyond the power of the court to grant.

The motion will therefore be denied.

CONTINENTAL ADJUSTMENT CO. v. COOK et al.

(Circuit Court, E. D. Wisconsin. December 28, 1906.)

1. CORPORATIONS—CREDITORS' SUIT AGAINST STOCKHOLDERS—GROUNDS OF LIABILITY.

Complainant's assignors organized a corporation, to exploit a supposed invention, which contracted with defendants to manufacture the article covered by such invention, and they expended a large amount of money therein for which they were never reimbursed, the corporation being without capital and the project an entire failure. Such assignors caused a large amount of the stock, purporting to be full paid, to be transferred to defendants, which they neither purchased nor agreed to pay for, and which was in fact worthless. Such assignors having obtained a judgment against the corporation, complainant as their assignee for its collection brought suit against defendants to enforce contribution from them as stockholders. *Held*, that such bill was without equity and could not be maintained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 952.]

2. SAME—PARTIES.

To a suit by a judgment creditor of a corporation against part only of the stockholders to enforce an unpaid stock liability, the corporation is an indispensable party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1118.]

In Equity.

This is on final hearing of a suit in the nature of a creditors' bill to enforce contribution from the defendants, as stockholders in a corporation known as the "Cushman United Telephone Company," organized in the state of Illinois in February, 1905. The suit is brought in the interest of S. D. and I. M. Cushman, who are the real parties in interest. The Continental Adjustment Company is a collecting agency to whom the cause of action has been assigned for the purpose of bringing this suit.

It appears that on the 8th day of January, 1896, S. D. Cushman and I. M. Cushman recovered a judgment in the superior court of Cook county against the Cushman United Telephone Company for $250,000, and the relief prayed in this suit is contribution from each of the defendants, as a stockholder of said Cushman United Telephone Company, of a sum sufficient to satisfy said judgment, upon which execution has been issued and returned nulla bona.

S. D. Cushman claimed that in 1851 he discovered that articulate speech could be transmitted on a wire, but he was never able to make his discovery practicable. Other inventors occupied the field and secured letters patent covering the art; but Cushman still insisted that the invention was his, and that it was his right and privilege to manufacture telephones embodying his inventive thought, notwithstanding the action of the Patent Office. He entered into a contract, for the consideration of $5, with William C. Deane, who appears to have been a clerk in a country store, and who is denominated by Mrs. Cushman in her testimony as a "mere figurehead." By this contract Cushman assigned and transferred to Deane his invention and all papers connected with the same, while Deane on his part agreed to organize a corporation, to give Cushman one-fifteenth of the stock, making him director, and further agreeing to pay the Cushmans $150 a month until the dividends on their stock in the projected corporation should equal $500 per month. Thereupon application was made for a charter for a corporation to be known as "Cushman United Telephone Company," with a capital stock of $20,000,000. The subscription to the capital stock was made by six persons, who subscribed for one share of $100 each, to be paid for "either in cash or property or services," while $19,999,400 of such stock was subscribed for by William C. Deane, who, by the contract before mentioned, had become the owner of the Cushman inven-

tion, which appears to have been the only asset in sight. Certificates of stock were issued to Deane for $19,999,400. Deane then assigned his contract with Cushman to the Cushman United Telephone Company, and indorsed his certificates in blank—some of which were reissued to the Cushmans—and it seems to have been the theory of this unique corporation that this stock, having been thus issued, could be sold or disposed of at pleasure. The corporation never appears to have had any capital. It may be said to have capitalized an idea of doubtful value. In 1905 Cushman importuned the defendant Cook, who then had a vacant factory at Oconto, Wis., to undertake the manufacture of telephones to embody the features of the Cushman invention. On the 29th of April, 1905, the parties came to an agreement, which is embodied in a written memorandum introduced in evidence, whereby the defendant Cook agrees to manufacture or supply the Cushman Telephone Company with certain instruments and appliances, to be constructed according to designs furnished by said company, in which the company agreed to pay him the costs of manufacture with 10 per cent. added. The defendants Beyer and Pampherin agreed to coöperate with Cook in this experiment. Thereupon Cushman caused $5,000,000 of stock theretofore issued to Deane to be reissued to Cook. $250,000 was also issued to the defendant Beyer, and a similar amount to the defendant Pampherin, all of which on its face purported to be full paid and nonassessable. Neither of the defendants subscribed for any stock, and neither agreed to pay anything therefor. It seems to have been considered as a bonus to encourage and stimulate the development of the Cushman invention, and perhaps an inducement for entering into the contract to manufacture. Thereupon the defendant Cook, with the assistance of his codefendants, did undertake, at his home at Oconto, Wis., to manufacture the Cushman telephone. He bought a large amount of material and manufactured a large number of telephone instruments and appliances. He expended between fifty and sixty thousand dollars of his own money, while the defendant Beyer contributed something over $6,000. The experiment proved a failure, because the Bell Company had usurped the field, and the Cushman device was held to be an infringement. When this stock was so issued to the defendants, Cook and Beyer were elected officers of the Cushman United Telephone Company, Beyer being president, and Cook general manager. After the failure of their manufacturing enterprise, the defendants declined to participate in any meetings or further operations of the corporation. In the meantime the Cushmans brought suit against the Cushman United Telephone Company upon the Deane contract, which had been assumed by the corporation, and recovered the judgment to which reference has been heretofore made.

S. C. Herren, for complainant.

Greene, Fairchild, North & Parker, for defendants.

QUARLES, District Judge (after stating the facts). This is to all intents and purposes a suit by S. D. and I. M. Cushman, although brought in the name of the Continental Adjustment Company. The complainant has merely taken an assignment of the cause of action for the purpose of collection. It therefore stands as the representative of the Cushmans, and has no superior rights or equities. The Cushmans were instrumental in the issuance of the stock to the defendants, and, being stockholders themselves, they stand upon a different footing from an ordinary creditor. Fort Madison Bank v. Alden, 129 U. S. 372, 380, 9 Sup. Ct. 332, 32 L. Ed. 725.

The bill states that the stock which was issued to the defendants had been theretofore subscribed for and issued to William C. Deane, and that such stock had thereafter been transferred back to the said corporation by said Deane, and was thereafter subscribed for and reissued to the defendants. It is elementary that, when stock has been subscribed for and actually issued to outside parties, it is not then the

subject-matter of subscription. Bates v. The G. W. Tel. Co., 134 Ill. 536, 545, 25 N. E. 521. But the testimony shows that neither of the defendants undertook to subscribe or pay for this stock. It was well understood that there was nothing behind the stock except the Cushman invention. There was no money in the treasury, and therefore everything depended upon finding a party who would furnish the money to make the experiment that the defendants actually made. The question, therefore, resolves itself into this: Is the bare possession of certificates, such as these, a ground for recovery in equity under the circumstances here disclosed?

I cannot see that there is any ground upon which the court can proceed. There is no averment in the bill that the stock when transferred to the defendants had any value whatever, and, if when so disposed of, it was without value, no wrong was done to creditors. Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104. In Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429, the court say:

"The liability of a stockholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and, in the absence of either of these grounds of liability, I do not perceive how a person to whom shares have been issued as a gratuity has by accepting them committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract."

To the same effect are Gilman v. Gross, 97 Wis. 227, 72 N. W. 885; Whitehill v. Jacobs, 75 Wis. 474, 482, 44 N. W. 630.

Upon what theory can the court decree, in the absence of fraud, that the defendants should pay for this stock more than it was worth and more than they agreed to pay? The evidence tends to show that defendants carried out their agreement with the Cushmans, and, for aught that appears either in the bill or in the proofs, they invested in experimental work more than the stock was worth. It seems to me, therefore, that the bill discloses no equity.

There is another good and sufficient reason why the complainant cannot recover in this suit. In a proceeding of this kind, where only part of the stockholders are joined, the corporation, the original debtor, is an indispensable party, if it retains its corporate existence. If it has been dissolved, then all the stockholders must be brought before the court. This is not an arbitrary rule, but one founded upon the maxims of equity, which require the presence of all parties who will be affected by the decree of the court, so that the rights of all may be considered, and complete justice done. When the corporation is before the court, the absent stockholders are in a sense represented; but to hold that a proceeding of this kind can be maintained against one or more delinquent stockholders alone would be contrary to the fundamental theory of a court of equity. This proposition is all-important here, because jurisdiction depends upon diverse citizenship only. The corporation is a citizen of Illinois. So that our jurisdiction depends upon an answer to the proposition now under consideration.

The federal rule is well stated in First National Bank v. Smith (C. C.) 6 Fed. 215 (which was a suit like this, to enforce contribution from delinquent stockholders):

"It is too clear to admit of discussion that the corporations are necessary parties to suits like these. Unless they are made parties, they will not be concluded by decrees made in the cases on the merits, and the defendants might be called upon a second time to account for the same assets at the suit of the corporation or receivers appointed over their affairs. The defendants have the right to insist that the decree shall conclude the plaintiffs, the corporations, and all other creditors, and afford a full and complete protection against future suits for the same causes of action. Such decrees cannot be made in suits where the corporations are not parties, or by a court having no jurisdiction to require the legal presence of the corporations in the proceedings."

To the same effect, Dormitzer v. Illinois Bridge Co., 6 Fed. 217, 219, decided by the Circuit Court. To the same effect, Elkhart National Bank v. N. W. Guaranty Co., 87 Fed. 252, 30 C. C. A. 632; 1 Foster's Fed. Practice, § 53; Cook on Stockholders, § 206.

The same rule is distinctly held in Illinois, in Patterson v. Lynde, 112 Ill. 205, where the court say, in substance, that to enforce the liability of the stockholder for his unpaid stock, in equity, it is indispensable that the corporation should be before the court, so as to be bound and concluded by its action. Swan Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; Wetherbee v. Baker, 35 N. J. Eq. 501; Medberry v. Troutman (C. C.) 94 Fed. 952, 954; Walsh v. Memphis (C. C. Ky.) 6 Fed. 797.

Complainant calls attention to the case of Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885, as an authority in favor of his contention. In that case the corporation was joined with several stockholders, and at some time during the proceedings the complainant discontinued as to the corporation and one of the stockholders. Why this was done does not appear in the reported case. It must have been done by consent of parties, and therefore the question we are considering was neither raised nor passed upon.

I cannot agree that the Illinois authorities cited by complainant sustain his views. It is repeatedly decided that all of the delinquent stockholders need not be joined in such a bill, but the corporation has been made a party. I cannot find that the well-reasoned case of Patterson v. Lynde has been overruled.

Other points have been raised by counsel for defendants, but it is unnecessary to discuss them.

For want of equity, and because defective as to parties, the bill must be dismissed, with costs. So ordered.

L. GANDOLFI & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1907.)

No. 4,379.

CUSTOMS DUTIES—MEASUREMENT—FISH IN TINS—"CONTAINING."

In applying the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], for fish in tins "containing" various quantities, the actual capacity of the tins should be considered, rather than the quantity of fish found in them.

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

For decision below, see G. A. 6,400 (T. D. 27,490), which affirmed the assessment of duty by the collector of customs at the port of New York.

The goods in controversy consisted of fish in tins; each tin having a separate piece of tin with a small piece of wood pressing it down on the fish to hold it in place, and this leaving a vacancy in each tin. The importers contended that in ascertaining whether the tins contained more or less than 33 cubic inches each, in order to determine their tariff classification, this vacancy should be allowed for, and only the cubic measurement of the fish should be considered.

Everit Brown, for importers.
D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The merchandise in question, consisting of anchovies contained in tin boxes or cans, is dutiable under paragraph 258 of the Tariff Act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650]. Duty was assessed by the collector at ten cents per box, as "containing more than 33 and not more than 70 cubic inches." The protestants assert that the merchandise is dutiable at only five cents per box, as containing more than 21 and not more than 33 cubic inches.

Upon the authority of In re Johnson et al. (C. C.) 56 Fed. 822, and Kauffmann Bros. v. United States (C. C.) 99 Fed. 430, holding that it was not so much the intention of Congress to impose a duty on fish as upon the tin cans in which the same are contained, and the opinion of the Board clearly stating the impracticability of opening the tin boxes or cans in which the fish are imported in order to ascertain the precise quantity therein contained, the contention of the importers is overruled, and the decision of the board affirmed.

CHARLES A. JOHNSON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 13, 1906.)

No. 4,083.

CUSTOMS DUTIES—CLASSIFICATION—WHETSTONE BLOCKS—CRUDE MINERALS.

Whetstone blocks, of an approximately rectangular shape, which after being quarried have had their projections removed by a process of rough dressing, and which are used in that state, *held* within the provision for "minerals, crude, or not advanced in value or condition by refining or

grinding, or by other process of manufacture," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 614, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685.]

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

The case relates to so-called "whetstone blocks" imported at the port of New York. They are nearly rectangular in shape, weighing approximately from 80 to 110 pounds. After being quarried, they were roughly dressed for the purpose of removing their projections; this leaving them with an irregular, uneven surface. The evidence showed that they were used in their imported condition by calico printers for sharpening instruments and grinding the edges of rollers. The Board of General Appraisers held these articles to have been properly classified as unenumerated manufactured articles, under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], overruling the importers' contention that they should have been classified under section 2, Free List, par. 614, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], which reads as follows: "614. Minerals, crude or not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially provided for in this act." The board observed in its opinion: "The claim under paragraph 614 we think not well taken. In our judgment this paragraph was not intended to cover articles of this character; besides, the evidence shows that the stones in question have been advanced in condition by some process of manufacture. In other words, the pieces as imported are not in the exact condition in which they came from the quarry."

Hatch & Clute (Walter F. Welch, of counsel), for importers.

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

HAZEL, District Judge. Decision reversed.

SEYD v. UNITED STATES.

(Circuit Court, S. D. New York. January 8, 1907.)

No. 4,211.

CUSTOMS DUTIES—CLASSIFICATION—MARBLEIZED PAPER.

So-called "marbleized paper," which is made by hand, *held* dutiable as surface-coated paper under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 398, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1671], and not as hand-made paper under paragraph 401, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672]. It is excluded from the latter paragraph because not ejusdem generis with the classes of paper there enumerated.

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

In the decision below, the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by William Seyd, under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626].

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

J. Osgood Nichols, Asst. U. S. Atty.

HAZEL, District Judge. The new evidence introduced in this court proves that the article in question, consisting of marbleized paper, is

used generally for fly leaves or linings of books. The collector assessed duty under paragraph 401, as hand-made paper. The importer claims that duty should have been assessed under paragraph 398, which provides for surface-coated papers. The merchandise is manufactured by first preparing a coating substance consisting of a gelatine bath; the desired coloring matter being sprinkled thereon by hand. The sheets of white paper are separately dipped into the solution or bath by hand; the colors being transferred to the paper. In this condition the marbleized paper, according to the proofs, is commercially known as "surface-coated" paper, as distinguished from a class known as "hand-made" paper. The government gave no evidence to refute the contention of the importers, but insists that the paper was made and the coloring matter or decoration actually applied by hand, and that the term "hand-made paper" is merely descriptive. Paragraph 401 imposes in general terms a duty upon "writing, letter, note, hand-made," and certain other papers specifically mentioned, and the provision is broad enough to include the article in question, but the tariff act specifically provides for surface coated papers by paragraph 398, thus rendering the former paragraph inapplicable. Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 188, 189 [U. S. Comp. St. 1901, pp. 1671, 1672]. The case of Miller, Sloane & Wright v. United States (C. C.) 128 Fed. 469, is a precedent. It is held there that the hand-made papers provided for in paragraph 401 are those which are ejusdem generis with the classes in said paragraph mentioned. The importation here under consideration is shown not to belong to that class, although admittedly hand made.

The decision of the Board of General Appraisers is reversed.

GOLDENBERG BROS. & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 28, 1907.)

No. 4,194.

CUSTOMS DUTIES—CLASSIFICATION—LACE ARTICLES.

Tariff Act July 24, 1897, c 11, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], relating to "articles made * * * of lace," includes goods made by sewing together pieces of lace produced in shapes designed to be used in making the articles; the term "lace" not being restricted to articles made up from lace that is bought and sold by the yard.

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

For decision below, see G. A. 6,290 (T. D. 27,113), which affirmed the assessment of duty by the collector of customs at the port of New York on collars, classified under the provision for "articles made wholly or in part of lace," under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662].

Evidence introduced before the Board as to the character of the goods and the method of manufacturing them showed "that thread is placed in lace machines which produce pieces of lace in shapes designed to be used in making collars, and that the collars are made by sewing several of these pieces

together." Following the decision of the Circuit Court for the Southern District of New York in U. S. v. Van Blankensteyn, 91 Fed. 977, the Board held that the articles were properly classified as made of lace. Note Mills v. Robertson (C. C.) 147 Fed. 634.

The importers, in their assignment of errors, asserted that the term "lace" means, commercially, a "fabrication or article sold by the yard, with one edge straight, the other scolloped, or both edges straight," and does not include articles "made in accordance with a design executed by means of a thread placed in a machine."

Walter E. Hampton (James W. Purdy, Jr., of counsel), for importers.

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

HAZEL, District Judge. The merchandise in question, consisting of cotton lace collars, was classified for duty as articles made of lace under the provisions of paragraph 339 of the tariff act of 1897. The importer claims that the goods should have been appraised under the provisions of paragraph 314. Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1658]. It would serve no useful purpose to again discuss the reasons for the conclusion that the articles of wearing apparel in question are made wholly or in part of lace. See Goldenberg Brothers & Co. v. United States (C. C.) 124 Fed. 1003, affirmed 130 Fed. 108, 64 C. C. A. 442, petition for certiorari denied 195 U. S. 634, 25 Sup. Ct. 791, 49 L. Ed. 354. Judge Lacombe, writing for the Circuit Court of Appeals, has fully and plainly covered the principal points relied upon. It is true that, in the former case, it was conceded at the hearing that the articles were wholly or in part of lace composed of cotton, while now it is vehemently insisted that such articles are made by hand or machine from cotton thread, usually in pieces which are sewn together to finish the article. The concession mentioned is not thought to have been controlling. That such lace neckwear, to come within the provisions of paragraph 339, must have been made up from lace that is bought and sold by the yard, is thought wholly untenable. The importers' restricted definition of the term "lace" is too narrow; and, moreover, it is reasonably clear that Congress intended to impose a higher rate of duty upon articles such as these in controversy than upon wearing apparel of the class described in the paragraph under which the importer claims the articles should have been assessed for duty. The case of Fleet v. United States, 148 Fed. (C. C.) 335, is readily distinguishable. In that case the articles of fur were sewn together simply for convenience and safety, and not, as here, to make a completed useful article.

I concur in the views of the Board as expressed in their opinion and affirm their decision.

UNITED STATES v. G. M. THURNAUER & BRO.

(Circuit Court, S. D. New York. January 18, 1907.)

No. 4,016.

CUSTOMS DUTIES—CLASSIFICATION—DECORATED CHINA—COMMERCIAL DESIGNATION.

The provision for decorated china, in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 95, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], was used in a commercial sense which includes china ware having a brown stain or glaze on the sloping underside, tending to conceal finger marks, etc.

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

The decision below reversed the assessment of duty by the collector of customs at the port of New York, on the authority of a former decision of the Board. G. A. 5,336 (T. D. 24,424). Following is an extract from the opinion of the Board in the present case: "At the hearing in the case, a member of the importing firm appeared and testified that the brown coloring matter in the glaze was employed to serve a useful, and not ornamental, purpose—that is, to hide finger marks and smoke; the articles being intended for use in serving eggs and other food that has been cooked in them.

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

Walden & Webster (Henry J. Webster, of counsel), for importers.

HAZEL, District Judge. The single question here presented is whether certain china ware, consisting of nappies and round china dishes, was or was not decorated. The collector classified the merchandise as "china, * * * painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner," at the rate of 60 per cent. ad valorem, under paragraph 95, Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]. The Board sustained the protest of the importers, and held the goods for duty, under paragraph 96, at 55 per cent. The proofs given in this court show that, in the year 1897 and prior thereto, the articles were known generally in usage and trade as decorated china. Such being the fact, I am of the opinion that the case of Koscherak v. United States, 98 Fed. 596, 39 C. C. A. 166, cited by the importer, is inapplicable. Two witnesses, in behalf of the importer, testified that there was no trade designation in the year 1897; that the china ware in fact is not decorated, and the brown coloring or stain on the sloping underside of the dish applied solely to its usefulness. Undoubtedly the staining or glazing of the dish tends to conceal smoke and finger marks; but, nevertheless, I think that under the broad terms of paragraph 95 the articles in question are included, and that they are decorated.

The decision of the Board is therefore reversed.

DONOVAN v. DIXIELAND AMUSEMENT CO.

(Circuit Court, E. D. New York. March 29, 1907.)

1. CORPORATIONS—JURISDICTION OVER—SERVICE ON OFFICER TEMPORARILY IN STATE.

Jurisdiction over a corporation of another state which has no place of business, and is not doing business, in the state of suit, cannot be acquired by service of process on one of its officers temporarily in such state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2613.

Service of process on foreign corporations, see note to Eldred v. American Palace-Car Co., 45 C. C. A. 3.]

2. REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—AMENDMENT OF COMPLAINT.

Where the amount claimed by a plaintiff in his complaint in the state court is sufficient to give a federal court jurisdiction, and the cause is otherwise removable, the plaintiff cannot defeat such jurisdiction after removal by offering to reduce the amount of his claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 133.]

On Motion to Quash Service and Motion to Remand to State Court.

Elder & Roehr, for plaintiff.

Edwin C. Dusenbury, for defendant.

CHATFIELD, District Judge. The plaintiff brought suit in the Supreme Court of the state of New York for $13,375, and served his process upon an officer of the defendant, which is a Florida corporation, while this officer was temporarily within the state. The defendant removed the case into the United States court, and now moves to set aside the service of the summons and complaint on the ground that the defendant corporation is not doing business within the state of New York, and is not a New York corporation. The plaintiff thereupon made a motion to remand the action to the state court, and has filed an affidavit in which he offers to reduce his claim to the amount of $1,999.

All the questions presented upon these motions are considered, and the numerous cases upon the subject referred to are cited in Johnson v. Computing Scale Co. (C. C.) 139 Fed. 339, and it is unnecessary here to repeat the statements of the court in that case.

The motion to set aside the service will be granted, and the motion to remand and to allow the filing of a release for a portion of the claim will be denied.

DR. MILES MEDICAL CO. v. SNELLENBURG et al.

(Circuit Court, E. D. Pennsylvania. March 26, 1907.)

No. 36.

EQUITY—PLEADING—EXCEPTIONS TO ANSWER.

A defendant will be required to file a new answer on the filing of exceptions to the original answer, which contains objectionable and irrelevant matter intermingled with parts that are good, so that the result of

sustaining the specific exceptions would be to leave the remaining parts disjointed and not in good form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 532.]

On Exceptions to Answer.

Frank F. Reed, Edward S. Rogers, and Biddle & Ward, for complainants.

Simpson & Brown, for respondent.

J. B. McPHERSON, District Judge. It would be a tedious and unprofitable task to consider these numerous exceptions seriatim. Some of them certainly ought to be sustained—notably those which object to the use of unnecessary epithets, and also the sixteenth, which seeks to introduce an irrelevant issue. The difficulty about taking up each exception in detail is that the passage objected to is frequently partly good and partly bad, so that the result of striking out the objectionable matter in such case would be to leave the passage disjointed, and sometimes not fairly expressive of the defendants' thought. I think, therefore, that the best and shortest way out of what might easily become a serious tangle is to require the defendants to recast their answer in a more dignified and dispassionate tone, avoiding, also, the introduction of all matter that is not strictly relevant. With this end in view, I shall sustain the exceptions pro forma, and direct the defendants to file a new answer within 20 days.

LE MARCHEL v. TEAGARDEN.

(Circuit Court, W. D. Arkansas, Harrison Division. April 7, 1907.)

1. PUBLIC LANDS—PATENTS—EFFECT.

A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 314.]

2. SAME—VACATION.

Where the officers of the land department have been induced to issue a patent to the wrong party, either by an erroneous view of the law or by gross or fraudulent mistake of the facts, the party entitled to the land may have the patent set aside on proof either that on the facts found, conceded, or established, without dispute at the hearing before the department, its officers erred in the construction of the law applicable to the case, which caused them to refuse to issue the patent to complainant, or that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 339, 340.]

3. SAME—FRAUD—QUANTUM OF PROOF.

Where a patent issued by the land department is attacked for mistake on the part of the government's officers, the complainant must allege and prove, not only that there was a mistake in the findings, but the evidence before the department from which the mistake resulted, the particular

mistake that was made, the way in which it occurred, and the fraud, if any, which induced it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 335.

Decisions of the land department, their conclusiveness and effect, see note to Hartman v. Warner, 22 C. C. A. 38; Carson City Gold & Silver Min. Co. v. North Star Min. Co., 28 C. C. A. 344; Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co., 57 C. C. A. 207].

4. SAME—DUTY OF ENTRYMAN.

Where an applicant for a cash entry of public land regularly applied to enter the land, paid the price, and obtained his receipt therefor, he was under no obligation to supervise the entries on the books of the register of the land office, in order to see that the proper entries were made.

5. SAME—VACATION OF ENTRY.

The records of the land office and the decision of the Interior Department with reference to a land entry could not be overturned 50 years after they were made and after the patentee had died, because of evidence that the patentee intended to enter the land for mill purposes, and that he erected a mill on an adjacent tract and not on the property entered, on which no water power existed.

6. SAME—SUBSEQUENT ENTRY.

G. made a cash entry on land in controversy in 1848, which immediately rendered the land subject to taxation, and withdrew it from the operation of the United States land laws. By mistake of the register in a land office, a patent was issued for another tract and long after G.'s death, the error was corrected, the original patent canceled, and a correct patent issued to G. and his heirs for the land in controversy, pending which complainant had made a homestead entry on the land. *Held*, that the land was not subject to homestead entry at the time complainant attempted to enter it, and that he had no rights therein.

For former opinion, see 133 Fed. 826.

Crump & Trimble and Woods Bros., for complainant.
Sewell & Sewell and J. W. Story, for defendant.

ROGERS, District Judge. On November 4, 1848, William Goodall made cash entry for the S. E. ¼ N. W. ¼, section 11, township 17 N., range 15 W. (situate in Marion county, Ark.), at the Batesville (now Harrison, Ark.) district land office. The practice of the office at that time, when a cash entry was made, was this: The receiver, when the money was paid for the land entered, issued duplicate receipts, describing therein the land entered, the price paid, and the quantity of the land. One of these receipts he gave to the purchaser and the other to the register. Predicated on this receipt the register made the necessary entries on the tract book and plats of his office, and issued the certificate of entry in favor of the purchaser for the land so entered. Monthly reports were made of his action to the General Land Office, and, on presentation of the certificate of entry to the General Land Office, the patent was issued thereon if everything appeared regular. In this case the receiver's receipt correctly described the land entered, shows the price paid, and the number of acres, and the land described in the receipt is the S. E. ¼ N. W. ¼, section 11, township 17 N., range 15 W.; but the register's certificate, issued the same day, incorrectly shows the land entered by Goodall to have been the S. E. ¼ N. W. ¼, section 11, township 16 N., range 15 W. The first

tract is in Marion county, and the latter in Searcy county, and are situate several miles apart. July 1, 1850, the patent was issued upon the Goodall entry, in accordance with the erroneous description appearing in the register's certificate. The patent so issued was duly transmitted to the local land office at Batesville, for delivery, but was never delivered, and in 1896 was burned, with other records of the Harrison land office. In 1892 the local land office, having discovered some confusion in the records of the local office as to the Goodall entry, advised the General Land Office that their tract books showed Goodall's entry to be for the S. E. ¼ N. W. ¼, section 11, township 17 N., range 15 W. (that being the tract described in the receiver's receipt), while the plat in their office showed it to be for the S. W. ¼ N. W. ¼ of said township, section, and range, which was a different tract from that described in either the receivers' receipt or the registers' certificate, or the tract book or in the patent issued, and inquired what land was covered by the Goodall entry. At that time, obviously, the officers of the General Land Office had not discovered that the registers' certificate differed from the receivers' receipt, and consequently the patent which had been issued was for a tract not entered by Goodall. Accordingly, on March 26, 1892, the Commissioner of the General Land Office advised the local officers at Harrison, Ark., that the Goodall entry was for the S. E. ¼ N. W. ¼, section 11, township 16 N., range 15 W., and that the entry had been patented July 1, 1850. Without any notice to Goodall, or his heirs, or those claiming under him, the officers of the General Land Office and the local land office at Harrison, on March 2, 1892, arbitrarily altered the tract books in both offices, which from November 4, 1848, had shown that Goodall entered the S. E. ¼ N. W. ¼, section 11, township 17 N., range 15 W., so as to make it appear that his entry was for the S. E. ¼ N. W. ¼, section 11, township 16 N., range 15 W., thereby making the tract books conform to the patent previously issued, and which was predicated on the incorrect description in the registers' certificate. These alterations were not made by erasures, but by simply running a line with pen and ink through the correct entry where it appeared on the tract book and then inserting the incorrect entry opposite, and was manifestly done in good faith by the local office, and in the General Land Office, which had not discovered the error in the register's certificate.

The effect of all this was to make it appear on the records of both the General Land Office and the local office at Harrison that the land in controversy at that time the S. E. ¼ N. W. ¼, section 11, township 17 N., range 15 W., was vacant land and subject to homestead entry. Indeed, some time in 1893 (letter not dated) complainant wrote the General Land Office inquiring the status of the land in controversy, and advising it that "the books of the Harrison land office show it to be vacant, which is disputed." On September 30, 1893, the acting commissioner of the General Land Office replied, stating that the tract books showed the land vacant so far as returns had been received, but some entry might have been made at the local office. Some other correspondence ensued about the status of the land, and finally, on December 28, 1893, complainant entered the land in controversy,

among others, as a homestead, and in January, 1894, began improving it, and finally, in apt time, moved on the land and made it his home. After living there 5 years, he gave the notice and made his final proof. Meantime the land was forfeited to the state for the taxes of 1896 and 1897, and on January 24, 1901, defendant bought and obtained a deed therefor from the state, and in March of the same year obtained quitclaim deeds from the heirs of Goodall. On February 15, 1901, defendant, in the name of the Goodall heirs, and with their consent, filed an application in the General Land Office to cancel the patent issued on July 1, 1850, to their ancestor William Goodall, because it misdescribed the land entered by him, and also for the issuance of a patent to the land actually entered by him; it being the land in controversy. Notice of this application was given complainant and he appeared. Both sides offered evidence, and the case was heard by the Commissioner, and decided in favor of the complainant. On appeal to the Secretary of the Interior, the Commissioner of the General Land Office was reversed, the patent canceled as erroneous, and a patent for the land in controversy was issued on the 27th of May, 1903, to the Goodall heirs, reciting that it was issued in lieu of the one canceled. This patent, of course, inured to the benefit of Grant Teagarden, who, as stated, already had quitclaim deeds from the Goodall heirs, and also a deed from the state. Thereupon Grant Teagarden instituted ejectment against complainant and recovered judgment against him in this court. Before said judgment was recovered this bill was filed, and a decree was asked declaring said Grant Teagarden a trustee for the complainant, and compelling him to convey the lands to him; he being the equitable owner under his homestead entry. That complainant has complied with the homestead law so far as residence and improvement of the land is concerned is not in controversy.

The rules of law governing cases of this character, where the action of a department of the government having jurisdiction of the subject-matter and parties is assailed for error and fraud, is so well stated in James v. Germania Iron Company, 107 Fed. 597, 46 C. C. A. 476, that I quote from the opinion of Judge Sanborn (Judges Caldwell and Thayer, both concurring) as follows:

"The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. Act March 3, 1849, c. 108, § 3, 9 Stat. 395; Rev. St. §§ 441, 453 [U. S. Comp. St. 1901, pp. 253, 257]; U. S. v. Winona & St. Paul R. Co., 67 Fed. 948, 955, 15 C. C. A. 96, 103, 32 U. S. App. 272, 283. But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the land department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds: (1) That upon the facts found, con-

ceded, or established without dispute at the hearing before the department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another (Bogan v. Mortgage Co., 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 958, 15 C. C. A. 96, 106, 32 U. S. App. 272, 288; U. S. v. Northern Pacific R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Cunningham v. Ashley, 14 How. [U. S.] 377, 14 L. Ed. 462; Barnards' Heirs v. Ashley's Heirs, 18 How. [U. S.] 43, 15 L. Ed. 283; Garland v. Wynn, 20 How. [U. S.] 6, 15 L. Ed. 801; Lytle v. Arkansas, 22 How. [U. S.] 193, 16 L. Ed. 306; Lindsey v. Hawes, 2 Black [U. S.] 554, 562, 17 L. Ed. 265; Johnson v. Towsley, 13 Wall. [U. S.] 72, 85, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 538, 24 L. Ed. 848; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152); or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect (Gonzales v. French, 164 U. S. 338, 342, 17 Sup. Ct. 102, 41 L. Ed. 458). If he would attack the patent on the latter ground, and avoid the departments finding of facts, however, he must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing. U. S. v. Northern Pacific R. Co., 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308; U. S. v. Atherton, 102 U. S. 372, 374, 26 L. Ed. 213; U. S. v. Budd, 144 U. S. 154, 167, 168, 12 Sup. Ct. 575, 36 L. Ed. 384; U. S. v. Mackintosh, 85 Fed. 333, 336, 29 C. C. A. 176, 179, 56 U. S. App. 483, 490; U. S. v. Throckmorton, 98 U. S. 61, 66, 68, 25 L. Ed. 93; Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. Ed. 800; Steel v. Refining Co., 106 U. S. 447, 451, 1 Sup. Ct. 389, 27 L. Ed. 226; French v. Fyan, 93 U. S. 169, 172, 23 L. Ed. 812; Ehrhardt v. Hogaboom, 115 U. S. 67, 69, 5 Sup. Ct. 1157, 29 L. Ed. 346; Heath v. Wallace, 138 U. S. 573, 575, 11 Sup. Ct. 380, 34 L. Ed. 1063; Barden v. Railroad Co., 154 U. S. 228, 14 Sup. Ct. 1030, 32 L. Ed. 992."

See, also, Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 458. Other cases along the same line may be cited but it is useless.

This bill assails the decision of the Secretary on both grounds stated, but it falls far short of a compliance with the rules of law there stated as to either. From the record it appears that, when the case was before the Interior Department, there was a mass of evidence, including records and ex parte affidavits introduced, and the effort made to show that the patent issued July 1, 1850, correctly described the land actually entered by Goodall, and therefore should not be canceled and a new patent issued for the land in controversy. So far as can be ascertained, such was the purpose when the original and amended bills were filed in this case. In the first amended bill the effort is made to show that the land really entered by Goodall is another 40 acres, north of the land in controversy, and in the same section, township and range. The second amended bill of complaint sets out the affidavits used in evidence for the cancellation of the patent issued July 1, 1850, and for the issuance of a patent for the land in controversy, and alleges that those affidavits were false, but omits any reference to the records before the Interior Department. The fact is that the affidavits were of no importance. They were irrelevant, and a glance at the Secretary's opinion discloses clearly that they were not considered, at least, not controlling. His decision was based on the record of the local and General Land Offices. Those records on which his opinion is predicated were not assailed by complainant. Indeed, he relied on them as they then appeared as show-

ing his right to the homestead entry. The written application for the Goodall entry is not produced. The registers' certificate, presumably made thereon in conformity to the practice, is not before me. Presumably, the paper is lost or burned, but the receivers' receipt, which was the next step in making the entry, is produced, and it shows the entry to be the land in controversy. The tract books in the General Land Office and the local land office both showed the same thing, until they were, without any legal authority, changed to conform to the registers' certificate and the subsequent patent issued thereon. These facts which are matters of record remain unaltered by the proof, and on which was predicated the opinion of the Secretary of the Interior. Goodall had applied to enter and had paid for the land in controversy, and got his receipt therefor. That was all the law required him to do. The officers of the United States were to do the rest. He was not required to supervise the entries on the books of the register, and the law presumes the register would do his duty, and Goodall had the right to rely on that presumption. The principle is stated in Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86, as follows:

"A party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land acquires a vested interest therein, and is to be regarded as the equitable owner thereof. While his entry or location remains in full force and effect, his rights thereunder will not be defeated by the issue of a patent to another party for the same tract."

In Chowning v. Stanfield, 49 Ark. 93, 4 S. W. 278, the court says:

"Few propositions are better settled than that the rights of one who has done all that the law requires of him cannot be impaired by the subsequent neglect or want of fidelity of a public officer. Lytle v. State of Arkansas, 9 How. (U. S.) 333, 13 L. Ed. 153; Coleman v. Hill, 44 Ark. 452; Stark v. Mather, 12 Am. Dec. 567, note; Nelson v. Simms, 23 Miss. 383, 57 Am. Dec. 144."

In the application of the Goodall heirs to cancel the patent issued July 1, 1850, it was stated, and proof offered pro and con, that Goodall entered the land for mill purposes, and that he died while erecting a mill on the same. There is also proof showing that the land patented to him July 1, 1850, was in the mountains, where there never was any water power. This having been ascertained, complainant is now offering to show that there is no water power, and no mill was ever erected on the land in controversy, but that the remains of an old mill is found on the 40 acres north of this land in controversy, in the same section, township, and range, and from this fact it is argued that Goodall never intended to enter this land, but did intend to enter the 40 north of it, where there was water power, and where there is now the remains of an old mill. I do not attach any importance to the statement of the Goodall heirs, in their application for the cancellation of the patent of July 1, 1850. They removed from Arkansas about 1850, more than 50 years ago, were then children, reared in the mountains of northwest Arkansas, and never had lived on the land in controversy. Only one of them claims to have ever seen the mill. It is an absurdity to suppose they knew the numbers of the land entered by their father, or whether the mill was erected on any particular 40-acre tract. It was not only an absurdity on its face, but it was utterly immaterial. The records of the land office and the decision of the Department of

the Interior are not to be overturned in that way, or by evidence of that character. And this view is borne out by the evidence of the Goodall heirs themselves, subsequently taken, which establishes conclusively that they knew nothing about what lands he entered. Nor are the records of the land office and the decision of the Interior Department to be overturned 50 years after they were made, and after the patentee, Goodall, in this case, is dead, because it can be shown that the land he intended to enter was for mill purposes, and that he erected a mill on another 40-acre tract adjacent, and that there was no mill erected, and no water power on the tract which the records of the land office show he entered. Titles to real estate rest on something more substantial than evidence of this character. Goodall may have intended to enter the tract on which the remains of the old mill are now found, but the records show he entered another. Even the patent, erroneously issued, was not for the tract north of the land in controversy on which the remains of the old mill are found, nor is there any entry or any record showing he entered the 40 north of the tract in controversy. There was a remedy for Goodall if he made a mistake in his entry, if it had been invoked in apt time, but neither he nor his heirs, nor those holding under him, ever claimed that he intended to enter the 40 north of the tract in controversy, nor could they be heard to do so now. They are estopped by their own action had before the Interior Department. Nor can complainant or any one else invoke a correction of an entry for them. It is also urged that the quitclaim deeds from the Goodall heirs were obtained by fraud and misrepresentation. Be it so, how can that avail complainant? That is a matter they might, under a proper showing, assert, but, if asserted and successfully, the benefit would inure to themselves, and not to complainant. Indeed, complainant's right to recover in this suit depends upon the legal title being vested in defendant. If vested in him at all, it is because the patent to the Goodall heirs inured to his benefit by reason of the quitclaim deeds from the Goodall heirs to defendant. If the quitclaim deeds are broken down, the title is in the Goodall heirs, and complainant's right of action against defendant is defeated, and no right of action could be had against the Goodall heirs because they are not parties to the bill and have had no day in court. But as the case now stands this land having been assessed for taxes and forfeited to the state, and subsequently sold to defendant, he holds the title adverse to the Goodall heirs, and also adverse to the complainant.

It accordingly appears that on November 4, 1848, William Goodall entered the tract of land in controversy; that immediately upon its entry it was subject to taxation, and withdrawn from the operation of the land laws of the United States; that by the mistake of the register of the land office a patent was issued for another tract, which is not that entered by Goodall; that long after the death of Goodall the error was corrected, the original patent canceled, and a correct patent issued to Goodall and his heirs for the land in controversy; that, when complainant made his homestead entry, it was not the property of the United States, nor was it subject to another entry for homestead purposes; that complainant's bill is without equity, and must be dismissed, at his own costs.

JAHN v. CHAMPAGNE LUMBER CO. et al.

(Circuit Court, W. D. Wisconsin. March 15, 1907.)

No. 124.

1. EQUITY—PLEA—DUPLICITY.

In a creditors' suit against two stockholders of a dissolved corporation, alleging a fraudulent distribution of its assets and praying for a discovery and accounting, a plea setting up that there are many other stockholders who are not made parties, and also that the assignment of the cause of action to complainant was speculative, and does not entitle him to maintain a suit in equity, tenders two defenses, and is bad for duplicity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 404.]

2. SAME—SUFFICIENCY OF PLEA—NECESSITY OF ANSWER IN SUPPORT.

Where a bill charges fraud and prays for a discovery, a plea to the whole bill, under equity rule 32, must be supported by an answer denying the fraud and giving the complainant discovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 415, 431.]

3. SAME.

That a complainant acquired the cause of action on which his bill is based for speculative purposes, and for a wholly inadequate consideration, will not entitle defendants to a dismissal of the bill for want of equity under all circumstances on a plea setting up such fact, as where such plea admits fraud charged in the bill.

In Equity. On plea.
See 147 Fed. 631.

The Champagne Lumber Company is a Wisconsin corporation engaged in the manufacture of lumber, and in 1896 action was brought by one Nyback, an employé, for damages by reason of personal injury. After a long and bitter contest in the courts Nyback in 1901 obtained in the Circuit Court of Appeals a judgment for costs against the corporation for $471, and thereafter, in 1902, a writ of fieri facias was issued upon said cost judgment, and was returned unsatisfied. Afterwards, in 1903, said Nyback obtained in this court a verdict against said corporation for $2,000 damages, upon which final judgment was entered, execution issued, and also returned nulla bona. After verdict, and before entry of judgment, Nyback, by an instrument in writing expressing a consideration of $15 and other good and valuable consideration, assigned and transferred said judgment for costs, and said verdict, and all rights of said Nyback thereunder, to the present complainant, who files this bill in the nature of a creditors' bill against the corporation and the two principal stockholders thereof, in his own behalf and in behalf of any other creditors who may choose to come in and participate in the proceedings. The bill alleges that, while the said personal injury suit was pending, the defendants Stewart and Alexander fraudulently caused said corporation to be disorganized, for the purpose of defeating any recovery by Nyback, and that to accomplish that purpose the assets of said corporation were fraudulently distributed among the stockholders; that the corporate funds so distributed were largely in excess of the amount necessary to liquidate both of the judgments. The bill prays full and complete discovery as to who were the other stockholders aside from the defendants named, as to the amount and character of the assets of said corporation so distributed, and as to many other facts, and for an accounting, and that all the assets of said corporation so fraudulently disposed of may be applied by the court to the payment of said two judgments and any other claims of creditors who may choose to come in and participate in the suit. A general demurrer heretofore interposed by the defendant was overruled, and the question now presented is raised by a joint plea going to the whole bill interposed by the defendants Stewart and Alexander.

The complainant has moved, without replication, to set the plea down for hearing.

William T. Lennon (Julius J. Patek, of counsel), for complainant.
Edwin M. Smart (John B. Sanborn, of counsel), for defendants.

QUARLES, District Judge (after stating the facts). The law is well settled, as defendants' counsel frankly concede, that a plea in equity must be single. Whatever the nature of the plea, the matter pleaded must reduce the issue between the complainant and the defendant to a single point. If the plea is double—that is, renders more than one defense as the result of the facts stated—it must be overruled. This plea, being to the whole bill, is obnoxious to the plea of duplicity. It presents two distinct propositions which have no legal or logical affinity. They are as incongruous as the pleas in Miller v. Rickey (C. C.) 123 Fed. 607.

The first proposition, briefly stated, is that the individual defendants are only two of many stockholders of said corporation, who are now scattered over the country, and some of whom are dead; that each such absent stockholder received his proportionate share of the property and assets when such corporation was dissolved; that it would be inequitable to require Stewart and Alexander to refund the entire amount of such corporate assets, because it would be impossible for them to enforce contribution against their corporate associates. The legal effect of this proposition would seem to be that the suit is defective for lack of parties defendant. If the defendants had "given the complainant a better writ" by naming such absent stockholders and showing that they were within the jurisdiction, the plea would have been similar to that sustained in Goldsmith v. Gilliland (C. C.) 24 Fed. 154. The second proposition presented by the plea is that complainant acquired the cause of action under circumstances that savored of maintenance and involved speculation, having paid Nyback only nominal consideration for the claim, which in the aggregate amounts to $3,000, and that a court of equity under such circumstances will not lend its aid to the complainant, but will remit him to his legal rights. These two propositions, covered by a single plea reaching the whole bill, are separate and distinct, and cannot without leave of the court be thus united.

Second. The plea is bad because it is not fortified by an answer denying the fraud charged in the bill. Prior to the adoption of the thirty-second rule in equity, many technicalities and refinements had been indulged by the courts as to which of the various pleas in equity required the support of an answer. The general rule, however, was that every affirmative plea must be fortified by an answer to allow the complainant the discovery which, in the nature of things, he cannot have under a plea. Bates' Federal Practice, §§ 235–238. In Lewis v. Baird, 3 McLean 56, 61, Fed. Cas. No. 8,316, it is broadly laid down that, where fraud is alleged in the bill, it should be denied in the plea, and also in the answer in support of the plea. The complainant is entitled to the oath of the defendant, and, if the answer does not deny the fraud, the plea may be overruled absolutely, or only

as an immediate bar, saving the benefit of it to the hearing of the cause. It has been held that certain pleas known as "pure pleas" required no support by way of answer, and defendants' counsel have cited several such authorities, and the claim is that this is a pure plea. It would seem that the function of the thirty-second rule in equity is to do away with these technicalities, and to require an answer in support of the plea in every case in which the bill specifically charges fraud or combination, and where the plea goes to that part of the bill, as it clearly does when it is interposed to the whole bill. Huntington v. Laidley (C. C.) 79 Fed. 865. It is familiar that the answer called for by the chancery practice in such case is not for the purpose of defense. The plea is supposed to embody that; but its office is to deny the fraud, and to give the complainant discovery to which he is clearly entitled under the present bill.

The contention of the defendants is that no supporting answer is necessary, because as the result of their plea all the averments of fraud stand admitted. But, nothwithstanding the admission, the complainant is entitled to the discovery without which he might not be able to secure necessary evidence, some of which is within the peculiar knowledge and custody of the defendants. Suppose, for the purpose of the argument, it were conceded that the defendants are right in their contention that no answer was necessary to fortify this plea, how would the case stand under the present pleadings? The complainant by setting the plea down for argument has not only waived irregularities in the matter of form, but has admitted every fact in the plea which is well pleaded. The defendants, on the other hand, stand admitting the frauds with which they are charged in the bill. In that aspect of affairs does the second proposition in the plea furnish a bar to the action? It is true that courts of equity have in many cases, of their own motion, and sometimes on suggestion, declined to afford relief on grounds similar to those set up in the plea. Yet I do not understand that such facts constitute a recognized bar which any defendant may interpose under all circumstances. The doctrine is intended to protect honest creditors from rapacity. In the leading case of Jencks v. Quidnick Co., 135 U. S. 460, 10 Sup. Ct. 656, 34 L. Ed. 200, much relied upon in argument, the court say:

"It is a case where equity, true to its ideals of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors," etc.

No case has been cited, and I believe none can be found, where a defendant who confesses himself guilty of fraud has been allowed by such a plea to screen his guilt and protect himself from making discovery. As a general rule, a stranger to the transaction cannot question the adequacy of the consideration of a transfer. Beach's Modern Eq. Juris. § 345, and cases cited. If the defendants had purged themselves of fraud by suitable denial, and by giving the complainant the discovery to which he is clearly entitled under the bill, a different question might be presented. Under the record as it stands, with the damaging admissions of the defendants, the conscience of the chancel-

lor will not sustain such a shock at the conduct of the complainant in acquiring the cause of action as without further investigation to absolve the defendants from all accountability for the gross frauds they openly confess. The rule is familiar that "he who comes into equity must come with clean hands"; but there is another maxim of equal sanction, that "he who commiteth iniquity shall not have equity." It would be difficult to conceive of a case where it is more necessary, in order to reach the equities of the respective parties, that the court should have the benefit of the evidence on both sides.

For these reasons, the plea will be overruled, and the defendants required to answer the bill of complaint on or before the next May rule day.

In re WENDEL.

(District Court, E. D. Pennsylvania. April 2, 1907.)

No. 2,407.

BANKRUPTCY—SALE OF MORTGAGED PROPERTY—ALLOWANCE OF ATTORNEY'S FEE TO MORTGAGEE.

Under the settled rule of practice in Pennsylvania an attorney's commission, stipulated for in a bond and mortgage in case of foreclosure, is subject to the control of the court, which may reduce the amount of such commission in its discretion, and such rule will be followed by a court of bankruptcy in that state, and, where the mortgaged property has been sold by the trustee in bankruptcy, under its order, the mortgagee will be allowed such part of the commission as will fairly compensate his attorney for the services actually rendered in the matter.

In Bankruptcy. On certificate from referee.

W. W. Franklin, for bankrupt.

Harnish & Harnish, for claimants.

J. B. McPHERSON, District Judge. In disallowing the whole claim of the mortgagee to be allowed the attorney's commission of 5 per cent. stipulated for in the mortgage and the accompanying bond, I think the referee overlooked the well-settled rule in Pennsylvania practice that subjects the amount of such commission to the control of the court, by whom it may be reduced to such sum as appears to be an adequate compensation for the labor that has actually been performed. Daly v. Maitland, 88 Pa. 384, 32 Am. Rep. 457; Wilson v. Ott, 173 Pa. 253, 34 Atl. 23, 51 Am. St. Rep. 767. I agree with the referee that the whole sum should not be allowed. Much of the work that would otherwise have fallen to the attorney for the mortgagee was performed by the bankrupt's trustee, acting under an order of sale issued by the court, but some labor was certainly performed in a proper effort to collect the debt before the final order of sale was awarded, and for this I think an allowance ought to be made.

The order disallowing the whole of the commission must therefore be set aside, with direction to the referee to award the sum of $50 to the mortgagee on account of the commissions provided for in the mortgage and judgment bond.

THE WILLIAM E. REIS. THE JOHN W. MOORE. THE FANNY NEIL. THE JAMES B. EADS.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1907.)

Nos. 1,606–1,608.

1. COLLISION—VESSEL BREAKING FROM MOORINGS—NEGLIGENT INATTENTION TO LINES DURING FLOOD.

The William E. Reis, a large modern steamship, having on board 4,800 tons of iron ore, which lay moored for the winter at a dock in the Cuyahoga river, at Cleveland, broke from her moorings by reason of the parting of her lines during a flood following a heavy thaw, with rain, and drifted against and injured other vessels moored below. The river had been rising for two or three days, and due warning of the approaching flood had been given by the press. Only one person was kept on board as shipkeeper, and he was unable alone to manipulate the lines to equalize the strain thereon as the vessel was lifted by the rising water, and the evidence tended to show that the lines broke because of the unequal strain thereon. There were 50 other vessels moored in the river, none of which broke loose. *Held*, that such facts did not sustain the burden of proof resting on the vessel to show affirmatively that her drifting was the result of inevitable accident, or a vis major, which human precaution and a proper exercise of nautical skill could not have prevented, but that, whether or not her fastenings were originally sufficient, they ceased to be so when the flood came, especially in view of her great weight, and the failure to take precautions to make and keep them so rendered her liable for the resulting damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 85½.]

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

For opinion below, see 143 Fed. 1013.

H. D. Goulder and F. L. Leckie, for appellant.

R. M. Lee, for the John W. Moore and the Fanny Neil.

G. W. Cottrell, for the James B. Eads.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. About 8 o'clock on the morning of January 22, 1904, the William E. Reis, a large modern steamship, which lay moored for the winter at the River Furnace dock, a short distance above the Columbus Street Bridge, in Cleveland, broke from her moorings during a freshet or flood following a heavy thaw, with rain, and drifted down the Cuyahoga river in a current of four or five miles an hour. A short distance beyond this bridge she struck and slightly damaged the barge Fanny Neil, then struck and broke adrift the steam propeller John W. Moore, which in turn struck and broke adrift the steam propeller John B. Eads, and the Reis, with the Moore and the Eads, drifted down the river till they brought up against the Superior Street Viaduct, where the Moore was sunk and the Eads badly damaged.

In the libels a number of faults were charged against the Reis, among others the lack of sufficient winter moorings, a failure to take proper precautions to prevent her going adrift in the rising flood, and the neglect to place her in charge of a competent and careful shipkeeper,

with authority to call for help, who could and would oversee her fastenings, and make such alterations and adjustments as the changing conditions resulting from the rising river should from time to time demand. The answer of the Reis set up "inevitable accident," alleging that her moorings when she was tied up were proper and sufficient under all the conditions that might then have been reasonably anticipated, that she was provided with a proper and suitable shipkeeper, and that she broke away because of an unprecedented flood, which put her fastenings under a strain which was not anticipated and could not be provided against. The court below rendered a decree in favor of the libelants, but placed it upon the ground that the Reis and her owners were at fault in not manipulating her moorings and in not loosening or tightening her lines and cables in a proper and seamanlike manner during the critical hours of the rising flood immediately preceding the accident.

As to the character of the original moorings, the court expressed the view that there was great conflict in the testimony; but, giving full weight to it all, it would appear that the fastenings were such as would satisfy a prudent navigator that they were sufficient, if kept in proper adjustment, to repel the force of any flood reasonably to be apprehended. The court did not go further into this confiict, placing its opinion, as we have indicated, upon the neglect of the Reis to keep the fastenings in the proper adjustment during the critical period of the flood. The Reis was 436 feet long over all, 50 feet beam, and 28 feet depth. She came to the River Furnace dock laden with about 6,500 tons of iron ore, and before she broke away about 1,800 tons had been removed, so that at the time she went adrift she had about 4,800 tons of ore on board. Her master and crew left her about December 12, 1903, leaving her in charge of one Coyne as shipkeeper. Coyne was a young man about 30 years old. He had sailed about 5 years as an oiler, watchman, and second cook. The fastenings which held the Reis to the dock were described by her captain, and as stated in the opinion of the court below they were as follows:

"An 8-inch manila line, leading ahead some 30 feet from her forward starboard tow chock, to a pile on the dock. The first fastening abaft of this was six parts of a 6-inch manila line, leading from the breast chock in the windlass room to the dock timbers on the dock; three of these parts leading quartering ahead, and three parts about 45 degrees forward of abeam. From her forward deck engine, a short distance abaft of her forward house, she had a ⅞-inch steel cable leading ahead and one astern; also three parts of a 6-inch manila line leading ahead. From her amidships timberhead, abreast of her amidships deck engine, she had a ¾-inch wire cable leading ahead. From her after deck engine, she had a ⅞-inch steel cable leading ahead, and another one astern; and from the same chock she had two parts of a 6-inch line leading ahead. From the after chock she had three parts of a 6-inch line, two leading ahead and one leading astern. These lines were all made fast to dock timbers and piles on the dock; and, where bights were put out, these were fastened around dock timbers with toggles. The lines had various leads, some short and some long; but it is impossible, from the testimony, to give their definite length."

There are some discrepancies between this statement and the fastenings given in the answers; the principal one, it seems to us, growing out of the different location of the vessel. According to the captain, when the vessel was first tied up, she was against the dock, both for-

ward and aft, but away from the dock amidships some 10 feet, because of a bend in the dock. On Thursday, before she broke away, she was substantially against the dock aft, but her straight side forward was away from the dock from 8 to 10 or 12 feet. It was a matter of doubt as to what caused this, whether a shoal place near the dock or the presence of some obstruction. At any rate, after the rise came Thursday night, the vessel cleared the obstruction, whatever it was, and, before she broke away, came up close so she was against the dock forward.

It appears from the testimony that there was an unusual covering of snow and ice, with cold and freezing weather, up to January 19th, when the temperature arose to 40 degrees above. It began to rain heavily and thaw from that time till the 22d. The river began to rise during Wednesday night. The ice broke up, and the snow melted and disappeared Wednesday. During Thursday the water arose rapidly, until by 4 or 5 o'clock that afternoon, it had arisen to a height of 2 or 3 feet at the River Furnace dock, where the Reis lay. By this time the press had given information of the threatening conditions, and extra precautions were being taken by those in charge of vessels moored in the river. An examination of the fastenings of the Reis was made by several masters of what is called the "Corrigan Fleet," some of which lay close below, and they testified that in their opinion the fastenings were sufficient, in view of the conditions then existing and to be expected. It appears that there was a so-called shore captain of the Reis, who lived aboard another vessel some distance away. He came to see the Reis on Wednesday, two days before she broke away. He satisfied himself that she was all right, went back to his comfortable quarters, and stayed there until he heard that the Reis and her victims had brought up against the viaduct bridge. So that the responsibility for handling the Reis during Thursday night, when the flood was really on rested upon the shipkeeper, Coyne. Coyne was on board with a friend of his, who was not a sailor man, so the entire work in the management of the fastenings was left to Coyne.

Coyne testified that his attention to the rise in the river was first called by the strain upon the lines, which he noticed Thursday night, some time between 9 and 12 o'clock. The vessel then came up forward closer to the dock than she had been. Coyne then went back and found the strain on the aft breast line; "more strain on that than the others," so eased that off a little. That was the first line he surged. The line was made fast to the timberheads on the starboard side. He slacked it probably some inches. It might have been less than a foot; it might have been more. He could not say. This was probably between 10 and 12 o'clock at night. The next thing he did was to slack the cable amidships leading ahead. He "slacked that wire next." He took a couple of turns off, and slacked it away a little. He took the turns off the timberheads. After he slacked the cables, he did not do anything for a couple of hours. After midnight he went forward and slacked away the 8-inch line. That was after 1 or 2 o'clock in the morning. He probably slacked that 6 or 8 inches. Then he found that the lines were all about on an equal strain as near as possible, and he went back to get something to eat. This was the extent of the manipu-

lation of the fastenings by Coyne. When the Reis broke away, no dock timber or pile, and no part of the dock, broke or gave way, and no timberhead or other fastening on the Reis broke or gave way, but the lines and the cables on the Reis parted. It appears that as the water rose the forward part of the Reis went in tight against the dock. As a result the stern was forced out, the strain upon the lines aft became so great that they parted, the stern swung out into the river, and then practically immediately the boat went adrift.

But it is contended that since the shipkeeper was as good a man as is usually employed in that position, and since he did all he could, and nevertheless the boat went adrift, it was not his fault, or that of the owners, and must be charged up to inevitable accident. If we believed that under the circumstances, the owners ought not to have anticipated any difficulty in manipulating the fastenings of this vessel which Coyne would not be able to cope with, then we should concede the strength of the argument. But this was not the ordinary case. It does appear in the testimony that usually one shipkeeper alone would be employed for a vessel, and sometimes, not even one. Not infrequently one man would take care of a number of vessels. But these were all vessels which had been unloaded, and were tied up securely, so that it was not necessary to do more than guard them against thieves, and give warning of any unexpected conditions requiring additional aid to care for the vessel. In the present case, however, three-fourths of the cargo was still aboard. The vessel was tied up with ropes and cables. At first she was against the dock both forward and aft. Later, at the time the flood began, her position for some reason had been shifted, and she was from 8 to 12 feet away from the dock forward. She was an unusually large vessel, carrying a heavy cargo, that must have put an enormous strain upon her fastenings. Under these circumstances, ordinary care required the exercise of constant vigilance in order to keep the moorings properly adjusted and the strains equalized. The heavy current tended to alter the position of the vessel, and the strains thus caused were heightened and complicated by those due to the rise in the water. The weight of the testimony was to the effect that under the existing conditions one man could not handle the fastenings of the Reis. It required five or six. If it required five or six, then it was the duty of the Reis and her owners to provide that many. Sufficient warning was given, and there was no justification for running the risk of allowing a large vessel like this to run amuck where 50 or more were safely moored, yet liable to be cut down and sunk in case of disaster.

This case involves no new doctrine. The rule applicable is stated in The Louisiana, 3 Wall. 164, 18 L. Ed. 85, as follows:

"The collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major which human skill or precaution and a proper display of nautical skill could not have prevented."

Whether the moorings of the Reis were originally sufficient or not, they certainly ceased to be so when the high water came, and there was no one on board who could and did adjust them so as to relieve them from the unusual and heavy strains to which they were then

subjected. The other shipkeepers either moored their vessels better, or they knew better how to care for their fastenings under a strain; for, of the 50 there, the Reis was the only one that broke loose and went adrift. We think the fault was with the Reis. If she had been made secure, she could have been kept secure by proper attention. She was neglected at a critical time, with the usual result.

The judgments are affirmed.

MEMPHIS CONSOL. GAS & ELECTRIC CO. v. BELL.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1907.)

No. 1,621.

ELECTRICITY—NEGLIGENCE—ACTION FOR INJURY FROM ELECTRIC LIGHT WIRE—QUESTIONS FOR JURY.

Plaintiff's intestate, who was a lineman in the employ of a telegraph company, while stringing wire on a pole, received a severe electric shock which caused him to fall, resulting in his death. The pole also carried telephone wires, one of which was grounded, and two high current electric wires of defendant. These wires were placed next the pole on each side, about 18 inches apart, and one was spliced near the pole, and at such splice the insulating tape had worn or burned away, leaving the wire exposed, but the absence of insulation was not noticeable without close inspection. The deceased was an experienced lineman, and was familiar with the pole and the wires thereon. No one saw the accident, but there was evidence tending to show that the shoulder of deceased came in contact with the exposed part of the electric light wire while his foot was touching the grounded telephone wire which was some five feet below. *Held* that, in view of the fact that defendant was required to insulate its wires and attempted to do so, the question of its negligence in placing the wires so near together, and in failing to properly inspect the same so as to keep the insulation in a reasonably safe condition, where it was known that linemen were liable to come in contact with them, was for the jury, as also the question of the contributory negligence of the deceased; there being no evidence that he knew the wire was not properly insulated, and did not rely on its being so insulated, as he had reasonable grounds to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, §§ 7–11.]

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

E. E. Wright and Edwin Hedrick, Jr., for plaintiff.

E. G. Bell, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for personal injuries resulting in the death of the plaintiff's intestate, D. L. Brooks, a lineman in the employ of the Western Union Telegraph Company at Memphis. This company and the Cumberland Telephone & Telegraph Company were originally joined as codefendants, but during the first trial the suit was dismissed as to them.

The original declaration contained a general charge of negligence against all three companies, and in addition a charge that the present defendant, the Memphis Consolidated Gas & Electric Company, had

negligently failed to properly insulate its wires where it was known the plaintiff's intestate and other linemen of the Western Union Telegraph Company were compelled to work, and that it negligently failed to inspect its wires so as to keep them in a reasonably safe condition. The case was twice tried, and during the second trial the plaintiff was permitted to amend his declaration by alleging that the defendant negligently failed to properly construct its wires upon the pole from which the plaintiff's intestate fell, and placed its high tension wires too close together, "the said negligent construction and maintenance consisting in placing said high tension wires eighteen inches apart." As already indicated, the case has been twice tried, the court setting aside the first verdict, because not satisfied the plaintiff was entitled to recover, and sustaining the second, although still indicating the impression that it should have withdrawn the case from the jury. In other words, the court was unable, after sitting through two trials, to satisfy itself upon the point whether the case was or was not one for the jury. The court indicates, however, in its final word that it is disposed to think that in this circuit perhaps a more stringent rule than obtains elsewhere has been established with respect to companies using dangerous currents of electricity upon wires strung in the streets.

It is now contended that the court should have directed a verdict for the defendant on the ground that the testimony not only failed to sustain the charge of negligence, but made out a clear case of contributory negligence. On August 3, 1905, D. L. Brooks was employed by the Western Union Telegraph Company. He was an experienced lineman, having been so engaged for several years, and was familiar with the pole on the corner of Main and Calhoun streets, in Memphis, on which were strung not only the telegraph wires of the Western Union Telegraph Company, but also the telephone wires of the Cumberland Telephone & Telegraph Company, and, on the lower crossarm, the electric light wires of the defendant, the Memphis Consolidated Gas & Electric Company. The pole stood between two inside parallel electric light wires of the electric company, located about 18 inches apart. About four feet below the crossarm which carried the electric light wires was a messenger wire of the Cumberland Telephone & Telegraph Company, which was "grounded," and this fact was known to Brooks. The inside electric light wire west of the pole was fastened together by a splice at a point about 18 inches north of and perpendicular to the crossarm. The distance from this joint in the electric light wire to the nearest point of the messenger wire leading out from the pole on its west was about five feet. On the day mentioned Brooks was ordered to string some wires for the Western Union Telegraph Company on this pole. While engaged in this work, he received a severe shock of electricity and fell from the pole to the pavement, receiving injuries from which he died within a few hours. No witness saw him fall. An examination of his person showed that he had been burned in two places, on the left foot and right shoulder. These are the points of his body which would naturally have come in contact—the first with the grounded messenger wire, and the second with the electric light wire at the point where it was spliced. An

examination of this splice disclosed the fact that the tape had become worn and weather-beaten and, at the point where Brooks' shoulder touched it, there was no insulation. The current of electricity had burned away the tape which remained, so the wire at this point was bare. There was testimony which showed that Brooks had been warned about these electric light wires and all similar wires; that they were dangerous, and, whether insulated or not, they should be treated as live wires. These were high tension wires, carrying a voltage of from 2,000 to 2,300 volts, an electric current dangerous to life.

The negligence charged against the defendant was in placing these high tension wires too close together on the pole, and in not properly insulating the same, and in failing to inspect them so as to keep them in a reasonably safe condition. According to the testimony, the high tension wire which was spliced and not properly insulated, and from which Brooks received the shock which resulted in his death, was not located more than 18 inches from the next high tension wire on that crossarm, and the pole was between. We think that the question was properly left to the jury as to whether the company was not negligent in placing these wires in such dangerous proximity. The testimony further showed that the high tension wire in question was not properly insulated at the splice or joint. But it is said that the lack of insulation at this point could not have affected injuriously the plaintiff's intestate, because it is impossible to effectively insulate a high tension wire of this character, and the deceased was instructed to treat all such wires as live wires, just as if no attempt had been made to insulate them. But, in view of the fact that such wires are required to be insulated, and that an attempt in this case was made to insulate the particular wire, and to all appearance it was insulated, and especially since it conclusively appears from the burns received by the plaintiff's intestate that the deadly current did actually pass through the joint or splice where the insulation had worn off, we think the court properly left it to the jury to say whether the defendant was not wanting in proper and ordinary care in placing these high tension wires so close together, and in permitting one of them to become uninsulated at the very point where the lineman was liable to brush against it in ascending the pole.

We next come to the question whether the court was justified in leaving the matter of contributory negligence to the jury. There was some testimony tending to show that the lineman, Brooks, on ascending the pole, could have observed, if he had kept his eyes open, that the electric light wire was exposed at the joint or splice and therefore was not properly insulated, but we think it was a question for the jury, since the testimony upon this point was conflicting, as to whether the lack of insulation could be observed by the lineman while ascending the pole. It is certain that after the accident a special examination had to be made in order to discover the extent to which the insulation was worn off, and to thoroughly satisfy himself on that point, the city electrician placed his finger upon the wire where the insulating tape appeared to be weather worn, and thus allowed himself to be slightly shocked and burned. In taking this view, of course, we re-

iterate the position taken with respect to the question whether the negligence of the defendant was properly left to the jury, that whether the high tension wire was insulated or not must not be regarded as unimportant, as if the company were under no obligation to keep such wires insulated, and linemen had no right to act upon the supposition that they were insulated. While it may be difficult to insulate high tension wires, and to keep them insulated under all circumstances, we think in cases like the present, where such wires are strung on the poles along with low tension wires, requiring frequent attention and repairs by the linemen of telegraph and telephone companies, the tendency of the courts is to hold that ordinary care and prudence requires their insulation to be maintained by reasonable inspection and repair, and by the usual methods adopted for such purposes. Memphis Con. Gas & Elec. Co. v. Letson, 135 Fed. 969, 68 C. C. A. 453.

The strongest point urged against a recovery in this case is that it appears from the burns found upon the body of the plaintiff's intestate that he was in contact with the grounded messenger wire at the time he touched the uninsulated electric light wire, and thus received the current which caused his fall. No one saw lineman Brooks climb the pole and no one saw him when he fell, and his location when he received the current is a matter of inference. The burn through his shirt and on his shoulder indicates that that portion of his body was in contact with the electric light wire where the insulation had worn off near the joint or splice, while the burn on his foot, although on the upper and not the lower part, indicates, so the witnesses say, that the foot was on the grounded wire, but that the current of electricity in passing out of the foot went through the upper part of the shoe, instead of the lower, because there was less obstruction there, the sole of the shoe acting as a resistant to the current. We must concede, however, that if Brooks put himself in contact with the grounded wire, and then touched the uninsulated electric wire, knowing it to be uninsulated, he was guilty of contributory negligence, for he knowingly and unnecessarily put himself in a position of great peril. Williams v. Choctaw, etc., Ry. (C. C. A.) 149 Fed. 104. And this is true if he knew that by touching the electric light wire, whether insulated or not, while standing upon or in contact with the grounded wire, he would expose himself to a dangerous current of electricity. In either event, if the proof upon these questions was conclusive, the court should have directed a verdict for the defendant upon the ground of contributory negligence. The question narrows itself to this: Whether, although the electric light wire was apparently insulated, the deceased, while in contact with the grounded wire, was as a matter of law guilty of negligence in permitting himself to come in contact with it. In other words, ought the jury to have been permitted to pass upon the question whether the deceased was negligent in permitting himself to come in contact with the electric light wire under the circumstances? While the question involved is a close one, and the court naturally remained in doubt as to the correctness of its conclusion until the end, we think the decision was a correct one. The matter was properly left with the jury. It is not to be assumed that Brooks intended to

commit suicide. The natural inference is that he relied, and had reasonable grounds to rely, on the insulation of the electric light wire when he attempted to pass by it while in contact with the grounded messenger wire. Whether he did so rely, and whether he had good reason to, and whether under the circumstances he was or was not guilty of negligence, were, in our opinion, questions which the court, under pertinent instructions, properly left for the jury to decide.

Judgment affirmed.

STANDARD OIL CO. v. PARKINSON.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

No. 2,461.

1. MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER—TEST.

The test of one's liability for the negligent act or omission of his alleged servant is his right and power to command and control his imputed agent in the performance of the causal act or omission at the very instant of its performance or neglect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1209, 1226.]

2. SAME—SCOPE OF EMPLOYMENT.

A master is liable for damages caused by the negligence of his servant within the scope and in the course of his employment, although he neither directs nor is aware of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1226.]

3. SAME—ACTION—QUESTION FOR JURY.

One Perry was intrusted with the keys of the storage tanks of the Standard Oil Company at a town in Nebraska, drew oil and gasoline from them, hauled and delivered these articles to customers of the company in neighboring towns, sold them when he could at prices fixed by the company, collected the prices of the articles delivered and sold, and remitted their proceeds weekly to the company, which paid him monthly one cent a gallon of the articles thus delivered and sold. He used a wagon of the company and his own horses and selected his own routes and times to haul the oil and gasoline, and, as he was driving across a railroad track, an engine collided with the wagon and a serious injury resulted.

Held, there was substantial evidence that Perry was the agent of the company at the instant and in the act of driving upon the railroad crossing, so that the question whether he was an agent or an independent contractor was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1274.]

4. DEATH—ACTIONS—PRESUMPTIONS.

In Nebraska the legal presumption is, in an action under sections 2503, 2504, Comp. St. Neb. 1901, for damages for the death of a person by the wrongful act of another, that the widow and children of the deceased person were dependent upon him for support and maintenance, and that they sustained pecuniary injuries by his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 77.]

5. SAME—ADMISSIBILITY OF EVIDENCE.

The legal presumption of the dependence of the wife and minor children upon the husband and father during his lifetime for support is rebuttable, not conclusive, and evidence by a plaintiff in support of it before she knows whether or not the defendant will present evidence to overcome it is neither incompetent nor immaterial.

(Syllabus by the Court.)

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

William D. McHugh (Alfred D. Eddy, on the brief), for plaintiff in error.

Ed. P. Smith (John J. Sullivan and C. J. Smyth, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On October 27, 1904, J. D. Perry drove his team, attached to a wagon of the Standard Oil Company loaded with oil and gasoline, upon a crossing of the Chicago, Burlington & Quincy Railroad Company, where an engine of that corporation driven by John C. Parkinson collided with it. The gasoline and oil took fire and burned the engineer so that he died. Rosa Parkinson, his widow and the administratrix of his estate, brought this action against the oil company for causal negligence. She averred that Perry was one of the company's servants, that he negligently drove his team upon the crossing and thereby brought about the death of the engineer. The oil company denied these allegations, and the jury returned a verdict for the administratrix. At the close of the evidence the court denied the motion of the defendant to return a verdict in its favor, and this ruling is assigned as error, upon the ground that there was no substantial evidence in the case that Perry was the agent or employé of the oil company in the act of driving his team upon the railroad track at the time of the accident.

The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, "respondeat superior," in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond. Brady v. Chicago Great Western R. Co., 114 Fed. 100, 107, 52 C. C. A. 48, 55, 57 L. R. A. 712; Atwood v. Railway Co. (C. C.) 72 Fed. 447, 454, 455; Byrne v. Railroad Co., 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693; Hilsdorf v. City of St. Louis, 45 Mo. 94, 98, 100 Am. Dec. 352; Town of Pawlet v. Rutland & W. R. Co., 28 Vt. 297, 300; Miller v. Railroad Co., 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; Wood, R. R. § 388; Donovan v. Construction Syndicate (1893) 1 Q. B. Div. 629; Rourke v. Colliery Co., 2 C. P. Div. 205. But a master is liable for damages caused by the negligence of his agent or servant within the scope and in the course of his employment, although he neither directs nor is aware of his acts. Philadelphia & Reading R. Co. v. Derby, 14 How. 468, 486, 14 L. Ed. 502; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 522, 10 Sup. Ct. 175, 33 L. Ed. 440. In the light of these rules of law, let us see whether or not there was any substantial evidence in this case that Perry was the agent of the oil company in the act of driving his team upon the track of the railroad company. There was testimony to the existence of these

facts: The oil company had storage tanks at Aurora, in the state of Nebraska, whence its oil was hauled by Perry's team to its customers in neighboring towns. The company owned the wagon and Perry the horses. The company fixed the prices of the oil and gasoline. Perry took them from the storage tanks, hauled and delivered them to the customers of the company in neighboring towns, sold all that he could in lots of 50 gallons each to others, collected all the money for these deliveries and sales, remitted it to the company weekly, and once a month the company paid him one cent for each gallon so delivered and sold. He devoted the principal part of his time to this occupation. He was not engaged for any specific length of time, and he was free to abandon the work, and the oil company was at liberty to discharge him at any time. The company directed him to keep its customers in four towns supplied with oil and gasoline, but it did not direct him when or by what routes he should draw these articles to them. He went to the customers whenever they needed the oil or gasoline which he supplied. Some time after Perry entered upon his work the company directed him to deliver oil to its customers at another town, Phillips, and he did so. He was on his way to Phillips when the accident which caused this suit occurred. By means of the horses and wagon he kept the customers in the towns it specified supplied with oil and gasoline pursuant to its direction. But he determined when, how, and by what roads he would drive his team to each town and customer. Perry testified of the beginning and end of his occupation in this way:

"Anyway, about November, Mr. Fender came here and I talked over the matter with him and he decided to hire me, and so I went to work for them. * * *

"Q. When did you quit their employ? A. Along in the fall.

"Q. How did you come to quit at that time? A. How?

"Q. I mean did you quit voluntarily or did they discharge you? A. They discharged me."

The witnesses divided upon the question whether or not the contract between the oil company and Perry was in writing. If it was, the written agreement was not in evidence, and the facts which have been recited are deduced from oral testimony. If these facts show that Perry was an independent contractor, or that at the instant or in the act of driving his team upon the crossing he was without the control and direction of the oil company, the latter was not liable for his act and a peremptory instruction in its favor should have been given. The facts that the storage tanks, the gasoline, the oil, the wagon, and the customers were the oil company's, that the company delivered to Perry the keys and the care of the tanks, that he drew the oil and gasoline from them into the wagon, then hauled it with his team to the customers, sold to others when he could, collected the proceeds of the sales and deliveries and remitted them to the company weekly, and was paid by the company one cent a gallon on the articles delivered and sold, are consistent with the inference that in the performance of all these acts Perry was the agent of the company, and that his relation began with the hiring and ended with the discharge. It is true he might have been the servant of the company in the care, delivery, sale of, and collection for the oil and gasoline and his own master in the selection of the routes over which, and the times and manner in

which he would drive his team to deliver the goods. But the latter acts are ordinarily within the scope and course of the employment of an agent to sell and deliver goods and to collect and remit their proceeds, and if, in this case, they were separated from the sales, deliveries, and collection, persuasive evidence is requisite to establish that fact, because it is out of the ordinary course of commercial dealings. The fact that Perry's compensation was agreed to be paid and was paid in solido for all that he did, including his hauling of the oil and gasoline and his sales, deliveries, collections, and remittances, indicates that all these acts were bound together and performed in the same relation, and the evidence that they were either by agreement or in fact so separated that he was an independent contractor in the performance of the former and the agent of the company in his relation to the latter is not so conclusive or convincing that all reasonable men in the exercise of an honest and unprejudiced judgment would agree that at the instant and in the act of driving upon the railroad Perry was his own master or without the command and direction of the company, while in the care, sale, delivery, and collection of the price of the oil and gasoline he was its agent. It is indisputable that there was substantial and persuasive evidence that in the performance of the latter acts Perry was the agent of the company subject to its command and direction. The driving of the team was an act ordinarily within the scope and course of such an agency, and, in view of the fact that the hauling and driving were paid for together with the acts of care, sale, and delivery, the evidence in this case is not so conclusive that he was not the agent of the company and subject to its command in the hauling and in the driving upon the crossing that it was the duty of the court below to withdraw that issue from the jury and to so hold as a matter of law. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 522, 10 Sup. Ct. 175, 33 L. Ed. 440; Waters v. Pioneer Fuel Co., 55 N. W. 52, 52 Minn. 474, 38 Am. St. Rep. 564.

This action was brought under sections 2503 and 2504 of the Compiled Statutes of Nebraska of 1901, which authorized the administratrix of the estate of one killed by the wrongful act of another to maintain an action for the death for the exclusive benefit of the widow and next of kin, and provide that the jury "may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars." The next of kin in the case in hand were the minor children of the deceased. Counsel for the company complain that the court below permitted the widow to answer this question:

"Were you and your children dependent upon your husband for support and maintenance? A. Yes, sir."

They insist that this ruling was error, and cite the decisions of the Supreme Court of Nebraska which have adopted the rule that evidence of the value of the estate left by the deceased is inadmissible for the reason stated by Judge Cooley in Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205, 214, 215, in these words:

"What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his lifetime; and to show that the family was poor has no tendency toward showing whether this was or was likely to be, large or small. One man contributes liberally in aid of his poor relatives, another delights in contributing luxuries where comforts are already abundant; but, when the contribution is cut off in either case, the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount must, when lost, be compensated to the same extent whether the loser be rich or poor." Chicago, R. I. & P. Ry. Co. v. Hambel, 89 N. W. 643, 644, 2 Neb. (Unof.) 607; Chicago, R. I. & P. Ry. Co. v. Holmes, 94 N. W. 1007, 68 Neb. 826.

But the evidence here introduced was not of the amount of the estate of the deceased, but of the dependency of the wife and children upon him in his lifetime for support and maintenance. The statute limited the recovery in this action to just compensation for the pecuniary injuries resulting to the beneficiaries of the statute from the death, and one of the objects of the introduction of this testimony was to prove that they suffered pecuniary injuries because they lost by the death of Parkinson their means of support and maintenance. If the beneficiaries of the statute in this action had been collateral heirs of the deceased or persons not legally dependent upon him in his lifetime, proof of their dependence upon him or of pecuniary injuries to them from his death would have been indispensable to a substantial recovery. Chicago, R. I. & P. Ry. Co. v. Young, 58 Neb. 678, 79 N. W. 556; Chicago, B. & Q. R. Co. v. Van Buskirk, 58 Neb. 252, 78 N. W. 514; Chicago, Burlington & Q. R. Co. v. Bond, 58 Neb. 385, 78 N. W. 710.

Proof of this nature is unnecessary when the beneficiaries are the widow and minor children of the deceased and where the prima facie legal presumption of their dependence is not overcome by countervailing evidence. But this is because they are legally dependent upon the husband and father during his lifetime, and the presumption of the law consequently is that they are pecuniarily injured by his death. Kearney Electric Co. v. Laughlin, 45 Neb. 390, 395, 63 N. W. 941; City of Friend v. Burleigh, 53 Neb. 674, 676, 74 N. W. 50; Omaha & Republican V. R. Co. v. Crow, 54 Neb. 747, 750, 74 N. W. 1066, 69 Am. St. Rep. 741. The presumption of legal dependence, however, is not a conclusive, but a rebuttal, presumption. The defendant had the right to meet and overcome it by evidence to the contrary, and, if it had done so, the resultant presumption of pecuniary injury from his death must have fallen. As the presumption was rebuttable and the plaintiff could not know before the defendant introduced its evidence whether or not it would present testimony to overcome it, her evidence in support of it was neither incompetent nor immaterial.

The judgment must be affirmed; and it is so ordered.

BOOKMAN v. SEABOARD AIR LINE RY.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1907.)

No. 670.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS.
Where intestate, a railroad employé, was going in the direction of his employer's terminal yards at the time the accident occurred, and his duties were such that he was required to be on the yards and go to and from the same, his employer owed him the duty to exercise reasonable care for his safety while he was thus engaged.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 212, 218.]

2. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
Rev. St. Fla. 1892, § 2345, provides that no person shall recover damage from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence; but if the complainant and the agents of the company are both at fault, the former may recover, the damages to be diminished by the jury in proportion to the amount of default attributable to complainant. *Held* that, while such section practically eliminates the doctrine of contributory negligence, it does not entitle a complainant to recover without proof that the particular negligence of which defendant was at the time guilty was the proximate cause of the injury.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 795–800.]

3. RAILROADS—INJURIES TO PEDESTRIANS—PRESUMPTIONS.
Where just prior to intestate's injury by being struck by a railroad train he was walking alongside the track at a place where he could not have been injured, the engineer and those in charge of the train were entitled to assume that he would not leave such place and go upon the track in front of the train.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1279, 1280.]

4. SAME—NEGLIGENCE—PROXIMATE CAUSE.
Where intestate stepped onto a railroad track in front of a train and was killed, and the engineer did not see him at all, the fact that the railroad company was negligent in failing to equip the engine with air brakes was not the proximate cause of the accident.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1320.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Columbia.

H. P. Green, for plaintiff in error.

John J. McMahan (Lyles & McMahan, on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge. This is an action brought by Mary A. Bookman, plaintiff, widow of A. G. Bookman, deceased, against the Seaboard Air Line Railway, defendant, for damages for the alleged negligent killing of the said A. G. Bookman while on duty on the yards controlled by the Terminal Company at Jacksonville, Fla., on the 16th of January, 1904, by the engine of the defendant company. The action

was brought in Lexington county, S. C., and removed to the Circuit Court of the United States at Columbia, that state. This action was instituted under the provisions of the Florida statute, which are as follows:

"Sec. 2342. Whenever the death of any person in this state, shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, carelessness, negligence or default of any agent of any corporation acting in his capacity of agent of such corporation, and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then and in every such case the person or persons who, or corporation which would have been liable in damage, if death had not ensued shall be liable to an action for damages notwithstanding the death shall have been caused under circumstances as would make it in law amount to a felony.

"Sec. 2343. Every such action shall be brought by and in the names of the widow or husband, as the case may be, and when there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and when there is neither husband nor minor child or children, then the action may be maintained by any person or persons dependent on such person killed for support; and when there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed," etc.

Chapter 4071, p. 113, of the Laws of Florida, approved May 4, 1891, reads:

"Section 1. A railroad company shall be liable for any damages done to persons, stock or other property, by the running of the locomotive or cars or other machinery of such company or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The plaintiff's intestate had been employed for a short time by the Atlantic Coast Line Railroad Company in the performance of duties which required him to go more or less on the terminal yards. Just prior to the time when he was injured he was walking alongside the track of the main line, and suddenly stepped on the track a few feet in front of the engine, and was immediately run over and killed.

In determining the merits of this controversy, it is necessary to decide whether the death of the plaintiff's intestate was due to the negligence of the defendant company. The intestate of plaintiff in error was going in the direction of the terminal yards at the time the accident occurred, being on the main line about 100 yards from the place where his employment required his presence. His duties were such that he was required to be on the yards and to go to and from the same, and while thus engaged the defendant company owed him reasonable care. In order to enable the plaintiff to recover in this action, it is necessary to show by competent evidence that the defendant company carelessly and negligently failed to do that which would have prevented the injury.

Section 2345 of the Revised Statutes of Florida (1892) is a part of the chapter on negligence, and confers a right of action in case of death resulting from the negligence or wrongful act of another, and was relied upon by plaintiff in error, and the court below ruled that the case at bar was governed by this provision of the Florida statute. The section in question is as follows:

"No person shall recover damage from a railroad company for injury to himself, or his property where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him."

This section practically eliminates the doctrine of contributory negligence; nevertheless, in order to enable the plaintiff in error to recover, it must be made to appear that the particular negligence of which the defendant was at the time guilty was the proximate cause of the injury.

In the case of Railroad Co. v. Williams, 37 Fla. 406, 20 South. 558, among other things, the court held:

"Though the defendant may be guilty of some negligence at the time of the accident, yet, in order to justify a recovery, it must be made to appear that the particular negligence of which it was at the time guilty was the proximate cause of the plaintiff's injury."

Under this decision there can be no apportionment of negligence in a case where the negligence of the defendant is not directly and proximately the cause of the result, or if, as in this case, plaintiff's negligence was the proximate cause of the result. Section 2345 obviously means that, in all cases where both plaintiff and defendant are at fault, the plaintiff shall be entitled to recover, but the damages to be awarded by the jury shall be reduced in proportion to the negligence of the plaintiff. However, this statute cannot be construed to mean that the plaintiff is entitled to recover in cases wherein the proof shows that the defendant could not by the exercise of due care have prevented the injury. The evidence in this case shows conclusively that just before plaintiff's intestate was injured he was walking alongside the track at a place where he could not have been injured by the engine of the defendant, and the engineer and those in charge of the train had a right to assume that he would not leave a place of safety and place himself in a position of imminent peril.

F. O. Blocker, foreman of the Atlantic Coast Line Railroad Company's switch engine, testified that he was near the scene of the accident. He was asked the question if he saw Bookman step on the track in front of the engine; to which he answered:

"I saw him just as he stepped in front of the engine; it was all done in the twinkling of an eye; I never did know until some one up there passed back and said that it was Mr. Bookman; that is all I knew."

He also testified that the deceased was about five or six feet in front of the engine when he stepped on the track, and that the engine was running about five or six miles an hour. There were a number of other witnesses who testified for the plaintiff and defendant. One witness

for the plaintiff, a colored switchman, testified that the engine was running about 15 or 20 miles an hour, but there was no evidence which tended to show that the engine was running at a dangerous rate of speed, nor that the life of plaintiff's intestate could have been saved under the circumstances, had the engine been running at a less rate of speed. It was also shown that the bell was ringing, and the engineer stopped the train the moment that he was informed that the deceased was on the track. If the engineer had seen the plaintiff's intestate walking on the track any considerable distance from the engine, he would have been justified in assuming that he would leave the track before the engine reached him. This is a reasonable and just rule, and in the absence of which it would be impossible to operate trains without being continuously compelled to stop whenever a person should be observed walking on the track.

The court which tried this case below, in its charge to the jury, among other things, said:

"Now, what is the proof as to the defendant company? The testimony upon which the plaintiff relies, the only testimony, is that of a colored witness, a switchman, who says that the engine was running at the rate of 15 to 20 miles an hour. There is no proof that that was a dangerous rate of speed; 15 to 20 miles an hour is not considered usually a dangerous rate of speed; it may or may not be, according to circumstances. But let us assume that 15 to 20 miles an hour was a dangerous speed (although there is no proof of it); the court would not be justified in imputing negligence, perhaps, if it assumed that that was a dangerous rate of speed. It was not in the circumstances proved, there was no reason that I can see, why the engines could not move around there with as much speed as it was proper; but it appears that for their own purposes the yard-master there gave instructions not to move at a greater rate than about six miles an hour, and all the witnesses for the defendant testify that the speed was not greater than six miles an hour. Only one witness testifies that it was greater, and that is a colored switchman. The other witness for the plaintiff, the engineer, testifies that he was running only about six miles an hour, so the overwhelming preponderance of testimony is that the engine was not running at a greater rate of speed than six miles an hour. Testimony is that the engine was old, ramshackle, in a very impaired condition. If it was in as bad condition as plaintiff's witnesses or witness attempts to show, the wonder is that it was running six miles an hour. But there is something more; it had stopped up at the semaphore, at the block, and had just started and gone about a hundred yards, according to the testimony, as the court recalls it, so that an engine of that kind, operating in the railroad yards, ramshackle, impaired, it is extremely doubtful whether it was possible for it to get up a speed of 20 miles in the distance of a hundred yards. So all that testimony, and all the inferences that would naturally and reasonably be drawn from the testimony, lead me to conclude that the engine was not running at a greater speed than six or seven miles an hour.

"Then, what else? The same witness who testified as to the speed has testified that the bell did not ring. I was rather favorably impressed by that witness, and if the balances are against any one man I think that the chances are that he is to be believed as against any other one man, colored though he was; but all that he could say was that he did not hear it. He could not say that it did not ring; he might truthfully say that he did not hear it. I conceive that he told the truth; he probably did not hear it. The ringing of a bell on yard engines moving around is a thing of such constant occurrence that it might take place without a man's attention being fixed upon it; but the other witness for the plaintiff, the engineer, Titus, swore that it did ring. The painter, a man who was not employed by the company, a man who was some distance off, testified that he heard it ring. A man down

at the shop testified he heard it. Blocker testified that he heard it. So how can I conclude that the bell did not ring when five or six witnesses, as credible and likely to know as the switchman, testified that they heard the bell ring, and the only testimony, on the other side is that one man who did not hear it? I think that the overwhelming preponderance of the testimony is that the bell was ringing. If it was a case where the testimony would be equally balanced, or where reasonable men might reasonably draw different conclusions from it, it would be my duty to leave it to the jury, I would say that it would be my pleasure to do so; I don't like to decide questions which I can avoid deciding. Questions as to the credibility of witnesses, and on questions of fact, as a rule, I prefer to take the judgment of the jury; but where a case is so plain that I would be bound, if the jury should find the other way, to set aside their verdict, it is my duty to express my own opinion. The only testimony tending to show negligence on the part of this defendant company is that that engine was in bad condition, and that it was not equipped with air brakes. If there was any ground to conclude that the failure to have a proper equipment contributed to this result, it would be my duty to leave it to the jury—that is, contributed as a proximate cause—but under the proof here, the fact that there were no air brakes could not in any view be considered as the proximate cause of this injury. The engineer did not see the man at all, and therefore he could not have put on his air brakes. It follows that the absence of air brakes did not contribute to the result, and, not being a proximate cause, neglect in that respect will not be considered."

The foregoing statement makes it perfectly clear that in no view of the case would the plaintiff be entitled to recover in this action. There is nothing in the evidence to show that the defendant in error was in any wise responsible for the death of plaintiff's intestate. This would be true under any rule of construction, and it is especially true under the statute which was invoked by plaintiff in error in the trial below.

This case was tried with great care by the learned judge below, and every opportunity was afforded the plaintiff in error to present her case in the strongest possible light, and, after carefully considering the different assignments of error, we are of opinion that the same are without merit. Therefore the judgment of the Circuit Court is affirmed.

ENOCH MORGAN'S SONS CO. v. WARD.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1907.)

No. 1,345.

1. TRADE-MARKS—UNLAWFUL COMPETITION—DRESS OF PACKAGE—ELEMENTS—ENSEMBLE.

A manufacturer may put forth his goods in a dress, in no element of which—size, shape, color, lettering, word, or symbol—has he an exclusive right of use; and yet, if the ensemble has come to be a public guaranty of origin and quality, he may secure protection against unfair trade of a preying competitor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 21, 72.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. SAME—INVENTED WORDS—SYMBOLS.

A manufacturer may put forth his goods in a distinctive or in a common dress, and may build up a good will by associating his product in the

public mind with an invented word or symbol, in which he has the exclusive right of use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 8.]

3. SAME—WORDS AND SYMBOLS.

Where a word or symbol is of a character to be appropriated, and has been duly appropriated as a trade-mark, it becomes property, which a competitor has no right to use, either alone or in connection with matter to which its owner lays no claim, without such owner's consent.

4. SAME—DIFFERENT TRADE-MARKS—SEPARATE USE.

Where complainant adopted two trade-marks which it registered and used separately in its advertisements, one being a coined word and the other a pictorial representation, the fact that both were jointly used on the wrapper of its manufactured article did not enable a competitor to use one of them alone.

5. SAME—SAPOLIO—INFRINGEMENT.

Plaintiffs' predecessor placed on the market a scouring soap, in the form of a cake, wrapped in silver paper, with a broad blue band having the name of the firm on one side and the coined word "Sapolio" on each end and on one side, and the pictorial representation "of a young man's face observing itself reflected in a pan" on one side. After complainant's product had been well and widely known, defendant put out a powder in a round can, dressed in yellow, called "Sopono" with a young woman's face observing itself reflected in a pan. *Held*, that defendant's label constituted an infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 74.]

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

Appellant's bill for alleged infringement of two trade-marks was dismissed for want of equity.

In 1869 appellant's predecessor, the firm of Enoch Morgan's Sons, put on the market a scouring soap for general household use. In connection with its introduction they adopted two marks. One was a word, then coined by them, "Sapolio." The other was a pictorial representation, then designed by them, of "a human face observing itself reflected in a pan." The business has been carried on continuously by the firm and by appellant as successor. Immense sums have been spent in advertising, and a good will of great value has been built up. The preparation was put forth in the form of a cake, wrapped in silvered paper, with a broad blue band having the name of the firm on one side, the word "Sapolio" on each end and on one side, and the pictorial mark on one side. In the advertisements, continuously and extensively displayed in magazines and other publications, the "dress" of the preparation was not taught to the public; the dominant note was always "Sapolio"; and with the word the fact was insisted upon, sometimes in connection with the pictorial mark, but more frequently by the use of verbal representations only, that the preparation was the best on the market for cleaning, scouring, and polishing household utensils.

About two months before the bill in this case was filed, appellee put out two cleaning, scouring, and polishing compounds. At that time the names of preparations in competition with "Sapolio" did not approximate the name "Sapolio"; they were advertised as "Scourene," "Bon Ami," "Pride of the Kitchen," "Silexo," "Crystal Mineral," and so on. One of appellee's preparation is in the form of a powder that "saves money, lightens labor, brightens life." It is contained in a round can, dressed in yellow. On the package appear in large letters the coined word "Sopono" and the name and place of appellee as maker. The other of appellee's preparations is "Mirror Scouring Soap," in cake form, also dressed in yellow. On the package the most conspicuous thing is a pictorial representation of "a human face observing itself

reflected in a pan." There was no proof of confusion of the respective packages.

In response to appellant's case as above stated, appellee introduced no evidence.

Archibald Cox and William O. Belt, for appellant.

Harry G. Colson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

A manufacturer may put forth his goods in a dress, in no element of which—size, shape, color, lettering, word, or symbol—has he an exclusive right of use; and yet, if the ensemble has come to be a public guaranty of origin and quality, he may secure protection against the unfair trade of a preying competitor. His right to exclude others from using the dress, if an analogy to the patent law may be drawn, is like the right of the patentee who claims a new combination of old elements. In such a case, "we should look at the matter as a whole, both at the resemblances and the differences to ascertain whether, in view of the differences, the resemblances are so marked that the ordinary purchaser would be likely to be deceived." Postum Cereal Co. v. American Health Food Co., 119 Fed. 848, 56 C. C. A. 360. If the case at bar is of that category, appellant was rightly defeated, for the differences in dress are confessedly radical.

Also, a manufacturer may put forth his goods in a distinctive or in a common dress and may rely upon building up a good will by associating in the public mind his product with an invented word or symbol in which he has the exclusive right of use. His right to exclude, if a further analogy to the patent law may be drawn, is like that of the primary inventor who produces a new integer in the useful arts. In such a case, a commercial pirate should not be permitted to escape the charge of infringement by putting a different dress on the competing article he is offering in association with the invented word or symbol. "The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof." Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997. If a word or symbol is of a character to be appropriated, and if it has been duly appropriated as a trade-mark, it becomes property; and a competitor's use thereof, either alone or in connection with matter to which its owner lays no claim, without the owner's consent, cannot be lawful.

The injury to property, which, of course, is the basis of a trade-mark suit, is well illustrated by this case. Appellant's constant insistence has been upon the word "Sapolio." The first customer, unfamiliar with the dress of the package, was taught by the advertisements to ask for the article by the arbitrary name. New customers have been continuously sought in the same way. Old customers, who had become acquainted with the dress of the genuine product, might not be deceived by an infringer of the coined word who associated it with a distinctive dress. But it may readily be conceived that the parasite, with respect to those members of the public who had not acquired a

familiarity with the dress of the genuine product, would divide the increasing benefits that flow from long-continued advertisements. Such a division might be avoided if appellant could sucessfully advise everybody that the original "Sapolio" could be distinguished from spurious "Sapolios" by means of the silvered wrapper, the blue band, and all of the minutiæ of appellant's dress. But, ought competitors to be allowed to force appellant to change its methods of advertising? To restrict appellant to a particular dress? To reduce appellant's integral invention to a mere element or feature in a combination claim?

So far as this record discloses, there was nothing to preclude appellant, in 1869, from taking and holding an exclusive property right in each of the marks. While it may be true that "the mere idea, represented by some figure on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated in a trade-mark" (Enoch Morgan's Sons v. Troxell, 89 N. Y. 293, 42 Am. Rep. 294), appellee has not brought into the record anything that assails the novelty in 1869 of representing the common idea by a drawing "of a human face observing itself reflected in a pan."

Respecting infringement, the record presents virtually two separate suits; but appellee raised no objection on that account. There is one contention that is common to both cases. It is insisted that, because appellant adopted the two marks in connection with one article, appellee may lawfully use either alone. Appellant's marks were adopted and registered separately. They have been used separately in the advertisements. The word mark has always been employed for denoting the compound, the pictorial mark for stating a characteristic. We are of the opinion that appellant acquired and has maintained a separate property right in each mark, which was not dependent upon a conjoint use.

In "Sapolio" and "Sopono" the accent is on the long "o" of the second syllables. The respective vowels of the first syllables are short and unaccented, and, as pronounced by persons of no great particularity in speech, would sound quite alike. And it may also be taken that in the mouths of scrubbers and scourers the four syllables of "Sapolio" would frequently be slurred into three, "Sapolyo." The resemblance is much closer than in the instances cited in American Grocery Co. v. Sloan (C. C.) 68 Fed. 539.

The fact that "Sapolio" is a cake and "Sopono" a powder is of no moment. The appeal is made to the same class of customers to use the respective articles for the same general purpose. Church-Dwight Co. v. Russ (C. C.) 99 Fed. 276.

In the pictorial marks there is no difference, except that appellee has substituted a young woman's face for a young man's.

The infringer rarely has the hardihood to make a Chinese copy. In respect to both of these marks, if greater similarity were required to establish infringement, nothing short of identity would suffice.

Of course, an actual infringer is answerable, irrespective of his intent; but there is a view in which intent has a bearing on the fact of infringement. Appellee's intent to profit by appellant's marks is quite apparent, we think, even when each of his acts is regarded separately; when taken together, his acts are unmistakable, just as the plea of

ignorance on the part of one who passes counterfeit money becomes untenable in the face of successive instances. If appellee had desired to build up an honest, independent trade in his product, he would have selected, as did appellant's fair-minded competitors, marks as distinct from appellant's as possible. Appellee's purpose being established, from it his opinion as an expert may be accepted that the steps he took were well adapted to injure the appellant company in its property rights.

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

SUTHERLAND v. ILLINOIS CENT. R. CO.*

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,316.

PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION—CARRIERS—CLEANING AND DRYING OF GRAIN BY CARRIER—RATIFICATION BY SHIPPER.

Plaintiff contracted for the sale of a large quantity of corn to be delivered in elevator at New Orleans for export and to grade No. 3 or better. The shipments were made in car load lots over defendant's railroad during about three months. At about the time they commenced plaintiff wrote his factors in New Orleans that he would ship over defendant's road because of its facilities for drying such of the corn as needed it. Certain of the cars when inspected in New Orleans failed to grade No. 3, and such cars were unloaded by defendant at another elevator, where the corn was cleaned and dried and then delivered on the contract; the result of such cleaning and drying being to reduce the weight. The charges of defendant for such service were paid by the consignees, and such charges, together with deductions for the shortage in weight, were shown by statements rendered from time to time by the consignees to plaintiff, and were allowed and paid by him without objection. *Held*, that such course of business amounted to a ratification by plaintiff of the acts of defendant in so treating the corn, even if not authorized in advance, and that, having availed himself of the benefits of such acts in obtaining a higher grade, he could not recover from it the charges and shortage on the ground that such treatment was not authorized by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 644–655.]

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

William H. Clopton, for plaintiff in error.

J. E. McKeighan and J. P. McBaine (Millard F. Watts and J. G. Drennan, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Sutherland, a grain dealer of St. Louis, sold between 1,100 and 1,200 car loads of corn to parties in New Orleans and shipped the same over the Illinois Central Railroad during a period commencing in December, 1903, and ending in the following March. The corn was consigned to shipper's order and the bills of lading contained directions to notify the New Orleans parties. As the shipments were made, Sutherland indorsed the bills of lading in blank, and attached them to sight drafts on the purchasers for ap-

*Rehearing denied June 11, 1907.

proximately the selling price of the corn. The drafts were at once forwarded for collection, and were paid by the purchasers before the arrival of the corn. The destination specified in the bills of lading was a certain elevator in New Orleans, where the corn was to be unloaded for export. All of the corn was sold to grade No. 3 or better and according to New Orleans weights and inspection; but it transpired that upon arrival and official inspection 250 car loads thereof were found to be inferior to the required grade. From time to time during the period mentioned, as the cars found to contain corn of inferior grade arrived in New Orleans, they were temporarily diverted by the railroad company, and sent to another elevator, where the corn was dried and in some instances cleaned, thus raising the grade to No. 3 or better, and making it deliverable under the contracts of sale. This being done, it was then sent to the designated destination. The drying and cleaning process resulted in a diminution of the weight of the corn so treated equivalent to nearly 12,000 bushels. The treatment charges, amounting to $1,371.88, were paid by the purchasers, and Sutherland reimbursed them from time to time as statements of the expenditures were furnished. Sutherland sued the railroad company for the loss in the weight of the corn and for the amount of the treatment charges, upon the ground that its action in diverting the corn and allowing it to be dried and cleaned before delivery at the destination specified in the bills of lading was a violation of its duty as a common carrier, was unauthorized by him, and could not have been lawfully authorized or ratified by the purchasers. The trial court directed a verdict for the railroad company. Hence this proceeding in error.

We need not stop to consider the contentions about the title to the corn, whether it remained in Sutherland or passed to the purchasers upon payment of the drafts and their receipt of the bills of lading, or even if Sutherland remained the owner, because the corn being of inferior grade was not deliverable under the contracts of sale, whether the railroad company, ignorant of the details of their contract relations, had a right to regard those who held the bills of lading either as the owners or as agents with sufficient authority to consent to the acts now complained of. Nor need we consider whether a rule that corn had to grade No. 3 or better to be admitted into export elevators at the port of New Orleans would be binding upon Sutherland, he not knowing of it.

There is another consideration that precludes a recovery. About the middle of December, 1903, Sutherland wrote his factors in New Orleans that the shipments in contemplation would have to be made over the railroad of the Illinois Central because of its facilities for drying such of the corn as needed it. Thereafter, when the corn commenced to go forward, he learned that part of it was running under grade and was being dried and cleaned to make it deliverable under his contracts. The certificates of official inspection of each car of inferior corn and of the weights before and after treatment were sent him within a few days after arrival and inspection in New Orleans. The purchasers paid the treatment charges, and their receipts for such payments were also forwarded to him. From these

certificates and receipts he knew the resulting diminution in weight and the precise amount of expense incurred and paid. He gave the purchasers credit for their disbursements and settled with them on the basis of the lesser weights; but he got his price for the corn as of the improved or higher grade. These instances were so many in number and were of such frequent occurrence that the method pursued assumed the character of a course of business; and Sutherland, fully advised of it, took all of the benefit it yielded without complaint of the corresponding loss. At no time during the progress of the shipments did he object to the action of the railroad company or to the propriety of the charges that were being incurred and paid. Whatever of advantage accrued from the improvement in the grade of the corn he accepted and said nothing; and now, after the business is at an end, he seeks to detach each shipment from the sequence of like occurrences, to have it considered as a transaction separate and apart from all of the others, and to recover for the loss in weight and the treatment charges because he did not consent thereto in advance. Clearly this will not do. It would be contrary to plain principles of justice and fair dealing. When Sutherland commenced shipping, he contemplated that some of the corn would need treatment. He knew that it was being done. He paid the charges without advising the railroad company of his objection and so induced it to continue. He received the benefit. It was his duty to speak if he was dissatisfied, and his silence was consent in a contractual sense.

The judgment is affirmed.

DAVIS v. BROTHERS.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,372.

EJECTMENT—EVIDENCE—ABSTRACT OF TITLE—ADMISSION OF ENTRY FOR LIMITED PURPOSE.

Under a rule of court requiring the parties to an action for the recovery of real property to file copies of their abstracts of title, the purpose being to enable the court to learn whether they trace their title from a common source, and, if so, to limit the proofs to subsequent conveyances and transactions, the fact that an entry in an abstract is admitted in evidence as showing a source of title common to both parties, but for no other purpose, does not render the subsequent entries admissible as evidence in favor of the proponent of such abstract.

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

Writ of error to review a judgment obtained by Jennie Brothers in an action in ejectment against E. L. Davis.

Charles B. Faris (Arthur L. Oliver, on the brief), for plaintiff in error.

D. P. Dyer and E. P. Johnson, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The trial was by the court upon waiver of a jury. There was a general finding and judgment for the plaintiff. No special findings of fact were made. No request was interposed for

specific declarations of law. No legal propositions applicable to the case as made were formulated and presented to the court for its decision. Therefore, under a familiar rule often repeated by this court, the general finding and the conclusions of the court embodied in it are not open to review, and the scope of our inquiry is limited to such rulings of the court in the progress of the trial as were excepted to. There is but one such ruling set forth in the assignments of error. It is that the trial court erred in admitting an entry from an abstract of title and in limiting the probative effect thereof to the fact that the parties claimed under a common source of title. The contention is that, since the court used an entry in defendant's abstract to ascertain that the parties claimed under a common source of title, it should have received in evidence all the succeeding entries as substantive proof of defendant's ownership. A rule of the Circuit Court for the district in which the cause was tried requires parties to an action for the recovery of real property to file copies of their abstracts of title; the purpose being to enable the court to learn whether they trace title from a common source, and, if so, to limit the proofs to subsequent conveyances and transactions. It was designed to narrow the issues, to facilitate the progress of the trial, and to avoid incumbering the record with unnecessary evidence. It was not intended that compliance with the rule should enable the proponent of an abstract to secure the use of it in its entirety as affirmative evidence for himself. It is as though counsel arose at the beginning of the trial and orally stated the history of their clients' titles as claimed by them to exist, beginning with the ownership of the sovereign, and ending with that of the litigants, and the court after comparison discovered a common point from which the chains of title commenced to diverge, and thereupon dispensed with proof of anterior conveyances. What was done at the trial was in effect a joinder by the parties in a judicial admission of a common source of title. The rule that an admission is to be taken in its entirety without exclusion of any part that tends to limit, modify, or destroy its purport (Insurance Co. v. Newton, 22 Wall. 32, 22 L. Ed. 793) is not applicable, since there is no contention here that the remaining entries in defendant's abstract qualified in any degree the fact that the divergent lines of title had a common source.

We may say with respect to another contention that we do not construe the judgment that was rendered as affecting the one-fourth interest in the property which was conceded to have been conveyed by the plaintiff to the defendant before the commencement of the action.

The judgment is affirmed.

STANCLIFT et al. v. FOX et al.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1907.)

No. 2,402.

INDIANS—INDIAN LANDS—TOWN SITES IN CREEK NATION—SECRETARY OF INTERIOR—DECISION—REVIEW.

Act Cong. March 1, 1901, c. 676, 31 Stat. 861, ratifying the agreement between the United States and the Creek tribe in the Indian Territory, authorized the Secretary of the Interior to survey and lay out town sites in the Creek Nation, the limits thereof to be so established as to best

subserve the then present needs and the reasonable prospective growth of such towns, and declared that all things necessary to be done, not otherwise specially provided for, should be done under the authority and direction of such Secretary. *Held*, that the extent of each site was to be measured by the then present needs and the reasonable prospective growth of the town, that the decision of this question of fact was intrusted to the Secretary of the Interior, whose action was to be final, and that, if not intended to be conclusive, it is at least controlling, in the absence of a clear, unequivocal, and convincing showing that it was wrong and was induced by fraud or imposition.

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

For opinion below, see 90 S. W. 614.

Francis R. Brennan, for appellants.

Preston C. West, F. L. Mars, and J. J. Mars, for appellees.

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

VAN DEVANTER, Circuit Judge. The controversy presented by the record in this case relates to the title to certain lands in the Creek Nation in the Indian Territory, and grows out of the designation of the exterior limits of a town site, by the Secretary of the Interior, under the following provisions of section 10 of an agreement between the United States and the Creek tribe, which was ratified by Congress March 1, 1901, and became effective May 25, 1901 (Act March 1, 1901, c. 676, 31 Stat. 861; Proclamation June 25, 1901, 32 Stat. 1971):

"All towns in the Creek Nation having a present population of two hundred or more shall, and all others may, be surveyed, laid out, and appraised * * * (by) the Secretary of the Interior * * * under rules and regulations to be prescribed by him, * * * in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. * * *

"The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town * * * at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances. * * *

"It shall not be required that the townsite limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such townsite limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established. Provided further, that the exterior limits of all townsites shall be designated and fixed at the earliest practicable time under rules and regulations prescribed by the Secretary of the Interior.

"Upon the recommendation of the Commission to the Five Civilized Tribes, the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands * * *, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction * * *, and this irrespective of the population of such townsite at the time. Such townsites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other townsites."

These provisions, in so far as they apply to towns having a population of 200 or more, had been in force in the Creek Nation since May 31, 1900, by reason of their incorporation in the Indian appro-

priation act of that date. Act May 31, 1900, c. 598, 31 Stat. 221, 237.

The agreement contained specific provisions respecting the appraisement and sale, under the supervision of the Secretary of the Interior, of the lots in town sites surveyed and laid out thereunder, certain preferences being accorded, in that connection, to owners of improvements and others, and also directed that all lands of the tribe, except as therein otherwise provided, should be allotted in severalty, by the Commission to the Five Civilized Tribes, so as to give to each member of the tribe an equal share of the whole in value.

The gravamen of the appellant's complaint is that in surveying and laying out the town site of Bixby, an unincorporated town having a population of 200 or more, the Secretary of the Interior restricted the town site to 80 acres and declined to include therein the lands now in controversy; in other words, that, although the Secretary found and concluded, as his act necessarily imports, that the then present needs and the reasonable prospective growth of the town did not require that these lands be included in the town site, the fact was actually otherwise.

The title and ownership of the Creek lands, including those now in controversy, being in the tribe at that time, whether or not any of them should be surveyed, laid out, and disposed of as town sites, and, if so, to what extent and through what agency this should be done, were matters which it was competent to determine in the agreement. In keeping with the prior legislation of Congress, it was therein determined that some of these lands, and particularly those upon which there were towns having a present population of 200 or more, should be surveyed, laid out, and disposed of as town sites; that the extent of each site should be measured by the then present needs and the reasonable prospective growth of the town; and that the decision of this question of fact should be intrusted to the Secretary of the Interior. The agreement contains no indication of an intent that his decision should be subject to re-examination elsewhere, and, considering the nature of the question, the direction that the exterior limits of each site should be designated "at the earliest practicable time," and the evident purpose that the allotment of adjacent lands should proceed expeditiously, we think it was intended to make his decision final. United States ex rel. v. Hitchcock (decided March 4, 1907) 27 Sup. Ct. 423, 51 L. Ed. ——. And it is not without significance in this connection that one of the concluding provisions of the agreement declares:

"All things necessary to carrying into effect this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the Interior."

As measurably relevant, we quote from Cragin v. Powell, 128 U. S. 691, 697, 9 Sup. Ct. 203, 206, 32 L. Ed. 566, as follows:

"The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the government. The correction of these mistakes and abuses has not been delegated to the judiciary."

But, if the decision of the Secretary of the Interior be not so conclusive as we have stated, it is at least controlling in the absence of a clear, unequivocal, and convincing showing that it was wrong and

was induced by fraud or imposition. The appellant's complaint does not contain such a showing. It makes liberal use of such words as "fraudulent," "arbitrary," and "injurious," but the matters properly stated are not sufficient, in our opinion, to sustain the pleader's conclusion. There is no statement that any of the lands in controversy, which comprise 80 acres, were used for town purposes, and what is said in respect of their occupancy and state of improvement is not only indefinite, but is largely in the nature of an explanation of why "houses were not erected thereon" and why they were not used for purposes of business or residence. And, while much is said about the prospective growth of the town, it does not tend with any certainty to show that the Secretary's decision was wrong in point of fact.

It is alleged that this decision was in reality made by one of the clerks in the Department of the Interior, and that its approval by the Secretary was a mere perfunctory act without any personal consideration of the merits. But of this it is sufficient to observe that in De Cambra v. Rogers, 189 U. S. 119, 23 Sup. Ct. 519, 47 L. Ed. 734, it was said of a like allegation:

"It is hardly necessary to say that, when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

Our conclusion is that the Court of Appeals in the Indian Territory rightly held that the complaint was properly dismissed (Capitol Townsite Co. v. Fox [Ind. T.] 90 S. W. 614), and its decree is accordingly affirmed.

AMERICAN BRAKE SHOE & FOUNDRY CO. v. RAILWAY MATERIALS CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 22, 1907.)

No. 1,262.

PATENTS—INVENTION—BRAKE SHOE.

The Herron patent, No. 423,998, for a brake shoe of the composite type, having wrought-iron bars imbedded in the casting for the purpose of strengthening it, is void for lack of invention. The composite shoe itself was old in the art, and the method of re-enforcing castings by imbedding wrought-iron strips therein was old in the casting art, and practiced generally by foundrymen. Also composite brake shoes had previously been strengthened by others by applying a wrought-iron backing plate and by strips placed on the sides, and the transference of such plates or strips to the middle of the shoe by the well-known foundry method did not involve invention nor accomplish any new practical result.

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

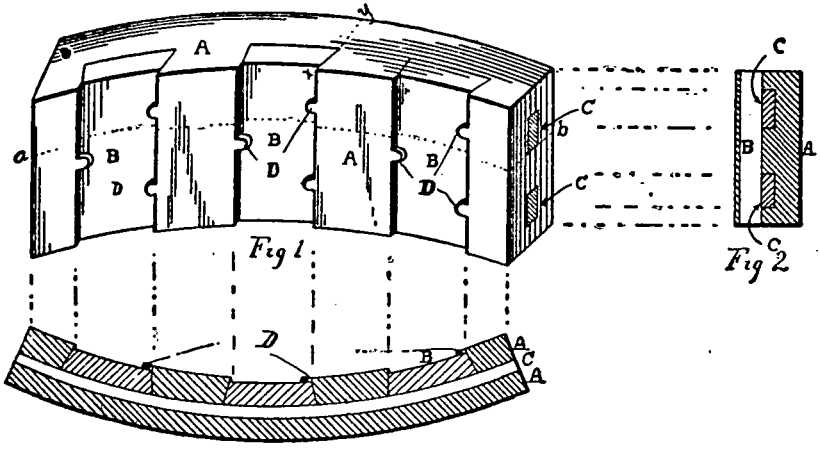
For opinion below, see 143 Fed. 540.

Appellant's bill for alleged infringement of patent No. 423,998, issued March 25, 1890, to Herron, for improvements in brake shoes, was dismissed for want of equity on the ground of lack of invention.

Claim 2 was the basis of the suit: "(2) In a brake-shoe, the shoe, A, having blocks, B, of steel set in its face below the surface, and the

strips, C, of wrought iron, substantially as shown and described, and for the purpose specified."

The drawings and description, explanatory of the claim, are as follows:



"This invention relates to brake shoes, more especially relating to the class of shoes known as 'composite' shoes, the object being to provide a shoe that will be strong, durable, and afford the greatest possible frictional contact with the hardened tire of the wheel, and one that will fit itself to the circumferential curve of said wheel, and that will not be open to the defects heretofore found in composite shoes. The details whereby these ends are accomplished are hereinafter fully described, and the parts claimed as new pointed out in the claims.

"In the accompanying drawings, Fig. 1 is a perspective view showing the contact-face and one edge and an end of the shoe. Fig. 2 is a vertical cross-section of Fig. 1 on the line x, y. Fig. 3 is a longitudinal section on the line a, b, Fig. 1 showing the cross-sectional contours.

"In the figures like reference marks indicate corresponding parts in the several figures.

"The blocks, B, are of crucible steel and are of cross-sectional form, as best shown in Fig. 3, being set in the face of the main body of said portion A an eighth to a quarter of an inch, said distance to be governed by the wearing qualities of the iron of which said part A is made, the prominence of the parts of the body, A, projecting above the blocks, B, being for the purpose of offering a surface for contact with the wheel which shall be easily worn down to the curve of the circumferential surface of the wheel and afford as soon as possible a steady bearing for the shoe on said circumferential surface. Projections, D, enter corresponding grooves in the hard pieces, B, and form a rib strengthening the shoe and obviating any possibility of lateral displacement of the parts, B. Strips or curved rods, C, of wrought-iron are cast into the main body of the shoe for the purpose of strengthening the entire mass, it being in such a position that any stress tending to break the shoe in cross-section will exert a pulling tension on said strip, C, and a crushing strain on the body of the shoe, thus applying the wrought-iron of the one and the cast-iron of the other to the exact force it is best adapted to successfully withstand. These strips may be as many in number as desired. The heavier the work to be done, the more intense is the strain to be overcome or guarded against, and the more strength to be supplied by these strips, C."

The prior art was illustrated by the German publication of Von Waldegg in 1871, and by the following patents: 8,255, reissue, McConway; 9,329, reis-

sue, Curtice; 11,137, Parker; 11,746, Walsh; 18,962, Eidlitz; 27,141, McCammon; 34,539, Warden; 43,418, Lovelace; 50,976, Storer and Whelpley; 54,838, Arnold; 78,786, Brown; 82,677, Barrows; 98,530, Titus; 149,875, McNish; 168,408, Onions; 174,898, Congdon; 223,062, Nichols; 286,371, Baldwin; 298,283, Brigham; 324,851, Lappin; 329,459, Lappin; 340,353, Pfleging; 344,517, Bradel; 354,724, Meehan; 354,725, Meehan; 374,272, Sargent; 374,427, Pollock; 385,352, Hayes; 397,617, Tilden; 399,665, Hatt; 410,989, Pollock; 412,572, Whalen et al.

Thomas F. Sheridan and Edmund Wetmore, for appellant.

William O. Belt, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). Excepting the Pollock patent, which is rather doubtful as an anticipation, it may be taken that the combination of claim 2 was not in any one disclosure of the prior art. The elements, broadly, are the cast-iron body, the hard metal insets, and the wrought-iron strips imbedded in the body back of the insets. The body with insets, the composite shoe, having the advantages referred to by Herron respecting durability, friction, and self-fitting to the car-wheel, was invented and developed by Congdon, Lappin, and others. The placing of wrought-iron strips within a mold so that they should be imbedded in any iron casting which was desired to be strengthened against fracture and held together after fracture was shown by patents and by oral testimony to be an old and familiar means of accomplishing the aforesaid ends, so old and familiar that a foundry foreman of 27 years' experience testified that it would be employed without hesitation or experiment whenever occasion arose. That a transverse strain upon any such casting should call upon the tensile strength of the wrought iron and the crush-resisting strength of the cast iron between the wrought-iron strips and the surface where the strain is applied, as dwelt upon by Herron in his specification, is but the physical law of the structure, a law discovered and commonly used long before Herron's time. The Herron cast shoe is therefore the old Congdon cast shoe re-enforced with the old means of re-enforcing any casting.

That the present patent comes within the exceptions, and that invention was required to extend the well-known strengthening method to the casting of a brake shoe, is argued in this wise: The Congdon composite-face shoe was invented in 1876; use proved that it was weaker than the all-iron shoe; various inventors, McConway in 1878, Curtice in 1880, Sargent in 1887, had recognized the desirability of strengthening the Congdon shoe, and had tried various methods, but not the method of imbedding wrought-iron strips behind the insets; therefore, although the ordinary foundryman would have known how to do what Herron did if the thought had occurred to him, the failure of McConway and others to re-enforce the Congdon casting by this familiar foundry expedient proves that in 1890 the Herron shoe was not an obvious thing, no matter how plain it may seem now in the light of Herron's disclosure, and that the creative imagination of the inventor had to be brought into play to produce this new use of the wrought-iron strips. And the teachings of the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, and other cases, are invoked to the effect that he who changes the failure or partial success of others into complete success is entitled to the award of monopoly.

The argument might appeal to us more persuasively on a different record. In this case it appears that Von Waldegg in 1871 had re-enforced the old cast-iron shoe by attaching a wrought-iron strip along the back. After the Congdon composite-face shoe came into use, McConway strengthened it by a wrought-iron backing plate, and Curtice and Sargent, differing from each other in details, applied wrought-iron strips along the sides of the composite face. These strips were placed in the molds according to the usual foundry practice.

Theoretically, the McConway backing plate holds together the cast-iron if that becomes fractured. It lends strength according to its mass. It cannot be bent in use without bringing into play the tensile strength of the metal in the front part of the plate and the crush-resisting strength of the metal at the back. The Curtice and the Sargent strips act as binders of broken cast iron, and, more prominently than in Herron's shoe, rely on the tensile strength of wrought iron and the crush-resisting strength of cast iron.

What new practical result did Herron attain by transferring the wrought-iron strips to the middle of the composite shoe? His shoe did not capture the market and drive out other re-enforced composite shoes. Of appellant's own output only 3 per cent. is of the Herron type. Nearly all of the great railroad systems of our country are named in the record, and only one adopted the Herron shoe. The superintendent of motive power of that system, in answering the question "Where did you use the Herron shoe?" said, "Where did we use it? We are not using it very extensively at present anywhere. We have substituted a steel-back shoe for it." Some smaller roads used the Herron shoe "a short time." Appellant's railroad witnesses substantially agree that equally good results are obtained with other re-enforced shoes. Appellant's unusual hammer test, the test by pressure being customarily employed, shows that the Herron shoe is stronger than an unre-enforced Congdon shoe. It proves nothing as to the comparative strengths of the Herron and of other re-enforced composite shoes.

The case standing, then, that Herron is entitled to no credit for the composite cast shoe, or for the method of strengthening castings by imbedding wrought-iron strips, or for the employment of wrought-iron strips to re-enforce composite cast shoes, and that the transference of the strips to the middle of the shoe accomplished no new practical result, the decree is affirmed.

AMERICAN BRAKE SHOE & FOUNDRY CO. v. WESTERN IRON & STEEL CO.

(Circuit Court of Appeals, Seventh Circuit. January 22, 1907.)

No. 1,311.

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

For opinion below, see 143 Fed. 540.

Thomas F. Sheridan and Edmund Wetmore, for appellant.

William O. Belt, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. In this case the issues are the same as those considered in American Brake Shoe & Foundry Co. v. Railway Materials Co. et al (decided at this term) 152 Fed. 700.

The decree is accordingly affirmed.

DIAMOND METER CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 31, 1907.)

No. 1,314.

PATENTS—ELECTRIC POWER TRANSMISSION—SPLIT-PHASE MOTORS.

The inventions covered by the Tesla patents Nos. 511,559 and 511,560, for a method of transmitting electrical power and means for practicing such method known as the "Split-Phase Motor," *held*, under the evidence, to have been made prior to April 20, 1888, and therefore not anticipated by the Ferarris or Shallenberger publications. Such patents disclose invention, and were not anticipated by anything in the prior art, nor are they for the same invention as patent No. 401,520, previously granted to the same inventor on a later application and also covered by the British patent No. 6,527 of 1889, and therefore do not constitute a case of double patenting, and are not affected by the expiration of such British patent.

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

The decree adjudges that appellant is an infringer of both claims of the Tesla patent No. 511,559, and of the first four claims of patent No. 511,560, issued December 26, 1893, the one for improvements of method and the other of means of electrical transmission of power.

The general nature of the new method of No. 511,559 is described in the following portions of the specification and in the claims: "In certain patents heretofore granted, I have shown and described a system of electrical power transmission in which each motor contains two or more independent energizing circuits through which were caused to pass alternating currents, having in each circuit such a difference of phase that by their combined or resultant action they produced a rotary progression of the poles or points of maximum magnetic effect of the motor and thereby maintained the rotation of its movable element. In the system referred to and described in said patents, the production or generation of the alternating currents, upon the combined or resultant action of which the operation of the system depends, is effected by the employment of an alternating current generator with independent induced circuits which, by reason of the winding or other construction of the generator, produced currents differing in phase, and these currents were conveyed directly from the generator to the corresponding motor coils by independent lines or circuits. *I have, however, discovered another method of operating these motors, which dispenses with one of the line circuits and enables me to run the motors by means of alternating currents from a single original source.*

"Broadly stated, this invention consists in passing alternating currents, obtained from one original source, through both of the energizing circuits of the motor, and retarding the phases of the current in one circuit to a greater or less extent than in the other.

"The distribution of current between the two motor circuits may be effected by induction or by derivation. In other words, I may pass the alternating current from the source through one energizing circuit and induce by such current a second current in the other energizing circuit. Or, on the other hand, I may connect up the two energizing circuits of the motor in derivation or multiple arc with the main circuit from the source. In either event I make

due provision for maintaining a difference of phase between the currents in the two circuits or branches.

"In carrying out my invention I have used various means for securing this result. For example, when I induce a current in one of the circuits from the current flowing in the other, I employ a form of converter or bring the two circuits into such inductive relations as will produce the necessary difference of phase. Or, when I obtain the two energizing currents by derivation, I make the two circuits of different degrees of self-induction by inserting a resistance or self-induction coil in one of said currents, or I combine these devices in different ways, as I shall more specifically describe hereinafter. * * *

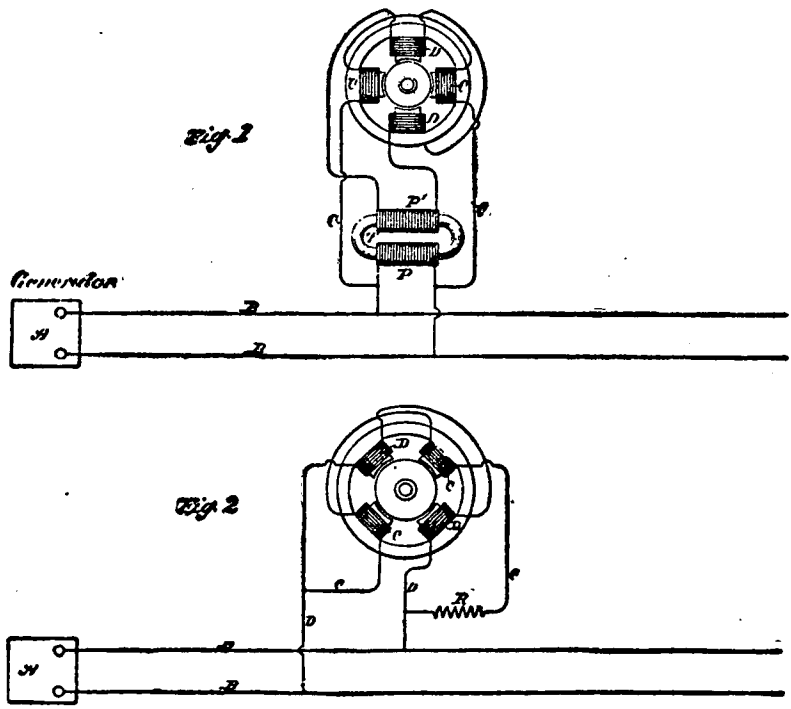
"In an application filed of even date herewith, I have shown and described other ways of accomplishing this result, among which may be noted the introduction of a resistance capable of variation in each motor circuit, or the use of a resistance in one circuit and a self-induction coil in the other. * * *

"What I claim herein is:

"(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits and retarding the phases of the current in one circuit to a greater or less extent than in the other.

"(2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor and varying or modifying the relative resistance or self-induction of the motor circuits and thereby producing in the currents differences of phase, as set forth."

Fig. 1 is illustrative of the inductive method, and Fig. 2 of the derivative.



In the specification of patent 511,560 Tesla said:

"My present application relates to the means employed when the two energizing currents are obtained from a single source by derivation.

"In explanation of what appears to be the principle of the operation of my invention and of the functions of the several instrumentalities comprised thereby, let it be assumed that the two energizing circuits of an alternating current motor, such, for example, as I have described in my patent No. 382,280, dated May 1, 1888, are connected up in derivation or multiple arc with the conductors of a circuit including an alternating current generator. It is obvious that if both circuits are alike and offer the same resistance to the passage of the current no rotary effect will be produced, for, although the periods of the currents in both circuits will lag or be retarded to a certain extent with respect to an unretarded current from the main circuit, their phases will coincide. If, however, the coils of one circuit have a greater number of convolutions around the cores, or a self-induction coil be included in one of the circuits, the phases of the current in that circuit are retarded by the increased self-induction. The degree of retardation may readily be secured by these means which will produce the difference in electrical phase between the two currents necessary for the practical operation of the motor. If in lieu of increasing the self-induction of one circuit a dead resistance be inserted, the self-induction of such circuit exerts a correspondingly diminished effect, and the phases of the current flowing in that branch are brought more nearly in unison with those of an unretarded current from the main line, and the necessary difference of phase between the currents in the two energizing circuits thus secured. I take advantage of these results in several ways. For example, I may insert variable resistances in both branches or energizing circuits, and, by varying one or the other so as to bring the phases of the two currents more or less in unison with those of the unretarded current, I may thus vary the direction of the rotation of the motor. In lieu of resistances I may employ variable self-induction coils in both circuits. Or I may use a resistance in one and a self-induction coil in the other and vary either or both.

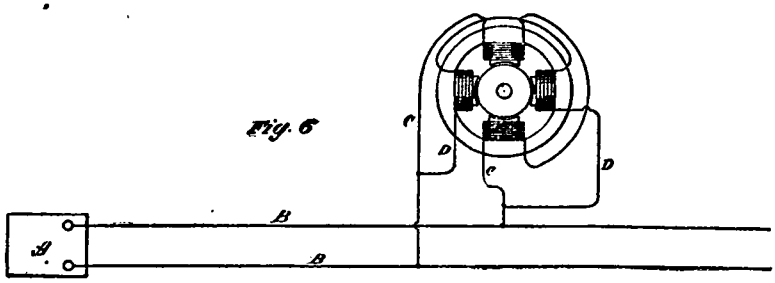
"* * * A reduction of resistance in one circuit imparts to the motor rotation in one direction, while a reduction of the resistance in the other circuit will produce a rotation in the opposite direction. By means of the two resistances, therefore, capable of variation or of being bodily withdrawn from or inserted in the circuits by any well-known means, a perfect regulation of the motors is secured. * * *

"In Fig. 7 the usual means for varying the resistance or self-induction of the motor circuits at will are indicated by the lever, M, sliding over a series of resistance plates, and by a core, N, which is adapted to be moved in and out of the induction coil, S.

"Similar results may be secured by such a construction or organization of the motor as will yield the necessary differences of phase. For example, one set of energizing coils may be of finer wire than the other, or have a greater number of convolutions, or each circuit may contain the same number of convolutions, but composed of different conductors, as, for instance, one of copper, the other of German silver. I have represented this in Fig. 6, in which the coils, C, are indicated by closer lines than coils, D."

Figs. 6 and 7 are as follows:

Fig. 6



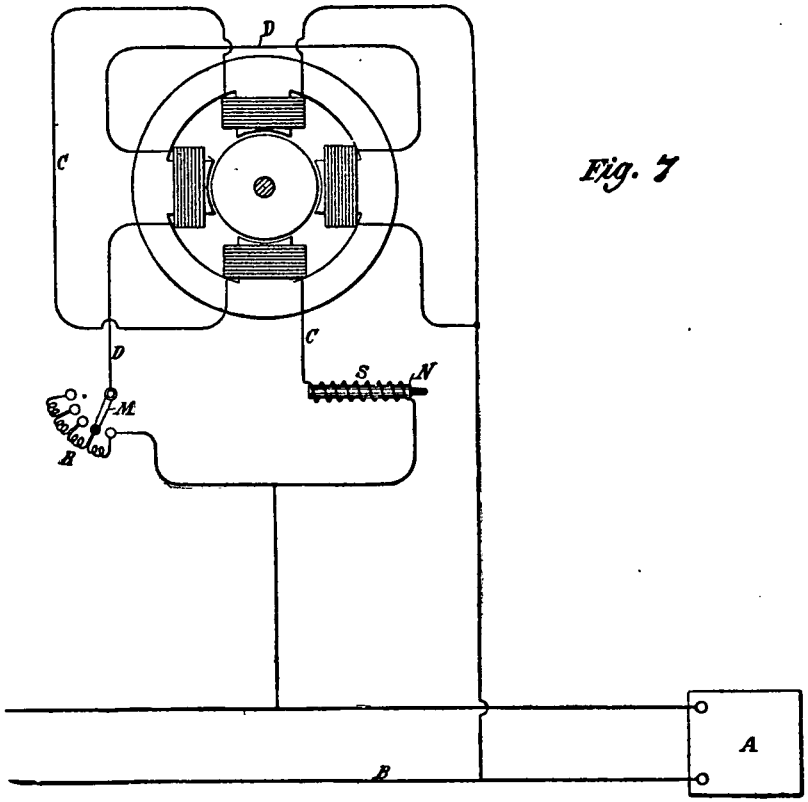


Fig. 7

The claims, of whose infringement complaint was made, read thus:

"(1) The combination, with a source of alternating currents and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase and an armature within the influence of said energizing circuits.

"(2) The combination, with a source of alternating currents and a circuit from the same, of a motor having independent energizing circuits connected in derivation or multiple arc with the said circuit, the motor or energizing

circuits being of different electrical character, whereby the alternating currents therein will have a difference of phase, as set forth.

"(3) The combination, with a source of alternating currents and a circuit from the same, of a motor having independent energizing circuits connected in derivation or multiple arc with the said circuit and of different active resistance, as set forth.

"(4) In an alternating current motor, the combination, with field magnets, of independent energizing currents, adapted to be connected in multiple arc with the conductors of the line or transmission circuit and a resistance or self-induction coil in one or both of the said motor circuits, as set forth."

In connection with the defense of double patenting, claim 5 is brought into the case:

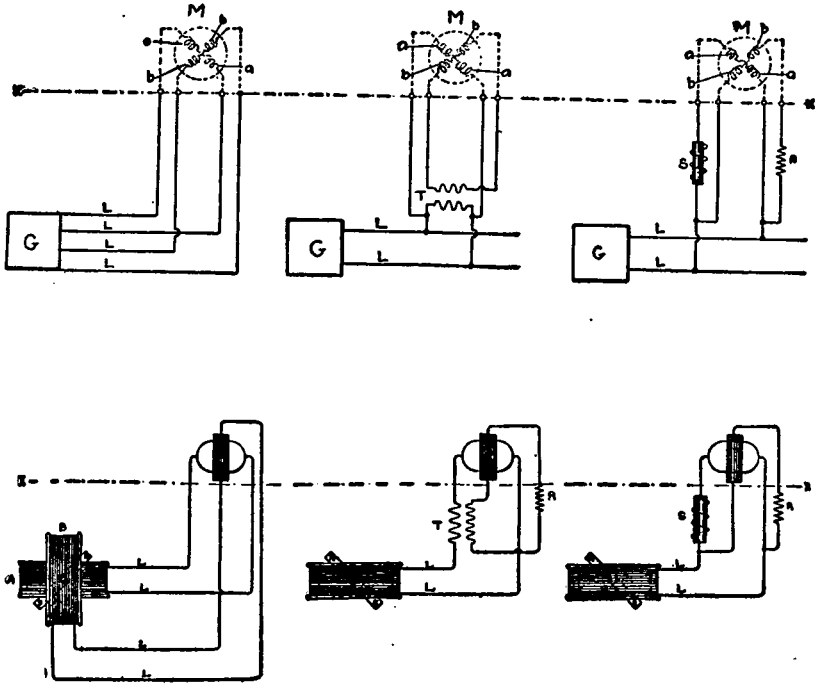
"(5) In an alternating current motor, the combination, with the field magnets or cores, of independent energizing coils adapted to be connected in multiple arc with the line or transmission circuit, and a variable resistance or self-induction coil included in one or both of the motor circuits, as set forth."

If the patents are valid, appellant concedes infringement.

The defenses are anticipation, want of invention, double patenting, and prior foreign patenting.

Respecting anticipation, the facts, as we find them to be, are summarized in the opinion.

As no anticipation is found, the prior art, with notice of which Tesla was chargeable, is limited to his own polyphase motor, referred to in the patents in suit, and to Overbeck's laboratory demonstration of the equivalency of three modes of producing two alternating currents of differing phases, one mode being by the use of a two-phase generator, and the other two being by splitting a single current and causing the part in one branch (either induced or derived) to lag. In one of appellant's briefs Overbeck's experiments and appellant's application of them to the patents in suit are diagramed thus:



The defense of double patenting is founded on a comparison of the patents in suit, particularly claim 5 and Fig. 7 of No. 511,560, with Tesla's patent No. 401,520, issued April 16, 1889, on an application filed February 18, 1889, for a "method of operating electro-magnetic motors."

The specification of No. 401,520 states:

"As is well known, certain forms of alternating-current machines have the property, when connected in circuit with an alternating-current generator, of running as a motor in synchronism therewith; but, while the alternating current will run the motor after it has attained a rate of speed synchronous with that of the generator, it will not start it. Hence, in all instances heretofore where these 'synchronizing-motors,' as they are termed, have been run, some means have been adopted to bring the motors up to synchronism with the generator, or approximately so, before the alternating current of the generator is applied to drive them. In some instances mechanical appliances have been utilized for this purpose. In others special and complicated forms of motor have been constructed. I have discovered a much more simple method or plan of operating synchronizing-motors, which requires practically no other apparatus than the motor itself. In other words, by a certain change in the circuit-connections of the motor I convert it at will from a double-circuit motor, or such as I have described in prior patents and applications, and which will start under the action of an alternating current, into a synchronizing-motor, or one which will be run by the generator only when it has reached a certain speed of rotation synchronous with that of the generator. In this manner I am enabled to very greatly extend the applications of my system and to secure all the advantages of both forms of alternating-current motor.

"The expression 'synchronous with that of the generator' is used herein in its ordinary acceptation; that is to say, a motor is said to synchronize with the generator when it preserves a certain relative speed determined by its number of poles and the number of alternations produced per revolution of the generator. Its actual speed, therefore, may be faster or slower than that of the generator; but it is said to be synchronous so long as it preserves the same relative speed.

"In carrying out my invention I construct a motor which has a strong tendency to synchronism with the generator. The construction which I prefer for this is that in which the armature is provided with polar projections. The field-magnets are wound with two sets of coils, the terminals of which are connected to a switch mechanism, by means of which the line-current may be carried directly through the said coils or indirectly through paths by which its phases are modified. To start such a motor, the switch is turned onto a set of contacts which includes in one motor-circuit a dead resistance, in the other an inductive resistance, and, the two circuits being in derivation, it is obvious that the difference in phase of the current in such circuits will set up a rotation of the motor. When the speed of the motor has thus been brought to the desired rate, the switch is shifted to throw the main current directly through the motor-circuits, and although the currents in both circuits will now be of the same phase the motor will continue to revolve, becoming a true synchronous motor." * * *

"I believe that I am the first to operate electro-magnetic motors by alternating currents in any of the ways herein suggested or described; that is to say, by producing a progressive movement or rotation of their poles or points of greatest magnetic attraction by the alternating currents until they have reached a given speed, and then by the same currents producing a simple alternation of their poles, or, in other words, by a change in the order or character of the circuit-connections to convert a motor operating on one principle to one operating on another, for the purpose described."

And the claims are these:

"(1) The method of operating an alternating current motor herein described by first progressively shifting or rotating its poles or points of greatest attraction, and then, when the motor has attained a given speed, alternating the said poles, as described.

"(2) The method of operating an electro-magnetic motor herein described, which consists in passing through independent energizing-circuits of the mo-

tor alternating currents differing in phase, and then, when the motor has attained a given speed, alternating currents coinciding in phase, as described.

"(3) The method of operating an electro-magnetic motor herein described, which consists in starting the motor by passing alternating currents differing in phase through independent energizing-circuits, and then, when the motor has attained a given speed, joining the energizing-circuits in series and passing an alternating current through the same.

"(4) The method of operating a synchronizing-motor, which consists in passing an alternating current through independent energizing-circuits of the motor and introducing into such circuits a resistance and self-induction coil, whereby a difference of phase between the currents in the circuits will be obtained, and then, when the speed of the motor synchronizes with that of the generator, withdrawing the resistance and self-induction coil, as set forth."

The defense of prior foreign patenting is based on section 4887, U. S. Rev. St. [U. S. Comp. St. 1901, p. 3382], as it stood when the patents in suit were issued:

"Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The foreign patent on account of which the patents in suit are said to have expired is British patent No. 6,527 of 1889. It is substantially the same as the domestic patent No. 401,520.

The patents here in suit, as well as the basic patents relating to the rotating-field motor-principle, have been in litigation repeatedly. In connection with the voluminous record and briefs we have read the following cases: Westinghouse Co. v. Granite Co. (C. C.) 103 Fed. 951; Westinghouse Co. v. Granite Co., 110 Fed. 753, 49 C. C. A. 151; Westinghouse Co. v. Royal Weaving Co. (C. C.) 115 Fed. 733; Westinghouse Co. v. National Electric Co. (C. C., E. D. Wis., not reported); Tesla Electric Co. v. Scott & Janney (C. C.) 97 Fed. 588; Westinghouse Co. v. Dayton Co. (C. C.) 106 Fed. 724; Dayton Co. v. Westinghouse Co., 118 Fed. 562, 55 C. C. A. 390; Westinghouse Co. v. Catskill Co. (C. C.) 94 Fed. 868; Westinghouse Co. v. Catskill Co. (C. C.) 110 Fed. 377; Westinghouse Co. v. Catskill Co. (C. C.) 121 Fed. 831; Westinghouse Co. v. Stanley Co. (C. C.) 129 Fed. 140; Westinghouse Co. v. Stanley Co., 133 Fed. 167, 68 C. C. A. 523; Westinghouse Co. v. Stanley Co., 138 Fed. 823, 71 C. C. A. 189; Westinghouse Co. v. Roberts (C. C.) 125 Fed. 6; Westinghouse Co. v. Mutual Life Ins. Co. (C. C.) 129 Fed. 213; Westinghouse Co. v. Electric Appliance Co. (C. C.) 133 Fed. 397; Westinghouse Co. v. Electric Appliance Co. (C. C.) 142 Fed. 545; Jefferson Co. v. Westinghouse Co., 139 Fed. 385, 71 C. C. A. 481.

Appellant's counsel urge their case with thoroughness and zeal, and they properly insist upon their right to our independent judgment of the merits of each defense as now presented.

Charles A. Brown and Charles E. Pickard, for appellant.
Parker W. Page and Thomas B. Kerr, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). Applications for the patents in suit were filed on December 8, 1888. Shallenberger on April 20, 1888, and Ferarris on April 22, 1888, made disclosures that void these patents unless the fact be that Tesla made the improvements in question at an earlier date. May 15, 1888, Tesla applied for patents,

which were granted as Nos. 555,190 and 511,915, on the inductive split-phase motor. This form was then regarded by Tesla and his attorney as more important than the derivative split-phase motor. Shortly afterwards the Westinghouse Company began negotiations for the purchase of the Tesla motor inventions; arrangements were consummated in July; and Tesla thereupon went to Pittsburg to instruct the Westinghouse engineers. Delay from May to December is thus accounted for. Tesla has no pecuniary interest in this litigation. His testimony is positive that he operated the "Exhibit Motor" in all of the ways involved in these patents as early as September, 1887. The "Exhibit Motor," as we understand it to have stood in September, was a rotating-field motor, the ends of whose windings were loose. These four wires could be coupled to the four wires of a two-phase alternating current generator, and the motor would then run in the manner described in the basic patents of May 1, 1888. These four wires could also carry, in turn, each of the phase-splitting means covered by the patents in suit, and when so equipped could be coupled to the two wires of a single-phase alternating current generator, and the motor would then run as an inductive or a derivative split-phase motor. So the exhibit is not regarded as proving anything beyond its capability of having built into it the phase-splitting devices. But the prolonged cross-examination, in our judgment, does not derogate in the least from the direct testimony that the exhibit was used as stated.

Brown, an electrical engineer, in 1887 and 1888 was financially concerned in the inventions that Tesla was then making. He has no interest in this litigation. When Tesla showed him the polyphase motor, designed to be coupled to the four wires of a two-phase generator, he raised the objection that it would not work in connection with the systems of single-phase generators and line-wires which were then in general use throughout the country. His testimony is positive that shortly afterwards, in the "summer" or "summer or fall" of 1887, Tesla fully disclosed the methods and means of the split-phase motor by the use of the "Exhibit Motor." We are not impressed by the parallel columns of alleged discrepancies between his testimony and that of Tesla. Advocates' argument is familiar that if witnesses agree in details their stories have been fixed up, and if they disagree in details neither is to be believed in respect to the vital matters about which they are in accord. So far as we can judge from the printed page, Brown was a reliable witness. It should not be doubted that he saw at some time what he says he saw. The Court of Appeals for the Second Circuit (121 Fed. 831, 58 C. C. A. 167), on a record less complete than that presented here, concluded that Brown was mistaken in the year; that he first saw the split-phase motor in the "summer" or "summer or fall" of 1888. We find that Brown was not mistaken, for these reasons: He fixes the place at Tesla's laboratory, 89 Liberty street, New York. Tesla gave up this laboratory and went to Pittsburg in July, 1888, stayed a year, and when he returned to New York took quarters in a different street; and Brown relates the time to the early days of the polyphase invention. As Tesla began filing applications for split-phase improvements as early as May, 1888, for Brown to have seen for the first time the "Exhibit Motor" operated as a split-

phase motor at the Liberty street laboratory in any summer or fall, the year 1887 must be accepted.

Nellis ran a stationary engine at 89 Liberty street. Tesla rented power from his employers. Nellis sometimes stayed at night to furnish power for Tesla and was admitted to the laboratory. His testimony appeals to us as that of an uneducated, entirely disinterested and honest witness. He says that he saw Tesla operate the "Exhibit Motor" with two wires, holding one in each hand and touching one and then the other to the motor, whereupon it would turn one way and then reverse. Of course the motor would not operate unless the circuit was closed; but neither Nellis's failure to see accurately nor his mistakes in narrating what he saw should deprive his testimony of the effect that the exhibit was operated as a two-wire rotating-field motor. The time was in the fall or winter. The only fall or winter during which these things could have occurred at 89 Liberty street was that of 1887.

The absence of other physical exhibits is accounted for by a fire in Tesla's laboratory. By mere chance the "Exhibit Motor" was not destroyed. It was at the Patent Office at the time, for use in the interference case between Ferarris and Tesla.

Page, attorney for Tesla in securing patents, is convincing in his testimony that Tesla fully disclosed the split-phase inventions, including those of the patents in suit, in the early part of April, 1888. He fixes the time positively as being later than the 6th and earlier than the 18th of that month. A canceled check fixes April 6th as the day he paid the final fees on the basic patents which were issued on May 1st. He is sure that Tesla had not then informed him of the split-phase methods and means, because, when told, he was greatly perturbed over the question of having the basic patents withheld from issue on the date already fixed upon. After consulting with his then partners in New York, he finally went to Washington to confer with an associate. This date is fixed by a hotel charge as being the 27th. He is positive that the disclosure was more than a week earlier, because it was made in connection with Tesla's discussion with him of an application for a patent on an alternating current regulator, issued October 9, 1888. This application was filed April 24, 1888. A bill for services and disbursements shows that the drawings were paid for on the 21st, and that the written part of the application was completed on the 18th.

This is not a case where witnesses, years afterwards, are brought in to antedate an alleged anticipation by the efforts of unaided memory. Certain time-marks are indisputably fixed. The only escape would be to discredit the accounts of the occurrences themselves. Furthermore, it is not as if the witnesses were now called for the first time. Tesla and Page particularly have had this question brought to their attention repeatedly, beginning with the Ferarris interference, when the matters were fresh in mind.

An incident in connection with the purchase of Tesla's motor inventions we deem corroborative. In 1887–88 Shallenberger, since deceased, was an electrical engineer and inventor in the employ of the Westinghouse Company. Independently he invented polyphase and split-phase motors. When Tesla's polyphase patents of May 1st came

to his notice he was grievously disappointed. On behalf of his company he went to New York in June to look into the advisability of buying the Tesla inventions. The purchase, consummated on July 7th, included the polyphase patents, the application of May 15th for inductive split-phase motors, and the inventions of the patents in suit, for which applications were to be filed later. If Shallenberger had not been convinced by his investigation that Tesla had anticipated him in every feature of both sorts of rotating-field motors, it seems to us incredible that he should have failed to apply for patents and should have advised the purchase of the Tesla inventions.

There is no direct evidence to put into the opposite scale. Two negative circumstances are counted on by appellant to prove that Tesla's story is false. Anthony was electrical engineer, expert, and inventor for the Mather Company of Manchester, Conn. He visited Tesla's laboratory in January or February, 1888. Tesla was at Manchester in March with a view to interesting the Mather Company in the polyphase motor. On neither occasion did Tesla disclose to Anthony that a rotating-field motor could be built that would operate when connected to a single-circuit line. Tesla says that he did not, because Brown had instructed him "not to give away any new ideas," and to confine his explanations to the polyphase motors that were submitted to Anthony to test. The other circumstance is that he did not make an earlier disclosure to his attorney. But if he disclosed when Page says he did, the alleged anticipations fail. Tesla gives two reasons. One is that, if he told Page of the two-wire motor before the patents for the four-wire motor were completed, Page might think the two-wire motor of so much greater importance that he would not bestow the care on the patents in hand that he otherwise would. The other is that he delayed in telling his attorney in the belief that the two-wire motor patents would detract from the commercial value of the four-wire motor patents. It is only unexplained silences that support the argument that because Tesla did not tell he had not then produced the split-phase motors. And the argument is based on an inconclusive inference, for accomplishment and silence may coexist. We regard the explanations as probable. If improbable, the resulting inconclusive inference does not assail the credibility of Brown, Nellis, and Page. On the whole record we have no doubt that Tesla antedated Ferarris and Shallenberger.

The prior art, therefore, is limited to Tesla's polyphase invention and to Overbeck's demonstration. The polyphase invention, "considered in its essence, was the production of a continuously rotating or whirling field of magnetic forces for power purposes by generating two or more displaced or differing phases of the alternating current, transmitting such phases, with their independence preserved, to the motor, and utilizing the displaced phases as such in the motor." Westinghouse Co. v. Granite Co., 103 Fed. (C. C.) 951; Id., 110 Fed. 753, 49 C. C. A. 151. Overbeck had proven as a fact in the science of electricity that two alternating currents of differing phases could be obtained not only from two out-of-step sources of generation, but also by splitting a single current and inserting means of retardation in one of the branches. The argument is that no invention was required to

uncouple the motor of the May 1st patents from the four wires of the two-phase generator and then to couple up the same motor to the four wires that had been split from the single phase generator. By referring to the illustrations taken from appellant's brief it will be seen that the assumption is made that the methods and means of the patents in suit resulted from the substitution above the line X, X, of the rotating-field motor of the patents of May 1st for Overbeck's current-testing instrument. And the assumption is attempted to be justified by italicizing the words from the specification, "I have, however, discovered another method of operating these motors, which dispenses with one of the line circuits and enables me to run the motors by means of alternating currents from a single original source."

If the assumption were accepted, we should not be ready to deny invention. Patents are granted for advances in the useful arts, not for increments of knowledge. On the basis of the assumption, this case would not stand as a transference of useful means within an art, or from art to art; it would be art's first application of an empirical teaching of science. Whether the accomplishments of the patents in suit would have been developed under the hands of an ordinary workman skilled in the electric motor art, or whether they would have lain unknown unless first visualized in the imagination of an inventor, are questions concerning which the experts differ antipodally. If we had doubts as to which experts voice the saner view, the success and value of these improvements should face us towards invention.

But when the specifications, drawings, and claims are taken together and examined in connection with the actual conditions relating to the practical question of transmitting power by electricity, we think the assumption is entirely unwarranted. Before the improvements of the patents in suit were made a power company could build a dam, put in turbines to run dynamos, and erect line wires to carry the current to consumers. By commutators at the power plant the alternating could be converted into a one-way current, which would run direct-current motors. Their power and the radius within which they could be used were quite limited. The synchronous alternating current motors would not start on application of the current, and would not continue if their loads threw them out of synchronism with the generator. When Tesla devised the polyphase motor, meaning thereby the rotating-field motor whose motor circuits are of the same electrical character and value, it will be remembered that Brown's objection in substance was that factory owners could not be expected to buy such motors unless and until power companies should reorganize their existing plants and put up additional sets of line wires. Though a power plant and line wires and a motor in a customer's factory, when connected, may be viewed as a unit electrically, practically they are separate. The practical, the commercial problem that Tesla solved was to put on the market a rotating-field motor that consumers of electricity could purchase and attach to the single alternating current wires of a power plant. The polyphase and the split-phase are both rotating-field motors. In that sense, and in that sense only, is the italicized sentence from the specification, when read with all the context, to be taken; for the polyphase and the split-phase motors differ from each other

radically. While the motor circuits of the polyphase must be of the same electrical character and value, the motor circuits of the split-phase must not be of the same electrical character and value. Take the split-phase motor of Fig. 6. To produce it a polyphase motor would have to be reconstructed by making one of the motor circuits of finer wire than the other. The same is true when copper is used for one motor circuit and German silver for the other. On examination it is found that every form of split-phase motor illustrated, described, and claimed in the patents in suit differs in the same way from the polyphase motor. Couple the two motor circuits of a split-phase motor to the line circuits from a two-phase generator, and, assuming the differences of phase in the motor circuits and in the line circuits to be the same, the split-phase motor will not work; the polyphase works in that connection, and in no other.

Finally, want of invention is urged from the fact that at about the same time Ferarris, Shallenberger, Anthony, and Jackson produced the same results in the same way. The argument involves the leveling of Tesla to a mechanic skilled in the electric motor art by assuming that the gentlemen named are of the mechanic rank. That Ferarris and competent patent authorities did not deem the assumption true as to him is proved by Ferarris's applying for and taking out patents in European countries, and by his interferences with Tesla's applications. Shallenberger obtained a patent on an electric-meter mechanism involving the split-phase principle. Apparently he thought this was all that was left open to him out of his independent inventions of the polyphase and split-phase motors. The tentative suggestion in the letter of Jackson, a university professor of physics, may be dismissed as a rebound from the disclosure in Anthony's letter to him. Anthony's letter, March 11, 1888, is accepted as showing that he then comprehended, if he had not then practiced, the principles of the split-phase motors. His previous examination and study of Tesla's polyphase motor induced, we believe, the train of thought and experiments which he now says did not involve invention. His letter, however, leads us to conclude that he was of a different opinion at the time, and that he would have applied for patents on split-phase motors had he not been restrained by a sense of professional honor. The contemporaneous opinions of these highly trained men we value as corroboration. We think they were right in ranking themselves inventors. And it is not unprecedented that the spirit of a particular period should bring forth within the same lines a galaxy of geniuses.

Our judgment on this record is that, to these unanticipated methods and means of producing a new and useful practical result, we cannot deny the quality of invention.

Was Tesla prevented from receiving and the government from granting the monopolies of the patents in suit by reason of the prior issuance of patent No. 401,520? The applications for the patents in suit were pending when the application for patent No. 401,520 was filed. The statute requires the applicant to point out clearly and to claim distinctly the new thing of which he is asking a monopoly. These considerations must be borne in mind in examining the application which became patent No. 401,520. The specification and claims

of this patent, as set forth in the statement, show that synchronous motors, polyphase motors, and split-phase motors were recognized as being then old in the art. Each form was therefore open to the use of the public so far as patent No. 401,520 was concerned. If some one was otherwise empowered to shut off the free use of synchronous motors or of polyphase motors or of split-phase motors, that was another matter. What was distinctly pointed out and claimed as new was a method of operating synchronous motors. One trouble with them had been that they were not self-starting. Tesla said: Take a synchronous motor; apply to it, for starting purposes, the rotating-field of either a polyphase or a split-phase motor; when synchronism is attained, cut out the rotating-field, and there is the synchronous motor in full operation.

Counsel argue that, particularly in view of claim 5 and Fig. 7 of patent in suit No. 511,560 and of the parts of the specification relating to such claim and figure, no invention was required to discover the method of patent No. 401,520, and therefore the invention that was covered by No. 401,520 was the invention now claimed under the patents in suit.

The variableness in the dephasing devices, described in No. 511,560, is for the purpose of regulating and reversing a split-phase motor. Differences of phase must be maintained if the split-phase motor is to operate. Motors, to be synchronous motors, must be supplied with single-phase current. Claim 5 and Fig. 7 have no "switch mechanism, by means of which the (full and unimpeded) line-current may be carried directly through the motor coils or indirectly through paths by which its phases are modified," as is required in No. 401,520. But even if the mechanical combination necessary to the method of No. 401,520 were described in No. 511,560, invention may have been involved in prescribing the method of use claimed in No. 401,520. As the Supreme Court said in Carnegie Co. v. Cambria Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968:

"If the mere fact that a prior device might be made effective for the carrying on of a particular process were sufficient to anticipate such process, the absurd result would follow that, if the process consisted merely of manipulation, it would be anticipated by the mere possession of a pair of hands."

So, looking only collaterally at the question of inventiveness in the method of No. 401,520, we are not prepared to reject the presumption which is carried by the grant.

But if the premise that no invention was displayed in the method of No. 401,520 were true, the conclusion would not necessarily follow that some other invention was covered by that patent, and that such other invention was the invention described and claimed in the patents in suit. From what has already been said, our conclusion may be gathered that No. 401,520, whether good or bad, does not touch the patents in suit.

"Every patent granted for an invention which has been patented in a foreign country" shall expire at the same time with the foreign patent. The invention which was patented in British patent No. 6,527 of 1889, being the invention patented in No. 401,520, was not the invention for which the patents in suit were granted.

The decree is affirmed.

INTERNATIONAL TIME RECORDING CO. v. W. H. BUNDY RECORDING CO.

(Circuit Court, N. D. New York. April 17, 1907.)

PATENTS—INFRINGEMENT—WORKMEN'S TIME RECORDER.

The Cooper patent, No. 528,223, for a workmen's time recorder, was not anticipated, and is valid as to claims 1, 4, 5, 7, and 10. Claims 5, 7, and 10 are limited to a construction in which the abutment which limits the movement of the card is intermittingly actuated by the time mechanism, and are not infringed by a device in which the abutment is moved by the hand of the operator. Claim 4 contains no such limitation, and any intermittingly operated mechanism is within its terms. In claim 1 a card guide or receiver adjustable relatively to the stamp is made by the language of the claim an essential element, and it is not infringed by a construction in which such receiver is stationary and the stamp and its actuating mechanism are movable.

In Equity. Suit for alleged infringement of claims 1, 4, 5, 7, and 10 of United States letters patent No. 528,223, dated October 30, 1894, to Daniel M. Cooper for workman's time recorder.

Kerr, Page & Cooper and Thomas B. Kerr (Drury W. Cooper, of counsel), for complainant.

Arthur E. Parsons and William A. Redding, for defendant.

RAY, District Judge. This patent in suit, No. 528,223, to Daniel M. Cooper, dated October 30, 1894, for workman's time recorder, application filed May 14, 1894, as to claims 2, 3, 4, 5, 7, 8, and 10, has recently been before this court and the Circuit Court of Appeals, Second Circuit, on appeal from the decree of the Circuit Court (International Time Recording Co. v. Dey et al., 142 Fed. 736, 74 C. C. A. 68), and the validity of such claims was there involved and sustained. In this case claims 1, not before involved, and 4, 5, 7, and 10, are in issue and infringement of each claim is alleged. As the infringement alleged here is not the same as involved in the prior suit the claims in issue will be given in full. They are as follows:

"(1) In a time recorder, the combination with a time stamp, of a card guide or receiver adjustable relatively to the stamp in one direction, an actuating device for causing the stamp to mark a card in the receiver, an abutment for limiting the movement of a card relatively to the stamp, said abutment being independent of the stamp actuating device, and adjustable in a direction at an angle to the before-described movement of the guide, whereby the card may receive two or more marks in the same or different planes, substantially as described."

"(4) In a time recorder, the combination with a time stamp and operating devices therefor, of a card guide or receiver, an abutment limiting the movement of the card relative to the time stamp, and intermittingly operated mechanism for actuating the abutment, substantially as described.

"(5) In a time recorder, the combination with a time stamp, and operating devices therefor, of a card guide or receiver, an abutment limiting the movement of the card relative to the time stamp, and intermittingly operated mechanism controlled by a time movement for actuating said abutment, substantially as described."

"(7) In a time recorder, the combination with the time stamp embodying marking wheels, and a time movement, of a card guide or receiver, an abutment limiting the movement of the card relative to the marking wheels, actuating

mechanism for moving the abutment and controlled from the time movement of the stamp, substantially as described."

"(10) The combination with the time stamp embodying marking wheels, and a time movement operating them, of the card receiver open at front and rear, and movable relatively to the marking wheels, the movable abutment at the bottom of said receiver, actuating devices for moving said abutment intermittingly toward the marking wheels, a time mechanism for controlling it, a movable hammer cooperating with the marking wheels, and operating devices therefor, substantially as described."

The defendant insists that it has produced evidence in this case which should secure (1) a reversal of the holding of the Circuit Court of Appeals that claims 4, 5, 7, and 10 are valid in view of the prior art; or (2) a material modification of the holding as to the breadth and scope of the invention disclosed in claims 4, 5, 7, and 10. I do not think the new evidence sufficient to justify a holding that the claims in issue, or either of them, are invalid in view of the prior art. Such evidence, to some extent, does limit the broader interpretation the claims would otherwise be entitled to. The fact remains, however, that Cooper made a notable advance, as an improver, over the prior art. A reference to the opinion of the learned Circuit Court of Appeals, delivered by Coxe, C. J., will show wherein that advance resided.

The contention here arises, in the main, over the construction of the words "and intermittingly operated mechanism for actuating the abutment," in claim 4, "and intermittingly operated mechanism controlled by a time movement for actuating said abutment," in claim 5, "actuating mechanism for moving the abutment and controlled from the time movement of the stamp," in claim 7, and "actuating devices for moving said abutment intermittingly toward the marking wheels, a time mechanism for controlling it," in claim 10. The defendant insists that the words quoted in each claim require and demand the presence of mechanism automatically operated by the clock by which the abutment is actuated and moved intermittingly. Defendant insists that in its device this is done by the hand of the operator, and therefore it does not infringe. In discussing this patent and the claims then in dispute including those now in suit, except claim 1, not there involved, the learned Circuit Court of Appeals, after reciting the defects to be remedied and which were largely remedied by the Cooper invention, as that court held, said:

"These were some of the defects which Cooper undertook to remedy and which he succeeded in remedying to a very considerable extent. His plan is to provide each workman with a card bearing his name and number, so arranged that the exact time of his going in and coming out of the factory will be printed each day. In order to accomplish this result, Cooper provides a clock mechanism and a time stamp embodying suitable printing mechanism combined with a card receiver which brings the card into such a position that the typeprinting wheels will inevitably print the correct time in the proper spaces upon the card. At the bottom of the receiver is a movable abutment on which the card rests when dropped in by the workman. This abutment is raised intermittently the distance between the centers of two of the horizontal spaces on the card, 'thereby decreasing the depth of the card receiver, every twelve hours, or half day, until Saturday night, and then, on Sunday morning, leaving it of maximum depth so that the card may be inserted nearly its full length, in position to print on the top line.' This is accomplished by an ingenious combination between the clock mechanism, the printing mechanism, and the receiver; the novel element being the adjustable card receiver

and the means employed by which it is brought into correct relations with the other mechanisms so as to produce a simple, accurate, and reliable time recorder."

That court then particularly discussed the claims in issue there, and as to claim 2, not in issue here, said:

"The first claim involved [No. 2] is for the combination, in a time recorder, of a card guide or receiver, adjustable relatively to the stamp in one direction, and a movable abutment or stop for engaging a card automatically movable relatively to the stamp in another direction, with a time stamp and operating devices therefor. In other words, it is for a combination, in a time recorder, containing the following elements: First. A time stamp. Second. Operating devices therefor. Third. A card receiver adjustable relatively to the stamp in one direction. Fourth. A movable abutment or stop for engaging a card automatically movable relatively of the stamp in another direction."

That claim reads:

"(2) In a time recorder, the combination with a time stamp and operating devices therefor, of a card guide or receiver adjustable relatively to the stamp in one direction and a movable abutment or stop for engaging a card automatically movable relatively of the stamp in another direction, substantially as described."

As to claim 3, not in issue here, that court said:

"Claim No. 3 is limited to an abutment actuated intermittingly by the time mechanism."

Claim 3 reads:

"(3) In a time recorder, the combination with a time stamp and operating devices therefor, of a card guide or receiver, an abutment limiting the movement of the card relative to the time stamp and time mechanism actuating said abutment intermittingly, substantially as described."

As to claim 4, which is in issue here, that court said:

"Claim No. 4 is the same as No. 3, except that by the omission of the word 'time,' before the word 'mechanism,' any intermittingly operated mechanism is within its terms."

Claim 4 reads:

"(4) In a time recorder, the combination with a time stamp and operating devices therefor, of a card guide or receiver, an abutment limiting the movement of the card relative to the time stamp, and intermittingly operated mechanism for actuating the abutment, substantially as described."

It will be noted that in claim 2 the words are "and a movable abutment or stop for engaging a card automatically movable relatively of the stamp in another direction," and, in claim 3, "an abutment limiting the movement of the card relative to the time stamp and time mechanism actuating said abutment intermittingly." It is admitted that defendant does not infringe claims 2 and 3, as the abutment is not "automatically movable" or actuated by "time mechanism." The Circuit Court of Appeals says that claim 4 covers "any intermittingly operated mechanism" for actuating or moving the abutment. This word "any" clearly includes mechanism operated manually, or by the hand of the operator or workman, provided it be "intermittingly operated." But claim 5 returns to an actuation or movement of the abutment by "intermittingly operated mechanism controlled by a time movement," and does not include mechanism controlled by the hand

of the operator. Hence defendant does not infringe claim 5 of the patent in suit. As claim 7 has as an essential element "actuating mechanism for moving the abutment," which is and must be "controlled from the time movement of the stamp," and defendant's is not thus controlled, there is no infringement of claim 7. The patent says:

"Where the term 'time stamp' is used in the claims it is to be understood, in the absence of further limitations, to mean the hour and minute marking wheels, and devices for marking an impression or imprint upon a card or slip placed between them."

The "time movement of the stamp" is the clock, and I think claim 7 necessarily excludes, or, does not include, mechanism for moving the abutment controlled by the hand of the operator. In claim 10 an essential element is "a time mechanism for controlling it," the abutment, or "the actuating devices for moving the abutment intermittingly towards the marking wheels." As this is wanting in defendant's time recorder, and the work is done by the hand of the operator, there is no infringement. Defendant has not merely disconnected the means for causing the movement and actuation of the abutment from the "time movement" and "time mechanism," etc., so as to make the difference in his device from the time recorder of complainant colorable merely, but the differences are in essential and substantial matters. As to infringement of claim 4, defendant's counsel, after quoting the language of Judge Coxe, "Claim No. 4 is the same as No. 3, except that by the omission of the word 'time' before the word 'mechanism' any intermittingly operated mechanism is within its terms," says:

"But this does not mean that the 'intermittingly operated mechanism' of claim 4 is not a mechanism operated substantially the same as that of the patent in suit, at regular intervals of time, and also operated automatically."

But the Circuit Court of Appeals did not say that the movement or actuation of the abutment in claim 4 must be by intermittingly operated mechanism moving or acting automatically. I can discover no difference, except in the mere wording, between claims 3 and 4, aside from the fact that in claim 3 the abutment is actuated—that is, moved, by a "time mechanism"—while in claim 4 it is actuated or moved by a mechanism other than a time mechanism. A mechanism operated by the hand of the operator and at his will is not a time mechanism. I think the Cooper patent contemplates two distinct movements caused by the clock, which is the motor of that device, viz., one operating the time-printing wheels and the other operating the abutment. Both are automatic, unless it be in claim 4, where the "time mechanism" is not included for moving the abutment, but it must be moved "intermittingly"; and, if this intermitting movement must be given and controlled by the clock motor and defendant causes it to be given by the hand of the operator, then there is no infringement of claim 4. But I do not so understand defendant's device and mechanism. I think that, in part, the "intermittingly operated mechanism for actuating the abutment" is operated by the clock which aids to give it its intermittent movement while it is not controlled by a "time mechanism." There is a difference between "intermittingly operated mechanism

for actuating the abutment" and "intermittingly operated time mechanism for actuating the abutment." Defendant uses the first, but not the second. In claims 5, 7, and 10 the Cooper patent demands that the "intermittingly operated mechanism" be "controlled by a time movement for actuating said abutment," or "actuating mechanism for moving the abutment," and which must be "controlled from the time movement of the stamp" or "a time mechanism controlling" the abutment. The mechanism for actuating the abutment may be automatically moved so far as to give it the intermittent movement or motion in part, and still the abutment may not be controlled by a time movement or time mechanism, but by the hand and the will of the operator. In defendant's time recorder the abutment is brought into position for printing the time on the card by mechanism operated by the hand of the operator, and not by a time mechanism. It is dropped back to its original position for starting work at the very bottom of the receiver by the hand of the operator, but the lever moved by the operator to move the abutment into position and to drop it back to the very bottom of the receiver is connected with and at times moved by the clock. As the claims in issue here plainly mark the distinction and make it essential, and as defendant controls the abutment by the hand of the operator, and not by a time movement or mechanism, except as to claim 4, which does not demand the "time mechanism" for actuating or controlling the abutment, there is no infringement.

Heretofore I have excluded from consideration claim 1 of the patent in suit, which was not in issue or considered by the Circuit Court of Appeals in the former suit. That claim has the following elements in combination: (1) A time stamp, which is defined in the specifications and is old in the art; (2) a card guide or receiver, adjustable relatively to the stamp in one direction, also old; (3) an actuating device for causing the stamp to mark a card in the receiver, also old; (4) an abutment for limiting the movement of a card relatively to the stamp, old—(a) said abutment being independent of the stamp actuating device, also old, and (b) adjustable in a direction at an angle to the above-described movement of the guide, whereby (c) the card may receive two or more marks in the same or different planes. It is contended by the complainant that this claim is valid and infringed by any device which causes a movement of the abutment by any means whatever in any direction whatever at an angle to the direction of the movement of the card guide or receiver. I think I am compelled by the decision of the Circuit Court of Appeals to hold this claim valid. It is, of course, limited to the combination of elements described. The same combination of the same elements—combined, of course, in the same way to produce the same result—is an infringement. The defendant does not move its card guide or receiver at all, it being stationary, but moves the time stamp and mechanism laterally, so as to bring the printing wheels, etc., to the desired column on the card by moving or pressing the handle or lever, with which he does the printing by a downward pressure thereof to the right or to the left as he desires to move the time stamp to the right or to the left. Defendant's card guide or receiver is in no sense adjustable

relatively to the stamp. It has no movement in any direction. But the time stamp, etc., is adjustable with reference to or relatively to the card guide or receiver. The Cooper patent, on the other hand, has a card guide or receiver adjustable relatively to the stamp in one direction; that is, we move the card receiver by means of an independent lever or handle laterally from right to left at will, thus bringing any desired column of the card in front of the time stamp for the printing. There is no patentable novelty in this movement or in the mechanism or means for producing it. Nor is there any patentable novelty in defendant's movement or means for producing it. Any skilled mechanic would have made the desired arrangement and produced the necessary mechanism in either case. To bring the two parts "by hand" into juxtaposition for printing the time on the card at any desired point was a simple matter; but the element is in the combination of claim 1, and it is made an essential element. Given a combination without it, and it is no longer the combination of claim 1 of the patent in suit.

Has Cooper, a mere improver, limited himself to "a card guide or receiver adjustable relatively to the stamp in one direction," in a combination with an actuating device for causing the stamp to mark a card in the receiver and "an abutment for limiting the movement of a card relatively to the stamp," and which abutment is independent of the stamp-actuating device and "adjustable in a direction at an angle to the before-described movement of the guide" or card receiver? The movement of the card receiver itself is twice emphasized. Evidently the inventor, Cooper, had no conception of a movement of the time stamp, etc., into proper juxtaposition with a stationary card receiver, and consequently with the card contained therein. Is the one movement and the means for producing it the fair and well-known equivalent of the other, and is complainant entitled to the benefit of the doctrine of equivalents? I think there can be no question that the one is the equivalent of the other in purpose and result. But the language of the claim is so emphatic, so precise, and definite, and the idea of a movable abutment so repeated, that we are almost compelled to the conclusion that the patentee has knowingly and designedly limited his claim to such a movement and mechanism for producing it. If this element itself imported into or embodied in the claim patentable novelty, was not old and simple, a well-known movement and mechanism, one suggested to any mechanic skilled in the art, and not emphasized and repeated in the language quoted, I should be disposed to hold that the complainant is entitled to the doctrine of equivalents. As it is, I do not think it is. The specifications, while not limiting the patentee as to mechanism for producing the movement of the guide, or receiver, do not suggest or imply any movement or mechanism for a movement other than that of the receiver, a movable card guide or receiver, one adjustable relatively to the stamp in one direction. A mechanism for moving and adjusting the time stamp and mechanism connected therewith relatively to some fixed object, as the card receiver, is quite different from a mechanism for moving and adjusting the simple card receiver itself relatively to the time stamp. It is well settled that an inventor, a mere improver, may so limit himself by the language of

his claims as to lose the benefit of a broad construction or interpretation of his claim, and so limit himself to a very narrow range of equivalents, and, as the Supreme Court of the United States has said in the recent case of Computing Scale Company of America v. Automatic Scale Company (decided February 25, 1907), 27 Sup. Ct. 307, 51 L. Ed. ——, practically to the means shown by the inventor. See, also, Cimiotti Unhairing Co. v. American Refining Co., 198 U. S. 399, 406, 407, 25 Sup. Ct. 697, 49 L. Ed. 1100, and cases there cited. The syllabus of that case is as follows:

"A greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, although the last and successful step, in the art theretofore partially developed by other inventors in the same field.

"The patent involved in this case, for the unhairing of seal and other skins, while entitled to protection as a valuable invention, cannot be said to be a pioneer patent.

"In making his claim the inventor is at liberty to choose his own form of expression, and, while the courts may construe the same in view of the specifications and the state of the art, it may not add to or detract from the claim.

"As the inventor is required to enumerate the elements of his claim, no one is the infringer of a combination claim unless he uses all the elements thereof.

"Where the patent does not embody a primary invention, but only an improvement on the prior art, the charge of infringement is not sustained if defendant's machines can be differentiated."

It is conceded by complainant's counsel, as indeed, the evidence shows, that defendant's alleged infringing device is in some respects an improvement upon complainant's, and clearly it is differentiated. Complainant claims infringement of claim 1 of the patent in suit by defendant's exhibit, defendant's Time Recorder No. 2, only. I do not think the defendant's fixed card receiver and laterally movable time wheels and mechanism for doing the work a mere reversal of the fixed time stamp and laterally-movable card receiver of claim 1 of the patent in suit. By a reference to the prior art, Martin and MacCoy British patents, Parkes British patent, and the Dey patents, it will be seen that defendant has done only what the prior art, aside from the patent in suit, warranted and justified him in doing in his combination. That prior art was open to the world so far as complainant is concerned and as defendant has utilized it, and not complainant's combination, it does not infringe.

I find infringement of claim 4 of the patent in suit only, but not by defendant's weekly time recorder No. 2. There will be a decree accordingly.

DAVIS et al. v. GARRETT.

(Circuit Court, D. New Jersey. April 9, 1907.)

PATENTS—SUIT IN EQUITY TO OBTAIN PATENT—PROCEDURE ON DEFAULT.

In a suit in a Circuit Court under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], to obtain a patent, application for which has been refused by the Patent Office and the appellate tribunal, the complainant is not entitled to a decree adjudging his right to a patent as a matter of course on default by the defendant, but must establish such right, including the patentability of his alleged invention by proofs, and where the defendant

has entered an appearance, although in default for want of pleading, he is entitled to notice before final decree is entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 166.]

In Equity. On application for final decree.

Melville Church, for complainants.

LANNING, District Judge. The bill of complaint in this cause is filed under the provisions of section 4915 of the Revised Statutes [U. S. Comp. St. 1901, p. 3392]. The defendant has entered appearance, but has not answered the bill. On December 26, 1906, an order that the bill be taken pro confesso was entered under the provisions of equity rule No. 18. Application is now made by the complainants for a final decree. Section 4915 is as follows:

"Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expense of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The question now presented for consideration relates to the practice that should be observed where no answer has been filed to such a bill. The court is asked, as the designated agent of the government, to grant to the complainants a monopoly of an invention by authorizing the Commissioner of Patents to issue a patent for the invention described in the bill of complaint. The case is therefore not like an ordinary suit in equity between private parties. The government itself has an interest in the suit, and it is the duty of the court to pass upon the merits of the application, and not to give to the complainants, as a mere matter of course, the decree for which they pray. That this is so seems clear from the reasoning of the Supreme Court in the case of Hill v. Wooster, 132 U. S. 694, 10 Sup. Ct. 228, 33 L. Ed. 502. In that case issue was joined, voluminous proofs were taken, and the complainant received a decree in his favor adjudging that he was entitled to receive a patent for the invention described in his application, notwithstanding the contrary conclusions reached in interference proceedings before the examiner of interferences, the examiners in chief, and the Commissioner of Patents. It seems that the only question considered by the Circuit Court related to priority of invention as between the parties to the interference proceedings, but the Supreme Court said:

"The provision of section 4915 is that the Circuit Court may adjudge that the applicant 'is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear,' and that, if the adjudication is in favor of the right of the applicant, it shall authorize the Commissioner to issue the patent. It necessarily follows that no adjudication can be made in favor of the applicant unless the al-

leged invention for which a patent is sought is a patentable invention. The litigation between the parties on this bill cannot be concluded by solely determining an issue as to which of them in fact first made a cabinet creamery. A determination of that issue alone in favor of the applicant, carrying with it, as it does, authority to the Commissioner to issue a patent to him for the claims in interference, would necessarily give the sanction of the court to the patentability of the invention involved. The parties to the present suit appear to have been willing to ignore the question as to patentability in the present case, and to have litigated merely the question of priority of invention, on the assumption that the invention was patentable. But neither the circuit court nor this court can overlook the question of patentability."

The court then examined the claims set forth in the complainant's bill and adjudged that the decree of the Circuit Court should be reversed on the ground that there was no patentable invention in what the complainant had set up in his bill. Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223, is also a case in which a bill was filed under section 4915. The defendants were the Secretary of the Interior and the Commissioner of Patents. Neither of the defendants appeared. Their default was entered, and full proofs, including a copy of the proceedings in the Patent Office, were thereafter taken. This seems to indicate the correct practice, for, as was said in that case, although "the proceeding by bill in equity, under section 4915, on the refusal to grant an application for a patent, intends a suit according to the ordinary course of equity practice and procedure, and is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits, yet the proceeding is, in fact, and necessarily, a part of the application for the patent." And in Morgan v. Daniels, 153 U. S. 124, 14 Sup. Ct. 772, 38 L. Ed. 657, in a proceeding brought under section 4915, it was further said:

"But this is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government. The one charged with the administration of the patent system had finished its investigations and made its determination with respect to the question of priority of invention. That determination gave to the defendant the exclusive rights of a patentee. A new proceeding is instituted in the courts—a proceeding to set aside the conclusions reached by the administrative department, and to give to the plaintiff the rights there awarded to the defendant. It is something in the nature of a suit to set aside a judgment, and as such is not to be sustained by a mere preponderance of evidence. Butler v. Shaw (C. C.) 21 Fed. 321, 327. It is a controversy between two individuals over a question of fact which has once been settled by a special tribunal, intrusted with full power in the premises. As such it might be well argued, were it not for the terms of this statute, that the decision of the Patent Office was a finality upon every matter of fact. * * * Upon principle and authority, therefore, it must be laid down as a rule that, where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction."

These authorities make it clear, I think, that before granting a final decree I should have before me a copy of the proceedings in the interference cases, with any other competent evidence the complainants may

wish to offer. And after the proofs shall have been taken and the complainants are ready to apply for a final decree the defendant, since he has entered appearance, will be entitled to notice for the reason that he is entitled to be heard concerning the form of the decree. Southern Pacific R. Co. v. Temple (C. C.) 59 Fed. 17.

An order will be made referring the cause to a master to take proofs.

CILLEY v. UNITED SHOE MACH. CO.

(Circuit Court, D. Massachusetts. February 13, 1907.)

No. 27.

MONOPOLIES—ACTION FOR DAMAGES UNDER ANTI-TRUST LAW—PLEADING.

In an action under section 7, Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3202], to recover damages for injury alleged to have been caused to plaintiff by reason of contracts made by defendant in restraint of trade or commerce among the several states or with foreign nations, and an attempt by defendant to monopolize such trade or commerce, or a part thereof, in violation of said act, it is not sufficient to frame the declaration in the language of the statute, but the nature and substance of the contracts relied upon, and the substantial facts alleged to constitute an attempt at monopoly must be pleaded to enable the court to determine whether they are in violation of the statute, and to enable the defense to properly prepare to meet the charge.

At Law. On demurrer to declaration.

Merritt & Merritt, for complainant.

Wm. H. Coolidge and C. A. Hight, for defendant.

COLT, Circuit Judge. This is a suit brought under the provisions of Act Cong. July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3202], in which the defendant is charged with making contracts in restraint of trade or commerce among the several states or with foreign nations, and with an attempt to monopolize such trade or commerce, whereby the plaintiff has been injured in his business and property. Section 7 of the act provides as follows:

"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 three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Among the things forbidden or declared unlawful by the act are "every contract * * * in restraint of trade or commerce among the several states or with foreign nations," and every "attempt to monopolize" such trade or commerce.

The case was heard on demurrer to the amended declaration. The grounds of demurrer on which the defendant relies are the following:

"(2) The declaration is insufficient in that it is too uncertain, vague, and indefinite to enable the defendant to know of what it is accused, of what damage the plaintiff has suffered, and to what it should direct its defense.

"(3) The declaration fails to set forth with substantial certainty the substantive facts necessary to show that the defendant has been guilty of anything forbidden or declared to be unlawful by the anti-trust act."

The material averments of the declaration may be summarized as follows: The plaintiff is a manufacturer of shoe machinery, and is engaged in manufacturing and selling a machine for sole leveling and for sole laying, known as the "Universal Leveler." The plaintiff has certain interests in patents on these machines, and is the owner of machines manufactured under these patents. The defendant is engaged both in manufacturing and buying shoe machinery, and now owns and controls the shoe machinery necessary to that part of the manufacture of boots and shoes known as bottoming. The defendant "has made divers contracts and agreements with a great number of manufacturers of boots and shoes, to the plaintiff unknown, throughout the several states and in foreign countries." By the terms of these contracts and agreements, such manufacturers are bound to use no machinery except such as is furnished to them by the defendant. By the terms of these contracts and agreements the use by such manufacturers of the plaintiff's machines is prohibited and prevented if such manufacturers use any one or more of the machines furnished by the defendant. These contracts and agreements are contracts in restraint of trade or commerce among the several states and with foreign nations, and are forbidden by the act of Congress of July 2, 1890. And, further, the defendant, contrary to the provisions of this act, is attempting to monopolize a part of the trade or commerce in shoe machinery among the several states, and with foreign nations "by endeavoring by divers means and methods unknown to the plaintiff to compel or induce all manufacturers of boots and shoes throughout the several states, and in foreign countries, to lease or otherwise to acquire shoe machinery from the defendant alone, and to enter with the defendant into contracts and agreements as aforesaid; and by trading and disposing throughout the several states and in foreign countries of certain of its shoe machinery of which it has sole control to the manufacturers of boots and shoes, by means of contracts, agreements, written leases, and other instruments; the terms of which are unknown to the plaintiff, but in which are contained divers agreements and conditions made by and between the defendant and its several customers and lessees substantially as follows, to wit: That the several customers and lessees will thereafter acquire shoe machinery from the defendant alone; that the several customers and lessees will not use any machines acquired from the defendant in any part or process of the manufacture of any boot or shoe if any other part or process of such manufacture shall have been done or performed by or upon any machine not acquired from the defendant," which "contracts, agreements, written leases, and other instruments the defendant, by divers means and methods unknown to the plaintiff, has compelled such manufacturers to execute and the agreements and conditions thereof and therein to observe and keep."

The declaration then alleges that these manufacturers constitute the sole market for the sale of the plaintiff's machines. The declaration further alleges that, by reason of these contracts, agreements, written leases, and other instruments, customers are prevented from buying or leasing the plaintiff's machines, that by these means the plaintiff has been deprived of the right to an open market, and prevented from

selling or leasing his property, and that thereby his business has been destroyed, and his property rendered of no value.

It will be observed that the contracts in restraint of trade set forth in the declaration are described as "divers contracts and agreements with a great number of manufacturers of boots and shoes throughout the several states and in foreign countries," by the terms of which such manufacturers are bound to use no shoe machinery except such as is furnished by the defendant, and are prohibited from using the plaintiff's machines if they use the machines furnished by the defendant. It will also be observed that the attempt to monopolize trade or commerce set forth in the declaration is described as endeavoring, "by divers means and methods unknown to the plaintiff," to compel all manufacturers to acquire shoe machinery from the defendant alone, or, "by means of contracts, agreements, written leases, and other instruments," to acquire shoe machinery from the defendant alone, and not to use any machines acquired from the defendant if any other part or process in shoe manufacture shall be done on any machine not acquired from the defendant.

It is manifest that these averments are of the most general character. No specific reference is made to any contract or contracts in restraint of trade entered into by the defendant, and no definite description is given of the terms of such contract or contracts. The declaration is also wanting in any definite description of the acts or contracts which constitute an attempt to monopolize trade or commerce. Presumably the defendant has made many contracts with manufacturers, and, before being required to plead, it is entitled to know upon what contracts the plaintiff relies, and the nature of those contracts. So, also, the defendant is entitled to have pointed out the substantial facts upon which the plaintiff bases his allegation of an attempt to monopolize trade or commerce; and, if this attempt to monopolize is founded upon contracts or leases, the material parts of these contracts or leases should be set forth in the declaration.

Again, the declaration alleges that the plaintiff is the owner of certain interests in patents relating to shoe machinery. It also alleges that the defendant owns and controls certain shoe machinery. These and other allegations in the declaration indicate that the defendant's control of shoe machinery is also based upon patents. If the defendant's contracts with manufacturers are based upon patent rights, this fact should appear, because contracts with respect to patents are, as a general rule, outside the doctrine of restraint of trade, both at common law and under the federal statute.

In my opinion, the averments in this declaration are too uncertain, vague, and indefinite to enable the defendant properly to prepare its defense, or to enable the court to determine whether the alleged offenses are within the statute.

Under the act of July 2, 1890, it is not sufficient to frame the declaration in the words of the statute. The statute does not set forth the elements of the offenses which are forbidden; and, further, there may be contracts in restraint of trade between the states or with foreign countries, and attempts to monopolize such trade or commerce, which are not within the statute. These circumstances make it imperative

that the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopolize, should be set forth in the declaration. These principles are well settled by the authorities.

In the case of In re Greene (C. C.) 52 Fed. 104, 111, Judge Jackson said:

"The act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute."

In United States v. Patterson (C. C.) 55 Fed. 605, Judge Putnam said:

"This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set forth all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge against it."

In the case of Rice v. Standard Oil Company (C. C.) 134 Fed. 464, 465, the court said:

"It is apparent that mere proof that the defendant has entered into a contract or engaged in a combination or conspiracy in restraint of trade or commerce among the several States will not be sufficient to support a cause of action under the seventh section, for there must, in addition thereto, be proof that the plaintiff has, by reason thereof, sustained damage. In his declaration, therefore, the plaintiff must aver not only facts showing such a contract or combination or conspiracy as is declared by the act to be unlawful, but facts showing that by reason of such unlawful thing he has been injured in his business or property."

In Bement v. National Harrow Company, 186 U. S. 70, 92, 22 Sup. Ct. 747, 756, 46 L. Ed. 1058, the court said:

"That statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

See, also, In re Corning (D. C.) 51 Fed. 205; United States v. Nelson (D. C.) 52 Fed. 646; Otis Elevator Co. v. Geiger (C. C.) 107 Fed. 131.

Demurrer sustained.

CASE v. SMITH, LINEAWEAVER & CO.

(Circuit Court, E. D. New York. March 30, 1907.)

1. PROCESS—VALIDITY OF SERVICE—NONRESIDENTS.

A defendant, who, knowing that a possible cause of action exists against him in a certain jurisdiction, voluntarily goes into such jurisdiction on business with third parties, takes the risk of being there discovered and served with process; and such service is not invalidated because the plaintiff had knowledge that defendant would come within the jurisdiction and arranged to be notified when he did come, where no trick or device was resorted to for the purpose of inducing his coming.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 70.]

2. REMOVAL OF CAUSES—PROCEDURE AFTER REMOVAL—FOREIGN CORPORATIONS—VALIDITY OF SERVICE—DETERMINATION.

Where an action against a foreign corporation has been removed from a state to a federal court, the question of the validity of the service of the summons and complaint on the defendant is to be determined according to the rules and practice of the federal courts, and not by the law of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 250.]

3. CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—PROCESS—SERVICE — VALIDITY.

A federal court cannot acquire jurisdiction over a foreign corporation which is not doing business in the state of suit and has no property within such state with relation to which the suit is brought, by the service of process on an officer who is casually within the state; and the fact that the corporation maintains an office room wihin the state of suit, in charge of a salaried sales agent, who takes orders for goods to be accepted and filled by the corporation at its home office, does not constitute a doing business within the state such as to validate the service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2613, 2626.

Service of process on foreign corporations, see note to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

On Motion to Set Aside Service of Summons.

Fox, Pierce & Rowe, for plaintiff.

Thomas Mills Day, for defendant.

CHATFIELD, District Judge. This action was begun originally in the Supreme Court of the state of New York. The alleged cause of action is for breach of contract for the delivery of coal by the defendant in Pennsylvania to the plaintiff at Port Reading, N. J.; the contract having been entered into, as is shown by the affidavits, in Philadelphia, in the state of Pennsylvania. The plaintiff is a resident of the Eastern district of New York, and had obtained, prior to the commencement of the action, by an assignment, all the right, title, and interest in the contract above referred to and any cause of action which might arise therefrom. The defendant company appeared specially for the purpose of removing the case into the United States court, which was done upon the ground of diversity of citizenship, the amount in dispute appearing to be more than $2,000; and the papers were filed in the United States Circuit Court for this district on the 6th

day of February, 1907. The defendant company then filed a special notice of appearance, for the purpose of moving to set aside the service of summons upon the said defendant, and obtained an order to show cause why such relief should not be granted, and extending the time of the defendant to plead generally until after the court should dispose of the motion upon the return of the said order to show cause.

The facts as to the service of the summons and complaint upon the defendant are not disputed, and appear to be as follows:

The defendant corporation has its home office and place of business in the state of Pennsylvania. It maintains at No. 1 Broadway, in the borough of Manhattan, New York City, an office room, where a sales agent, working upon a salary, negotiates for the purchase and sale of coal, to be filled by the direction of the Philadelphia office and by shipments from collieries in Pennsylvania, West Virginia, and Maryland. No stock of coal was kept within the state of New York. No property was invested in the state of New York, beyond the furniture in the said office, and no officer or director of the company was within the state of New York, except the president under the circumstances hereinafter set forth. The corporation had not obtained permission, under section 16 of the Corporation Law of the state of New York (Laws 1892, p. 1806, c. 687), to do business within that state, and had not designated any person to accept service therefor. On the 20th day of November, 1906, Henry H. Lineaweaver, the president of the defendant corporation, came from Philadelphia to New York, and was there served with the summons and complaint by one of the attorneys for the plaintiff. Mr. Lineaweaver's presence within the state of New York happened as follows: A New York man, by the name of Crawford, was indebted in a large amount to various creditors, among whom were this defendant (Smith, Lineaweaver & Co., of Philadelphia) and McTurk & Co., of Philadelphia. The attorneys for Mr. Case in the present action, while endeavoring to serve Smith, Lineaweaver & Co., were also representing McTurk & Co. in the collection of the debt from Crawford. A brother-in-law of Crawford, one Dr. Diller, through a family arrangement, was taking up Crawford's debts and obtaining receipts and releases therefor. The attorneys for the plaintiff in this action knowing of the debt held by Smith, Lineaweaver & Co. against Crawford, and knowing of the arrangement to pay the Crawford debts, because of the claim of their own client McTurk & Co., obtained from Dr. Diller and his attorneys information as to the day and hour upon which Mr. Lineaweaver would call in person upon Dr. Diller to receive payment of the Smith-Lineaweaver claim against Crawford. This information as to Mr. Lineaweaver's visit was given to the attorneys for the plaintiff herein as the sequel to an arrangement which had been previously made between said attorneys and the attorney for Dr. Diller, by which arrangement a letter was to be sent to Smith, Lineaweaver & Co., on behalf of Dr. Diller or of the Crawford family, which letter was similar to that being sent to the various Crawford creditors, which letters requested a representative to call in person and receipt for the payment. Mr. Lineaweaver thereupon called upon Dr. Diller at the time appointed, at his office in New York

City, and was served with the summons and complaint in this action as soon as Dr. Diller had made the payment for the debt due from Crawford to Smith, Lineaweaver & Co.

There is no claim, and the facts do not admit of any charge, that Mr. Lineaweaver was lured, by any false representations, into the state of New York, or brought to Dr. Diller's office by any deceit on the part of the Crawford family or its representatives. Two grounds for asking that the service be set aside are suggested: First, that the plaintiff could not take advantage of Mr. Lineaweaver's presence in the state of New York for the purpose of serving him with process while in the state, inasmuch as the plaintiff's attorneys knew that he was coming to New York for an especial purpose, and had arranged to be informed of such coming and to take advantage of his being there. Second, that the service, as such, was not good under the general requirements in the United States courts that a defendant, a foreign corporation, cannot be served by service upon an officer casually within the state, unless the corporation transacts business within the district where the suit is brought.

Under this first point, it is extremely difficult to say whether knowledge that a party upon whom service is desired to be made is coming within the jurisdiction of the court, and arranging in advance to obtain information of such coming, is sufficient to bring a service of papers within the words "trick or device," or within the cases where the party seeking service is considered to have held out some inducement. No case has been cited on all fours with this situation; and while the courts seem universally to have jealously guarded the privilege of an individual who relies upon the good faith of persons inviting him within the desired jurisdiction, and upon the inviolability of that jurisdiction's fair administration of its laws, it seems that a defendant who (knowing that a possible cause of action existed, and that a different particular piece of business in which he was interested with third parties would bring him within the jurisdiction in which the cause of action was located) voluntarily goes within the jurisdiction, when there has been no invitation or act which could be construed as such on the part of the person desiring to effect service, takes the risk of his presence being discovered. Mere foreknowledge would seem to be no different from knowledge gained by accident during his temporary presence within the jurisdiction. The test must be whether the party seeking to take advantage has given any invitation or extended any inducement which could be considered as a guaranty of good faith. Such an inducement does not seem to be present in this case, so the matter passes to the second ground of objection.

The second ground for the motion makes it necessary to decide whether the sufficiency of the service is to be considered according to the law of the state of New York, or according to the rules and practice of the federal courts, inasmuch as the service, such as it was, was completed before any application for removal.

In the case of Goldey v. Morning News, 156 U. S. 523, 15 Sup. Ct. 559, 39 L. Ed. 517, it is said:

"The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the

Constitution of the United States, and cannot be enlarged or abridged by any statute of a state. The Legislature or the judiciary of a state can neither defeat the right given by a constitutional act of the Circuit Court of the United States, nor limit the effect of such removal. Gordon v. Longest, 16 Pet. 97, 10 L. Ed. 900; Insurance Co. v. Morse, 20 Wall. 446, 22 L. Ed. 365; Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915; Southern Pacific Co. v. Denton, 146 U. S. 202, 207–209, 13 Sup. Ct. 44, 36 L. Ed. 942. As was said by this court in Gordon v. Longest: 'One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence, and to which all who were nonresidents or aliens might resort for legal redress.' 16 Pet. 104, 10 L. Ed. 900."

To the same effect is Cavanagh v. Manhattan Transit Co. (C. C.) 133 Fed. 818. In the case of Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 106, 11 Sup. Ct. 36, 34 L. Ed. 608, the Supreme Court applies the rule of the United States courts to an action removed from the state court, and affirms a decision setting aside the service of a summons and complaint, procured by what is there called a "fraudulent device and trick," and also uses the following language:

"Nor are we impressed with the tenability of plaintiff's position in relation to the service in any view. Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; New Eng. Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379; Ex parte Schollenberger, 96 U S. 369, 24 L. Ed. 853."

The motion to set aside the service, therefore, will be granted, inasmuch as the defendant corporation could not be said to be doing business within the state of New York, is not incorporated within the state of New York, and has no property within the state with relation to which the suit is brought, so that jurisdiction cannot be acquired by service upon an officer casually within the boundaries of New York.

In re McKANE et al.

(District Court, E. D. New York. April 2, 1907.)

1. BANKRUPTCY—APPOINTMENT OF RECEIVER—REQUIREMENT OF BOND.

   Where the only property of an alleged bankrupt, so far as shown, is property subject to a mortgage upon which a decree of foreclosure has been entered, before the court will appoint a receiver the petitioning creditors will be required to furnish a bond, and include as one of its conditions that they will pay the expenses of the receivership if sufficient assets applicable to that purpose are not discovered.

2. SAME—JUDGMENTS AVOIDED BY PROCEEDINGS—DECREE FORECLOSING MORTGAGE.

   A decree foreclosing a mortgage on property of the defendant entered within four months prior to the filing of a petition in bankruptcy against him is not a judgment creating a lien which is rendered void by his adjudication as a bankrupt under Bankr. Act July 1, 1898, § 67f, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], but merely a decree for the enforcement of a prior lien, which is not affected by the bankruptcy proceedings.

In Bankruptcy. On application for appointment of receiver, and for stay of sale under foreclosure decree.

Lyman W. Redington, for petitioning creditors.
F. W. Sparks, for mortgagee.

CHATFIELD, District Judge. The petitioning creditors have applied for the appointment of a receiver and for a stay of a certain sale under decree in foreclosure, which sale is advertised for April 2, 1907. The attorney for the mortgagee, plaintiff in foreclosure, has appeared in opposition to both motions, and a serious question arises as to the application of section 67f of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]).

Without going into the matter at length, or citing the numerous cases which can be included in a further memorandum when the matter is disposed of, it seems to the court that, if the petitioning creditors consider that there is any property which can be conserved for the bankrupt estate and which is not subject to a valid lien under the mortgage, they are entitled to have a receiver appointed to act with reference to it. But, inasmuch as they apparently show no assets except those directly involved in the foreclosure suit, the petitioning creditors will be required, if they wish a receiver, to furnish a bond in the sum of $2,000, and include as one of the conditions of the bond that they pay the expenses of the receivership, if sufficient assets applicable to that purpose are not discovered.

As to the second motion, in which a stay of the sale under the foreclosure is asked, a hasty examination seems to indicate, from the reasoning set forth in the case of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, that the judgment in foreclosure has not created the lien, and is not within the provisions of section 67f. The judgment is merely a decree by a court having competent jurisdiction directing the enforcement of a lien which cannot be affected or vacated by bankruptcy proceedings.

If, however, the petitioning creditors and the receiver, who will be appointed if they see fit to comply with the above requirements, can furnish authorities to show that a stay can be granted, further consideration will be given to the motion before disposing of it finally. It should be said that, upon the statement of the whole transaction, it would seem as if the bankrupt and the unsecured creditors had had every opportunity to take care of the mortgage lien under foreclosure, and, if its validity is unquestioned, it would be a hardship to interfere with the sale. Such action would apparently cause loss to the estate, rather than benefit, under the present showing of facts.

BETHLEHEM IRON CO. v. HOADLEY.

(Circuit Court, D. Rhode Island. March 30, 1907.)

No. 2,785.

1. CONTRACTS—PLEADING—DECLARATION—ALLEGATION OF CONTRACT.
   A declaration which alleges a conveyance of real estate by a third party to defendant "upon his express promise and agreement as to the consideration for said conveyance to him" that he should thereafter pay to plaintiff and the other creditors of the grantor 50 per cent. of their claims and judgments against said grantor sufficiently alleges the making of a contract by defendant to make such payments.
2. SAME—CONTRACT FOR BENEFIT OF THIRD PERSONS—RIGHT OF ACTION TO ENFORCE.
   The right of a third person to sue upon a contract made for his benefit being fully established by decision in Rhode Island, such rule of the state court is controlling upon a federal court sitting in that state. But whether the state decisions can be extended so far as to sustain an action on a contract to pay only a percentage of a debt due from the promisee to the plaintiff, quære.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 798.]
3. SAME—ACTION TO ENFORCE—PLEADING.
   A declaration which alleges a contract between defendant and a third party, by which defendant promised for a valuable consideration to pay 50 per cent. of the amount of the "claims and judgments" of creditors of the promisee, does not state a cause of action in favor of the plaintiff, who subsequently obtained a judgment against such promisee, although it was based on an indebtedness existing when the contract was made, since the claim as then existing was merged in the judgment, and the contract as alleged covers only such judgments as were then in existence.

At Law. On demurrer to declaration.

John A. Tillinghast and Frederick W. Tillinghast, for plaintiff
Henry W. King and Wm. A. Morgan, for defendant.

BROWN, District Judge. The first point on demurrer is to the effect that the declaration does not sufficiently allege the making of a contract between the defendant and the Corliss Steam Engine Company. The declaration alleges a conveyance of real estate by the Corliss Company to the defendant, "upon his express promise and agreement as to the consideration for said conveyance to him that he, the said Alfred H. Hoadley, should thereafter pay the plaintiff and said other creditors of said Corliss Steam Engine Company 50 per cent. of the amount of their said claims and judgments against said Corliss Steam Engine Company," etc. While a more direct form of allegation would have been preferable, it sufficiently appears that the consideration for the conveyance by the Corliss Company was the defendant's agreement to pay the plaintiff and other creditors. As the declaration subsequently speaks "of said promise and agreement of said Alfred H. Hoadley, so made to said Corliss Steam Engine Company," the declaration in substance alleges a contract between the Corliss Company and Hoadley. This objection is not substantial.

The second point on demurrer is that the contract set forth is not such a contract as entitles the plaintiff to sue the defendant thereon. The right of a third person to sue upon a contract made for his benefit

seems thoroughly established in Rhode Island. Kehoe v. Patton, 23 R. I. 360, 50 Atl. 655; Munroe v. Prov. Firemen's Relief Ass'n, 19 R. I. 363, 34 Atl. 149; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427; Urquhart v. Brayton, 12 R. I. 169; Merriman v. Social Mfg. Co., 12 R. I. 175; Phenix Foundry Co. v. Lockwood, 21 R. I. 556, 45 Atl. 546; Wilbur v. Wilbur, 17 R. I. 295, 21 Atl. 497. The authorities are so numerous to the effect that, upon a question of this character, the federal court will follow the rule of the state court, that a citation of them is unnecessary. It is also unnecessary to consider in detail the various decisions of the Supreme Court of the United States relating to the general question of the right of a third party to sue. This right is to be determined upon the state decisions. I find no support in the declaration for the defendant's point that the contract in the case at bar was under seal. This is not an inference from any fact alleged in the declaration. It is apparent from the decisions in Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427, and Phenix Foundry Co. v. Lockwood, 21 R. I. 556, 45 Atl. 546, that, when a creditor proceeds against one who has promised to pay the debts of the original debtor, the original debtor's obligation is released. The Rhode Island decisions treat the substitution of a third party for the original debtor as practically a novation. The contract set up in the declaration presents one peculiarity, in that the promise was to pay only 50 per cent. Therefore this could not be a complete novation, and, if the plaintiff acceded to the arrangement and elected to hold the defendant Hoadley for 50 per cent. only of the claim, it still held the Corliss Company for the remaining 50 per cent. Whether there can be a splitting up of liabilities in this way is a matter upon which I have considerable doubt; but, as it has not been argued, the point may be reserved for further hearing.

The third point on demurrer is that the plaintiff, by bringing suit and recovering judgment against the Corliss Steam Engine Company, signified its refusal to become a party to the contract. The declaration shows that, at the time of the promise by Hoadley, the plaintiff's claim against the Corliss Company was upon a promissory note, and upon book account, and that it proceeded to judgment against the Corliss Company thereon. The result of this is that the note and book account are extinguished and merged in the judgment. Ober v. Gallagher, 93 U. S. 199, 206, 23 L. Ed. 829. No effect, therefore, can be given to allegations of the declaration that the defendant promised to pay 50 per cent. of the promissory note and book account. The plaintiff, having sued the note and book account to judgment, could no longer proceed on the defendant's promise to pay the original obligations. A suit by the plaintiff on the original obligations, either against the Corliss Company or against the defendant as a substituted party, would be barred by the fact that these claims were merged in the judgment. The obligation of the Corliss Company then became of record, and the plaintiff's further remedy was either upon execution or by action of debt on the judgment. The declaration, however, alleges as a consideration for the conveyance that the defendant should pay the plaintiff and other creditors 50 per cent. of the amount of their claims and judgments. The plaintiff in this case can recover,

therefore, if at all, only on a promise to pay the judgment. It is apparent from the declaration that the judgment recovered by the plaintiff against the Corliss Company did not exist at the date of the contract between the Corliss Company and Hoadley. The plaintiff, therefore, can recover, if at all, only upon a contract to pay future judgments. Such a contract is not properly alleged in the declaration, since the word "judgments" therein must be construed to mean judgments then in existence. As the note and book account as causes of action have been extinguished as appears by the allegations of the declaration as to the judgment, and as the declaration alleges no promise to pay judgments other than those then in existence, it must be held that the declaration is insufficient in its failure to set forth any contract between Hoadley and the Corliss Company whereon the plaintiff is now entitled to sue as beneficiary. This case well illustrates the difficulties ensuing from a departure from the rule that only parties to a contract or their representatives are entitled to sue thereon. As has been before intimated, I am by no means certain that the Rhode Island decisions can be extended so far as to cover a contract to pay only a percentage of the indebtedness. In passing upon this demurrer, I do not intend to pass finally upon this question. I am of the opinion that the demurrer should be sustained for the reason that the declaration does not set forth any contract upon which the plaintiff is entitled to sue the defendant. The judgment against the Corliss Company seems to me to bar the plaintiff from any further proceeding against the defendant, save upon a promise to pay the judgment. The contention of the defendant that the relations of the promisor and promisee to the third party are those of principal and surety seems inconsistent with the express decisions of the Rhode Island court, to the effect that the rights of the third party are substitutional. The cases of Davis v. National Bank of Commerce, 45 Neb. 589, 63 N. W. 852, Rodenbarger v. Bramblett, 78 Ind. 213, and Rothermel v. Bell Coal Co., 79 Ill. App. 667, also seem inconsistent with the theory of the Rhode Island cases. See especially Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427. The third cause of demurrer seems good to the extent that it applies to a promise to pay the promissory note and book account. The second cause of demurrer seems well taken for the reasons hereinbefore stated.

Demurrer sustained.

UNITED STATES v. ADAIR.

(District Court, E. D. Kentucky.)

1. COMMERCE—REGULATIONS—CONGRESSIONAL POWER.

The commerce clause of the federal Constitution empowers Congress to regulate the adjuncts of interstate commerce, as well as such commerce itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 10-35.]

2. SAME—STATE REGULATION—IMPLIED CONSENT.

The implied consent of Congress to state legislation regulating interstate commerce, arising from a failure of Congress to enact similar legis-

lation, is temporary only, and is withdrawn by a congressional enactment covering the same subject-matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 8.]

3. SAME—STATUTES—REGULATION OF EMPLOYÉS.

Act Cong. June 1, 1898, c. 370, § 10, 30 Stat. 428 [U. S. Comp. St. 1901, p. 3211], makes it an offense for an interstate carrier and any officer, agent, or receiver thereof to (1) require any employé or person seeking employment, as a condition thereof, to enter into an agreement not to become or remain a member of any labor organization, or (2) threaten any employé with loss of employment or unjustly discriminate against any employé because of his membership in such a labor organization, or (3) require any employé or person seeking employment, as the condition thereof, to agree to contribute to a fund for charitable, social, or beneficial purposes, and to release the employer from liability for personal injuries, etc., or (4) to attempt or conspire after having discharged an employé, or after his quitting, to prevent him from obtaining employment. *Held*, that such section directly affects one of the adjuncts of interstate commerce, and was within the power of Congress conferred by the commerce clause of the federal Constitution.

4. CONSTITUTIONAL LAW—COMMERCE CLAUSE—LIMITATIONS—DUE PROCESS OF LAW.

The provision of the fifth amendment of the federal Constitution that no person shall be deprived of life, liberty, or property without due process of law, though a limitation on the commerce clause of the federal Constitution, was not infringed by Act Cong. June 1, 1898, c. 370, § 10, 30 Stat. 428 [U. S. Comp. St. 1901, p. 3211], regulating the relations between interstate carriers and their employés; such carriers not being entitled to unrestricted liberty of contract either in their relations with the public or their employés.

5. COMMERCE—INTERSTATE COMMERCE—REGULATION—DISCRIMINATION.

Act Cong. June 1, 1898, c. 370, § 10, 30 Stat. 428 [U. S. Comp. St. 1901, p. 3211], regulating the relations between interstate carriers and their employés, was not unconstitutional as penalizing a common carrier engaged in interstate commerce for discharging an employé because of his membership in a labor organization, or otherwise discriminating against him on that ground without reference to whether he was engaged in interstate or intrastate commerce.

6. EVIDENCE—JUDICIAL NOTICE—SUBJECTS.

A court will take judicial notice that a particular common carrier engaged in interstate commerce also operates trains over its lines solely within the state.

7. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—FEDERAL CONSTITUTION.

The provisions of the fourteenth amendment of the federal Constitution prohibiting class legislation, applies only to state action amounting to such denial; there being no provision prohibiting Congress from passing laws subject to such objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 649–677.]

J. H. Tinsley, U. S. Atty., and W. R. Harr, Sp. Asst. to Atty. Gen. S. D. Rouse and B. D. Warfield, for defendant.

COCHRAN, District Judge. This case is before me on demurrer to the indictment. It was found under section 10 of the Act of June 1, 1898, c. 370, 30 Stat. 428 [U. S. Comp. St. 1901, p. 3211] entitled "An act concerning carriers engaged in interstate commerce and their employees." That section is in these words:

"That any employer subject to the provisions of this act and any officer, agent or receiver of such employer who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement either written or verbal, not to become or remain a member of any labor corporation, association or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such labor corporation, association or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employee's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor and upon conviction thereof in any court of the United States, of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

The ground of the demurrer is that this section of that act is unconstitutional. In order to appreciate the particulars in which it is claimed that it is unconstitutional, it is necessary to understand that section and the act of which it is a part. That act contains 12 sections. The twelfth section repeals a previous act approved October 1, 1888, c. 1063, 25 Stat. 501 [U. S. Comp. St. 1901, p. 3211], entitled "An act to create boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carriers engaged in interstate and territorial transportation of property or passengers and their employees."

The commission, which, as one of its features, it provided for, composed of three members, two appointed by the President and the other, the Commissioner of Labor, was authorized to examine the causes of the controversies and differences referred to in the title, the conditions accompanying them, and the best means for adjusting them, and required to report the result of their examination to the President and Congress. It is stated, in one of the briefs filed on behalf of the United States, that this act was the result of disturbances growing out of a controversy, or controversies, between railroad companies and interstate commerce and their employés. I have no means of verifying this statement.

After the great railroad strike at Chicago, in June–July, 1894, a commission created under said act examined the causes thereof. It reported the result of its examination to the President November 14, 1894, who transmitted it to Congress December 10, 1894. December 18, 1894, a bill drawn by two of the members of the Commission, at the request of the committee on labor and in line with the recommendations of their report, was introduced in the House. H. R. 8259, 53 Cong. 3d Sess. January 17, 1895, another bill covering the same general subject, approved by the Attorney General, was likewise introduced in the House (H. R. 8556, 53d Cong. 3d Sess.) and subsequently passed by it. It failed to pass the Senate. The House in the Fifty-Fourth Congress passed a like bill (H. R. 268) which failed to pass the

Senate. Similar bills were introduced at the first session of the Fifty-Fifth Congress (S. 122, 1014; H. R. 61) and again at the second session thereof (S. 3662; H. R. 4372), and then enacted into said act of June 1, 1898. That act, therefore, may be said to be an outgrowth of said Chicago strike. In the reports made to the Senate and House, it is characterized and treated as a voluntary arbitration bill. As to the need for the bill, the Senate Committee on Education and Labor, which reported it to the Senate, said:

"The necessity for the bill arises from the calamitous results in the way of ill considered strikes arising from the tyranny of capital or unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employés, with their helpless wives and children, are confronted with starvation."

The House committee on labor, which reported it to the House, said:

"Persons engaged in interstate commerce, who are most affected by the bill under consideration, have been anxious to secure the enactment into law of such measure as would operate justly and effectively put an end to industrial wars that have resulted from disputes growing out of the questions of wages, hours of labor, and the conditions of employment between the employer and the employé."

The act, however, is something more than a mere voluntary arbitration measure. That may be said to be its principal feature, but it has other features of which section 10 in question herein is one. By section 1 it is provided:

"That this act shall apply to any common carrier or carriers and their officers, agents and employees except masters of vessels and seamen, as defined in section 4612, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3120], engaged in the transportation of passengers or property, wholly by railroad or partly by railroad and partly by water, for a continuous carriage of shipment, from one state or territory to the United States, or the District of Columbia to any other state or territory of the United States, or the District of Columbia, or for any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States."

Sections 2 to 7 inclusive and section 11 relate to the arbitration feature of the act. The contingency which it is provided is to put it in operation is "whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this act, and the employés of such carriers seriously interrupting, or threatening to interrupt the business of said carrier"; and the arbitration is to be brought about by the endeavor of the chairman of the Interstate Commerce Commission and the Commissioner of Labor upon their failure, at the request of either party to the controversy, to amicably settle it by mediation and conciliation, in getting both parties to sign articles of submission to arbitration and choosing two of the three arbitrators. It is provided that, in signing the articles of submission and in choosing one of said two arbitrators, the employés of the carrier involved in the controversy shall be represented by the labor organization to which they belong, except where the majority of them do not belong to any such organization, in which case they shall be represented by a committee chosen by them, and,

that after an award has been made, it shall not be lawful for such organization to order, counsel or advise any of said employés to quit the service of their employer for three months thereafter without just cause, without giving to said employer 30 days' written notice of an intent so to do.

The other features of the act are contained in sections 8, 9, and 10. By section 8 it is provided that in every incorporation under the provisions of Act June 29, 1886, c. 567, 24 Stat. 86 [U. S. Comp. St. 1901, p. 3204], entitled "An act to legalize the incorporation of National Trade Unions," it must be provided in the articles of incorporation and in the constitution, rules, and by-laws that a member should cease to be such by participating in or by instigating force or violence against persons or property during strikes, lockouts, or boycotts, or by seeking to prevent others from working through violence, threats, or intimidations; that members of such incorporations should not be personally liable for the acts, debts, or obligations of the corporation, nor should such corporations be liable for the acts of members or others in violation of law; and that such corporations might appear by designated representatives before the board created by the act, or in any suits or proceedings for or against any such corporations or their members, in any of the federal courts. By section 9 it is provided that, whenever receivers appointed by federal courts are in the possession and control of railroads, the employés thereof shall have the right, through the officers and representatives of their associations, whether incorporated or not, to be heard upon all questions affecting the terms and conditions of their employment, and that no reduction of wages shall be made by such receivers without authority of the court therefor upon notice to such employés. Section 10, under which the indictment herein was found, has heretofore been quoted in full. It makes it a criminal offense, punishable by fine, for any employing common carrier subject to the provisions of the act, and any officer, agent, or receiver thereof, to do either one of four separate things, to wit: (1) Require any employé or any person seeking employment, as a condition of employment, to enter into an agreement not to become or remain a member of any labor corporation, association, or organization; (2) threaten any employé with loss of employment or unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization; (3) require any employé or person seeking employment, as a condition of employment, to enter into a contract whereby he shall agree to contribute to any fund for charitable, social, or beneficial purposes, and to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employé's contribution to such fund; (4) attempt or conspire, after having discharged an employé, or after his quitting, to prevent him from obtaining employment.

These four separate features of this act, to wit, arbitration, forfeiture of membership, hearing by the court, and employing common carrier's conduct, have more than a mere formal unity, i. e., union in one and the same act. The act is not an arbitrary aggregate. Those features of it have a real unity—a unifying thread—an organiz-

ing idea that makes them parts of a real whole. That idea is a common purpose, and that common purpose an avoidance of an interruption to interstate commerce arising from a resort by employés to strikes, lockouts, or boycotts, to redress their real or fancied wrongs. We are driven to this conclusion by a consideration of the provisions of the act in the light of its history.

The provisions made in the first and third features of the act to avoid such an interruption is a settlement of the controversy between the antagonistic parties; in the former, by either the mediation and conciliation of the two chairmen, or the submission to arbitration and award pursuant thereto, and, in the latter, by the decision of the federal court, if the railroad is in the hands of its receiver. That made in the last feature is by penalization of certain conduct of the employing common carrier calculated more or less to provoke a controversy between it and its employés which might result in a strike, lockout, or boycott; and that made in the second feature is forfeiture of membership in such trade unions by employés participating in or instigating force, violence, threats, or intimidation during strikes, lockouts, or boycotts. The forfeiture provided for is for participating in or instigating force, violence, threats, or intimidation during strikes, lockouts, or boycotts, and not for participating in or instigating strikes, lockouts, or boycotts. This feature therefore makes no provision for an avoidance of or interruption to interstate commerce by strikes, lockouts, or boycotts, but only for an avoidance of such interruption by force, violence, threats, and intimidation during strikes, lockouts, and boycotts.

Possibly some favoritism toward the employé can be found in the act. It attaches no hurtful consequences to the employé, under any consideration, for engaging in a strike, lockout, or boycott. Possibly the power to attach such consequences was quite limited. There would seem, however, to be no reason why forfeiture of membership could not have been based on a participation in or instigation of a strike, lockout, or boycott, as well as on a participation in or instigation of force, violence, threats, or intimidation during a strike. Possibly, also, this forfeiture of membership feature and the penalizing of certain of the conduct of the employing common carrier would have but little effect in preventing a strike, lockout, or boycott. Yet it cannot be said that they would not have some effect. This idea, therefore, of avoiding an interruption to interstate commerce, pervades the whole act and pervades section 10.

The indictment contains two counts. In each it is alleged that, at the time of the commission of the offense charged, the defendant, William Adair, was master mechanic of the Louisville & Nashville Railroad Company, a common carrier engaged in interstate commerce, and one O. B. Coppage, a member of the Order of Locomotive Firemen, a labor organization, was in its employ as a locomotive fireman. The offense charged in the first count is that the defendant unjustly discriminated against said Coppage because of his membership in said order, by discharging him from said employment on that ground. That charged in the second count is that the defendant threatened said

Coppage with loss of employment because of his membership in said order.

It is claimed that said section is unconstitutional for several reasons. The first one is that no warrant for its enactment is to be found in the federal Constitution. It is denied that it is within subsection 3, § 8, art. 1, conferring on Congress power "to regulate commerce with foreign nations and among the several states and with the Indian tribes," the only provision thereof which it can be claimed justifies it. Is this denial sound? The question whether any given legislation by Congress is within this provision hangs upon two others. What is it that Congress is thereby empowered to regulate? And, what is to regulate it? It is empowered to regulate nothing else and to do nothing else to it than to regulate it.

In considering what it is Congress is thereby empowered to regulate, I will, for convenience sake, limit myself to commerce among the several states, or interstate commerce. Interstate commerce, though perhaps not limited thereto, includes interstate intercourse. We are concerned here with no more. Interstate intercourse is the passage of property, persons, or messages from within one state to within another state. It has certain adjuncts, to wit, the persons corporate or natural and their employés effectuating the passage, the means by which they effectuate it, including the ways, artificial or natural, over which, and the instrumentalities by which, the passage is made, and the charges made for the service rendered. Strictly speaking, these things are not interstate intercourse or commerce. They are merely the adjuncts thereof. Congress, however, is empowered by said provision to regulate the adjuncts of interstate commerce as much so as interstate commerce itself. Its power to regulate them is as extensive, full, and complete as its power to regulate it. The rationale or juridical explanation of this may be debatable. It may be because, within the meaning of said provision, the adjuncts of such commerce are parts thereof, or because to regulate the adjuncts thereof is to regulate it, or because power to regulate the former is granted by necessary implication; to regulate the latter being all that is expressly granted. Or it may be that the power to regulate the adjuncts of interstate commerce is dependent somewhat on the last subsection of said section 8, art. 1, which confers on Congress power to pass laws necessary and proper to carry into execution the powers conferred by the other and preceding sections thereof. But as to the existence of power to regulate the adjuncts of interstate commerce, and as to the extent thereof being as stated, there can be no question.

What I have said as to the nature of interstate commerce and its adjuncts is not put forward as exhaustive or exactly accurate. The matter has not been sufficiently reflected upon for me to be absolutely sure of my ground. It is put forward simply as a working basis, and is deemed sufficient for that purpose. It is a deduction from the relevant decisions of the Supreme Court of the United States. I will not, however, pause to make this good.

What is it, then, to regulate interstate commerce and its adjuncts? This question requires a more extended consideration, as it is here

that it is claimed on behalf of defendant that said section breaks down. It is urged that the power to regulate, conferred by said provision of the federal Constitution, is a power to regulate directly and substantially, and not indirectly, remotely, incidentally, or collaterally, and that said section, in so far as it is a regulation at all, is an indirect, and not a direct, one, and hence not within such power. Two lines of decisions of the Supreme Court of the United States are relied on in support of both these positions, i. e., as to the nature of said power, and as to the nature of the legislation embodied in said section.

One line consists of decisions in cases in which the application of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], was involved, and divides itself into two classes; those where it was held that it did not apply, and those where it was held that it did. Cases of the former class are the following, to wit: United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. Cases of the latter class are the following, to wit: United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. The other line consists of decisions to the effect that certain state legislation was not an encroachment on the commercial power of Congress, and hence was valid. Amongst the cases cited containing such decisions are the following, to wit: Sherlock v. Alling, 93 U. S. 102, 23 L. Ed. 819; Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; C., M. & St. Paul Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186.

I cannot accede to the correctness of either position, i. e., as to the nature of said power, or as to the nature of said legislation, or that either finds support in either one of these lines of decision. The position as to the nature of the power conferred on Congress by said constitutional provision interpolates therein the qualifying word "directly." The power conferred thereby is "to regulate" without limitation, and not "to regulate directly." The courts have no right to limit a constitutional provision by inserting a qualifying word therein. They must take it as they find it. If, then, there is such a thing as an indirect regulation of interstate commerce, or its adjuncts—if indeed all regulation is not in its very nature direct—it is hard to conceive why it is not covered by the power conferred. In the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, Mr. Chief Justice Marshall said:

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

The correct definition of the power, as it seems to me, is that it is the power to enact legislation that directly affects interstate commerce or its adjuncts, and not legislation that affects it or them indirectly only. Or it may be put this way: It is the power to enact legislation which relates to, acts upon, or touches interstate commerce or its adjuncts or legislation of which either is the subject. Such legislation affects them directly. Legislation which does not relate to, act upon, or touch them, or of which they are not the subject, can only affect them indirectly.

No support of the position of defendant's counsel as to the nature of the power in question can be found in either of the two lines of decisions relied on by them. So far as they throw light on the subject, they bear out the statement as to the nature thereof, which I have put forward. The last line throws less light on it than the first. This is to be expected, as it has to do with state legislation; whereas, the other has to do with congressional legislation. Indeed, the decisions in the Sherlock, Escanaba Company, Smith, Nashville, etc., Railway Company, Hennington, and Solan Cases, and certain expressions in the opinion in some of them, may mislead one as to the nature of that power or the subject of it, if he is not careful. The legislation involved in those cases and held valid was as follows, to wit: In the Sherlock Case, the Indiana wrongful death statute in its applicability to owners of steamboats engaged in interstate commerce; in the Escanaba Company Case, the Chicago bridge ordinance, providing that the draws in the bridge across Chicago river should be closed at certain times in the day, and not kept open longer than 10 minutes at other times; in the Smith Case, the Alabama statute requiring locomotive engineers to be examined and licensed in its applicability to such engineers engaged in interstate commerce; in the Nashville, etc., Railway Company Case, the Alabama statute prohibiting employment in certain capacities by railroad companies of persons afflicted with color blindness, in its applicability to such companies when engaged in interstate commerce; in the Hennington Case, the Georgia statute prohibiting the operation of railway trains on Sunday in its applicability to such as were so engaged; and, in the Solan Case, the Iowa statute prohibiting contracts by railroad companies to exempt them from liability as a common carrier in its applicability to such companies when so engaged.

These decisions may so mislead one as to the nature of said power or the subject of it that if he does not duly consider them he may think that it follows, from the fact that it has been held thereby that a state Legislature has power to enact such legislation, that Congress has no power to enact similar legislation. He will naturally so think, if he has the idea that in no state of case can a state legislature enter the field of interstate commerce or its adjuncts—that, so far as that field can be occupied at all by legislation, it can only be occupied by congressional legislation, and, properly so, if such idea is correct. For, if in no state of case can a state Legislature enter such field, a

decision that particular legislation enacted by it is valid, necessarily means that it does not by its enactment enter it, and, if by its enactment it does not enter that field, Congress by the enactment of similar legislation would not enter it either, and hence its action would be beyond its power. But that idea is not correct. It is not true that in no state of case can a state Legislature enter the field of interstate commerce or its adjuncts.

The commercial provision of the federal Constitution does not in terms exclude the several states from the field of interstate commerce and its adjuncts. It simply confers on Congress power to enter it. If they are excluded therefrom, it can only be as an inference from the grant of power to Congress to enter it. It is held that this is a proper inference therefrom, and that the power of Congress to enter that field is exclusive. But it does not follow from this that a state Legislature can in no state of case enter it. It simply follows therefrom that a state Legislature cannot enter it without the consent of Congress. In the matter of consent, it is not necessary that it be expressly or affirmatively given. It may be given by mere silence, or, as it is frequently put, by nonaction or inaction. One of the most difficult problems that the Supreme Court of the United States in its history has had to deal with has been the question as to when such consent is to be implied, and when it is not. It has often been referred to in the opinions of that court as difficult and perplexing, and has frequently caused dissent amongst the justices thereof. The court has always refused to lay down any single and exact rule of decision applicable to all cases that might arise. It lies outside of my path to make any reference to the considerations that have been referred to as having a bearing on the solution of the problem. The outcome of the presentation of the problem to that court has been two lines of decisions. One consists of cases where it has been held that such consent is not to be implied. It begins with the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23. The other consists of cases where it is held that it is to be implied. It begins with the case of Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412. It is to this latter line of decisions that the Sherlock and other cases just considered belong. It embraces many others. That the implied consent of Congress to the enactment of such legislation by a state Legislature is the determining factor in the matter of its validity is not brought out in the earlier cases. It is only later that it appears that such is the case. Such consent, when it is implied, is temporary only. It may be withdrawn at any time. Congress, whenever it sees fit to do so, may enter the field in that particular by the enactment of similar legislation. If it does so, it thereby ousts the state legislation. This is recognized in each of the cases referred to above.

In the Sherlock Case, Mr. Justice Field said:

"Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies giving a right of action in such cases to the personal representative of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

In the Escanaba Company Case, Mr. Justice Field said:

"But until Congress acts on the subject the power of the state over bridges across its navigable streams is plenary."

And, again:

"It is therefore a matter of good sense and practical wisdom to leave their control and management with the states; Congress having power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."

In the Smith Case, Mr. Justice Matthews said:

"The statute of Alabama, the validity of which is drawn in question in this case, does not fall within this exception. It would, indeed, be competent for Congress to legislate upon its subject-matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the states; and such legislation is undoubtedly justified on the ground that it is incident to the power to regulate interstate commerce."

In the Nashville, etc., Railway Company Case, Mr. Justice Field said:

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But, until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits."

In the Hennington Case, Mr. Justice Harlan said:

"The argument on behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the Constitution, without reference to affirmative action by Congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and therefore is valid, at least until Congress interferes."

And, again:

"The legislative enactments of the states passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destruction of some right secured by the fundamental law, are to be respected by the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution."

In the Solan Case, Mr. Justice Gray said:

"The rules prescribed for the construction of railroads and for their management and operation designed to protect persons and property otherwise endangered by their use are strictly within the scope of the local law. They are not in themselves regulations in interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject,

they are to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

In the case of N. Y., N. H. & H. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853, belonging to the same line of decisions as the foregoing, but not cited by defendant's counsel, in which the New York statute forbidding the heating of passenger cars, in that state, by stoves or furnaces kept inside the cars or suspended therefrom, was held valid in its applicability to cars engaged in interstate commerce, Mr. Justice Harlan said:

"Nor is it, within the meaning of the Constitution, a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce, and enacted under the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress might rightfully establish under its power to regulate commerce with foreign nations and among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

It does not follow, then, from the decisions in those cases, that Congress has no power to enact similar legislation to that involved therein. On the contrary, it follows therefrom—the validity thereof depending on the implied consent of Congress—that it has power to enact similar legislation; and this is expressly recognized in the quotations I have made from the opinions embodying those decisions. Viewed in this light, these decisions, instead of misleading one as to the nature of said power or its subject, will be helpful in enabling one to arrive at a true notion in regard thereto.

Then, as to the expressions in some of said opinions which may mislead one, I have in mind such expressions as that in the quotation made from the opinion of Mr. Justice Gray, in the Solan Case, contained in these words, to wit:

"They are not in themselves regulations of interstate commerce."

And as that in the quotation from the opinion of Mr. Justice Harlan, in the N. Y., N. H. & H. R. Company Case, contained in these words, to wit:

"Nor is it within the meaning of the Constitution a regulation of commerce, although it controls in some degree the conduct of those engaged in such commerce."

Substantially similar expressions may be found in the opinion of Mr. Justice Matthews, in the Smith Case, in these words, to wit:

"But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such."

And, again:

"They are not per se regulations of such commerce. It is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress enacted on the subject, that they can be required to give way to the supreme authority of the Constitution."

And in the opinion of Mr. Justice Harlan, in the Hennington Case, where he speaks of such local laws not being, "within the meaning of the Constitution and considered in their own nature, regulations of interstate commerce, simply because for a limited time, or to a limited extent, they cover the field occupied by those engaged in such commerce."

Such expressions cannot be construed to mean that such legislation, if enacted by Congress, as to interstate commerce or its adjuncts, would not be regulations thereof. Congress would not have power to enact them unless they were. The fact that Congress has power to so enact them, according to the conclusion heretofore reached, settles the fact that they would be such regulations if so enacted. We are now in position to appreciate the value of the decisions which we have been considering in extenso in their bearing on the nature of the commercial power of Congress. The legislation involved therein, if enacted by Congress as to interstate commerce and its adjuncts, would affect them directly. It would relate thereto, act upon, and touch them, and such would be the subject thereof. And it follows that the nature of that power is to enact legislation that will do and be this.

The other two decisions belonging to said second line, cited and relied on by defendant's counsel, tend in the same direction. They are the decisions in the Kidd and Williams Cases. There the state legislation involved was held valid, not because of any implied consent by Congress to its enactment, but because the enactment of such legislation was not an entry within the field of interstate commerce or its adjuncts. In the Kidd Case the legislation involved was the Iowa statute prohibiting the manufacture and sale of intoxicating liquors in that state, and in the Williams Case the legislation involved was the Georgia statute imposing a tax on emigrant agents; that is, persons hiring others in that state to labor in other states. In neither case did the statute affect interstate commerce or its adjuncts directly, or relate thereto or act upon or touch either, or was such the subject thereof. So far as they affected either, they affected it indirectly. The subject-matter of each was something other than interstate commerce or its adjuncts.

We come, then, to the first line of decisions cited and relied on by defendant's counsel as bearing out their claim as to the nature of the commercial power of Congress, and which, I think, bear out the statement which I have put forward as to the nature thereof. As they have to do with congressional legislation, it is to be expected that they will settle beyond question the true nature of that power, and in this we will not be disappointed. The exact question in each of those cases was, not whether Congress might enact any particular legislation under its commercial power, but whether the contract involved therein was in restraint of interstate commerce within the meaning of said anti-trust act, and prohibited by it. That act, however, depended for its validity on said power of Congress, and its meaning—the kind of contracts intended to be covered thereby—was treated in those cases as dependent on the nature of that power. It was held that it covered contracts that affected interstate commerce directly, that related thereto, acted

upon and touched it, and of which it was the subject, and did not cover contracts that affect it indirectly only, and which did not relate thereto, act upon, or touch it, or of which it was not the subject.

In the Knight Case the contract involved affected directly the manufacture of sugar in the state of Pennsylvania. It related to, acted upon, and touched it, and such manufacture was the subject thereof. It affected interstate commerce indirectly only. It did not relate thereto, act upon, or touch it, and such commerce was not the subject of it. It was held not within the act. In the Hopkins and Anderson Cases the contracts involved were between the members of certain live stock exchanges doing business in Kansas City, Mo., embodied in certain rules thereof. Those contracts affected directly the buying and selling of live stock at the stock yards in said city. They did not relate to interstate commerce on live stock, and affected it indirectly only. They were held to be not within the act. In the Trans-Missouri Freight Association, Joint Traffic Association, and Northern Securities Company Cases, the contracts involved were between common carriers engaged in interstate commerce. In the Addyston Pipe Steel Company Case the contract involved was between persons engaged in interstate commerce in iron pipe. And in the Swift and Company Case the contract involved was between persons engaged in interstate commerce in meat. The contract in each instance affected directly the interstate commerce carried on by the parties thereto. It related to such commerce, acted upon, and touched it, and such commerce was the subject thereof. It was held in each instance that the contract was within the act.

It follows from these holdings that the nature of the commercial power of Congress is as I have stated it. Legislation prohibiting contracts that affect interstate commerce or its adjuncts indirectly, or which do not relate thereto, act upon, or touch either, or of which such is not the subject, itself, affects interstate commerce or its adjuncts indirectly, and does not relate thereto, act upon, or touch them, and such is not the subject thereof. It is only legislation prohibiting contracts that affect interstate commerce or its adjuncts directly, or that relate thereto, act upon, or touch either, or of which such is the subject, that itself affects interstate commerce or its adjuncts directly and relates thereto, acts upon, and touches them, and of which such is the subject. In the course of his opinion, in the Addyston Pipe & Steel Company Case, Mr. Justice Peckham frequently refers to contracts within said act as those regulating said commerce directly and substantially, and not those regulating it indirectly, remotely, incidentally, and collaterally. It is this reference, no doubt, that suggested the position taken here as to the nature of said power which I have criticised. There are, however, other references in said opinion which show that what he had in mind was the distinction between contracts and legislation that affected interstate commerce directly, and contracts and legislation that affected it indirectly, which is the correct way, as I submit, of putting the matter.

I have thus arrived at the conclusion as to the nature of the power in question by a generalization of the two lines of decisions cited and relied on by defendant's counsel, as upholding their view thereof. The

generalization might have taken a wider scope by embracing the great number of other decisions involving the validity of state legislation claimed to be an encroachment on the commercial power of Congress not cited or relied on; but to have done so would not have changed the result and unduly lengthened this opinion.

There are not many other decisions of the Supreme Court involving the validity of congressional legislation, whose validity was dependent on that power, that can be considered in arriving at such a conclusion. Until lately, legislation in any way affecting interstate commerce or its adjuncts has been enacted principally by state Legislatures. There has not been a great amount of congressional legislation affecting that matter. It is only in recent times that it has become, to any great extent, the subject of congressional consideration and action. It is just what one would expect, therefore, to find that there are not many decisions of that court dealing with the validity of such legislation. Outside of those already considered, I do not deem it important to make any reference to any such decisions beyond the case of Johnson v. Southern Pacific, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. It involved the Safety Appliance Act of Congress of March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. The constitutionality of the act was assumed therein. It was not attacked. The decision was occupied entirely with its construction. The safety appliance act affected directly an adjunct of interstate commerce, to wit, the cars engaged therein, and that as to their couplers. It related thereto, acted upon, and touched it, and such was the subject thereof.

I am aware that the classic definition of the power in question is to be found in the words of Mr. Chief Justice Marshall, in the case of Gibbons v. Ogden, when he said that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed," often subsequently repeated in subsequent decisions of the Supreme Court in substantially the same words. Mr. Justice Harlan, in the case of Champion v. Ames, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, characterized it as a "general observation." What I have advanced is simply the outcome of a struggle after something more definite. After the great number of decisions of that court involving state and congressional litigation affecting interstate commerce and its adjuncts, the matter ought to be capable of more definite statement. A true generalization thereof is bound to give it.

Having thus reached a conclusion as to the nature of the power in question, we come to the other position of defendant's counsel, to wit, that said section is not within said power; and in disposing of it I will treat its nature as I have defined it, and not as they have. Does it affect interstate commerce, or any of its adjuncts, directly? Does it relate thereto, act upon, or touch either, or is either the subject of it? It must be admitted that it does, and that such is the case. It affects an adjunct of interstate commerce, relates thereto, acts upon, and touches it, and such is the subject of it. That adjunct is common carriers engaged in interstate commerce, and their officers, agents, and employés. It forbids them from doing any of the things covered by that section.

But it may be thought that it is not sufficient that congressional legislation should affect an adjunct of interstate commerce directly, relate thereto, act upon, or touch it, or that it be the subject thereof in order to be valid. To this end it must serve some useful purpose in regard to interstate commerce itself, and not be intended to and in fact accomplish no more than some ulterior purpose. I am not prepared to say that such a view is not correct. There is nothing in the Johnson Case impugning its correctness. Of course, the requirement as to providing couplers was and is beneficial to the manufacturers thereof and to brakesmen; but it is beneficial also to interstate commerce itself. It makes it more attractive for brakesmen to engage therein, by lessening the danger of the business. The necessities of this case do not require that I should dispute the correctness of this view. The section involved herein is not without a beneficial effect upon interstate commerce itself. Its tendency is to prevent an interruption to interstate commerce by reason of strikes, lockouts, and boycotts, and such, as I have already stated, was its intent.

Until recent times, the national attitude towards interstate commerce has been almost solely to prevent its being burdened and interrupted. Such has been the controlling consideration in determining the validity of state legislation affecting it or its adjuncts.

In the case of United States v. Coombs, 12 Pet. 72, 9 L. Ed. 1004, the question involved was whether one could be indicted under the act of Congress entitled "An act more effectually to provide for the punishment of certain crimes against the United States and for other purposes," approved March 3, 1825, for stealing a quantity of merchandise belonging to a ship wrecked on the coast of New York; the goods at the time they were stolen being above high-water mark, and hence outside of the jurisdiction of the United States. It was held that he could. Mr. Justice Story said:

"It [commercial power of Congress] does not stop at the mere boundary line of a state; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states. Any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt that the various offenses enumerated in the tenth section of the Act are all of a nature which tend essentially to obstruct, prevent, or destroy the due operation of commerce and navigation with foreign nations and among the several states."

In the case of In re Debs, 158 U. S. 565, 15 Sup. Ct. 900, 39 L. Ed. 1092, it was held that the United States, through its Attorney General, had a right to bring a suit to enjoin the interruption of interstate commerce caused by the Chicago strike of 1894.

The anti-trust act of 1890 is another manifestation of this national attitude, and there would seem to be no room to doubt that the tenth section of the act of June 1, 1898, involved herein, is a still further manifestation thereof.

The ground upon which it is claimed by defendant's counsel that said section does not affect directly or, as they have it, regulate directly

that which is the subject of the commercial power of Congress, and hence is not within it, is that "it is merely an intermeddling by Congress with the private relations between master and servant." But it does not deal with the relations between master and servant in the abstract. It deals with the relations between particular masters and servants, to wit, common carriers engaged in interstate commerce and their employés. Such carriers and their employés are the adjuncts of such commerce. Hence said legislation affects those adjuncts directly. It relates thereto, acts upon, and touches them, and they are the subjects thereof. This being so, it is within that power. I conclude, therefore, that said section is not unconstitutional for this reason.

Another reason given in support of the claim that said section is unconstitutional is that, however it may be as to its being within the commercial power of Congress, it is prohibited by the fifth amendment to the federal Constitution, in so far as it provides that no person shall "be deprived of life, liberty or property without due process of law." In other words, it is claimed that that portion of said amendment is a limitation upon the commercial power of Congress, and, though said section comes within the latter, it comes within the former also. It must be conceded that, if this position is correct, then said section is unconstitutional.

Defendant's counsel cite in support of his position the following decisions of the highest courts of the states of Missouri, Illinois, Wisconsin, and New York, to wit: State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; State v. Kreutzburg, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748, 91 Am. St. Rep. 934; People v. Marcus, 77 N. E. 1073, 185 N. Y. 257. In each of these cases a state statute was involved substantially similar to said tenth section, in making it an offense for an employer to discharge or refuse to employ an employé because of his membership in a labor organization. In those cases they were sought to be enforced against persons engaged in private business—in the Missouri and New York cases against a manufacturer, and in the Illinois case against a contractor. It does not appear in what business the defendant was engaged in in the Wisconsin case. In each case the statute was held to be unconstitutional, as in violation of certain provisions of the state Constitution and of the fourteenth amendment to the federal Constitution, in so far as it prohibited state action depriving any person of life, liberty, or property without due process of law.

Counsel for the United States contend that said decisions are erroneous. They maintain that such statutes do not deprive the employer of any lawful right; that they simply protect the rights of employés against invasion by the employer; and that the alleged right of the employer is a right to interfere with the liberty of his employés because they are in his service. This argument merely begs the question. No decision is cited to the contrary of those decisions, except a nisi prius decision in the case of Davis v. State, 30 Wkly. Law Bul. 342. I am not disposed to question the correctness of those decisions. On the contrary, they seem to me based upon sound reasoning. As said by Cooley on Torts, 278:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice, or malice. With his reasons, neither the public nor third persons have any legal concern."

But it does not follow from the correctness of these decisions that section 10 is unconstitutional, though it seems quite plausible that, if state legislation of this character is unconstitutional as being in violation of the fourteenth amendment, prohibiting state action depriving any person of life, liberty, or property without due process of law, said tenth section is unconstitutional also, as being in violation of the fifth amendment, prohibiting federal action depriving a person of life, liberty, or property without due process of law. The question may be thought to depend upon whether said fifth amendment is a limitation upon the commercial power of Congress conferred by subsection 3, § 8, art. 1, of the original Constitution.

In the case of Gibbons v. Ogden, Mr. Chief Justice Marshall, in the language heretofore quoted, said:

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

This language is repeated several times in subsequent cases. It would seem to imply that limitations on said power are to be found in the federal Constitution. I have found nowhere any statement as to what limitations thereon are to be found therein. Nor have I taken the time to study the Constitution with the view of ascertaining for myself those limitations. But it would seem to be reasonable to hold that said amendment is a limitation on said power.

In the case of United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, Mr. Justice Harlan, in his dissenting opinion, said:

"In committing to Congress the control of commerce with foreign nations and among the several states, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of the people of the Union. It wisely forbore to impose any limitations upon the exercise of that power, except those arising from the general nature of the government, or such as are embodied in the fundamental guaranty of liberty and property."

It would hardly be held that it was not a limitation on the commercial power of Congress in the matter of depriving a person of his property without due process of law.

In the case of Monongahela Nav. Co. v. United States, 148 U. S. 336, 13 Sup. Ct. 630, 37 L. Ed. 463, Mr. Justice Brewer said:

"But, like the other power granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor."

If Congress were to pass a law reducing the rates for interstate transportation of passengers or goods to such a point as to amount to a confiscation of the property of a common carrier engaged therein, there can be no question that such a law would be held to be affected by the fifth amendment. If, then, said amendment limits said power in the matter of depriving a person of his property without due process of law, no reason can be given why it should not be held to limit said power in the matter of depriving a person of his liberty without due process of law.

Yet it has been held in the cases heretofore considered in which the anti-trust act of 1890 has been applied, that it does not limit said power of Congress in prohibiting contracts in reasonable restraint of interstate commerce, whether made by common carriers or others engaged therein. The liberty of private contract in this particular is held not to be preserved by said amendment as against the commercial power of Congress. In the Addyston Pipe & Steel Company Case, Mr. Justice Peckham said:.

"The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution."

But, conceding, as I think we must do, that said amendment is a limitation, to a certain extent at least, upon the commercial power of Congress, in so far as it prohibits a deprivation of liberty without due process of law, is the legislation in question a deprivation of such liberty within the meaning thereof, and hence unconstitutional? This depends entirely upon what liberty is intended to be protected thereby. It is certainly not the liberty to do what one pleases that is thereby protected from invasion by Congress under its commercial power. We have just seen that the liberty of making reasonable contracts in restraint of interstate commerce are not so protected. Congress, under its commercial power, notwithstanding said amendment, had the right to enact the anti-trust act of 1890 which has been construed to prohibit the making of such contracts, or of any contracts that directly affect by way of restraint such commerce. In the case of Champion v. Ames, 188 U. S. 357, 23 Sup. Ct. 327, 47 L. Ed. 492, it was held that the act of Congress, prohibiting the transportation of lottery tickets from one state to another by an express company, was valid under said commercial power, notwithstanding said amendment. Mr. Justice Harlan there said:

"But surely it will not be said to be a part of any one's liberty, as recognized by the Supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals."

In view of these decisions, one must conclude that it is only a liberty that it is reasonable and proper that should not be subject to invasion by Congress under its commercial power that is protected therefrom by said amendment. The matter here, then, comes to this: Is the liberty of a common carrier engaged in interstate commerce to discharge an employé, or to refuse to employ him, because of his member-

ship in a labor organization, such a liberty as that it is reasonable and proper that it should not be interfered with by Congress under its commercial power? We have seen that it has been held that the liberty of one engaged in what may be characterized as a lawful private business to so act is such that it is reasonable and proper that it should not be invaded by state legislation, and that it is protected by the fourteenth amendment; but it does not follow from this that the liberty of such a common carrier to so act is such that it is not reasonable or proper that it should be invaded by Congress under its commercial power. A person engaged in a lawful private business and a common carrier engaged in interstate commerce occupy entirely different positions. The former has a fundamental right upon his own choice to engage in and carry on such business. The latter has no such right. It exercises a public function, and has no right to exercise it except by consent of the national government, express or implied.

The position that a common carrier, such as a railroad for instance, exercises a public function, is upheld by frequent statements in the opinions of the Supreme Court. In the case of Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051, Mr. Justice Field said:

"Though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested for that purpose with special privileges. They are allowed to exercise the state's right of eminent domain, that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purpose, and they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates, and they are authorized to charge reasonable compensation for the services they thus perform."

Mr. Justice Brewer, in his dissenting opinion in the case of Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, said:

"Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the state, has a right to create and maintain, and therefore one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and pro tanto the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work, he is pro tanto doing the work of the state. He devotes his property to a public use."

In the case of L. & N. R. Co. v. Kentucky, 161 U. S. 696, 16 Sup. Ct. 721, 40 L. Ed. 849, Mr. Justice Brown said:

"It has been too often held that railways were public highways, and their functions were those of the state, though their ownership was private, and that they were subject to control for the common good, to be now open to question."

And in the case of United States v. Joint Traffic Association, 171 U. S. 569, 19 Sup. Ct. 32, 43 L. Ed. 259, Mr. Justice Peckham said:

"When the matter of the building of railroads as highways arose, a question was presented whether the state should itself build them, or permit others to do it."

And, again.

"The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all."

It follows, then, that a common carrier engaged in interstate commerce is exercising a function of the national government and that by its consent, express or implied. The national government can itself exercise that function. In the case of California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150, Mr. Justice Bradley said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority of Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent; the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the territories of the United States and its power to grant franchises exercisable therein, are and ever have been undoubted; but the wide power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of states as well as federal corporations."

And in the case of Wilson v. Shaw (decided January 7, 1907) 27 Sup. Ct. 233, 204 U. S. 24, 51 L. Ed. ——, the Supreme Court based the right of the United States to build the Panama Canal, which was questioned therein on its commercial power. Mr. Justice Brewer said:

"Again, plaintiff contends that the government has no power to engage anywhere in the work of constructing a railroad or canal. The decisions of this court are adverse to this contention. * * * These authorities recognize the power of Congress to construct interstate highways. A fortiori Congress would have like power with the territories and outside of state lines, for there the legislative power of Congress is limited only by the provisions of the Constitution, and cannot conflict with the reserved power of the states."

That differences in matter of action on its, or his, part follow from this difference of position occupied by a common carrier engaged in state or interstate commerce, and a person engaged in private business, is stated by Mr. Justice Peckham, in the case of United States v. Trans-Missouri Freight Association, 166 U. S. 321, 17 Sup. Ct. 540, 41 L. Ed. 1007, in these words:

"The company [a railroad company] may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things."

It would seem also that differences in the matter of the right of the state or United States to control follows therefrom. In the case of

Cotting v. Goddard, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, Mr. Justice Brewer intimated that there might be a difference in this particular as to property rights. He said:

"Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered, and in those in which, without any intent of public service, the owners have placed their property on such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself; in the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the state, may it not be urged that he in a measure subjects himself to the same rules of action, and that, if the body which expresses the judgment of the state believes that the particular services should be rendered without profit, he is not at liberty to complain? While we have said again and again that one volunteering to do such service cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertake to act for the state, he must submit to a like determination as to the paramount interests of the public?"

By referring to this statement I do not commit myself to the idea it may be thought to favor. Rather I would be inclined to think that if a state or the United States declines itself to perform this public function, and permits and, as it were, invites others to perform it, and to make an investment of time, thought, labor, and capital in its performance, such persons should be entitled to a fair and reasonable return on the investment, and that this right could not be taken from them without just compensation. Such may be said to have been a term in the implied understanding of the parties to the permission or invitation at the time of its acceptance.

But it seems to me clear that there is a difference in this particular as to liberty of action by such common carrier or person. Whatever may be the control that a state or the United States has over a person engaged in private business in the matter of his liberty of action, it is reasonable to hold that it has sufficient control over a common carrier in the matter of its liberty of action as to enable it to bring about an efficient performance of the public function with which it is intrusted, and to prevent action on its part that may cause an interruption in the performance thereof, and this on the ground that another term in that

understanding is that it (the common carrier) would perform the public function intrusted to it to the very best advantage, and that the state or United States, as the case might be, reserved to itself the power thereafter to control it to an extent reasonably necessary to secure that result. Amongst the things which Mr. Justice Brown said in the quotation above made from his opinion in the case of L. & N. R. Co. v. Kentucky, had been held too often to be thus open to question, was "that railways were subject to control for the common good." And in the case of Charlotte, C. & A. R. Co. v. Gibbes, supra, Mr. Justice Field referred to what followed from the nature of the function performed by railroad corporations, in these words:

"Being the recipients of special privileges from the state to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 179, 9 Sup. Ct. 47, 32 L. Ed. 377. That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses of extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion."

If this line of reasoning is sound, then said section is not within the fifth amendment. It is not reasonable or proper that the liberty of action of a common carrier engaged in interstate commerce in the particulars covered thereby should be beyond the control of Congress under its commercial power. It is not such liberty of action as is protected thereby against the exercise of said power, in that it is action calculated to provoke strikes, boycotts, and lockouts, and cause an interruption and cessation of interstate commerce. The one particular, more than any other, in which such common carrier's liberty of action seems to be within the control of Congress under its commercial power, is in doing that which will, or may, obstruct such commerce. As we have seen, Congress has power to prevent obstruction thereof by contracts reasonably restraining it, entered into between competing common carriers, and so great is its power here that it can prohibit such contracts when made by persons not exercising any public function. Had the United States itself exercised this public function, there can be no question that legislation of this character affecting officials would be entirely legal. There is no reason why the fact that it has intrusted its performance to a private corporation should make any difference. The only possible ground for holding that said section is in violation of the fifth amendment is that it has no real and substantial relation to the free course of interstate commerce. I believe that it has such relation thereto. At the very least I cannot say that it has not. I am constrained, therefore, to hold that said section is not unconstitutional for this reason.

Still another reason urged in support of the position that said section is unconstitutional is that it penalizes a common carrier engaged in interstate commerce for discharging an employé because of his member-

ship in a labor organization, or otherwise discriminating against him on that ground, without reference to the fact whether he is engaged in interstate commerce or solely in intrastate commerce. This court takes judicial knowledge of the fact that the Louisville & Nashville Railroad Company, a common carrier engaged in interstate commerce, and whose master mechanic is charged with a violation of said section in the indictment herein, operates trains over its railroad solely in Kentucky. It operates such trains between Louisville and Lexington, and between Lexington and Maysville, and possibly elsewhere. It is claimed that by said section it is made an offense for said company, or any officer, agent, or employé thereof, to discharge or otherwise discriminate against an employé so engaged solely upon any of said intrastate trains, because of such membership; that it is penalized by the very same words that such discriminating action as to an employé engaged in interstate commerce is penalized; that I have no power to limit this broad language to employés not engaged on intrastate trains; and that therefore the whole section must fall. The cases of U. S. v. Steffens (The Trade-Mark Cases), 100 U. S. 82, 25 L. Ed. 550, U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290, and Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 32 L. Ed. 766, are cited in support of the next to the last of these several propositions. To the same effect are the following cases, to wit: Allen v. Pullman Co., 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; Illinois Central R. Co. v. McKendree, 27 Sup. Ct. 153, 203 U. S. 514, 51 L. Ed. ——.

Of course the doctrine of those cases must be accepted as sound; but they have no application here. It is not likely that the employés of a railway common carrier engaged in interstate commerce, employed solely upon intrastate trains, do not have anything to do in the course of their employment with interstate commerce, i. e., that such employés, though exclusively so engaged, are not in reality also adjuncts of interstate commerce. It is so unlikely that I would not be disposed to overthrow the section in question, if such fact would render it unconstitutional, without further information that such was the case. Said section was enacted in view of existing conditions, and its validity would not be affected by an imaginary, as distinguished from a real, state of things. Take, for instance, the intrastate trains of the Louisville & Nashville Railroad Company, operating between Louisville and Lexington and between Lexington and Maysville. That company operates no interstate trains over said portions of its railroad. In consequence said intrastate trains do an interstate commerce business, and, no doubt, a very large business of that character. Frequently, if not always, the intrastate freight trains operated thereon have on them interstate cars passing between points thereon and points on its Memphis, Nashville, and Knoxville branches to the south of Kentucky. The same is true as to the intrastate passenger trains operated thereon. Beyond question they do a large interstate passenger and express business between said points. Undoubtedly there is a breakage in the passage at Louisville and Paris, but the passage is under one contract and for continuous service. The employés on such trains, therefore, though adjuncts of intrastate commerce, are at the very same time adjuncts of interstate commerce. If, then, Congress, under its com-

mercial power, has no right to penalize a common carrier of interstate commerce for such discriminating action, save only as to interstate employés, the fact that said section applies to such employés who are also intrastate employés cannot invalidate it.

In the case of The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999, Mr. Justice Field said:

"The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts, in that transportation, it is subject to the regulation of Congress."

The only likelihood of an intrastate train of an interstate carrier not doing any interstate business under any circumstances would be where such train was operated over that portion of the road over which interstate trains ran also. But, again, if it be conceded that there is such a thing in this country as employés of a common carrier engaged in interstate commerce, who are adjuncts solely of intrastate commerce, and that to invalidate an act of Congress penalizing such discriminating action towards such employés would be unconstitutional, there is room to hold that the section in question admits of a construction limiting its application to employés who are wholly, or partially, adjuncts of interstate commerce, notwithstanding the sweeping language in the first section, providing that "the term employés as used in this act, shall include all persons actually engaged in any capacity in train operation or train service of any description." It is a cardinal rule of construction that where legislation admits of two constructions, one of which would uphold and the other invalidate it, the former will be adopted. Such a construction may be justified by the evident intent of Congress to be drawn from its title and all its provisions to keep within its commercial power.

There is nothing in any of said decisions relied on here against such a position. I understand the indictment to charge that Coppage, the employé, whom it is alleged was discriminated against was an employé engaged in interstate commerce. But it is not entirely clear that an act of Congress, penalizing such action towards such employés, would be unconstitutional. It would not be the action of a common carrier engaged in intrastate commerce, that would be so penalized, but the action of the common carrier engaged in interstate commerce, who also did an intrastate business. Such action towards an employé engaged in the intrastate department of its business would be as likely to cause an interruption in or embarrassment of its interstate department as like action towards an employé engaged in the latter.

In the case of Gibbons v. Ogden, Mr. Chief Justice Marshall said:

"The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completly within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of execution, of some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved to the state itself."

And, again:

"It is obvious that the government of the Union, in the exercise of its express powers (that, for example, of regulating commerce with foreign nations and among the states), may use means that may also be employed by a state, in the exercise of its acknowledged power (that, for example, of regulating commerce within the state). If Congress license vessels to sail from one port to another, in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police."

It seems to me, therefore, that the section in question herein is not unconstitutional for this reason: A final reason urged in support of the contention that it is unconstitutional is that it is class legislation, in that it confers privileges upon union labor that are not conferred upon nonunion labor. In other words, the claim is that it denies to nonunion labor the equal protection of the laws. But I find no provision in the federal Constitution prohibiting class legislation, i. e., prohibiting Congress from denying one the equal protection of the laws. The provision in the fourteenth amendment applies only to state action amounting to such denial.

I would not, however, commit myself to the proposition that Congress can deny one the equal protection of the laws. It is too serious a matter to dispose of upon the very slight consideration which I have given the matter. The necessities of this case do not require that I should dispose of this question herein. The section in question does not come within such a prohibition, even if there was one affecting Congressional action. Such a prohibition would not prevent all discrimination, but only such as was arbitrary and not reasonable; that is, not based on some reason of public policy. The discrimination here, so far as it exists, is based on a reason of public policy. The purpose of the legislation, as we have seen, was to prevent an interruption of interstate commerce. The discriminating action on the part of a common carrier engaged in interstate commerce towards an employé prohibited by the section is liable to bring about such an interruption. Like discriminating action toward an employé who is not a member of a labor organization is not liable to produce any such result. There is nobody to back him up in his complaints and demands, or means by which he can bring about such interruption.

It will not do to overlook the fact that Congress in enacting the legislation in question viewed it, not from the standpoint of the labor organization, but from its own. That standpoint was the interest of interstate commerce committed to its charge by the federal Constitution. This reason, then, does not meet my approval. I am constrained to hold, therefore, that said section is constitutional. In disposing of the question I have borne along with me two general considerations: One is that I am not concerned with the policy of said legislation—only with its constitutionality. The other is that I have no right to hold an act of Congress unconstitutional, unless it is clearly so. It seems to me that these two considerations, in connection with those handled in detail, are sufficient to demand of me that I uphold said law.

The matter has been considered elsewhere in two cases. In the case of United States v. Hill, an indictment found in the district of Massachusetts under said section in 1899, Judge Lowell overruled a demurrer thereto, and submitted the matter to a jury, which hung. There seems to have been no further trial of the case. He delivered no opinion as to its constitutionality. His action, however, involved its being constitutional. In the case of United States v. Scott (D. C.) 148 Fed. 431, Judge Evans of the Western district of this state, a prosecution against an employé of the Louisville & Nashville Railroad Company, held the section unconstitutional. A comparison of his opinion with this will indicate wherein we differ.

The demurrer is overruled.

In re NORTHRUP et al.

(District Court, N. D. New York. March 20, 1907.)

1. BANKRUPTCY—WRONGFUL CONVERSION OF TRUST FUNDS—RIGHT TO RECLAIM.
   Where a bank acting merely as collection agent for another bank under an agreement by which it was to remit the proceeds of all collections as received, without authority to credit the same on its books, made a collection and mingled the proceeds with its own funds, and became bankrupt without having remitted the same, so much of its cash at least as remained on hand at all times between the date of the collection and the bankruptcy, and came into the hands of its trustee, will be presumed to be proceeds of the collection, and may be reclaimed by the bank owning the collection as its property.
2. SAME—EQUITABLE SET-OFF—POWER OF COURT TO ENFORCE.
   Bankrupts as partners, doing business as a private bank, had an agreement with claimant bank by which each bank was to act as collection agent for the other, remitting the proceeds of all collections made without charge or credit. The bankrupts made an assignment, and were subsequently adjudged bankrupts, having a short time previously collected a draft sent them by claimant, the proceeds of which they had not remitted, but mingled with their own funds. At the time of the assignment they had certain collections in the hands of claimant, and between themselves agreed that the collections as between the two banks should be considered a "stand-off," and they did not list claimant as a creditor, nor schedule the collections in its hands as assets of their estate in bankruptcy. Claimant, however, having made the collections sent it, in ignorance of the assignment, or that its own funds had been converted, in accordance with its agreement remitted the proceeds of such collections by drafts which were received and collected by the assignee, the proceeds afterward coming into the hands of the trustee in bankruptcy. On learning the facts, claimant accepted the set-off intended by the bankrupts, and demanded a return of its drafts or their proceeds, which being refused it applied for an order directing their return by the trustee. *Held*, that it was competent for the bankrupts to restore so much of the claimant's funds they had wrongfully converted by applying thereon the proceeds of their own collections in claimant's hands, and for claimant to accept and ratify such intended substitution upon learning of it, instead of attempting to trace and reclaim its own funds, and that the court in the exercise of its equity powers could carry such completed agreement into effect by directing the return of the proceeds of the drafts.

In Bankruptcy.

This is an application by the National Bank of Syracuse for an order directing the trustee in bankruptcy of Walter E. Northrup and Robert A.

Hill, as copartners under the name of the Central Bank, doing business at Oneida, N. Y., to pay over to it the sum of $796.23, the amount of certain drafts sent by the National Bank of Syracuse to the said Central Bank in payment of certain collections it had made as agent for said Central Bank, but which had not been received by it at the time it made a general assignment for the benefit of its creditors. The same were received by the assignee soon after such assignment, and collected by him, and the proceeds thereof have been paid over to the trustee in bankruptcy.

Mackenzie & Wade, for the application.
E. Leland Hunt, opposed.

RAY, District Judge. The National Bank of Syracuse at all the times mentioned was incorporated and doing business as a national bank under the national banking laws, and had its principal office and place of business in the city of Syracuse, N. Y. Walter E. Northrup and Robert A. Hill were copartners, engaged in a private banking business under the name of Central Bank of Oneida, N. Y., and they had their office and principal place of business in the city of Oneida, N. Y. An agreement was made between the two banks under and by the terms of which each was to receive from the other, for collection simply, such paper as should be sent to it for that purpose. It was the agreement that, when collection was made, the proceeds of the paper collected should be immediately remitted to the one sending the paper for collection. No charge was made and no credit given. The relation of debtor and creditor was not to arise. The relation was that of principal and agent purely. The parties acted under that agreement, and it is conceded that such was the relation existing between the parties. Each bank kept an account of the paper so received for collection and of remittances made.

June 16, 1905, under this agreement, the National Bank of Syracuse forwarded to the Central Bank of Oneida for collection and remittance a certain draft for the sum of $1,170.29, which draft was drawn on one Robert Paul, of Oneida, N. Y. On the 17th day of June, 1905, the said Central Bank presented the draft to Paul for payment, and received from him in payment thereof the sum of $1,170.29. Nine hundred sixty-five dollars and ninety-eight cents of this sum was paid in cash, and the balance by certain exchange items. The Central Bank had the benefit of the same, and presumably the cash paid went into its vaults and became a part of the cash on hand. The identity of the money as such was therefore lost. It was no longer capable of exact identification, but it was money which it was the duty of the Central Bank to transmit to the National Bank of Syracuse, which had the title thereto. On the 27th day of June, 1905, the said Walter E. Northrup and Robert A. Hill, both individually and as copartners under the said firm name, made a general assignment for the benefit of their creditors to one H. C. Stone, who qualified and took possession of the assets of said Central Bank and of said individuals comprising said firm. At the time such assignment was made and the doors of the Central Bank were closed there was in the said bank cash to the amount of $502, but between the day when said Paul draft was collected and the closing of the doors of the Central Bank its cash had been reduced to the sum of $247, so that the said Central Bank had

actually appropriated to its own use all of said money except the sum last stated. There was no communication between the two banks in relation to such collection or the remittance of the proceeds. The Central Bank did not remit the proceeds of the Paul draft, and the proceeds have not been remitted or paid over since. From June 20 to June 26, 1905, inclusive, the National Bank of Syracuse received from said Central Bank for collection and remittance under said agreement and collected items amounting to $540.50 and also another item of $255.73. There was no communication between the parties as to the collection of these items or the remittance of the proceeds. As a necessary consequence, these moneys belonged to the Central Bank, and there was no right of offset, or to balance accounts, or to strike and remit balances, by the terms of the existing agreement. June 27, 1905, and before the Central Bank made the assignment referred to, the National Bank of Syracuse in due course of business, and in ignorance of the facts that the Central Bank was financially involved, or about to make an assignment, or that it had, in fact, used or appropriated any part of the Paul draft collection or that same had been collected, but assuming, of course, that it would remit the proceeds in due course of business, made and left for mailing, and about 6 o'clock p. m. of that day and after the Central Bank had closed its doors, but before the assignment was executed, mailed to the said Central Bank, two drafts for the amount of such collections made by said First National Bank of Syracuse, viz., one for $540.50 and the other for $255.73. These drafts were received by said assignee, H. C. Stone, June 28th, duly indorsed by him, forwarded for collection, and paid by the Bank of America of New York City, on whom drawn, before the First National Bank of Syracuse could stop payment thereof, which it, with due diligence, endeavored to do on learning of such assignments. June 29, 1905, an involuntary petition in bankruptcy was filed against the said firm (called "Central Bank") and the individuals comprising same, and H. W. Coley was appointed receiver of their property, etc., by the District Court of the United States in such proceedings, and July 29, 1905, they were duly adjudicated bankrupts accordingly, and thereafter said Coley was duly appointed trustee of such bankrupt estates. The cash in said Central Bank when such assignment was made, $502, and the proceeds of such drafts for $540.50 and $255.73, respectively, received by said assignee, were paid over by the said assignee to said receiver and by him to such trustee, and he now holds same. It was given in evidence, and not disputed, that before closing its doors and making the said assignment, but on the same day, Northrup and Hill, composing the firm, had a conversation between themselves, in contemplation of the assignment, in which one asked the other how they stood with Syracuse, referring to the First National Bank of Syracuse, and the reply was that Syracuse owed them as much as they did Syracuse, and the partner making the inquiry then said, "Then that is a stand-off."

It is contended (1) that under these circumstances there was such a mistake of fact inducing the forwarding of the drafts to the Central Bank June 27th that title did not pass, and this court, in equity, may and should direct their return or the return of the proceeds; and

(2) that, if this cannot be done, the First National Bank is entitled to the cash in the Central Bank at the close of business June 27th, and which passed to the assignee and subsequently to the trustee and now in the possession of the court, or at least to the sum of $247, the least sum such Central Bank had after the collection of such Paul draft. There can be no question that under the agreement sustained by the course of dealing between the Syracuse Bank and the Central Bank the title to the Paul draft, as well as its proceeds, remained in the First National Bank of Syracuse. The title was in the Syracuse Bank under evidence in the case which I have not recited. Metropolitan Nat. Bank v. Lloyd, 90 N. Y. 530. It remained there for the reason that by special agreement the Central Bank was a mere agent to collect and remit. It could not by its own act and without the consent or acquiescence of its principal make itself the owner of the draft or of its proceeds. No such consent was shown, and there was no acquiescence in any such action as the Syracuse Bank was ignorant of what the Central Bank had done. The Central Bank did become liable to the Syracuse Bank for the conversion of its property, the proceeds of the Paul draft, to the extent it was converted, and Northrup and Hill also became criminally liable for grand larceny, but in no other sense did they or their copartnership become the debtors of the Syracuse Bank. True, that bank might have waived the tort and brought action for money had and received after knowledge of the facts. It might have waived compliance with the contract and the remittance of the proceeds of the draft, and given consent that the sum collected by the Central Bank be offset against the amount collected by it, but nothing of the sort was done by mutual consent or arrangement, and what the First National Bank actually did in remitting the amounts collected by it for the Central Bank to that bank when it knew the Central Bank had its paper for collection and which probably had been collected, or its proceeds, negatives any idea of such waiver and consent.

This is a plain case of honesty and integrity, and strict compliance with the agreement on the one part, and of dishonesty, malfeasance, and violation of contract and moral obligations on the other, in which honesty got the worst of it. If Northrup and Hill had informed the assignee, H. C. Stone, of the situation and of the obligations of the agreement and of their talk regarding "the stand-off," and had provided in the assignment for the protection of the Syracuse Bank in case it had remitted or should remit before obtaining knowledge of the assignment, or had requested the holding by their assignee of any such remittance in case it should come until the Syracuse Bank could take measures to protect itself, the case would be stripped of some of the rascality and felonious intent shown. The speed with which the assignee secured payment of the drafts in question may display mere business diligence. But, if so, this fact in no way ameliorates the acts of Northrup and Hill. It is a case where the Syracuse Bank should be protected if protection can be afforded without doing violence to the law and without injury or injustice to others. The First National Bank of Syracuse was guilty of no wrong, no laches. It simply observed its own contract obligations with strict business fidelity and

honor notwithstanding the delay of the Central Bank in accounting for the Paul draft sent to it for collection and remittance June 16th. In order to follow and recover or reclaim trust funds improperly disposed of by trustee or agent, it is generally necessary to identify the same. But such identification need not be absolute and complete as between the trustee and cestui que trust, or as between principal and agent. And there is no presumption the trustee or agent has actually converted, misapplied, or wrongfullly disposed of the trust funds shown to have been in his hands. The presumption is the contrary. Tracing and identifying is a matter of evidence. Then, has the First National Bank of Syracuse traced into the possession of Northrup and Hill (the Central Bank) and sufficiently identified any of the proceeds of the Paul draft? June 17, 1905, they received the money, and, so far as the evidence shows, they at all times thereafter had $247 on hand. This is sufficient identification to that amount. It is not shown to be money other than the proceeds of the Paul draft. There is no presumption that any of such proceeds were misapplied; but that it was misapplied in part is shown by the absence of all but $247 thereof. The proceeds of the Paul draft went into the Central Bank with the other funds belonging to that bank, and is presumed to have remained there, not having been paid over to the Syracuse Bank; and it is immaterial that such proceeds were mixed with other funds of such Central Bank. They did not lose their character. Roca v. Byrne, 145 N. Y. 182, 189, 190, 39 N. E. 812, 45 Am. St. Rep. 599; Van Alen v. American Nat. Bank, 52 N. Y. 1; Importers' & Traders' Nat. Bank v. Peters, 123 N. Y. 272, 25 N. E. 319; Pennell v. Deffell, 4 De Gex, M. & G. 372; Veil v. Mitchell, 4 Wash. C. C. 105, Fed. Cas. No. 16.908; Hatch v. Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403; Union S. Y. B. v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; Nat. Bank v. Ins. Co., 104 U. S. 54, 26 L. Ed. 693. In Importers' & Traders' Bank v. Peters, supra, it was held:

"When money held by a person in a fiduciary capacity has been deposited by him in his general account at a bank, the party for whom the money is held can follow it, and has a charge on the balance in the banker's hands. If the depositor after such a deposit draws out sums by checks generally and in the ordinary manner, it must be presumed that he drew out his own in preference to the trust money. The rule attributing the first drawings out to the first payments in does not apply to such a case."

In Van Alen v. Am. N. Bank, supra, it was held:

"Where an agent deposits in a bank, to his own account, the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor."

Here it is not shown that all of the fund belonging to the Syracuse Bank was drawn out and used by the Central Bank for its own purposes; and, a part having been restored, I am inclined to think the First National Bank of Syracuse is to be deemed the owner of all the money in the Central Bank at the time of the assignment. There is no proof it belonged to any other person or party. Why should not the

law so apply such balance of $502? I know of no principle of law which will prevent a wrongdoer from restoring a fund which he has misapplied. Why will not the trust attach to whatever balance the wrongdoer has in bank, even though it appears he has been drawing out and making deposits generally, so that the amount to his credit has at times been below the trust mark? The Syracuse Bank contends, however, that it is entitled to reclaim these drafts or their proceeds for the following reasons: First. The Central Bank, having the money of the First National Bank of Syracuse in its possession for remittance to it, and being short of funds, used the money of that bank for its own business purposes and by such act became liable to the First National Bank in the sum of $1,170.29 in an action for conversion or for money had and received to its use. Second. That having become liable to said Syracuse Bank in that sum which said Syracuse Bank could have recovered in a suit at law in either form of action suggested, and recognizing such liability, the Central Bank elected to pay the Syracuse Bank the amount to which it was entitled by appropriating to that purpose, and leaving with the Syracuse Bank certain moneys in possession of that bank which the Central Bank owned, and to which it was entitled, and which otherwise it was entitled to demand and receive from said Syracuse Bank. Third. That in legal effect this was a setting apart and an appropriation of the amount due from the First National Bank of Syracuse to the Central Bank to the payment and reimbursement of the trust fund misappropriated, and that, as this was done prior to the assignment, it only wanted the consent of the First National Bank of Syracuse to make it effectual. Fourth. That it is immaterial, no other rights having intervened, that the First National Bank of Syracuse in ignorance of this election of Northrup and Hill (the Central Bank) actually remitted the moneys due from it to the Central Bank; that the election having been made by Northrup and Hill, and not revoked or rescinded or nullified, the right of the First National Bank of Syracuse to consent and ratify this action and election became fixed; and that its right to the money in case it did consent and ratify followed the money in every form into which it had been transferred and into all hands, except those of a bona fide holder for value. Fifth. That neither the assignee for the benefit of the creditors of the Central Bank nor its trustee in bankruptcy obtained any greater right than the Central Bank (Northrup and Hill) had, and that such assignee and trustee took the drafts and their proceeds subject to the right of the First National Bank of Syracuse to ratify and assent to the election and action of Northrup and Hill above referred to; that is, to the appropriation of the money represented by such drafts to the payment of the sum due the Syracuse Bank. Sixth. That so soon as the First National Bank of Syracuse was informed of the facts, the use of its money by Northrup and Hill and their election to apply and appropriate the money held by it for them and due to them to reimburse the First National Bank of Syracuse and make good the fund, it assented, ratified, and approved such action, and that it is immaterial that such assent was given after the assignment and not before, and immaterial that no book entry was made, no communication sent to Syracuse, and that the money was not where the Central Bank

could handle it when such appropriation was made, that neither the assignee nor the trustee could repudiate or rescind, or by any act of theirs affect this right. Seventh. That, as the money represented by the drafts was actually in the possession of the Syracuse Bank when the Central Bank declared it an offset or stand-off, it was in legal effect an actual delivery thereof to the Syracuse Bank, and that the sending of the drafts was in ignorance of the actual facts.

If there had been no such agreement, only an open account between the two banks as to these transactions, one of debit and credit, and the Central Bank had credited the Syracuse Bank with the amount due from it, there can be no question this would have been an effectual appropriation of the money due from the Syracuse Bank to the Central Bank to the payment of the claim of the Syracuse Bank. In such case the Syracuse Bank could have followed and retained these drafts or their proceeds. I think it entirely immaterial in a case like this that no entry in the books was made. The question is: What did the conversation between Northrup and Hill followed by the action of the Syracuse Bank when it learned the facts amount to? That conversation occurred just before the bank was closed June 27th, and was as follows:

"Mr. Northrup asked me [Hill] how we stood with Syracuse. He said, 'This draft [referring to the Paul draft] has not been remitted for'; and K. told him that they [Syracuse Bank] owed us practically the same amount. Northrup says that is an offset, so there is nothing to that."

And later:

"Mr. Northrup says that is a stand-off; that is, an offset."

This must be construed either as an admission by Northrup that the amount due from the Central Bank to Syracuse was, in fact, an offset to the amount due it from Syracuse under some agreement or understanding, or as an expression of opinion on his part, or as an appropriation or application of that fund by Northrup and Hill to the restoration of the money misappropriated. There can be no doubt of their right to restore and make good the fund from any part of their own property. That it was, in fact, an offset is negatived by proof of the agreement and conduct of the parties in reference to these and other similar collections. If an expression of opinion, it was a mistaken one, both as to the fact and law. Does that conversation between Northrup and Hill and K. establish the proposition that they then and there appropriated or agreed to appropriate or set apart the amount due from the Syracuse Bank to the Central Bank to the payment or satisfaction, pro tanto, of the said claim of the Syracuse bank against the Central Bank or to the restoration of the fund belonging to that bank? No credit was given or written memorandum made, and no word was sent the Syracuse Bank. Equity sometimes regards that as actually done which ought to have been done; but can we extend or apply that doctrine to the facts of this case? There can be no question that Northrup and Hill understood the Syracuse Bank would and intended that bank should retain the money due them (the Central Bank) from it; that they understood that sum being in the possession of the Syracuse Bank did restore and make good to that extent the

fund it held for that bank. If the Syracuse Bank had not sent the drafts, and on learning of the assignment and other facts recited, including the conversation referred to, had refused to remit or pay over the amount of its collections made for the Central Bank, could the assignee, all the facts appearing pleaded as a defense, have maintained an action therefor? This seems a fair test. I do not think such action could have been maintained. Equity would say such money had already been applied by the Central Bank before the commencement of the action to the reduction of the claim of the Syracuse Bank for the conversion, or to the restoration of the converted fund, by the election to permit the Syracuse Bank to retain it for that purpose. Equity will regard the transaction as having been completed in accordance with the actual intent of the wrongdoers.

The situation is narrowed to this: The First National Bank of Syracuse, having in its possession certain moneys of the Central Bank received under an agreement with it, which the Central Bank intended it should retain, and supposed it would retain, and which it, in fact, had the right to retain, and which it would have retained but for the fact that it was ignorant of the wrongful transactions of the Central Bank hereafter mentioned done in violation of the agreement, and of its purpose to right the wrong by allowing such retention, sent such moneys forward to the Central Bank pursuant to the terms of such mutual agreement between them, but which had been violated by the Central Bank. The assignee of the Central Bank, in ignorance of such wrongs and of such intent and purpose that the Syracuse Bank should retain such money, or, if not in ignorance of the facts, in disregard thereof, received the money, and has passed it into the hands of a court having equitable power and jurisdiction over the fund. The Central Bank, acting under such mutual agreement, but being insolvent, having received moneys of the Syracuse Bank to a larger amount than was coming from it, wrongfully converted same to its own use, but intended and purposed and so declared that the Syracuse Bank should retain the said moneys in its hands as restoration, in part at least, of the moneys so converted. The Central Bank then made an assignment for the benefit of its creditors, and was then thrown into bankruptcy. The Syracuse Bank was ignorant of these facts and of the financial condition of the Central Bank when it sent the money in its hands forward. It was free from laches. Had it known such facts, it would not have remitted the money. In equity is the First National Bank of Syracuse entitled to a return of the money so remitted? While the legal title thereto was in the Central Bank in equity, it belonged to the Syracuse Bank. It was paid over in ignorance of its rights and without fault on its part, under a mistake as to the facts. The payment was induced and procured by the wrong of the Central Bank in not notifying the Syracuse Bank of the facts, and the money was secured by its further wrong in not notifying that bank of its assignment, and in not advising its assignee of the truth. Every equity demands the return of this money, the proceeds of the drafts sent by the Syracuse Bank to the Central Bank and received by its assignee and turned over to the receiver in bankruptcy and then to the trustee and now in this court for distribution, to the First National

Bank of Syracuse, or the turning over to it of the $502 in the Central Bank when it closed its doors. This court cannot lead itself to the consummation of a grand larceny of the funds of that bank, or permit its officers and agents so to do or to profit from such a transaction. Having concluded to close their doors, being insolvent, and having concluded to treat the amount coming from the Syracuse Bank to them as a valid offset and substitution for the amount coming from them to the Syracuse Bank because of their failure to remit instead of remitting the balance in their hands $502, as honesty and business integrity required them to do, and having declared such intention, suppose that thereafter, and before they made the assignment, the drafts in question had been delivered to them by a messenger, would Northrup and Hill have been justified in receiving and retaining and collecting same as their own, and in retaining the proceeds thereof? They would have had the legal, but not the equitable, title thereto. It would have been their duty to restore such drafts or the proceeds. Equity would have enjoined their collection by the assignee of the Central Bank, or would have compelled their return if demanded by the Syracuse Bank on being informed of the facts. I think and hold that, when the Central Bank (Northrup and Hill) determined to close their doors and declared their purpose to consider and treat the money coming from the Syracuse Bank to them as "an offset" or a "stand-off" to the money in their hands belonging to the Syracuse Bank which they had converted to their own use, it amounted to substitution of that money in place of the money so converted, and impressed it with a trust in favor of the Syracuse Bank, which this court in equity and good conscience should recognize and enforce. It is the same as if they had put the converted money into some security or bank in their own name for that purpose. The substituted money was in the hands of the Syracuse Bank, and the declared intent of the owners, Northrup and Hill, was that that bank should retain it as an applied offset or "stand-off." This made the First National Bank of Syracuse the beneficial owner. In effect, it is the same as though Northrup and Hill had set apart so much money belonging to them in place of and to reimburse the converted fund. As the money so substituted then equitably belonged to the Syracuse Bank, the rules declared in 3 Pomeroy, Eq. Jurisprudence (3d Ed.) pp. 2013, 2015, §§ 1047, 1048, come into play, viz.:

"Sec. 1047. (2) Money Received Which Equitably Belongs to Another. By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like. It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit; but in many instances a resort to the equitable jurisdiction is proper, and even necessary.

"Sec. 1048. (3) Acquisition of Trust Property by a Volunteer, or Purchaser with Notice. Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee

to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation. It is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice."

As the money so substituted and so impressed with a trust in favor of the beneficial owner was transmitted by such owner in ignorance of its rights and of the facts conferring those rights and without any fault or laches on its part, and its mistake in so transmitting or forwarding the money or fund was induced by the criminal conduct and action and negligence of the party whose successor in interest is now seeking unconscionably to take advantage of it, equity will afford relief, even though the mistake was on one side only and not a mutual mistake. The rule is thus stated:

"Where relief is given because of the mistake of one party alone, it is where it is induced by the conduct of the other party, or because the other seeks unconscionably to take advantage of it, and the ground of jurisdiction is really fraud." 16 Cyc. 68–69.

The principle is illustrated in Martin v. Home Bank, 160 N. Y. 190, 196, 54 N. E. 717. There the plaintiff's testator paid the defendant bank the amount of a check of a third party drawn on another party, and indorsed by him, and which had been credited to his account by the bank with which it was left for collection. The check was not in fact collected, but the failure so to do was due to the negligence of the bank. In ignorance of the facts, plaintiff paid to the bank the amount of the check, but, on learning the truth, his executors, he having died, sued to recover the amount so paid as paid under a mistake of fact. The Court of Appeals, among other things, said:

"When the indorser paid the check without knowledge of the facts, the defendant received so much money from him to which it was not legally entitled. The plaintiff's testator, having paid the check without knowledge of the facts which discharged him from all liability as indorser, was entitled to call upon the defendant to restore the money so paid."

True, in that case the legal title to the money paid the bank was in the plaintiff's testator, who paid it, while here the legal title, perhaps, was in the assignee to whom it was paid, and the equitable title only was in the Syracuse Bank. But the principle involved is precisely the same, viz., the Syracuse Bank, in ignorance of its equitable title and right to retain the money as its own, which ignorance was induced by the wrongful conduct of the other party, and without fault or laches on its part, forwarded the money, which in equity belonged to it, to the Central Bank, which bank in equity had no right to receive or retain it. That bank has at least the equitable right to call upon the one now holding it to return the money. As this court has ample equity

powers in the premises, and has full control of the fund, it is its duty to direct its return to the beneficial or equitable owner. National Bank v. Insurance Co., 104 U. S. 54, 69, 26 L. Ed. 693; A. S. R. Co. v. Fancher, 145 N. Y. 552, 559, 40 N. E. 206, 27 L. R. A. 757; People v. City Bank of Rochester, 96 N. Y. 32. When a bank receives a draft for collection bearing the indorsement of another, and, on receiving notice from its agent he has received the drawee's check for the amount, credits the account of the one leaving the draft with the amount thereof, this shows an irrevocable election and intention to treat the draft as paid. Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714. See, also, Clark v. Merchants' Bank, 2 N. Y. 380. Here it is a question of intention whether or not Northrup and Hill elected or intended to treat the money belonging to them (the Central Bank of Oneida) as the property of the Syracuse Bank in place of the money of that bank converted by it. On the whole evidence in the case that question of fact must be decided in favor of the Syracuse Bank. The Syracuse Bank offered to show by Hill a reason why the amount was not credited to Syracuse on the account the Central Bank kept of these transactions. The trustee objected to this being shown, and the special master sustained the objection. He cannot now complain that there was not a purpose to still further consummate the substitution of the money with the Syracuse Bank in place of the converted fund by entering the transaction on the books. Such an entry would have been conclusive evidence of the intent, but its omission is not fatal to the claim of the petitioner. Again, when the schedules in bankruptcy were made, this substitution was recognized, as the Syracuse Bank was not made a creditor for the amount of the drafts, and the drafts or their proceeds were not included as assets of the Central Bank. And to constitute a substitution and restoration it was not necessary that the Syracuse Bank be present or take part in the transaction. Its subsequent ratification is shown by its demand for the drafts or their proceeds on learning the facts. It is settled that the substitute for the thing converted still follows the nature of the thing itself, so long as it can be ascertained to be such substitute. Taylor v. Plumer, 3 M. & Sel. 562, cited and approved in Newton v. Porter, 69 N. Y. 138, 25 Am. Rep. 152; National Bank v. Insurance Co., 104 U. S. 54, 69, 26 L. Ed. 693. In Taylor v. Plumer, supra, Lord Ellenborough said:

"It makes no difference, in reason or law, into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money produced on the sale of the goods of the principal as in Scott v. Surman, Willes, 400, or into other merchandise, as in Whitecomb v. Jacob, Salk. 160, for the product or substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fails."

In Newton v. Porter, 69 N. Y. 138, 139, the court, after quoting the above, said:

"In courts of equity the doctrine is well settled and is uniformly applied that when a person, standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired. The jurisdiction exercised for the pro-

tection of a party defrauded by the misappropriation of property, in violation of a duty, owing by the party making the misappropriation, is exceedingly broad and comprehensive. The doctrine is illustrated and applied most frequently in cases of trusts, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust and converted into other property. In such case a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made, whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property may be placed. Equity only stops the pursuit when the means of ascertainment fails, or the rights of bona fide purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. Lane v. Dighton, Ambler, 409; Mansell v. Mansell, 2 P. Wms. 679; Lench v. Lench, 10 Ves. 511; Lewis v. Madocks, 17 Ves. 56; Perry on Trusts, § 829; Story's Eq. § 1258."

In National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693, the Supreme Court approved the language of Strong, J., in F. & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215:

"It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership."

In A. S. R. Co. v. Fancher, 145 N. Y. 552, 559, 40 N. E. 206, 208 (27 L. R. A. 757), the court said:

"The court in many cases resorts to the fiction of a trust, and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff."

In Matter of Holmes, 37 App. Div. (N. Y.) 15, 55 N. Y. Supp. 708, affirmed 159 N. Y. 532, 53 N. E. 1126, it was held:

"Proof that a trustee, upon his appointment, received a trust fund amounting to $9,364, and paid interest on that sum to the beneficiary up to the time of his death, sufficiently establishes, as against his administrators, that the entire trust fund was in the possession of the trustee at the time of his death, although it appears that $4,650.56 thereof was commingled with individual funds of such trustee. In making withdrawals from the fund, after such commingling of the trust money therein, the trustee is presumed to have used only his individual moneys."

It would be extremely and ridiculously technical to assert that where a wrongdoer, so far as he can, rights a wrong committed in converting the money of another, by substituting at a subsequent time other money of his own to make good that converted, the beneficial owner may not claim and hold the substituted money or property as impressed with precisely the same trust as the original fund. And equity would be short-sighted and hampered, indeed, should it refuse to recognize and enforce the trust character of the thing substituted and the trust obligation thus imposed and created by the owner of the substituted property. It does not lie with the wrongdoer, or his assignee or trustee in bankruptcy, who has made the substitution, to say that the substituted thing is neither the trust property itself nor its proceeds, nor property purchased with the proceeds. Having made the substitution, he should be and is estopped to deny the title of the

owner of the original fund. The assignee of the Central Bank took no better or greater right and title in the fund represented by the drafts than that bank had and it could have been recovered of him. American Sugar Refining Co. v. Fancher, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757; Von Sachs v. Kretz, 72 N. Y. 548. It is now well settled that the trustee in bankruptcy takes the property of the bankrupt in the same plight and condition as when in the hands of the bankrupt and subject to all the valid liens and equities existing in favor of third persons. Thompson v. Fairbanks, 196 U. S. 526, 25 Sup. Ct. 306, 49 L. Ed. 577.

One other fact should be referred to. When the Syracuse Bank learned of the assignment, it at once directed the delivery of all paper held for collection for it to another bank. The correspondence shows that the Syracuse Bank supposed the Paul draft was still held for collection, and that the assignee did not promptly undeceive it, and hence its inability to stop payment of the drafts.

The findings and conclusions of the special master are disapproved and set aside, and there will be an order containing findings of fact and conclusions of law in conformity with this opinion, and adjudging and directing the payment by the trustee in bankruptcy of Walter E. Northrup and Robert A. Hill, as copartners under the name of the Central Bank, to the First National Bank of Syracuse of the sum of $796.23, the proceeds of the two drafts in question. He will also pay the charges of the special master, including stenographer's charges, or so much thereof as he has not already paid, and, if the Syracuse Bank has paid any part thereof, it will be reimbursed by the said trustee.

BALLANTINE et al. v. BALLANTINE et al.

(Circuit Court, D. New Jersey. March 1, 1907.)

1. WILLS—CONSTRUCTION—LEGACY TO WIFE IN LIEU OF DOWER.
   A legacy given to a wife in lieu of dower is based upon a valuable consideration, and is a matter of purchase and not merely of gift, and, in case of ambiguity or conflicting provisions in the will, is entitled to preference over gifts merely voluntary.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 989.]

2. SAME—INCONSISTENT OR AMBIGUOUS PROVISIONS.
   A primary provision of a will controls as against inconsistent secondary provisions, and, when a clear gift has been made, it will not be impaired by any subsequent ambiguous or doubtful disposition.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 987.]

3. SAME—WILL CONSTRUED.
   A testator by his will devised his estate to trustees as an entirety, with directions that the income therefrom should be paid to his wife until his youngest child living should reach the age of 21 years, after which one-third of the income should be paid to the wife and the remaining two-thirds divided equally between his three daughters and his son or their descendants. It was provided that after the death of the wife the income should be equally divided between the children or their descendants, subject to a further provision that one-fifth of the son's share in the estate should be paid to him when he reached the age of 21 years, and three-fifths when he reached the age of 28, subject to the discretion of

the trustees and widow, if living, to delay such payment until they should approve, the remaining one-fifth of his share to be held in trust for the benefit of himself or his direct descendants. The provision for the widow was to be in lieu of dower. *Held*, that the primary purpose of the will was to provide for the widow who was entitled during her lifetime, after the youngest child became 21 years old, to one-third of the income from the entire estate without diminution on account of the provisions relating to the son, and that it was also the purpose of the testator that the shares of the children should be equal; that, therefore, the son was not entitled to receive the fifth parts of his fourth of the entire estate so long as his mother lived, but only to such parts of his fourth of two-thirds of the estate, since any other construction would reduce his mother's share of the income or that of his sisters.

4. SAME—TRUSTEES—DISCRETION TO WITHHOLD PAYMENT OF LEGACY.

A testator has the right to postpone the payment of a legacy to a child to a definite period beyond the majority of the legatee and also the right to have its payment further withheld at the discretion of his trustees, and in such case the trust is an active and continuing one, and, in the absence of fraud or an abuse thereof, the discretion of the trustees cannot be controlled by the courts.

5. SAME—CONSTRUCTION OF TRUST PROVISION.

A will, after providing for the payment to a son of the testator of four of the fifth parts of his share of the estate, provided that "the remaining one-fifth part of his share shall be held in trust by my executors for the benefit of my said son * * * and his direct descendants." *Held*, that such provision did not create an estate tail which entitled the son to receive such portion at once, but that it was the testator's intention to create a trust which was sufficiently declared and under which the property must be held by the trustees for the contingent benefit of any children the son might leave at his death.

In Equity.

F. Morse Archer (Burr, Brown & Lloyd, of counsel), for complainants.

Pitney & Hardin and Lehlbach & Johnson (John O. H. Pitney, of counsel), for defendants.

CROSS, District Judge. This case is presented to the court upon bill, answer, plea, replication, and proofs. The more important facts briefly stated are these: Peter H. Ballantine, a resident of the city of Newark, N. J., died September 16, 1882, leaving a last will and testament which was duly proved before the surrogate of the county of Essex on the 29th day of September, 1882, whereby, among other things the decedent appointed John H. Ballantine, Robert F. Ballantine, and George G. Frelinghuysen his executors, who took upon themselves the burden of administering his estate. The testator by his said will, after directing the payment of his debts, gave all his property, real, personal, and mixed, to his executors in trust, for the purposes thereinafter mentioned. By the next item of his will he gave to each of his four children, naming them, the sum of $5,000, to be paid them when they would each, respectively, reach the age of 21 years. Then follow items 5, 6, and 7 of the will, which, as they are the principal ones bearing upon the present controversy, are set forth at length.

"V. The remainder of the estate shall be held in trust by my executors and the income thereof paid to my beloved wife Isabelle Linen Ballantine until the youngest child then living shall reach the age of twenty-one years, and on the death of my beloved wife my executors shall hold for the benefit of and

pay the income thereof to my children Sara Linen, Isabel A., George A. and Mary C. or to their direct descendant or descendants of either of them in equal shares subject to the provisions of section VII hereinafter as to the share of George A. Ballantine.

"VI. That when the youngest child then living shall reach the age of twenty-one years the executors shall pay to my beloved wife one-third of the income of my estate and divide the other two thirds in equal shares between my children Sara, Isabel, George and Mary or such of them as may be then living or to their direct descendant or descendants share and share alike per stirpes, provided however that the payment of the income of any child or children aforesaid, or to a descendant or descendants of either shall be first approved by my beloved wife otherwise the same shall be withheld for the benefit of that child from whom it shall be so withheld.

"VII. That one-fifth part of the share of my son George A. Ballantine (provided for in section V) in my estate shall be made over to him absolutely on his reaching the age of twenty-one years and that in addition thereto three-fifths of his share in my estate be made over to him on his reaching the age of twenty-eight years, provided that the executors, with the approval of my beloved wife if she is then living, may delay the payment of the last mentioned part of his share to wit the three-fifths part until such time as they may approve, and that the remaining one-fifth part of his share shall be held in trust by my executors for the benefit of my said son George A. Ballantine and his direct descendants."

It was further provided by the last item of the will that the provisions made therein for his wife were in lieu of dower and right of dower. The testator left him surviving a widow, Isabella L. Ballantine, and four children, Sarah L., Isabel A., George A., and Mary C., all of whom are still living. Sarah L. is the wife of George G. Frelinghuysen, one of the trustees named in the will. She was married at the time of the testator's death, and has two children. Isabel A. is unmarried. George A., one of the complainants, attained his majority October 14, 1887. He has been twice married. By his first wife, from whom he was divorced prior to 1896, he had one child only, a son, who died in infancy. In 1896 he married his present wife, but has had no children by her. Mary C., the testator's youngest daughter, attained her majority in 1891. She is married to Robert W. Cumming, and has five infant children. The widow, all of the children, except George A., and all of the grandchildren of the testator, are parties defendant to this suit. George A. Ballantine, as already stated, is one of the complainants. All of the executors and trustees named in the will qualified. Two of them, however, John H. Ballantine and Robert F. Ballantine, are deceased. The former died in April, 1895, and the latter in December, 1905. The complainants other than said George A. Ballantine are the New York Finance Company, trustee for Mary F. Chapman and for Catharine Stewart Wood, and the Provident Life & Trust Company of Philadelphia, executors under the will of William Brewster Wood, deceased. The New York Finance Company claims to be interested in the share of George A. Ballantine in his father's estate under and by virtue of two assignments made by him to the said company to the extent of $50,000, $40,000 of which sum it claims as trustee and the balance of $10,000 in its own right. The bill of complaint admits that George A. Ballantine has received an agreed upon value for the one-fifth part of the share coming to him upon his reaching the age of 21, under item 7 of the will, but asks for a decree

for the payment of the three-fifths of his share in the estate, which under the same item of the will was to be made over to him on his reaching the age of 28, and also for the payment of the remaining one-fifth part, which is directed to be held in trust by the executors for his benefit and that of his direct descendants. The bill also claims interest, in addition to what has been received, upon all of those shares. As to the three-fifths of George's share, the claim is made that the provision postponing its payments until he became 28 years of age, and further at the discretion of the trustees, is void, but, if otherwise, it is claimed that the discretion has not been properly exercised; while as to the last one-fifth of his share, the claim is made that he is entitled to a like decree, for reasons which will be referred to later. Upon the question of interest the trustees have adhered throughout to a construction of the will which held that George was and is entitled during his mother's lifetime to but one-fourth of two-thirds of the income of the estate, and they have always paid him and received releases from him on that basis, whereas on his behalf it is insisted that he is entitled to the entire income on the one-fifth of the share which was to be made over to him when he became 21, from that time until he assigned it in 1898 and 1900 to his sisters; that as to the three fifths he is entitled to the entire income thereof, at least from the time he became 28 years of age; and that as to the remaining one-fifth the entire income should at all times have been paid directly and exclusively to him.

The issues presented by the pleadings are succinctly stated in the brief of defendant's counsel substantially as follows: (1) Is the discretion to withhold three-fifths of George's share under item 7 of the will valid? If so, has that discretion been properly exercised? (2) Were the trustees justified in paying to the widow one-third of the income on George's one-fourth of the estate either upon a proper construction of the will, or by virtue of an agreement entered into by all of the parties in interest? (3) Is the provision as to the last one-fifth of his share valid, or is it now payable to him?

At the outset of the discussion, it will be well to set forth what seems to me to be the general scheme of the will, which is incomplete and somewhat difficult of construction. There are seeming inconsistencies in it which, however, can be resolved as I think, without doing violence to any of its manifest provisions. Apparently the primary purpose of the testator was to make provision for his widow and infant children. Consequently he directs that all the remainder of his estate, after the payment of his debts, should be held in trust by his executors, to whom it was directly devised, to pay the entire income thereof to his wife, until his youngest child then living should attain the age of 21 years, and, when his youngest child then living should reach that age, he directed his executors, instead of paying all of the income of his estate to the widow as theretofore, to pay one-third of such income to her and divide the other two-thirds in equal shares between his four children, naming them, or to their direct descendant or descendants, share and share alike. He then provided that, on the death of his wife, the executors were to hold the estate for the benefit of, and pay the income therefrom to, his children, or to their direct descendant or descendants as before, subject, however, to the provisions of section 7

as to the share of his son George. If by this scheme the testator manifested any intention to abate or lessen the provision made for his wife between the time his youngest child reached the age of 21 and the death of the widow, I am unable to discover it. This provision for the wife is in lieu of dower. "Such legacies are held to be given for a valuable consideration, the relinquishment of a valuable right or interest, and not merely of bounty, and therefore they are regarded in the light of purchase money, for such right or interest is held to be, and for that reason entitled to preference over gifts, merely voluntary." Howard v. Francis, 30 N. J. Eq. 444, 447; Wiggins v. Wiggins, 65 N. J. Eq. 417, 425, 56 Atl. 148. These authorities are cited simply to show that a legacy of this character is a matter of purchase, and not of gift, and therefore should not be lightly abated or overthrown. It is a general rule of construction that a primary provision will control as against inconsistent secondary provisions. Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322; Walker v. Parker, 13 Pet. 166, 173, 10 L. Ed. 109. When a clear gift has been made, it will not be impaired by any subsequent ambiguous or doubtful disposition. The children are not in terms given specific shares in the residue of the estate, at least during the lifetime of the widow, nor are the trustees required to divide the residue into specific shares and hold such shares separately, and pay over the income therefrom to the widow and children. The property is given to the trustees as an entirety, and it is the income from this entirety which they are to divide and apportion. The fifth item of the will refers forward to the seventh, and the seventh refers back to the fifth, and to the fifth only; and they are thus made measurably interdependent. Moreover, as already stated, the fifth clause, so far as it refers to the children's shares at all, refers to a period after the death of the widow. There is nothing in the will which, to my mind, modifies the sixth clause, so far as the widow's interest therein is concerned. That clause, as was admitted on the argument, unquestionably refers to the entire remainder of the testator's estate, as such estate is described in the fifth clause. The widow was to receive one-third of the income of such remainder, and the remaining two-thirds were to be divided equally between the four children; that is, each child during the lifetime of the widow was to receive one-fourth of two-thirds of the income, no more and no less. The payments of income, however, were to be made so as not to affect either the widow's or any child's share. Nobody's share was to be trenched upon. It was provided in effect that one-third of the estate should be set aside for the benefit of the widow during her lifetime. Hence George is not, nor is any other of the children, entitled to receive more than one-fourth of two-thirds of the income during that period. This conclusion leads to the result that the payments which were to be made to George under the seventh item were to be so made as not to impair the widow's right to one-third of the income of the estate. The payment to George of his entire share in the estate, if allowable, would break up the testator's scheme. Such payment would result in an impairment of the widow's income, or, if that were maintained arbitrarily, it would be at the expense of income plainly given to the daughters. The payments of fifth parts to be made to George at certain times and un-

der certain conditions, as provided in item 7, are therefore payments of fifth parts of one-fourth of two-thirds of the estate, and not of one-fourth of the entire estate. This construction attains a result not only abstractly just and righteous, but one which as it seems to me is more in consonance with the terms of the will than any other. If George should receive his full share of the principal of the entire estate—that is, a full one-fourth part thereof—it would be at the expense of either the widow or his sisters, or of all of them, and this would be so even if he no longer received any income under the sixth item, although his right to income under that item would apparently still remain unimpaired and equal to that of his sisters. I conclude, therefore, that George's one-fourth interest in the estate is subject to contribute towards the provision made for the widow, and that he has therefore received all of the income to which he is entitled.

I have arrived at this conclusion upon what I deem a proper construction of the will. It is claimed, however, on behalf of the defendants, that the same result would be attained under a settlement arrived at in 1900 between George and his sisters. This settlement was evidenced by a formal written agreement duly sealed and acknowledged, and which was embodied in the assignment to and was a part of the consideration of the purchase by his sisters of the one-fifth share which was to be made over to George when he arrived at the age of 21. Written notice under seal of this agreement was given by George to the trustees, and the same was accompanied by releases from him to the trustees and to his mother. The agreement appears to have been made upon a valid and sufficient consideration after full discussion and deliberation, during which the assignor at all times had the advice of independent counsel. The agreement and releases were expressly intended to assure, and I think did assure, independently of the provisions of the will, a full one-third of the income of the entire estate to the widow during her lifetime; and they are in no wise attacked by the bill of complaint, or, indeed, by the evidence. No allegation of bad faith, surprise, or fraud in their execution has been made; hence, so far at least as this suit is concerned, they must stand, and in and of themselves be held to bar George to all claim to additional income either prior or subsequent to their execution.

We come now to the question as to whether any, and, if so, what, part of the principal of George's share is now payable. He has already assigned to his sisters, as appears by the evidence, the one-fifth of his share which was to be made over to him, as the expression is, on his arriving at 21 years of age, so that the first disputed item for consideration is the one directed to be made over to him on his reaching the age of 28 years. It seems to me that the testator had the undoubted right to postpone such payment until the beneficiary arrived at the age named, and even then to make its payment discretionary with his trustees. The shares were devised to trustees, and while so held by them were subservient to a life estate, and, furthermore, to a discretion conferred upon them to withhold payment thereof after George should arrive at the age of 28, with the widow's approval. Such provisions are not infrequent, and their validity is supported by abundant authority. In Chambers et al. v. Smith et al., 3 App. Cases,

795 (21 English Ruling Cases 476), the facts were these: A testator directed his trustees to hold the residue of his estate for the behoof of his children. The shares in the residue were to vest at the testator's death, and be payable six months thereafter; but powers were given to the trustees, "notwithstanding the period above appointed for payment of the shares of the residue," to postpone as long as they should think it expedient to do so the payment of such shares in the case of all or any of the children or grandchildren, and to apply only the interest of the same during the period of the postponement to the use of his children or grandchildren. Power was also given to the trustees to vest the principal in other trustees for the benefit of the children and grandchildren. The trustees for a period of five years paid the whole of the interest and a part of the principal of a share to one of the testator's sons. Subsequent judgment creditors of this son sought to subject his share to the payment of their judgments, whereupon the trustees executed a deed giving to the son a life interest only. An attack was made upon this action of the trustees, but it was sustained, and the right of the creditors to attach the fund was denied. The whole of the opinion is interesting and pertinent to the case at bar. Only short extracts, however, can be given. Lord Hatherly says:

"We find a power in the trustees overruling all directions for payment and vesting before given, and directing them during the postponement to apply the interest for the behoof of the children. This must mean that the child is to have no control over the fund at all when the trustees resolve on postponement. * * * The debtor, James Chambers, could not, I think, in the case before us, insist on payment to himself of any principal moneys or interest the payment of which the trustees under the powers contained in the testamentary disposition thought right to postpone; and for the same reason the arresting creditor cannot make that demand. The trustees might under the will, if they thought fit, pay any given creditor for necessaries, or take any other course to them appearing advisable for the benefit of the legatee, but could not be compelled to pay it as the legatee may direct."

Lord O'Hagan substantially reiterates the views of Lord Hatherly, and adds:

"In this way the settlor provided that his purposes should be carried into effect, and the result was that the beneficiaries took an estate vested in them, and, if the trustees thought proper, to belong to them absolutely at the periods indicated; but it was a qualified estate to be enjoyed by them only on the conditions and at the times which the trustees, in their uncontrolled discretion, should appoint. * * *" James Chambers could not have forced his trustees, against their judgment and in disregard of their duty, to pay him, at once, the money the payment of which they deemed it expedient to postpone; and his creditors can have no higher right. Neither the debtor nor the creditor can be permitted to disregard the direction and defeat the purpose of the settlor of the property. No special mode of postponement is prescribed by the deed of trust. The manner, as well as the time and the conditions of it, was left to their discretion; and the declaration of their resolution to postpone, however made, was sufficient for the purpose."

Lord Blackburn in his opinion goes over much of the ground covered by the previous opinion; and, referring to the testator, says:

"I think that the truster, having a perfect right to give his son James nothing, had also a perfect right to give him a vested interest in a fund, subject to a condition that the trustees might in their discretion divest that fund."

In Hardenburgh et al. v. Blair et al., 30 N. J. Eq. 645, the following state of facts appears:

"The testator gave to his executors a large sum of money in trust to be safely invested and to pay to his son the interest and income of such sum at such times, in such manner, and in such amounts as his executors should deem most prudent for and during his natural life, and, upon his death leaving issue, then to hold said sum for the benefit of such issue."

The court held that the payment of the income to the son was subject to a reasonable discretion on the part of the executors as to the times, manner, and amounts for the payment the son claimed.

In speaking for the Court of Errors and Appeals, Mr. Justice Depue, in delivering the opinion of the court, says:

"There is, in effect, no difference between the language in which the gift of the interest and income to the life tenant is made and a gift in express words of the whole of the interest and income. It is an absolute and unqualified gift of the interest and income derived from the fund invested. The executors have a discretion with respect to the time, manner, and amounts in which it shall be paid over; but this discretionary power, and the mode in which it shall be exercised, will not abridge or qualify the substantive gift to the life tenant of the interest and income. It is his absolutely, and any accumulations of interest during his life, not paid over to him, will, at his death, go to his personal representatives, and not to his issue, under the testator's will. Green v. Spicer, 1 Russ. & M. 395; Barber v. Barber, 3 Myl. & Cr. 688; Beevor v. Partridge, 11 Sim. 228. The distinction is between a mere power, which is left discretionary with the donee, and a trust in connection with which there is a discretion lodged with the trustee as to the manner in which it shall be performed. Simple powers, which are purely discretionary, are not imperative. Trusts are always imperative, and, while a court of equity will not ordinarily interfere with the discretion of a trustee fairly exercised, yet it will not permit the discretion to be so exercised as to defeat the substantial purposes of the trust. 2 Spence's Eq. Jur. 81–88; 2 Lead. Cas. in Eq. 964, note to Hastings v. Glyn. The testator does not direct the payment of the accrued interest and income to the life tenant at any stated time, either annually or otherwise. He expressly gives his executors a discretion as to the time, manner, and sums in which the interest and income shall be paid over. They are not required to pay it over as fast as it accrues, or whenever demanded. They have a reasonable discretion over the subject, and the life tenant is entitled to the interest and income when collected by the executors, subject to a reasonable discretion on the part of the executors, as to the time, manner, and amount of the payments."

A provision not unlike the foregoing, except that it embraced both principal and income, was upheld by the Supreme Court of the United States in Nichols, Assignee, v. Eaton, 91 U. S. 716, 23 L. Ed. 254. The facts show that a testator gave the income of some trust property to his son, which, however, was to cease on alienation of the property or upon his insolvency or bankruptcy, whereupon the income was to be accumulated and added to the principal, with discretionary power in the trustees in the application of such accumulations to the son or his family. Power was also given the trustees by the will in their discretion to transfer one-half of the trust fund to the son at any time. The son became bankrupt, and his assignee brought suit to recover the accumulation. The right of the assignee to relief was denied, and in the course of the opinion Mr. Justice Miller says:

"No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express lan-

guage of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court. * * * Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor that the testatrix has in express terms said that such exercise of this discretion is not 'in any manner obligatory upon them,' words repeated in both of these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. Hillon, Tr. 486; Lewin, Tr. 538; Boss v. Goodsall, 1 Younge & C. Ch. 617; Maddison v. Andrew, 1 Ves. Sr. 60. And certainly they would not do so in violation of the wishes of the testator. * * * Why a parent or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

See, also, the cases of Holmes v. Penney, 3 K. & J. 90; Cantwell v. Higgins, 1 Jur. 791; In re Coleman, 39 Ch. Div. 443; Hall v. Williams, 120 Mass. 344; Foster v. Foster, 133 Mass. 179; Nickerson v. Van Horn, 181 Mass. 562, 64 N. E. 204; Meek v. Briggs, 54 N. W. 456, 87 Iowa, 610, 43 Am. St. Rep. 410; Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968; Stone v. Westcott, 18 R. I. 685, 29 Atl. 838. The foregoing cases all deal with trusts vested in executors with power to withhold payment from beneficiaries at their discretion. It is true that the most of them deal with the right to withhold income, rather than principal, but I think the right to withhold principal under a discretionary power is equally clear and equally well supported. Indeed, the case of Chambers v. Smith, supra, is directly in point; that case dealt with both principal and interest, and the same is true of Nichols, Assignee, v. Eaton, 91 U. S. 716, 23 L. Ed. 254. The case of Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454, 14 Am. St. Rep. 393, is also in point. In that case it was contended that the provision of a will postponing the payment of a legacy beyond the time when the beneficiary was 21 years old was void. The court upheld the provisions of the will and said:

"We are unable to say that the directions of the testator to the trustees to pay the money to the plaintiff when he reaches the age of 25 and 30 years are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect."

In this state such postponement has been upheld in cases where the property was vested in trustees and a discretion given to them or any duty imposed upon them, which could properly be said to make the trust an active one. In Cooper et al. v. Cooper, 36 N. J. Eq. 121, the testator directed that the defendant's share of his personal estate should be retained in the hands of his trustee and the income thereof appropriated to the defendant's support and maintenance at their discretion. He further directed that the defendant's share of his real estate should continue to be held in trust, and the income alone thereof

appropriated as had previously been directed in the case of his share of the personal estate. On a partition of the testator's real estate, the chancellor held that the defendant's share of the proceeds on sale thereof must be retained by the trustees. He held the trust to be an active one involving confidence, discretion, and active duty. To the same effect is Force v. Brown et al., 32 N. J. Eq. 118. The case of Randolph v. Randolph, 40 N. J. Eq. 73, is also instructive. The will there construed was that of the late Governor Randolph. By it the testator set aside $200,000 for the benefit of his children. The chancellor held that, while the principal of the trust fund belonged to the children as well as the income, they were nevertheless not entitled to a division of the fund among them, for the reason that the trust was not a simple, but a special, one, and that they did not therefore have a right to the actual possession of the property and to call upon the trustees to convey the legal estate at their discretion; citing Lewin on Trusts, 21, and Cooper v. Cooper, supra. I think that the principle which distinguishes the case at bar from those cited by complainant's counsel lies in the fact that herein we find not only a trust, but an active trust. Not only is the principal of the fund, as already shown, measurably subservient to a life interest, but its payment to the beneficiary by the trustees is not to be made arbitrarily, and at all events, but at their discretion, a discretion which, in the absence of fraud, the court cannot control. We are not dealing with a dry trust, but an active and continuing one; and I discover nothing whatever in its terms which creates or tends to create a perpetuity, or which is otherwise opposed to public policy. The testator had the right to postpone its payment to a definite period beyond the majority of the beneficiary, and he had an equal right to have its payment further withheld at the discretion of his trustees. There is no valid reason why a testator may not confer a discretionary power upon trustees to parcel out the payment of the principal of a legacy just as he may undoubtedly parcel out the income of a fund. It would be a hard and unreasonable rule which held otherwise, since it would compel a parent who doubted the wisdom of giving the principal of his estate to a son at majority, but who would like to have portions thereof paid to him from time to time, in the discretion of trustees, to leave the principal to a remainderman while the income alone was doled out to the son.

Coming, now, to the exercise of the discretion of the trustees in withholding payment of the three-fifths interest mentioned in the seventh item of the will, it is not my purpose to set out at any considerable length the reasons which impelled them to this course. It is sufficient to say that the testimony to my mind discloses that they were ample and sufficient. It shows in brief that, as to the one-fifth share payable at 21, George requested the executors to withhold its payment, and he never requested payment of the three-fifths share at all or at least not until after the time when he now claims it became payable. It is not denied that the trustees in the exercise of their discretion might have acted so unreasonably as to invoke judicial control, but no such case is here presented. The evidence discloses that the question of withholding payment of the three-fifths was from time to time talked over by the trustees and their determination to withhold payment thus

arrived at had at all times the approval of the widow. The matter was under consideration at different times, and the widow was always consulted, and always expressed herself unwilling to approve the payment to her son of the three-fifths in question. There can be no doubt from the undisputed testimony that her attitude on this question was always the same. Moreover, the trustees had sufficient reason for withholding the payment. Their refusal was justifiable. It is only too apparent that, if the payment to George had been made by them, the entire fund would long before this have been spent. He was inattentive to business, grossly extravagant, and expended within a comparatively short period not only a large income, but also the principal, which he received from his sisters for the one-fifth of his share assigned to them, as well as a far larger sum received from his grandfather's estate, notwithstanding which he was, during much of the time, as he is now, heavily in debt. It appears, furthermore, that even in the hands of the trustees George has managed to seriously cripple and impair his estate, by from time to time assigning portions thereof to his creditors, which assignments have naturally caused the trustees much anxiety, embarrassment, and expense. There is not a word in the testimony to show that the trustees have abused their discretion; on the contrary, it is conclusively shown to have been sound and honestly and wisely exercised, and such, moreover, would be the presumption of law in the absence of testimony to the contrary. Their conduct is not open to censure. They have shown praiseworthy forbearance under somewhat trying circumstances, and have apparently with honest purpose done all that lay in their power to protect George from himself and from the harpies who have constantly surrounded him.

The last clause of the seventh item of the will remains to be considered. The language used is as follows:

"And that the remaining one-fifth part of his share (George's) shall be held in trust by my executors for the benefit of my said son George A. Ballantine and his direct descendants."

I understand complainant's counsel to contend that descendants here means "issue," and that "issue" is the same as heirs of the body, and from this it is argued that the testator created an estate in tail at common law, which as to so much of the share as consists of real estate would be converted into a life estate in George, with remainder to his children, and that, as to so much of the share as consists of personalty, the estate tail would be immediately converted into an absolute gift in George, the first taker, and that consequently he is entitled to receive this portion of his share immediately. I think this argument, however, is contrary to the plain intention of the will, and that under such circumstances an estate tail ought not to be, and will not be, presumed. If the complainant's argument is sound, George became entitled to this share, subject to his mother's interest therein, immediately upon the death of his father, and while he was in his minority. The seventh section of the will, however, plainly shows that the part of George's share now under consideration was intended to be the last, as, indeed, it was the last disposed of. The scheme of the will was that one-fifth should be payable at 21, three-fifths at 28, unless payment should be

postponed by the executors, and then "the remaining one-fifth part." If it had been the testator's intention that George should have this one-fifth at his death, it would have been given directly to him, and not have been given to trustees at all, nor would his descendants have been mentioned. This portion of the share is plainly a part of a trust, the direction is positive—"it shall be held in trust by my executors." An interpretation of the will which would have required this share to be paid to George during his minority would violate every provision of the third, fifth, and sixth sections of the will. Such a construction will not be adopted if it can be avoided. The clause certainly did not intend a direct and simple gift to George. A trust was intended, and I think was sufficiently declared. The word "descendants" is used in at least two other places in the will and as used is equivalent to the word "children." In Walker et al. v. Walker's Ex'rs et al., 25 Ga. 420, an entire estate was directed to be invested and transferred to the American Colonization Society to be held in trust by it for the maintenance and support of seven specified slaves and their descendants. It was claimed that this device created a perpetuity and was void. In dealing with this question, the court, at page 428, said:

"We hold that this is not a legitimate conclusion, such is not the meaning of the word 'descendants.' This term is equivalent to next of kin, or those who would take under the statute of distributions of the state. It means children and grandchildren. 3 Bro. Ch. Cases 169."

The provision was intended as a trust for the benefit of George and his children, and, so construed, George takes a life estate, with remainder in his children. In Steward v. Knight et al., 62 N. J. Eq. 232, 49 Atl. 535, the word "children" was construed to mean "descendants." By using these words interchangeably, the intent of the testator is preserved. Furthermore, it will be noticed that the language used is not "descendants," but "direct descendants," which may properly mean nearest or immediate descendants; that is, those who would be first or immediately in the line of descent, as children. In Noe v. Miller, 31 N. J. Eq. 234, Vice Chancellor Van Fleet construed a gift made to a daughter, free from the control of her husband, and which was to be her's and her child's or children's forever, as giving the wife a life estate, with remainder in her children. In his opinion, after citing numerous authorities, he says:

"Most of these cases were decided by a simple expression of opinion, without any attempt by the judge to give the course of reasoning by which he reached his conclusion. The construction adopted, however, seems to me to be reasonable and just. I think it is much more natural and reasonable to conclude, where a father makes a bequest of a particular sum or fund to a child and also to the children of such child jointly, without indicating in any way when their enjoyment shall commence, that he intends the parent shall have simply the income or produce during life, and that the principal shall go to the children on the death of their parent, than that he meant that his grandchildren should share equally with their parent at once, and have a right to demand a division of the fund as soon as it is payable. I therefore hold, in accordance with what I deem the decided weight of authority, that, by the proper construction of this bequest, the complainant's intestate took a life estate in the legacy, and her children the principal or remainder."

And this rule is the one applied and adopted apparently in all cases where a provision of this character is made in trust. Where, how-

ever, there is no trust declared, but a simple devise is made to a person and his or her children, the parent and children take as tenants in common. In this particular case, however, whichever construction is adopted, the result is the same. George at present is the only beneficiary, but his estate is subject to be divested to let in after-born children. It is therefore a contingent estate, and must continue to be held in trust. Among the many cases supporting the doctrine laid down in Noe v. Miller, supra, are Vaughan v. Headfort, 10 Sim. 639; Combe v. Hughes, L. R. 14 Eq. 415, 41 L. J. Ch. 693; Audsley v. Horn, 1 De G., F. & J. 226, 29 L. J. Ch. 201; Ward v. Gray, 26 Beav. 485; Jeffrey v. De Vitre, 24 Beav. 296; Morse v. Morse, 2 Sim. 485. In this last case it was held that a gift in trust for a daughter and children should be held by the trustee in trust for the daughter for life, and, after her decease, for all her children, whether "born in the testator's lifetime or after his death." See, also, Hannan v. Osborn, 4 Paige (N. Y.) 336; Rich v. Rogers, 14 Gray (Mass.) 174.

In conclusion I would say that, whatever construction is put upon the clause under consideration, it seems to me that the fund must continue to be held in trust, at least during the lifetime of George, and that is all that need now be determined. The result I have reached upon the whole case is that George has received all of the income under his father's will to which he is entitled, and that upon a proper construction of the will, and under the evidence, there is no principal payable to him at the present time.

The bill will therefore be dismissed with costs.

LEWIS PUB. CO. v. WYMAN.

(Circuit Court, E. D. Missouri, E. D. April 19, 1907.)

No. 5,417.

1. POST OFFICE—POSTMASTER GENERAL—DECISIONS—REVIEW BY COURTS.
   Federal courts have jurisdiction to re-examine the action of the Postmaster General in denying a periodical publisher the right to have his publication mailed as second-class mail matter, when it is asserted that such executive officer acted without authority of law or in excess of the power granted to him by Congress.

2. SAME—ACTS OF ASSISTANTS.
   Under Rev. St. § 161 [U. S. Comp. St. 1901, p. 80], authorizing the head of each executive department to prescribe rules and regulatons for the conduct of the officers and clerks therein, and the distribution and performance of the business of the department, pursuant to which the Postmaster General intrusted the determination of matters pertaining to the second-class mailing privilege to the Third Assistant Postmaster General, it was immaterial to the right of a publisher to have an order excluding his publication from the mails as second-class mail matter reviewed by the courts that the hearing was before the Third Assistant Postmaster General, if the order was made by the Postmaster General.

3. SAME—HEARING.
   Act March 3, 1901, c. 851, 31 Stat. 1107 [U. S. Comp. St. 1901, p. 2655], provides that, when any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested. Complainant, the publisher of a periodical, was notified to appear June 17, 1905, before the

Third Assistant Postmaster General and show cause why the authorization for the admission of his publication as second-class mail matter should not be revoked, and why the third-class rate of postage should not be charged for the transmission of such publication. Complainant appeared and was notified that he might submit evidence, but nothing further was done until April 19, 1906, when the publisher was notified that, as a result of investigation, it was found that his right to mail subscription copies as second-class matter did not exceed 141,328, and that he would be afforded an opportunity to present evidence to the contrary on a subsequent day. The letter also informed him that the right of such publication to second-class entry was also in dispute. On the adjourned day the publisher appeared, but the hearing was limited to the question as to the number of copies the publisher was entitled to mail as second-class matter, and without further hearing his right to use the second-class privilege at all was subsequently revoked. *Held*, that such order was entered without the hearing required, and was therefore void.

In Equity.

The complainant, a corporation organized under the laws of the state of South Dakota, charges in its bill that it is engaged in the printing and publishing business, having a publishing plant in University City, Winner Station, one of the substations of the post office of St. Louis, Mo., and that the defendant is the postmaster of said city of St. Louis; that one of the publications owned, printed, and issued by complainant is the Woman's Farm Journal, which has been published for many years as a monthly publication, issued regularly each month; that on December 4, 1891, it was admitted by the postoffice department as a publication entitled, under the postal laws of the United States, to the mails at the St. Louis post office as second-class mail matter at the rate of postage of one cent per pound, and ever since has been received and transmitted through the mails at that rate, the periodical having at all times been and is at present so conducted, published, and mailed as to be fully entitled to admission and the use of the mails as second-class mail matter; that the subscription price of said journal has been for 10 years, and now is, 10 cents per annum, and it has always had, and now has, a large and legitimate list of subscribers, and that the benefit of said mailing privilege as second-class matter is of great value to it, and, if the same were taken away from it, the cost of mailing the journal to its subscribers would involve an additional expense of several thousand dollars monthly.

It is further alleged that the journal is not published for circulation at a nominal price, nor is it designed or used primarily for advertising purposes or for free circulation at nominal rates, but that it is a clean and interesting paper, intended to entertain women on the farms and elsewhere, and is designed for that purpose, and such has been the character of said paper during the period the same has been published and owned by complainant; that shortly prior to October, 1905, a difference arose between the complainant and the defendant as postmaster touching the proper number of copies of said journal which could be mailed monthly as second-class matter under its permit, the defendant claiming that complainant was not entitled to mail so large a number under the said second-class mail privilege as it tendered; that the bona fide and legitimate subscription to the Woman's Farm Journal was at least 315,000 at that time and for a year next preceding, and that under said permit it would be entitled to send through the mails twice the number of said subscriptions, but that since April, 1906, the defendant demanded prepayment at third-class transient rate of one cent for every four ounces on all copies mailed at the St. Louis post office in excess of 141,328 subscriptions, and complainant has been obliged to deposit with defendant security in cash or bonds for said transient rate, under penalty of being denied the use of the mails entirely as to such alleged excess; that in April, 1906, defendant notified the complainant that it was entitled to transmit through the mails at the pound rate not to exceed 282,656 copies of the Farm Journal, and demanded prepayment of postage on all copies in excess, at the transient second-class postage rate, amounting to one cent for each four ounces, to be prepaid by stamps,

although complainant protested against this order, claiming a much greater list of bona fide subscribers than 141,328; that, in order to serve and supply the subscribers with the journal, complainant had to deposit large sums of money with the said postmaster, besides indemnity bonds given on the same account, and it therefore complained, and demanded an official investigation of the disputed issue of the actual number of bona fide subscriptions to said journal, which was referred by the defendant to the post-office department at Washington, whereupon complainant was cited to appear for that purpose, and no other, on April 30, and May 1, 1906, before the Third Assistant Postmaster General, where a hearing was accorded to complainant on the issue as to the number of copies which it was entitled to mail at the St. Louis post office at the pound rate; that at said hearing before the Third Assistant Postmaster General that was the only matter taken up and on which evidence was submitted, and upon the completion of the hearing the said Assistant Postmaster General took that subject under advisement, but at no time was the right of complainant to enjoy the continued use of the second-class privilege, nor the question of the suspension or annulment of that privilege, taken up, heard, or in any wise considered at that hearing, but the sole matter heard was as to the number of copies complainant was entitled to mail under its said permit; that after said hearing the said Assistant Postmaster General set on foot an independent and original examination into the circulation of complainant's publication, and at his request all the books, papers, and original documents of complainant were submitted to a commission of five persons employed by the post-office department for that purpose, said examination beginning in June and ending in August, 1906, and that said examination showed a bona fide subscription list of the said Farm Journal of over 310,000, entitling complainant to mail at the St. Louis post office 620,000 copies thereof at the second-class postage rate; that, notwithstanding these facts, defendant intends to deprive complainant entirely of the right to use and enjoy the second-class mail privilege accorded it in 1891 and enjoyed ever since, except as in the bill stated; that such action would cause irreparable damage to complainant, and is in violation of the laws of the United States, which provide that no periodical once admitted to enjoy the second-class mail privilege shall be deprived thereof without a hearing.

The prayer of the bill is that the defendant, as postmaster, be restrained from refusing transmission through the mails as second-class matter of 600,000 copies of the said Farm Journal and depriving complainant of the privilege of the second-class postage rates as granted to it for said journal in 1891; that the court ascertain and adjudge the amount of legitimate subscriptions of the said Woman's Farm Journal as of March 1, 1907, and for prior months since September, 1905, to the end that it may be determined what number of copies complainant is entitled to send through the mails as second class matter.

Upon presentation of the bill and a preliminary answer filed by defendant, a rule on the defendant to show cause why a temporary injunction should not be granted was issued, and in the meantime a temporary restraining order was granted to maintain the status quo, restraining the postmaster from refusing the admission of the magazine at second-class rates, but in no wise interfering with the order made limiting the number of copies admitted at that rate.

The answer first filed by the defendant was withdrawn, and in lieu thereof he filed a response to the order to show cause, in which he denies the jurisdiction of the court to grant any of the relief demanded, and then sets up the following grounds why, if the court does assume jurisdiction, an injunction should be denied: It denies that the privilege to mail the Woman's Farm Journal as second-class mail matter had been annulled without a hearing, but, on the contrary, the defendant charges that the said journal was excluded from that privilege upon three grounds: First, that it did not have a legitimate list of subscribers; second, that it was designed primarily for advertising purposes; and, third, that it was circulated at nominal rates of subscription—that before this privilege was withdrawn the complainant was accorded two hearings before the Third Assistant Postmaster General, the first on June 17, 1905, and the second on April 30, and May 1, 1906, at each of which it was represented by its president and counsel; that the publication con-

sists principally of advertising, the advertisements being editorial and space; that much of the advertising space, as well as the editorial page, is used as a medium for promoting various business enterprises and interests controlled in whole or in part by the president of the publishing company, and that the reading matter consists partly of short and serial stories, but largely of brief notes and clippings, such as are ordinarily contained in advertising circulars transmitted through the mails at the third-class postage rate; that the statute provides, as among the conditions upon which publications may be admitted to the second-class privilege, that "it must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers; provided, however, that nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates"; that the president of the publishing company has promoted or exploited through the medium of the journal more than a dozen of his private enterprises, one of which was the People's United States Bank, against which a fraud order was issued by the Postmaster General on July 6, 1905, for the reason that the sales of its stock had been made and deposits induced upon false representations and promises, and that the funds of the institution were being misapplied; that the complainant advertises a much larger circulation for said journal than it possesses for the purpose of charging a higher rate for its advertising; that an exhaustive inquiry into the publication methods of complainant was instituted by the department in March, 1905, which extended to April, 1906, this was followed in May, 1906, under like direction, by an inquiry conducted by different officers attached to another bureau of the post-office department, which extended to February, 1907; that it was found that a great many copies were sent out in excess of the bona fide subscription and the number of sample copies allowed by the rules and regulations of the department; that such official inquiry disclosed the further fact that a very large proportion of the subscriptions had been obtained at the club rate of five and six cents per annum, instead of at the advertised rate of ten cents; that many subscriptions are furnished free, and others at greatly reduced rates and in pursuance of advertising arrangements; that the average amount received in cash upon the copies of the publication mailed was approximately three and one-third cents per annum; that in April, 1906, after having learned by very thorough tests and exhaustive inquiry that almost one-half of the mailings of the journal were illegitimate, the postmaster at St. Louis, acting under the instructions from the post-office department, began collecting from the Lewis Publishing Company a transient second-class postage rate of one cent a copy, which additional postage has amounted to about $7,000 a month on this journal and the Woman's Magazine, also published by complainant; that complainant appealed from the action so taken by the postmaster, and was accorded a hearing on April 30, and May 1, 1906, upon the question whether the postmaster should be sustained in his action in collecting excess postage, and also upon the question of the legitimacy of the subscription lists of the publications. Following that hearing the second official inquiry was instituted, and as a result of that inquiry the original finding as to the number of subscribers to the publication was substantially confirmed. This inquiry developed that in order to maintain the circulation of the Farm Journal at 600,000, as advertised, and of the Woman's Magazine at the advertised circulation of a million and a half, the company was sending 74 per cent. of its mailings of the Farm Journal to persons whose subscriptions had expired; that the postal laws and regulations treat as subscribers "those who voluntarily seek and pay for the publication with their own money"; that on March 4, 1907, the Postmaster General, by an order duly promulgated, directed the said Farm Journal to be excluded from the second-class mailing-privilege, upon the ground, first, that it had not a legitimate list of subscribers; second, that it was designed primarily for advertising purposes; and, third, that it was circulated at nominal rates of subscription, and at the same time also dismissed complainant's appeal from the action of the postmaster at St. Louis requiring the higher rate of postage on all copies of the journal sent through the mails in excess of that allowed by the

rules and regulations of the department, and approving the finding of the postmaster that the bona fide subscription list did not exceed 141,323 and directing the postmaster to collect the postage on the excess copies mailed.

The issues being thus made up, a hearing was had, the complainant producing his witnesses in court for oral examination, subject to cross-examination, and having also taken depositions of witnesses upon notice. The defendant introduced some witnesses and also offered an affidavit of the chief clerk of one of the divisions of the post-office department at Washington.

Barclay & Fauntleroy and Carter, Collins & Jones, for complainant.
Chester H. Krum and H. H. Glassie, for defendant.

TRIEBER, District Judge. The contention of counsel for defendant that the courts have no jurisdiction to re-examine the action of the head of one of the executive departments in matters of this kind cannot be sustained, as it is well settled that courts have jurisdiction to re-examine the action of the head of one of the executive departments in matters of this kind when he is either acting without authority of law or in excess of the power granted to him by law, has proceeded in violation of an act of Congress, or has misconstrued the legal effect of the statute under which he is acting. Teal v. Felton, 12 How. 284, 13 L. Ed. 990; School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888; Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894; Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225; People's U. S. Bank v. Gilson (C. C.) 140 Fed. 1. The bill charges that the acts of the Postmaster are in violation of law.

The fact that the hearing was before the third Assistant Postmaster General and the order made by the Postmaster General is immaterial. The statute only authorizes the Postmaster General to grant or revoke these privileges; but, as Congress well knew that it would be impossible for the head of any executive department to give a hearing in person to all matters coming before that department, it has authorized the head of each department to prescribe rules and regulations for the conduct of the officers and clerks and the distribution and performance of its business. Section 161, Rev. St. [U. S. Comp. St. 1901, p. 80]. In pursuance of this authority, the Postmaster General has intrusted the determination of matters pertaining to the second-class mailing privilege to the Third Assistant Postmaster General, subject, of course, to his approval. The actions of the Assistant Postmaster General on matters of this kind are merely those of a master or referee of a court to hear proofs and report his findings of fact and probably conclusions of law. It is the judge of the court, or, in cases of this kind, the head of the department, who finally acts on that matter, either adopting the recommendations of the referee or assistant, or rejecting them. It is the head of the department who promulgates the conclusions as his own, independent of what the recommendations of his assistant might have been. The courts will conclusively presume that the head of the department acted on the testimony submitted to him as fully as if he had been present at the hearing and had not submitted it to one of his assistants.

The next question to be determined is: Was there a hearing granted to the defendant within the meaning of the Act of March 3, 1901, c. 851, 31 Stat. 1107 [U. S. Comp. St. 1901, p. 2655]? This statute provides:

"When any publication has been accorded second class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

Sections 10 and 14 of Act March 3, 1879, c. 180, 20 Stat. 359 [U. S. Comp. St. 1901, pp. 2646, 2647], are as follows:

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in sections 12 and 14."

"Sec. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets without board, cloth, leather or other substantial binding such as distinguishes printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers; provided, however, that nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes or for free circulation or for circulation at nominal rates."

In order to determine what Congress meant by providing for "a hearing" by the act of March 3, 1901, it is advisable to ascertain the state of law at the time of the passage of the act and thus find the mischief then existing and sought to be remedied. It had been conclusively determined by the decisions of the various national courts, including the Supreme Court of the United States, that the power of Congress over the postal system was plenary, absolute, and exclusive; that it embraced the regulation of the entire postal system of the country, including the right to designate what shall be carried and what excluded, and at what rates. Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; Enterprise Savings Association v. Zumstein, 67 Fed. 1000, 15 C. C. A. 153; Dauphin v. Key, McArthur & M. (D. C.) 203; Missouri Drug Co. v. Wyman (C. C.) 129 Fed. 623.

It had also been decided many times that the duty of determining facts could by Congress be intrusted to the head of the department charged with the administration to which that matter belongs, and the findings of facts made by the head of a department, uninfluenced by fraud or mistake of law, are regarded as conclusive, and will not be disturbed by the courts. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Lake Superior Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183; Burfenning v. Chicago & St. Paul Ry., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 458; Johnson v. Drew, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88. The power thus vested in the Postmaster

General was great, and not being reviewable by the courts, except for fraud or mistake, that official had the power to practically destroy any magazine or newspaper by merely withdrawing the second-class privilege from such magazine or periodical; for no such publication having an extended circulation outside of the place where it is published could exist for any length of time if required not only to pay the third-class postage, but to prepare it for the mails as such matter. It was to remedy this mischief, no doubt, that this provision was added to the appropriation act of March 3, 1901, making the appropriation for the service of the post-office department for the fiscal year ending June 30, 1902. If this was the intent of Congress, and it is impossible to conceive of any other, then something more was meant by "a hearing" than mere notice to the publisher to show cause by a day certain why the privilege theretofore accorded to him should not be revoked. It may be conceded that Congress did not intend to confer upon the head of an executive department judicial powers, nor that there should be a hearing according to the strict rules governing courts, and it may also be conceded that this is a mere privilege and not a right which has become vested by the original permit; still, in order to make it a hearing, as I construe the meaning of this act, the publisher should not only be cited to show cause, but, after appearing in response to the citation, ready to show cause, be given the opportunity of presenting his evidence and also be informed what he is called upon to answer. If by reason of the umpire, commissioner, or acting head of the department, who is to hear and pass upon the matter in the first instance, he is prevented from presenting his evidence or induced not to do so upon the assurance of being given an opportunity to do so at a later day, then the action of the head of the department, without giving him the opportunity to be heard and offer proofs in support of his claims, is not a hearing within the meaning of the statute, and the acts of the Postmaster General without such hearing are absolutely void for want of jurisdiction.

The undisputed facts as they appear in this case on this subject are: That the Women's Farm Journal was admitted at the post office at St. Louis as a publication entitled to the use of the mails as second-class matter, at the rate of postage of one cent per pound, on December 4, 1891. That about May 17, 1905, some post-office inspectors recommended to the department that the second-class privilege of that journal be revoked. That acting upon that recommendation the Third Assistant Postmaster General on June 5, 1905, sent the following citation to the publishers of the Woman's Farm Journal (the words in italics were printed and the others typewritten).

Edwin C. Madden, Third Asst. P. M. General. Form 3,557.

Post Office Department.

Office of the Third Assistant Postmaster General, Classification Division.

58,208. Washington, D. C., June 5, 1905.

Publisher of Woman's Farm Journal, Saint Louis, Missouri—*Sir: You are hereby notified that, in accordance with the Act of Congress approved March 3, 1901 (ch. 851, 31 Stats. at L., 1107), you will be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at* 2:30 p. m. *on* Saturday, June 17, 1905, *to show cause why the authorization for the*

admission of "Woman's Farm Journal," *to the second class of mail matter under the act of March 3, 1879, should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails, upon the following ground:* That this publication comes within the following prohibition of the statute:

"Provided, however, that nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates"—

in that, first, it is primarily designed for advertising purposes; second, it is primarily designed to advertise the other businesses in which stockholders and officers of the publishing company, and especially E. G. Lewis, are interested; third, it is primarily designed for free circulation or for circulation at nominal rates.

Your answer, in writing, must be submitted on or before Saturday, June 17, 1905.

Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative.

Respectfully, Edwin C. Madden,
GGT–HMB–r *Third Assistant Postmaster General.*
Registered.

That, in response to this citation, the complainant by its officers and attorneys appeared before the Third Assistant Postmaster General on June 17, 1905, and presented an elaborate oral statement with respect to the matters mentioned in the citation; Mr. Lewis, the president of complainant, being interrogated by the Third Assistant Postmaster General and his attorney in respect to the same matter, and at its conclusion complainant was notified that he might submit any other evidence he might desire. Nothing further was done in the matter until April 19, 1906, when the Third Assistant Postmaster General sent the following letter to Mr. Lewis as president of complainant:

Post Office Department.

Office of Third Assistant Postmaster General, Division of Classification.

April 19, 1905.

Mr. E. G. Lewis, President, Lewis Publishing Company, St. Louis, Missouri —Dear Sir: The ruling of the postmaster at St. Louis, dated April 6th, concerning the excess mailings of the Woman's Farm Journal and the ruling of April 12th, concerning excess mailings of the Woman's Magazine, have been reported to this office with notice that you had appealed from the ruling in the case of the Woman's Farm Journal. Your letter to the Hon. Jesse Overstreet with accompanying statement in which that appeal appears to be embodied has also been received by this office. Although these latter papers can not in strictness be said to constitute an appeal to this office from the ruling of the postmaster, nevertheless they will be treated as such. As a result of his investigation the postmaster has found and determined that the legitimate subscriptions to the Woman's Farm Journal number not to exceed 141,328, entitling the publisher to mail samples not to exceed an equal number and that the subscriptions to the Woman's Magazine number not to exceed 539,901, entitling the publisher to mail samples not to exceed that number. With regard to that appeal from the ruling of the postmaster as to excess mailings, I have to inform you that the facts found by the postmaster will, in the absence of evidence to the contrary, be taken as prima facie correct. You will be accorded an opportunity at this office April 27th next at 2:30 p. m., to present any and all evidence to the contrary which it may be your wish to lay before me for consideration in connection with your appeal. In this connection you are also informed that the question of the right of these publications to second-class entry is in dispute.

Respectfully, Edwin C. Madden,
Third Assistant Postmaster General.

This entire letter was typewritten.

At the request of complainant this hearing was postponed until April 30, 1906.

It will be noticed that this last letter or citation deals almost wholly with the ruling of the postmaster at St. Louis concerning excess mailings of complainant's publications made April 6, 1906; only the concluding part referring to the right of the second class privilege. Complainant, when notified by the postmaster at St. Louis of his action in regard to the number of copies he was authorized to send through the mails at the one cent per pound rate, appealed from that decision to the Third Assistant Postmaster General, in conformity with the rules prescribed by the department, and which will be found in Postal Guide of 1906, p. 1000, amending section 485 of the postal laws and regulations. In this appeal it asked for a refund of the excess postage paid by it under protest to the postmaster at St. Louis in order to secure admission of its publications to the mails, and which amounted to $3,100 for the May issue of this Journal. That is the appeal referred to in the letter of the Third Assistant Postmaster General. On April 30th the president and some of the other officers of the complainant, with their attorney, Judge Barclay, appeared at the office of the Third Assistant Postmaster General in the city of Washington, and the following proceedings were had:

"Gen. Madden (Third Assistant Postmaster General): I wish to say, Mr. Lewis, that ordinarily hearings of this kind are open; that we admit the press or any person interested in what may be going on before the office, and you are privileged to have here any persons you desire or to have excluded every person except those belonging to the department, all who are here, at least, by invitation. It is entirely with yourself to determine that question. If you have any objection to the presence of any person, we will exclude them.

"Mr. Lewis: Thank you, General; we have no objection at all."

After a few remarks made by Hon. Richard Bartholdt, member of Congress from the district in which complainant's plant is situated, Judge Barclay, as attorney for complainant, addressed Gen. Madden as follows:

"General, in order to put the precise question before you in a formal way, perhaps it would be well to read our appeal from the decision of the postmaster at St. Louis.

"Gen. Madden: I think you had better read that.

"Judge Barclay: It is quite short."

He thereupon read the appeal, and proceeded to address the Third Assistant Postmaster General as follows:

"There is one thing, Gen. Madden, in your letter that I wish to ask you about particularly, and that is as to the paragraph of your honored communication of the 19th of April in regard to the question of circulation. It is the last paragraph in your communication of the 19th where you say, 'In this connection you are also informed that the question of the right of these publications to second class entry is in dispute.' If that matter is to be heard independently of the question of circulation, we would like to understand that, because it is involved with and bears upon the issue as to the circulation.

"Gen. Madden: It is independent of this.

"Judge Barclay: Then we will be heard upon that question?

"Gen. Madden: Not necessarily to-day. This is on the appeal.

"Judge Barclay: Then we will only talk on the appeal to-day. Is that right?

"Gen. Madden: That is right."

Gov. Lon V. Stevens thereupon introduced Mr. Lewis to Gen. Madden, stating that they had implicit confidence in Mr. Lewis, to which the following reply was made:

"Gen. Madden: I am glad to know that. Now, Mr. Lewis, the report of the postmaster at St. Louis is that there is an excess of mail amounting approximately to 300,000 copies of the Woman's Farm Journal, and I deem the statement as prima facie correct as to that. You can show to the contrary, an opportunity to do which is now given you.

"Mr. Lewis: I will say as to the Woman's Magazine—

"Gen. Madden: Let's consider one case at a time. We had better proceed with one publication at a time.

"Judge Barclay: Are we at liberty to know on what information the department has acted?

"Gen. Madden: It has acted on information furnished here through the investigations that have been made from time to time and reports put in.

"Judge Barclay: Are we to have the privilege of seeing those reports and knowing what the facts are, if they amount to the improper use of the mail?

"Gen. Madden: The entire question is one of fact, and it will be immaterial what the postmaster has reported, or even what Mr. Lewis shall state. If it becomes necessary to determine the facts, we will have other means of determining them.

"Mr. Glassie, Counsel for the Post-Office Department: You have the precise figures, have you not?

"Mr. Lewis: Yes, sir.

"Judge Barclay: What is Mr. Wyman's claim as to our circulation?

"Mr. Glassie: The claim is that the legitimate subscriptions to the Woman's Farm Journal are not to exceed 141,328, and to the Woman's Magazine not to exceed 539,901.

"Gen. Madden: Now, Mr. Lewis, I will ask you some questions. Do you wish to make some statements now?

"Mr. Lewis: We wish to state, regardless of the source of the information upon which these figures are based, that they are absolutely incorrect. Is Mr. Glassie going to ask some questions?

"Mr. Glassie: No. I wanted to give you the figures that are claimed to be in excess or outside of the second class privilege. Let's find the exact number of copies claimed to be in excess, so you will know that.

"Mr. Lewis: Yes; we understand that.

"Mr. Glassie: That is the issue.

"Mr. Lewis: My understanding is that the hearing to-day is to be separate from the last clause of the department letter; that is, that it isn't on the general character of the publications or their being entitled to second class privilege.

"Gen. Madden: No, sir.

"Mr. Lewis: It is purely on excess of second class mailings.

"Gen. Madden: Yes.

"Mr. Lon V. Stevens, Vice President of Complainant: I want to be well understood here. Are we going to have the privilege of knowing what the facts are tending to establish the prima facie case made by Mr. Wyman or anybody else?

"Gen. Madden: No, sir. I am going to give you the opportunity of hearing what you have to say and your own figures, independently of the prima facie case."

On May 3, 1906, two days after the hearing, the Third Assistant Postmaster General appointed a commission of five employés of the post-office department, with directions to said commission to proceed to St. Louis, Mo., and there, in co-operation with the Lewis Publishing Company, to make an investigation and to report upon the circulation of the said Woman's Farm Journal. An investigation was made by this commission, assisted by a committee appointed by complainant,

who went through all the books and papers of the complainant throwing any light on the question of subscription, and finally reporting that the subscription list of the Farm Journal, as shown by the books and papers of the complainant, was in excess of 300,000. Nothing further seems to have been done in the matter until March 4, 1907, when the Postmaster General issued an order to the postmaster at St. Louis, Mo., advising him that the appeal of the publishers of the Woman's Farm Journal had been dismissed, and, furthermore, that the second-class mailing privilege theretofore extended to the journal is withdrawn. This letter is as follows:

"Office of the Postmaster General,

"Washington, D. C., March 4, 1907.

"Sir: In the case of the appeal of the publisher of the Woman's Farm Journal from your recommendation and action in the matter of demanding and collecting postage at the transient second-class rate on all copies of said publication mailed monthly in excess of its legitimate subscribers, which, as shown by the extended investigations of the Department and the count of October 13, 1905, aggregated 141,328, and in excess of a like number properly marked and sent as sample copies, you are informed that upon a hearing granted the publisher on April 30 and May 1, 1906, and a careful and thorough investigation by the Department, your recommendations are approved and your action sustained. You will, therefore, remit to the Department in cancelled stamps attached to sheets of paper, the excess postage that has been collected by you, and also make demand on the publisher for the balance due the Government, under the law and the regulations of the Department, at the transient second-class rate of postage, upon all excess copies of the publication mailed on and after October 1, 1905. In the matter of your recommendation that the Department revoke the order granting second-class mailing privilege to this publication, you are informed that upon a hearing granted the publisher on the same dates (April 30 and May 1, 1906), and upon a careful and thorough investigation of all of the evidence by the Department, I find that the publication does not have a legitimate list of subscribers, that it is designed and published primarily for advertising purposes; and that it is being circulated at a nominal rate, contrary to the law and the regulations of the Department. You will, therefore, refuse hereafter to accept for mailing at the second-class rate of postage copies of the said publication, and inform the publisher that the second-class mailing privilege heretofore extended the Woman's Farm Journal is withdrawn, and that the order granting the same is revoked.

"Very respectfully, Geo. B. Cortelyou, Postmaster General.

"The Postmaster, St. Louis, Missouri."

The letter of April 19, 1906, of the Assistant Postmaster General to the complainant, as well as the proceedings had before that official on April 30, and May 1, 1906, show conclusively that the hearing in June, 1905, was not treated as final, and that the post-office department at the hearing on April 30, 1906, led complainant to believe that it would be given a full opportunity to be heard and submit evidence on the issue of revoking the second-class privilege under the citation of June 5, 1905, and, relying upon that assurance, complainant did not at that hearing present any evidence. The order of the Postmaster General revoking the privilege also shows that it is based solely upon the hearing had on April 30, and May 1, 1906.

It is therefore impossible to sustain the contention that the order revoking the second-class privilege of complainant was based upon the hearing had in June, 1905, and as it is undisputed that at the hear-

ing had on April 30, and May 1, 1906, complainant was advised that this matter would not be taken up then, but that he would be notified thereafter when to appear for a hearing on that issue, and it never has been so notified, it is impossible for the court to make a finding that there had been any hearing on this issue, within the meaning of the law.

This conclusion makes it unnecessary to determine whether it is essential in order to constitute a hearing under the act of March 3, 1901, that the publisher be either confronted with the witnesses whose testimony is to be used against him or that he be at least furnished their testimony and names in order that he may be able to rebut their evidence, if it is possible for him to do so.

The other issue involved is whether the determination by the Postmaster General of the number of bona fide subscribers which the journal has, and consequently the number of copies which it may send through the mails under the second-class rate privilege, can be reviewed by the courts. Congress has not seen proper to provide for a hearing in matters of that nature. It has left the law as it had always been construed. The wisdom of this policy is not to be determined by the courts. Congress alone has control of that.

In Veazie Bank v. Fenno, 8 Wall. 533, 548, 19 L. Ed. 482, it was contended that:

"The tax [in the case before the court] was so excessive as to indicate a purpose on the part of congress to destroy the franchise of the bank, and was therefore beyond the constitutional power of Congress."

But Chief Justice Chase, who delivered the opinion of the court, in reply to that contention, said:

"The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers,. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected."

Of the many cases to the same effect the following may be cited: McCulloch v. Maryland, 4 Wheat. 316, 428, 4 L. Ed. 579; Kirtland v. Hotchkiss, 100 U. S. 491, 497, 25 L. Ed. 558; Spencer v. Merchant, 125 U. S. 345, 355, 8 Sup. Ct. 921, 31 L. Ed. 763; The Chinese Exclusion Cases, 130 U. S. 581, 609, 9 Sup. Ct. 623, 32 L. Ed. 1068.

In the case at bar it seems that there was a hearing granted to complainant and a commission appointed by the department, who examined the books and papers of the publishing company bearing upon the subject of its bona fide subscribers. It seems that from this examination it appeared that the journal had over 300,000 subscribers. Still the Postmaster General, from evidence submitted to him, as stated in his order, found that the bona fide subscription list of the journal did not exceed 141,328 copies, as found by the Postmaster of St. Louis. There is nothing to show in this case how he arrived at that conclusion, and what additional evidence was before him, except in the response to the rule to show cause why the temporary injunction should not be granted defendant alleges:

"The postmaster made inquiry of the postmasters at the post offices of address of 1,000 of these excess copies of the issue of the Woman's Farm Journal

for October, 1905, and the replies received showed that 90 per cent. of the persons to whom such copies had been mailed had never subscribed for the publication. Five hundred names taken from similar copies were submitted to the publisher, with the request that he exhibit accurate records showing that they represented persons whose subscriptions had expired, but he was able to supply only 6 such names of the 500 claimed. Later he repeated his claim that these excess copies were mailed to persons whose subscriptions had expired, but, on being confronted with the results of the inquiries made by the postmaster and the investigating officers, admitted that such copies had been mailed, not to persons whose subscriptions had expired, but to persons whose names had been selected by him. He then claimed that payment for these copies was made from a special fund contributed by his sympathizers, but failed to substantiate this statement. These excessive mailings were, in fact, sample copies illegally mailed."

No evidence to sustain these allegations was offered on behalf of the defendant. It is therefore impossible for the court to determine how the conclusions were reached by the Postmaster General, and whether these conclusions are correct and supported by proper proofs; but, as Congress has seen proper to intrust this entire matter to the Postmaster General, the courts are powerless to interfere.

As shown by the citations in the first part of this opinion, it has always been held that the power possessed by Congress embraces the regulation of the entire postal system of the country, including the right to designate what shall be carried and at what rates, and that this power may be lawfully delegated to the Postmaster General. Section 3962 of the Revised Statutes [U. S. Comp. St. 1901, p. 2704] authorized the Postmaster General to make deductions from the pay of contractors for the failure to perform services according to contract and impose fines upon them for other delinquencies, and it has been uniformly held that the action of the Postmaster General, under the power granted him by this section, is a matter within his discretion, and not subject to review by the courts. Chicago, etc., Ry. Co. v. United States, 127 U. S. 406, 407, 8 Sup. Ct. 1194, 32 L. Ed. 180; Eastern Ry. Co. v. United States, 129 U. S. 391, 396, 9 Sup. Ct. 320, 32 L. Ed. 730; Allman v. United States, 131 U. S. 31, 35, 9 Sup. Ct. 632, 33 L. Ed. 51.

It is impossible to give any convincing reason why Congress cannot delegate powers of this nature to the Postmaster General without judicial intervention, in the same manner as the regulation and enforcement of the immigration laws have been entrusted to the heads of other departments. That this may be done in the latter cases is now no longer open to discussion. Nishimura Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; The Japanese Immigrant Cases, 189 U. S. 86, 97, 23 Sup. Ct. 611, 47 L. Ed. 721; United States v. Ju Toy, 198 U. S. 253, 261, 25 Sup. Ct. 644, 49 L. Ed. 1040. In the last cited case the court say:

"The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive."

And, after reviewing a large number of authorities, the court answers the question as follows:

"In view of the cases which we have cited, it seems no longer open to discuss the question propounded as a new one."

In the Japanese Immigrant Cases the court said:

"The constitutionality of the legislation in question in its general aspects is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers without judicial intervention, are principles firmly established by the decisions of this court."

In Passavant & Co. v. United States, 148 U. S. 214, 219, 13 Sup. Ct. 572, 37 L. Ed. 426, the question presented was whether the courts could review the decision of the Board of General Appraisers under the act of June 10, 1890, as to the dutiable value of imported merchandise; and the court held:

"It was certainly competent for Congress to create this Board of General Appraisers, called 'legislative referees' in an early case in this court (Rankin v. Hoyt, 4 How. 327, 339, 11 L. Ed. 996), and not only invest them with authority to examine and decide upon the valuation of imported goods, when that question was properly submitted to them, but to declare that their decision 'shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein.' * * * In the tariff legislation of the government, Congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the government's revenues would be seriously obstructed and interfered with."

No doubt Congress has thought that to permit the courts to review the findings of facts made by the Postmaster General in cases of this nature might have that same effect upon the mails as is said by the Supreme Court the effect would be on the collection of the government revenue, although since then Congress has seen proper to confer the power upon the courts to review the actions of the Board of General Appraisers. If the Postmaster General had authority to pass on this matter, then, in the language of Mr. Justice Holmes, in United States ex rel. v. Hitchcock, 205 U. S. ——, 27 Sup. Ct. 423, 51 L. Ed. ——: "His jurisdiction did not depend upon his decision being right." In Chicago, Burlington & Quincy Ry. v. Babcock, 205 U. S. ——, 27 Sup. Ct. 326, 51 L. Ed. ——, the court, in passing upon the acts of a State assessing board which were attacked by the railway company, said:

"The board was created for the purpose of using its judgment and its knowledge. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663, and other cases. Within its jurisdiction, except as we have said, in case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity, as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."

Evidence was introduced by complainant establishing the fact that the proportion of advertising matter in the journal, in comparison with the literary, editorial, and other reading matter, is no greater, and in some instances smaller, than that of some of the leading maga-

zines and newspapers of the country who are permitted to enjoy the second-class rate privilege. It is not contended that this evidence is sufficient to establish fraud on the part of the Postmaster General; in fact, the application of any such supposed rule of uniformity would render the law impossible of enforcement, for it would then be impossible for the post-office department to exclude any publication until it has acted on all publications, but, as hereinbefore shown, the courts are unable to consider this testimony except for the purpose of establishing fraud.

In De Cambra v. Rogers, 189 U. S. 119, 122, 23 Sup. Ct. 519, 47 L. Ed. 734, the court said:

"It is hardly necessary to say that, when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the method by which he reached his determination."

Applying the foregoing rules to the facts in this case, the court finds itself powerless to interfere or review the action of the postmaster at St. Louis, affirmed by the Postmaster General, as to the number of copies of the journal which complainant can transmit through the mails at the one cent per pound rate.

There will be a temporary injunction restraining the defendant from enforcing that part of the order of the Postmaster General withdrawing the second-class mailing privilege granted to complainant for the Woman's Farm Journal; but as to all other matters the injunction will be denied.

FOWLER v. GOWING.

(Circuit Court, N. D. New York. April 20, 1907.)

1. TRUSTS—CREATION—ACTS OF DONOR.

Defendant set apart certain money of his own, to the amount invested in certain of the installment stock of a loan association, and procured the stock to be issued in the names of his children, respectively, adding his own name as trustee. When the stock matured and was paid, the checks were made payable to defendant as trustee for each of the interested children, after which defendant invested the funds in the form of such checks in the stock of a bank, distinctly declaring to the bank's officers at the time the stock was purchased that he desired to invest the funds "for the benefit of his children in the stock of the bank." The stock was thereupon issued to defendant as trustee for each of the children, and at this time defendant, in his own books, opened an account between himself as trustee for the children, naming them, and himself individually, in which he declared that as trustee he had received checks of the loan association of the value of $5,000, and as such trustee had purchased and then held 45 shares of the stock of the bank. He thereafter received the dividends on the stock, as trustee, but put the money in his own individual account, from which he also paid taxes on the stock and subsequently purchased five additional shares, partly with the money belonging to the trust fund and partly with his own money, and on the failure of the bank he charged "Profit and Loss" with the difference between the amount advanced and the amount he subsequently received in dividends, etc. *Held*, that such acts constituted an irrevocable trust of the shares for the benefit of the children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 53.]

2. BANKS AND BANKING—NATIONAL BANKS—STOCKHOLDER'S LIABILITY—TRUSTEES.

Rev. St. § 5151 [U. S. Comp. St. 1901, p. 3465] provides that shareholders of every national bank shall be individually responsible for all contracts, debts, and engagements thereof to the extent of the amount of their stock therein at its par value, in addition to the amount invested in such shares, and section 5152 declares that persons holding stock as trustees shall not be personally liable for any liabilities as stockholder, but the estates and funds in their hands shall be liable in like manner as if the person beneficially interested held the stock in his own name. *Held*, that where a father voluntarily declared a trust of certain shares in a national bank for the benefit of his children in good faith, and not for the purpose of evading liability, and did not hold himself out as the owner of the stock individually, he was not personally liable as a stockholder on the failure of the bank.

[Ed. Note.—Who liable as shareholders in national banks, see note to Beal v. Essex Savings Bank, 15 C. C. A. 130; Earle v. Carson, 46 C. C. A. 503.]

3. TRUSTS—TRUST FUNDS—INVESTMENT.

The rule that trustees are not authorized to invest trust funds in the stock of national banks has no application to a trust voluntarily created by a donor as to such stock.

4. BANKS AND BANKING—NATIONAL BANKS—FAILURE—STOCKHOLDER'S LIABILITY—TRUST.

Where stock in a national bank at the time of its failure was held by a trustee for the benefit of his children, the fact that the trust estate was wiped out of existence, so far as value or financial responsibility was concerned, by the failure of the bank, did not charge the trustee individually as a stockholder with the additional statutory liability imposed by Rev. St. §§ 5151, 5152 [U. S. Comp. St. 1901, p. 3465].

This is an action to enforce and collect of the defendant individually assessments upon stock of the American Exchange National Bank of Syracuse, N. Y., levied by the Comptroller of the Currency of the United States under the provisions of section 5151, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3465], and which stock was issued in the name of and stood upon the books of the said bank in the name of "D. H. Gowing, Trustee."

Fowler, Crouch & Vann, for complainant.
White, Cheney & Shinaman, for defendant.

RAY, District Judge. This action comes before the court upon an agreed or stipulated state of facts; the material ones being as follows:

(1) The American Exchange Bank of Syracuse was organized on or about December 1, 1897, under the banking laws of the state of New York, and did business as such until about the 12th day of April, 1900, when it was duly reorganized as and became a national banking corporation and subject to the national banking laws. The old stockholders took stock in the new bank thus reorganized for the same amounts, respectively.

(2) The new or national bank continued to do business as such until on or about February 10, 1904, when, being insolvent, and its capital stock having become impaired and worthless, it ceased to do business and closed its doors.

(3) Thereupon a receiver of said bank was duly appointed, and later the complainant here was duly appointed receiver thereof to succeed the original receiver and now is such.

(4) The capital stock of the bank was $200,000, divided into 2,000 shares of the par value of $100 each.

(5) About August 9, 1904, the Comptroller, having found and determined that in order to discharge the debts and liabilities of said bank it was necessary to enforce the individual liability of the stockholders to the extent of $134,000, duly made an assessment and requisition upon the stockholders of said bank to the extent of $67 upon each and every share.

(6) The defendant, D. Henry Gowing, at the time of such failure of said bank, was the owner in his own name and right standing in his own individual name of 60 shares of the stock of said bank, and such assessment thereon he duly paid.

(7) The defendant at such time also held and had in his possession 50 shares of the capital stock of said bank issued to him in the name of "D. Henry Gowing, Trustee" and standing in the name of "D. Henry Gowing, Trustee" on the books of said bank.

(8) It is to collect the said assessment on these 50 shares of stock, so issued to "D. Henry Gowing, Trustee," of the defendant individually, that this action is brought. Defendant says he is not individually liable; that he held and owned same as trustee of a defined trust for the benefit of his five children: Helen Louise Gowing, Nathan Howard Gowing, Sarah French Gowing, Mary Naomi Gowing, and Daniel H. Gowing, and not individually.

(9) The facts in regard to the alleged trust, its creation, and the purchase and issue of such stock, are as follows: About December 31, 1890, the defendant, D. Henry Gowing, with his own money purchased five shares of the installment stock of the Syracuse Co-Operative Savings & Loan Association a corporation organized under and pursuant to the laws of the state of New York, of the par value of $200 each, in the name of "Helen Louise Gowing, D. H. Gowing, Trustee," and the stock was issued in that name. Thereafter defendant continued to pay with his own money the installments of $5 per month thereon until same matured on the 11th day of November, 1899. On that day said association paid to said D. H. Gowing, this defendant, said sum of $1,000 by its check drawn on the Bank of Syracuse payable to the order of "D. H. Gowing, Trustee Helen L. Gowing." Said Helen L. Gowing was then about 14 years of age. On or about the 15th day of January, 1890, defendant purchased with his own money ten shares of the stock of said association of the par value of $200 each, purchasing and taking five of such shares in the name of "Nathan Howard Gowing, D. H. Gowing, Trustee," same being issued in that name, and purchasing and taking the other five shares in the name of "Sarah French Gowing, D. H. Gowing, Trustee," same being issued in that name. Thereafter defendant paid with his own money the installments of $5 per month on such ten shares of stock until same matured, November 11, 1899, when said association by its two checks for $1,000 each, drawn upon the bank of Syracuse, paid same. One of said checks was payable to the order of "D. H. Gowing,

Trustee, Nathan H. Gowing," and the other to the order of "D. H. Gowing, Trustee, Sarah F. Gowing." Said Nathan H. Gowing was then about four years of age, and said Sarah F. Gowing was then about ten years of age. About May 1, 1890, defendant purchased in the same way of the same association five shares of its same stock of the same par value in the name of "Mary Naomi Gowing, D. H. Gowing, Trustee," same being issued in that name, thereafter paying the monthly installments with his own money, until maturity of the stock, November 11, 1899, when the association paid to defendant $1,000 by its check drawn on said bank payable to the order of "D. H. Gowing, Trustee, Mary N. Gowing." Said Mary N. Gowing was also an infant. About November 1, 1890, defendant purchased in the same way of the said association five other shares of said stock of the same par value in the name of "Daniel H. Gowing, Jr., D. H. Gowing, Trustee," same being issued in that name, and thereafter paid the monthly installments thereon until maturity, November 11, 1899, when there was paid to defendant by the association $1,000 by the check of the association drawn on said bank payable to the order of "D. H. Gowing, Trustee, Daniel H. Gowing, Jr." Said Daniel H. Gowing, Jr., was then one year of age. Thereupon, and on the same day, the defendant took the said five checks to the said American Exchange Bank of Syracuse, and informed its officers that he desired to invest said funds represented by said checks for the benefit of his children in the stock of said bank. Thereupon, and on the same day, the officers of said bank procured for the defendant from one J. J. Cummins a certificate of stock in said bank for 45 shares thereof, which was indorsed in blank by said Cummins, and same was delivered to the defendant, who, in payment therefor, duly indorsed and turned over said checks, and same were collected through said bank, and the proceeds turned over to said Cummins. Defendant then surrendered said certificate of stock to the cashier of said bank for transfer to "D. H. Gowing, Trustee," and defendant then received therefor certificate No. 123 for 45 shares of the stock of said bank issued in the name of "D. H. Gowing, Trustee," and defendant receipted for same under the name "D. H. Gowing, Trustee," and the stock stub stated that such stock was issued to "D. H. Gowing, Trustee." The cashier of the bank thereupon duly registered in the stock transfer book of the bank the transfer of said stock from said J. J. Cummins to "D. H. Gowing, Trustee," and opened an account in said book in the name of "D. Henry Gowing, Trustee," separate and apart from the account wherein was recorded the stock held by D. Henry Gowing individually and before referred to, and in such account registered or recorded the transfer of such stock from said J. J. Cummins to "D. H. Gowing, Trustee." At this date said Helen Louise Gowing had become 21 years of age. On the 2d day of July, 1902, the defendant surrendered said certificate of stock of the American Exchange Bank of Syracuse to the American Exchange National Bank of Syracuse, and there was issued in place thereof certificate No. 58 for 45 shares of the stock of said American Exchange National Bank, and same was issued in the name of "D. H. Gowing, Trustee," and the stub of said certificate in the certificate book showed the issuance of such stock to "D. H. Gowing, Trustee,"

and the defendant receipted for said stock by signing "D. H. Gowing, Trustee." This transfer was recorded in the books of the bank, and in the stock transfer book in an account opened and entered in the books thereof in the name of "D. H. Gowing, Trustee," and separate and apart from the account wherein was recorded the stock held by the defendant in his own name, "D. Henry Gowing." At this date Helen Louise Gowing and Sarah French Gowing had become 21 years of age.

On or about the 24th day of July, 1901, the defendant went to the office of the American Exchange National Bank of Syracuse and stated to the president and cashier thereof that he desired to purchase for the account of "D. H. Gowing, Trustee," five additional shares of the stock of said bank, so that it would make ten shares for each of his children. Thereafter the said officers procured and delivered to the defendant a certificate for five shares of the stock of said bank, which had been issued to Frank D. Hennessy, which was duly assigned in blank by said Hennessy, and the defendant then paid over to the cashier of said bank for five shares of stock represented by said certificate $585 of his own money. The defendant then surrendered said Hennessy's certificate to the cashier for transfer to "D. H. Gowing, Trustee," and received in exchange therefor certificate No. 22 for five shares of the stock of said bank, which certificate was issued in the name of "D. H. Gowing, Trustee," and receipted for by the defendant under the name "D. H. Gowing, Trustee," and the stub for the newly issued stock stated that same was issued to "D. H. Gowing, Trustee." Said sum of $585 was charged upon an account kept in the name of "D. H. Gowing, Trustee for Helen L. Gowing, Sarah F. Gowing, N. Howard Gowing, Mary N. Gowing, D. Henry Gowing, Jr.," in the books kept by the defendant in his own business. This account was opened by the defendant in his own books November 11, 1899, the date when he received the checks from the savings and loan association. On that date the defendant charged himself in this account in his own books as follows:

"D. H. Gowing, Trustee for Henry L. Gowing, Sarah F. Gowing, N. Howard Gowing, Mary N. Gowing, D. H. Gowing, Jr., in account with D. H. Gowing. 1899, November 11, by check of Savings and Loan Association, $5,000."

And he credited himself with having paid for 45 shares of American Exchange Bank stock, $5,000. November 1, 1890, defendant credited himself in said account with having paid taxes on bank stock, $81.41; and December 19th with having paid taxes on bank stock, $17.86. January 21, 1901, defendant charged himself in said account with dividend on bank stock, $135; and July 3d charged himself with dividend on bank stock, $112.50. July 13, 1901, he credited himself in said account with having paid for the five shares of American Exchange Bank stock, $585; and in 1902, January 2, he charged himself in said account with dividend on bank stock, $125; and July 2d with the same amount; and in 1904 defendant in said account charged profit and loss, $186.77. The cashier of the bank recorded in the stock transfer book thereof the transfer of said stock from said Hennessy to "D. H. Gowing, Trustee," in the account of Hennessy, and also in the account

in said book in the name of "D. H. Gowing, Trustee," separate and apart from the account wherein was recorded the stock held by the defendant in his own name, "D. Henry Gowing." At this time Helen Louise and Sarah French Gowing were over 21 years of age.

January 1, 1901, a dividend check on the said 45 shares of stock for $135 payable to the order of "D. Henry Gowing, Trustee," was delivered to the defendant, and was indorsed by him, "D. H. Gowing, Trustee," and January 21, 1901, defendant deposited the same to his own credit in his own individual account. July 1, 1901, a dividend check on said 45 shares of stock for $112.50 was issued payable to the order of "D. H. Gowing, Trustee." This was properly indorsed in the same manner by the defendant and deposited by him in his own personal account. January 2, 1902, a third dividend check on the 50 shares of stock for $125 was issued, payable to the order of "D. H. Gowing, Trustee," and delivered to the defendant. The defendant indorsed same properly, "D. H. Gowing, Trustee," and deposited the same to his own individual credit in his own account. July 1, 1902, a fourth dividend check on said 50 shares of stock for $125 was issued payable to the order of "D. Henry Gowing, Trustee," and delivered to the defendant, who indorsed the same, "D. H. Gowing," and deposited the same to his own individual account in the American Exchange National Bank of Syracuse. The total dividends received were $497.50. The taxes paid were $99.27. The charge to profit and loss was made after the failure of the bank and the worthlessness of the stock had become apparent.

There is no suggestion in the statement of facts agreed upon that the defendant ever communicated to his children, or to either of them, that he had created a trust or set aside a trust fund or fund in trust for their benefit, or for the benefit of either of them, or that they or either of them had any knowledge of the transaction or transactions hereinbefore set forth. There is no suggestion in the facts stated that the defendant had in mind any time short of his death when the trust should be consummated by a payment over to the children, respectively, of the fund so set apart. There is no suggestion that the defendant at any time showed or delivered to either child the certificate of stock, or his book of account. Was it, as to each share, a tentative trust, a proposed trust or gift merely, the father, defendant here, retaining the title in himself? Or was title or some beneficial interest in the fund transferred to and vested in the children? I take it that there is a wide difference between the mere setting apart of a fund as a proposed gift in the name of the donor as trustee, the donor retaining the possession and control thereof with the right and power at any time to change his mind and appropriate the money or fund to his own use, without being under obligation to account to any one therefor, even though he has repeatedly and plainly declared to third persons his intent and purpose to create a trust and eventually make the gift, and a case where the money is actually set apart as a trust fund in the name of the donor as trustee, and he either notifies the beneficiary of such action, or passes to the beneficiary evidence of his title thereto or interest therein. Here we have a case which differs from both the cases just recited. The defendant not only set apart this money, in the first

instance, to the amount invested in the installment stock of the Co-Operative Loan Association, but he had that stock issued in the names of his children, respectively, adding "D. H. Gowing, Trustee," and when the stock matured and was paid the checks were payable to him, "D. H. Gowing, Trustee Nathan Howard Gowing," etc. When the defendant invested these funds in the original bank stock, he distinctly informed the officers of the bank that he "desired to invest said funds which he so held [in the form of such checks] for the benefit of his children" in the stock of said bank. The investment was, then, actually made for their benefit in the manner set forth. And at this time the defendant in his own books of account opened an account between himself as trustee for the children, naming them, and himself individually, in which, in effect, he declared that, as trustee for Helen L. Gowing, Sarah F. Gowing, N. Howard Gowing, Mary N. Gowing, and D. H. Gowing, Jr., he had received checks of the savings and loan association of the value of $5,000, and that as such trustee he had purchased and then held 45 shares of the stock of the American Exchange Bank. He subsequently received the dividends on this stock as trustee, but he put the money in his own individual account, from which he also paid the taxes on such stock. He subsequently paid $585 for five additional shares, having at the time $148.23 of money belonging to the trust fund, so that, assuming the $585 was not intended as a further gift, or proposed gift, to the fund, he as trustee then owed himself individually $436.77, and this indebtedness was by subsequent receipts of dividends reduced to $186.77, which on the failure of the bank he charged to profit and loss, as the trust estate, if there was one, was lost. The defendant's children had not all come of full age when the bank failed. All dealings with the checks received from the loan association and all dealings with and transfers of the bank stock were, on his own book and in the books of the banks, recorded and entered as with "D. H. Gowing, Trustee." Evidently, and I find as a fact, the defendant intended to make himself "D. H. Gowing, as Trustee," his debtor to himself, D. H. Gowing, individually, when he purchased the five additional shares of stock and intended to reimburse himself individually from the dividends. This is demonstrated by his method of keeping the account.

The question, under the decisions, is, not did the donor actually give and deliver the subject of the gift to the donee, or such evidences of title as demonstrate an executed gift, as in such case no question of trust would remain, but, rather, is there substantial evidence here of the creation of an irrevocable trust for these children, one created by the acts and accompanying declarations of the defendant, D. Henry Gowing, by transferring to D. Henry Gowing, as trustee for such children, the title to such stock. There can be no question that, had D. Henry Gowing died at any time after he purchased the bank stock, and had it issued in the manner he did, the children would have held it in equal shares as against his executors or administrators. His holding it until his death in that form, without proof of his declarations and entry in his own books, would have constituted satisfactory evidence that he had created; and intended to create, an irrevocable trust, not at his death and by his death, but at the time he set apart and invested the

money in the stock for them. Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed by Court of Appeals, 173 N. Y. 626, 66 N. E. 1115. The facts will be stated later. This is conceded by the opinion in Matter of Totten, 179 N. Y. 112, 125, 126, 71 N. E. 748, 70 L. R. A. 711. I discover no new doctrine or declaration of principle in that case. All the court decides is that a mere deposit by a person in bank of his or her own money, to his or her own credit, adding the words "in trust for" some person named, or "trustee for" some person named, without anything more being done, is not sufficient evidence that such person intended and created an irrevocable trust for the benefit of such named person and passed title to the fund so deposited to himself or herself as trustee for the benefit of the proposed beneficiary. But, if such person dies leaving the fund so deposited on deposit in the same way, then the fact that it is so left is sufficient evidence that a trust was created and intended to be created by the deposit made in that way as to all of the deposit not withdrawn. Says the Court:

"It is a tentative trust merely, revocable at will, until the depositor dies, or completes the gift [to the trustee in trust] in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary."

It is well settled that a gift cannot be "completed" until delivery of the thing itself, or means of possession, or legal evidence of title. But in these cases the gift to the trustee for the beneficiary may be completed in other ways, says the court, viz., "by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary." Clearly this is not intended to exclude all other "unequivocal acts and declarations" showing the intent and purpose of the donor to make the gift in trust irrevocable prior to his death and to vest the title in the trustee prior to that time. Neither is it intended to hold that the declaration must be made to the beneficiary of the trust, or that the act done must be one between donor, or depositor, and beneficiary of the trust. Establish such a rule, and it would be impossible to create such a trust for the benefit of a person over the seas or whose present whereabouts are unknown, unless by writing and mailing a letter "present address unknown." The contrary is decided by the Court of Appeals in Robinson v. Appleby, 173 N. Y. 626, 66 N. E. 1115, affirming 69 App. Div. 509, 75 N. Y. Supp. 1.

The question returns: Did D. Henry Gowing, by unequivocal acts and declarations at and about the time he so invested this money in this bank stock and took same into his possession, declare and evidence his intent and purpose, in presenti, to create an irrevocable trust for these children; to vest title to the bank stock and its proceeds and dividends in the trustee for them, they becoming the beneficial owners? That he could do so in his lifetime is established by the decision in Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed in 173 N. Y. 626, 66 N. E. 1115, and quoted and approved in Matter of Totten, 179 N. Y. 125, 71 N. E. 748, 70 L. R. A. 711. In that case one Helen C. Pratt, in 1887, deposited in savings bank $2,695, and received a pass book headed "Helen C. Pratt, in trust for Freddie Hemenway Robinson." Thereafter she made deposits to and withdrawals from the account. May 31, 1893, the balance was $2,740.

Mrs. Pratt then surrendered the pass book and transferred such balance to a new account, headed "Helen C. Pratt, in trust for Freddie H. Robinson. Note: not to be paid to F. H. R. until he is 30 years of age." She also signed the following paper which was in fact her application for opening the account:

"I desire to open an account with the Riverhead Savings Bank in my name in trust for Freddie H. Robinson. Said account to be governed by the by-laws, rules and regulations of the said institution. After my death the balance then due on said account is not to be payable to said Freddie H. Robinson until he is 30 years of age."

Both this paper and the pass book were left with the bank, but there was no pretense they were left to be delivered to or in trust for Robinson. There was no pretense the transaction was communicated to Robinson. Said Freddie H. Robinson, the beneficiary, died January 20, 1894, and four days later Mrs. Pratt, the donor, withdrew the whole sum. Later she died, and the administratrix of Robinson was held entitled to recover the amount of the deposit from the executors of Mrs. Pratt. In citing and commenting on this case, the learned Judge Vann, who delivered the opinion in Matter of Totten, supra, said:

"In this case the written declaration was so full and explicit that we had no difficulty in sustaining the trust as irrevocably established, when that paper was signed and delivered to the bank as custodian of the trust fund. There was much more than a mere deposit in the name of one person in trust for another, for an independent instrument was executed which not only declared the intention of the depositor, but directed when the account was to be paid to the beneficiary."

I see little force in the fact that the paper stated when the account was to be paid to the beneficiary, as, in the absence of such an expression or any expression on the subject, the law would fix the time at the death of the trustee which would terminate the trust.

In Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531, the father deposited money in the name of the son. He always retained possession of the pass book, and made one further deposit to the account and one withdrawal. The son had no knowledge of the transactions and there was no other declaration of trust. The son died before the father. Mr. Justice Andrews, in giving the opinion of the court, said:

"There was no declaration of trust in this case, in terms, when the deposit of July 5, 1866, was made, nor at any time afterwards, and none can be implied from a mere deposit by one person in the name of another. To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created. * * * We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the depositor."

In Matter of Totten, supra, the learned judge reviewed the facts at length, and said:

"It was her practice to draw from all these accounts at will, whether they were kept in her name as trustee, or otherwise, and to close them and open others as she saw fit. She kept the pass books, and no beneficiary named in any account ever drew therefrom, except upon drafts signed by her. * * *

There was no evidence that the decedent ever spoke to any one about any of these accounts, or stated what her intention was in opening them. The accounts in question were opened with her own money, and no part thereof came from her brother Lewis. Out of thirty-one accounts in seven savings banks she paid over to the alleged beneficiaries the balance left when two thereof were closed, but in both of these instances, as well as in all other cases, she treated the accounts as her own, drawing against them and making new deposits from time to time as she thought best. All the pass books with a trust heading, containing accounts which had not been closed when the decedent died, were delivered to the respective beneficiaries, who drew the balance on hand. Emile R. Lattan did not know of the existence of any accounts on which he relies in this proceeding until more than a year after the decedent died. * * * The most favorable view of these facts and others of like character not mentioned does not permit the inference as matter of fact, that the decedent in making the deposits in question intended to establish an irrevocable trust in favor of the respondent. Aside from what took place when the deposits were made, every act of the decedent, with one exception, is opposed to the theory of a trust. That exception is the closing of one account after the words of trust had been canceled and the deposit of part of the proceeds in the same form as the original. This is not enough when considered with the other facts to establish an irrevocable trust. Cunningham v. Davenport, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641. No connection was shown between any deposit and the sum held in trust by the decedent and her sister Angelica for Lewis H. Lattan, who is still living and was sworn as a witness at the trial. A deposit in favor of the son would not have satisfied the claim of the father, in the absence of a request from the latter, of which there was no evidence. In view of the practice of the decedent in doing business with savings banks, the custom of many other persons in that regard, the various objects which people have in making deposits in the form of a trust, the retention of the pass book with the corresponding control of the deposits according to the rules of the bank, the subsequent history of the various accounts with the frequent withdrawals and changes, we think that the form of the deposits as they appear upon the books was not strengthened by the other evidence."

It thus appears that the case was decided against the alleged trust, because of the utter absence of evidence of any intention to create a trust, or of any declaration of trust aside from the mere form of the deposit, and also because the other facts were opposed to and negatived such an intent.

In the case now before this court, there was the original investment by the father in the name of the children; the taking of the checks payable to "D. H. Gowing, Trustee, Helen L. Gowing," etc.; the investment of the identical money or checks in the bank stock; the declaration to the officers of the bank at the time that he desired to invest the same for the benefit of his children; the issuance to him of the stock as trustee; the opening of the account in the bank and in its books in relation to same, with Gowing as trustee; the opening by Gowing at the same time of the account in his own books of account, which would come to his children or to his executors or administrators in the event of his death, between himself as trustee for these children, naming them, and himself individually, in which he declares the trust and charges himself as trustee with the stock and its dividends; the subsequent purchase of other stock, etc.—all acts and statements declaring the existence in presenti of a trust and showing an intent and purpose to create an irrevocable trust. It seems to me very clear that on the admitted facts it appears satisfactorily and conclusively that the defendant not only intended to create, but did create

and declare orally and in writing, an irrevocable trust for the children. The title to the stock was in D. H. Gowing, trustee for these children, and not in him individually. There is no pretense that defendant did this for any purpose other than the benefit of his children. It was not done to evade taxes, or to defraud creditors, or to conceal his property, or secure the privilege of making deposits in a savings institution, which would draw interest, beyond the amount permitted by the rules of the institution to any one depositor. The only acts inconsistent with the existence of the irrevocable trust are the depositing by dedefendant of the dividend checks to his own personal account. But we have, first, the fact that a deposit account in bank as trustee for these children would have been a small affair, and one with which banks do not care to be bothered; and, second, the fact that Mr. Gowing evidently intended to invest these dividends for the children, as shown by the fact that he did purchase additional stock, charging the trust account with the money paid therefor, and crediting it with the dividends as received. I think the fact fully explained and divested of any significance, except that on the whole it tends to show the creation and existence of an irrevocable, not a tentative, trust.

The following cases are instructive and controlling: Matter of Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711; Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed 173 N. Y. 626, 66 N. E. 1115; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; Matter of Bolin, 136 N. Y. 177, 32 N. E. 626; Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116; Cunningham v. Davenport, 147 N. Y. 43, 47, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641; Haux v. Dry Dock Sav. Inst., 2 App. Div. 165, 37 N. Y. Supp. 917, affirmed 154 N. Y. 736, 49 N. E. 1097; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Mabie v. Bailey, 95 N. Y. 209; Willis v. Smyth, 91 N. Y. 297; Farleigh v. Cadman, 159 N. Y. 169, 171, 53 N. E. 808; Washington v. Bank of Savings, 171 N. Y. 166, 63 N. E. 831, 89 Am. St. Rep. 800; Matter of Bulwinkle, 107 App. Div. 331, 95 N. Y. Supp. 176; In re U. S. Trust Co. (Sup.) 102 N. Y. Supp. 271. Garvey v. Clifford, 99 N. Y. Supp. 555, 114 App. Div. 193; Lucas v. Coe (C. C.) 86 Fed. 972. In all of the cases we are brought to the proposition: Is there evidence showing the donor intended and sufficiently declared a trust, an irrevocable trust, or is it a tentative, or proposed, trust merely?

The complainant insists, however, that even if the evidence is sufficient to sustain the creation and existence of an irrevocable trust in D. Henry Gowing, as trustee for the benefit of the children named, as beneficiaries, it is not such a trust as is recognized by the Revised Statutes of the United States—section 5152 [U. S. Comp. St. 1901, p. 3465] (national banking act)—which reads as follows:

"Sec. 5152. Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

The preceding section (5151) imposing the personal liability on shareholders in national banks, reads as follows:

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

But for this section, there would be no personal liability of the shareholders for an assessment of this description. The liability is statutory, and is imposed on the shareholders only. The only effect of section 5152 is to first declare a principle or proposition of law, viz.: That executors, administrators, guardians, and trustees are not personally liable, or personally subject to any liabilities, as stockholders on account of stock held by them as such; and, second, to impose the liability for such assessments, created by section 5151, on the estate or funds in the hands of such executors, administrators, guardians, and trustees. But for this section, there would be no liability for an assessment on stock in a national bank held by executors, administrators, guardians, or trustees, imposed on any one, either the estate, the executor, etc., as such, or personally. Neither section purports to create and impose a liability for such an assessment for such a purpose on any person who does not own the stock, but who has at some prior time owned it, or on the person who has in good faith purchased it for a lawful trust, one recognized by the law, voluntarily created by such person for the benefit of another or others. The crucial question is: did D. Henry Gowing, the defendant, personally own this stock or any beneficial interest therein, at the time the liability to an assessment thereon, under section 5151, Rev. St., arose? If he did not, in the absence of a fraudulent transfer to evade liability, etc. (McDonald v. Dewey, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128), he is not personally liable for this assessment on this stock in question (Beal v. Essex Sav. Bank, 67 Fed. 816, 15 C. C. A. 128; Lucas v. Coe [C. C.] 86 Fed. 972). In the last case, Coxe, now Circuit Judge, said:

"But it is argued that the section quoted [section 5152, supra] refers only to a trustee appointed by a will or by the order of a court or judge. The statute does not so say and there can be no question that the relation of trustee and cestui que trust may exist without such formal action."

In Beal v. Essex Sav. Bank, supra, opinion by Putnam, C. J., the court held:

"One who holds stock of an insolvent national bank as collateral security for a loan, which stock is registered upon the books of the bank in his name 'as collateral,' is not liable to assessment upon such shares under the statutory liability of shareholders."

To same effect is Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844. However, in Nat. Bank v. Case, 99 U. S. 628, 25 L. Ed. 448, Marcy v. Clark, 17 Mass. 330, cited in McDonald v. Dewey, 202 U. S. 520, 26 Sup. Ct. 731, 50 L. Ed. 1128, and Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818, it was held, in effect, that one who takes stock in a national bank as security for a loan of money, and who puts his name on the registry as owner there-

ot, incurs an immediate liability as a stockholder. But here the defendant did not put his name on the registry of the bank or in the certificate issued as owner, and the whole transaction with the bank and the entries in the books of the bank showed to it and all who examined the books that he was trustee merely. Whatever the true reasons may be for the holding of the courts in the cases cited, see a full statement Nat. Bank v. Case, 99 U. S. p. 631, 25 L. Ed. 448; Pauly v. S. L. & T. Co., 165 U. S. 621, 17 Sup. Ct. 465, 41 L. Ed. 844; Waite v. Dowley, 94 U. S. 527, 534, 24 L. Ed. 181, no one of them obtains here. By taking the transfers of the bank stock to "D. H. Gowing, Trustee," there being no fraud or insolvency, and fully informing the bank of the facts, he transferred the stockholder's liability to the trust estate, and not to himself, as he did not hold himself out as owner of the stock individually. The bank had full knowledge of the trust and of the names of the beneficiaries of the trust.

In Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844, it was held:

"A creditor who receives from his debtor a transfer of shares in a national bank as security for his debt, and who surrenders the certificates to the bank, and takes out new ones in his own name, in which he is described as pledgee, and holds them afterwards in good faith as such pledgee and as collateral security for the payment of his debt, is not a shareholder, subject to the personal liability imposed upon shareholders by Rev. St. § 5151."

In this case, at pages 619 and 620 of 165 U. S., page 470 of 17 Sup. Ct. (41 L. Ed. 844), the court laid down certain rules as to the liability of shareholders of national banking associations, among which are the following:

"That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association. * * * That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he (the creditor) will not, although the real owner may, be treated as a shareholder within the meaning of section 5151. That the pledgee of personal property occupies towards the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor."

This last-quoted rule distinctly recognizes that such stock may be held in trust by a trustee other than an executor, administrator, guardian, or trustee appointed by a court or judge. The pledgee is a trustee, made such by the pledgor and pledgee and operation of law. So, in the case now to be decided, Gowing was trustee of a trust voluntarily created, but one recognized in the law, and this fact appeared on the

books of the bank, and the certificate issued and the entries and account there kept showed to all stockholders, bank examiners, and creditors, and all the world, the true character of his holding and ownership.

In Pauly v. State Loan & Trust Co., supra, the court said:

"Does the statute, in letter or spirit, require that the word 'pledgee,' appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the transferee?"

And then pointed out the intent and object of the statue, and then said:

"But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued was not in fact, and did not assume to be, the owner of the shares represented by them, but was and assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation."

In Welles v. Larrabee et al. (C. C.) 36 Fed. 866, 2 L. R. A. 471, it was held:

"One to whom the shares are assigned in trust as security for a debt due a third person, and following whose name on the stockbook of the bank is the word 'trustee,' is not liable for the assessment, under section 5151, and is also within the provision of section 5152, exempting from such liability persons holding stock as trustees."

In Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, it was held that it is an erroneous assumption that the word "trustee," added to a name alone, has no meaning, or legal effect, and also that "the law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust." In Duncan v. Jaudon, 15 Wall. (U. S.) 165, 21 L. Ed. 142, the Supreme Court of the United States cites and approves this case.

But it is contended that executors, administrators, guardians, and trustees are not authorized to invest the trust funds in the stock of national banks. This is true generally, but the rule has no application to a trust voluntarily created by a donor as to such stock. Generally the statutes of the states specify the nature of the investments which executors, etc., created by will, or appointed by the courts pursuant to statute, are authorized to make. If they find the money of the estate, when it comes to their hands, invested in good and safe securities, apparently, and they are guilty of no negligence, they may continue to hold them; but if they invest the money of the estate, or trust, represented by them in unauthorized securities, they may be treated as having converted the funds, and the securities so taken may be treated as their own individual property, or the persons entitled to the fund so invested may elect to ratify the transaction and take the securities in place of the money. They cannot do both. The court of its own motion cannot, however, ratify or recognize such an investment by executors or guardians as lawful. It is unnecessary to decide what the effect would have been had Mr. Gowing received the money on this stock after he had declared the irrevocable trust, which he did when he put the money into the stock and took the stock as

trustee and opened the accounts in the form he did, and then invested it in the stock of some other bank, although I am inclined to the opinion he would not have been controlled by the statutes relating to and governing statutory and testamentary trustees. Diven v. Lee, 36 N. Y. 302, and King v. Talbot, 40 N. Y. 76, have no application here.

It is unquestionably true that a solvent person may purchase with his own money and set apart any species of property, not prohibited by law, as a trust fund for another; and in such case, if the donor sufficiently declares the trust and makes it irrevocable, and not tentative merely, and the property is properly transferred, by writings when required, the property so set apart and invested becomes trust property, and is owned by the trustee as such. Matter of Estate of Straut, 126 N. Y. 201, 27 N. E. 259. Of course, such trusts must be for lawful purposes, and not forbidden by law. Parker v. Robinson, 71 Fed. 256, 18 C. C. A. 36, and Hampton v. Foster (C. C.) 127 Fed. 468, have no application here. As stated in the last case cited, under the Massachusetts practice the trustee cannot be sued at law as such, but the action must be against him as an individual, and his description as trustee in the writ and declaration is surplusage. Whether, in case judgment goes against him, it is to be enforced in some other way, or he is to be reimbursed from the trust funds, is another question, and, under the Massachusetts practice, is settled in another tribunal. No such practice obtains in the state of New York, and by statute these actions in the United States courts must follow the practice of the state in which brought. Here the action against the trustee to enforce a liability of the trust estate must be against him as trustee, and he must be so described in the summons and complaint. Such a liability cannot be enforced against him individually, and if he is sued individually and so named, and the cause of action is not against him individually, but in fact against him as trustee and to enforce a trust liability, there must be an amendment, or the action will be dismissed. So, if sued as trustee when the cause of action is against him personally, the action must be dismissed. Griswold v. Watkins, 20 Hun, 114; Baylie's Code Pleading (2d Ed.) 171. However, the complaint governs, and its allegations determine whether the action is against a defendant in his representative capacity. Beers v. Shannon, 73 N. Y. 292; Stilwell v. Carpenter, 62 N. Y. 639; Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58; Spooner v. D. L. & W. R. Co., 115 N. Y. 22, 21 N. E. 696; Knox v. M. El. R. Co., 58 Hun, 517, 12 N. Y. Supp. 848. In New York the distinction between actions at law and in equity is largely done away with, but no judgment under our practice can go against a trustee personally, when the liability is that of the estate or trust he represents. In Massachusetts, as stated, the practice is different.

There is no question in this case that the trust estate represented by D. Henry Gowing, as trustee, is liable for any assessment made against it on account of this stock held for it, but the defendant, D. Henry Gowing, personally, is not, and any assessment made thereon or on account thereof against D. Henry Gowing, personally, is not enforceable against him or collectable of him from his individual estate. In

Davis v. Weed, 44 Conn. 581, Fed. Cas. No. 3,658, it is held, as to section 5152, Rev. St. U. S., before quoted, that the principal object of this section is to prevent a personal liability from running against the persons named therein who have purchased in their representative capacity, or to whom national bank shares have been transferred as such representatives for the benefit of the trust estate. In Irons v. Manufacturers National Bank (C. C.) 27 Fed. 591, it is held:

"Section 5152, p. 3465, U. S. Comp. St. 1901, is designed to protect those holding such stock in a representative capacity from any personal liability, and only makes the funds in their hands or under their control liable."

Section 5210 of the National Banking Act [U. S. Comp. St. 1901, p. 3498] requires that such banks keep a correct list of all stockholders with the number of shares held by each, which shall be at all times open to the inspection of shareholders and creditors of the institution and state officers authorized to impose taxes. These books and lists are always open to the inspection of bank inspectors. In Pauly v. State Loan Association (before referred to) 165 U. S. 621, 17 Sup. Ct. 465, 41 L. Ed. 850, it is held that the section was intended to give creditors and state officers opportunity for information as to the liability and responsibility of shareholders.

As the books of the bank showed that Gowing was trustee, and held the stock as such, and all were put on inquiry, and as the bank knew the facts, there is no reason for holding Gowing responsible for the assessment. The fact that the trust estate was wiped out of existence, so far as value or financial responsibility is concerned, by the failure of the bank, is no reason or justification for looking to the trustee personally. The opinion of Judge Coxe, in Lucas v. Coe (C. C.) 86 Fed. 972, is quite clear and emphatic on that proposition.

The conclusion is that the defendant is not personally liable for the assessment made on the 50 shares of stock issued to "D. H. Gowing, Trustee," and there will be a judgment accordingly.

UNITED STATES ex rel. GIANT POWDER CO. v. AXMAN et al.

(Circuit Court, N. D. California. September 6, 1906.)

1. UNITED STATES—CONTRACTS—SUBCONTRACT—AGENCY.

Where, after defendant A. had obtained a contract from the government for the removal of certain rocks from San Francisco Bay, he organized defendant corporation, of which he was president and the owner of a majority of the stock, and contracted with such corporation, in consideration of a block of the stock, to employ it as his agent in the performance of such contract, the corporation agreeing to carry out the contract and specifications and to have full control of the work and all employés working thereon, etc., the corporation was neither an assignee of the contract nor a subcontractor, but a mere agent for A.

2. COURTS—FEDERAL COURTS—JURISDICTION—CASES ARISING UNDER UNITED STATES LAWS.

An action by the United States on relation of a materialman against a government contractor and a surety to recover on the contractor's bond to the government, as required by Act Cong. August 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], for materials furnished to enable him to perform the contract, constituted a case arising under the Consti-

tution or laws of the United States, and was therefore within the jurisdiction of the federal courts, as provided by Act Cong. March 3, 1875, as amended by Act March 3, 1887, and corrected by Act August 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508].

[Ed. Note.—Jurisdiction in cases involving federal question, see note to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purch. Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

3. LIMITATION OF ACTIONS—APPLICATION OF STATUTE—TIME.

Where a materialman delivered materials to a government contractor for use in the performance of the contract in California, the materialman's right to recover on the contractor's bond to the government was barred by the California statute, limiting actions on accounts to two years, and was not within the four-year statute relating to actions on written contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 136, 137.]

4. SAME—ACKNOWLEDGMENT OF DEBT.

Where a contractor executed his note to a materialman for $5,000, such note constituted an acknowledgment of indebtedness to that amount within the statute of limitations as of the date the note was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 591–602.]

J. F. Cowdery and Robert Harrison, for plaintiff.
Charles A. Shurtleff and Lawler, Allen & Van Dyke, for defendant.

MORROW, Circuit Judge (orally). I shall decide this morning the cases of the United States on the relation of the Giant Powder Company, and also the United States upon the relation of W. W. Montague & Co., against Rudolf Axman and American Surety Company.

I have not had an opportunity to write an opinion in either of these cases, and what I shall say will be a brief reference to the points involved in the cases. Counsel will recall the fact that evidence was introduced, over the objection of counsel on both sides, and admitted provisionally, with the understanding that when the court came to render its final decision it would be deemed to have ruled on these objections, overruling objections to such evidence as the opinion would indicate the court had accepted, and sustaining objections to such evidence as the court rejects. It will therefore be noted that the court rules now upon these various objections to the evidence, and so states, and exceptions may be deemed to have been entered to such ruling by respective counsel.

The first case I will take up will be the case of the United States on relation of the Giant Powder Company against Rudolf Axman and the American Surety Company of New York, No. 13,441. This case was commenced July 18, 1903, to recover the sum of $16,286 for material supplied to the defendant Axman, who had a contract with the government, dated September 14, 1899, for the removal of certain rocks in the Bay of San Francisco, known as Arch Rock and Shag Rocks, Nos. 1 and 2. The contract for this work was to remove these rocks to a depth of 30 feet at low water, and the contract price for removing these rocks was $253,000.

The act of Congress approved August 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], requires that a contractor for the construction of any public building, or the prosecution and completion of any public work, shall, before commencing such work, execute the usual penal bond with good and sufficient sureties, and the additional obligation that such contractor shall promptly make payment to all persons supplying him labor and material in the prosecution of the work provided for in the contract. In this case the defendant Axman, on September 14, 1899, executed such a bond in the penal sum of $100,000, with the American Surety Company as his surety. This suit is now brought upon this bond.

It appears from the evidence that on October 19, 1899, the defendant Axman organized the Coast Contracting Company, a corporation which was incorporated October 23, 1899, with Axman as its president, and his associates with him as directors and stockholders, and he the owner of the majority of stock and the president of the corporation; that, immediately after the incorporation of this Coast Contracting Company, Axman, as party of the first part, and the Coast Contracting Company, as the party of the second part, entered into the following agreement:

"Memorandum of Agreement, made and entered into this first day of November, A. D. 1899, by and between Rudolf Axman, of the city and county of San Francisco, state of California, party of the first part, and the Coast Contracting Company, a corporation organized and doing business under and by virtue of the laws of the state of California, party of the second part, witnesseth:

"That, whereas, the said Rudolf Axman has entered into a contract with the government of the United States, through its proper officers, for the removal of Arch Rock and Shag Rocks, numbered one and two, in the San Francisco Harbor, California, and is to furnish all necessary labor and material and remove the rocks as specified in the specifications issued by the United States engineer's office, dated June 7th, 1899, for the sum of $253,500.00;

"And whereas, the said party of the second part is desirous of acting as the agent of the party of the first part in carrying out the said contract and in furnishing the necessary labor and material in connection with said contract and acting as superintendent thereof, but not in any way as the assignee of said contract or as having any interest therein, but solely for the purpose of employment under said party of the first part in the work of removing the said rocks as aforesaid.

"Now, therefore, this agreement witnesseth that the said party of the second part in consideration of the premises and of the agreement on the part of the party of the first part, hereinafter contained, to employ the party of the second part as the agent and representative of the party of the first part in carrying out the contract between the party of the first part and the government of the United States as aforesaid, agrees to issue to the said party of the first part five hundred (500) shares of its capital stock, fully paid up.

"And the said party of the first part in consideration of the issuance to him of the said five hundred shares of the said capital stock of the party of the second part as aforesaid, agrees to institute, appoint and employ the said party of the second part as his agent and employee irrevocably in the removal of the said Arch Rock and Shag Rocks, numbered one and two, in San Francisco Harbor, California, and to carry out all the terms of the contract entered into between the party of the first part and the said government of the United States as hereinbefore referred to; the said party of the second part to do all things necessary to carry out the said contract and to furnish all necessary labor and material and remove the said rocks and within the time as specified in said contract and specifications aforesaid.

"And for the services of the said party of the second part in that behalf the said party of the first part agrees to pay to the said party of the second

part the full sum of $253,500.00, as the same shall be received by the party of the first part from the government of the United States for the work aforesaid, according to the terms of the contract aforesaid.

"It is further agreed between the parties hereto that the party of the second part shall in carrying out the contract and specifications aforesaid have full control of said work and of the direction thereof, and of all employees employed by it on the work thereof according to the terms of said contract.

"And it is further covenanted and agreed that said party of the first part shall appoint the treasurer of the said party of the second part his agent for the purpose of receiving from the government of the United States, in the name of the party of the first part, all monies due upon the contract aforesaid, and that said treasurer shall act as the agent and representative of the party of the first part in reference to all transactions between the party of the first part and the government of the United States in reference to the contract aforesaid."

It will be observed that by this contract the Coast Contracting Company became the agent of Axman in the execution of the contract. Under the agency created by this contract, the plaintiff, in this case the Giant Powder Company, delivered to the Coast Contracting Company material commencing January 8, 1900, and terminating March 24, 1903. The total amount of this material delivered during the four years was $30,340.02. During this time there was paid on this account the sum of $14,064.36, excluding a promissory note executed on December 15, 1902, for the sum of $5,000. The balance was $16,275.66, and that is the amount sued for. I call the attention of counsel now to some discrepancy in the complaint and account with respect to the amount sued for. The amount I find is $16,275.66, and the amount in the complaint is $16,286, a difference of a few dollars. In preparing the findings it will be necessary to verify this to see which is the correct amount. As I say, that left, deducting the $5,000 note, $16,275.66. This suit is brought against Axman and the American Surety Company to recover this balance.

The first objection that is made to this action is one with reference to the jurisdiction. It is objected on the part of the defendants that this court has no jurisdiction of this case, and the following cases are cited in support of this objection: U. S. ex rel., etc., v. Henderlong (C. C.) 102 Fed. 2; U. S. ex rel., etc., v. Sheridan (C. C.) 119 Fed. 236; U. S. ex rel., etc., Maxwell v. Barrett (C. C.) 135 Fed 189. These cases hold that the United States is not the real plaintiff in such a case; that the real plaintiff is the person for whose benefit the suit is brought, which in this case would be the Giant Powder Company. The Giant Powder Company was incorporated in this state, and under the law is a citizen of this state and so is the defendant Axman, and as the two parties are citizens of this state there is no such diversity of citizenship as entitles the plaintiff to bring this suit in this court. I think, however, the jurisdiction of this court in this case is to be looked for in another provision of the statute, and that it will be found under that provision of the statutes of March 3, 1875, as amended by the act of March 3, 1887, and corrected by the act of August 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], which provides that the Circuit Court has jurisdiction of cases arising under the Constitution or laws of the United States. In this case, the bond in suit is authorized by the act

of August 13, 1894. It was an act that was passed not only in the interest of the United States, but in the interest of materialmen who should supply the material for public buildings and other public work. It was a matter in which the United States was moved to act not only in the interest of the government, but for the protection and in the interest of those who should supply material to contractors for the government. I think in every state in the Union there is some provision made by statute for securing the materialmen on building contracts. Now, the plaintiff, of course, would have no security on such a contract unless it is upon the bond under this statute. The original bond that was provided for the security of the United States alone was one that had been required probably during the entire existence of this government, but this act of 1894 added to this provision the obligation and liabilities with respect to the supply of material and labor, etc. It was in the interest of the government to have such a provision in the law with respect to work of that character, and it was to its interests to protect laboringmen and those who supplied the material. There are cases, it is true, where the courts have held that this court does not have jurisdiction under a statute of the United States where the questions involved are of a general or local character, as, for instance, a controversy between claimants to mining lands, where the title is acquired under the laws of the United States. It has been held that such a statute does not give the Circuit Court jurisdiction. But that is a very different statute from the one now under consideration. The controversy under the mining statute is between parties with respect to a matter in which the United States has no interest whatever, and the questions are of a general local nature. The land of the United States is open to people of the United States for exploration and occupation, and where controversies arise between locators it is provided that such controversies must be determined by a court of competent jurisdiction. Other statutes might be referred to which contemplate proceedings in court without conferring jurisdiction upon courts of the United States. But the present statute confers rights which are special and dependent upon the law itself. It is a law of the United States under which this suit was brought, under which it is maintained, under which judgment is to be entered—there cannot be a judgment entered in the case in favor of persons supplying the material and labor except upon this statute. I therefore hold the jurisdiction in this case is to be sustained as a suit arising under a law of the United States.

The next defense is that this material was delivered not to Axman, but to the Coast Contracting Company, and therefore the defendant American Surety Company is not liable in this action; that the American Surety Company is only responsible upon this bond for the material delivered to Rudolf Axman. Now, what was the relation of Rudolf Axman to this contract? He was the original contractor with the government, but he did what is done in any number of cases, and in nearly every case of this kind, he appointed an agent. He had a right to employ an agent to act for him. It would be in most of these government contract cases impossible for a contractor to supply all the work and furnish all the material, to perform all the duties and

obligations of the contract, without the assistance of an agent. He has to have somebody to act for him in much of the business relating to the contract. In this case Axman employed the Coast Contracting Company to act as his agent in carrying out the terms of the contract. The point is made that there was a transfer of the contract to the Coast Contracting Company, and that under section 3737 of the Revised Statutes [U. S. Comp. St. 1901, p. 2507] the transfer was void; and under another provision of law—section 3477 [U. S. Comp. St. 1901, p. 2320], I believe—all transfers and assignments of contracts are void under the law of the United States. This was not a transfer of a contract, nor an assignment of a contract. As I read the evidence in this case, and as I read this document, it was, as I said a moment ago, the appointment of the Coast Contracting Company as the agent of Axman to carry out this contract in every particular, and to receive money from the United States to pay these claims. I am of the opinion that Axman is the responsible person in this case, and that the Coast Contracting Company is also a responsible party in this case, but only as the agent of Axman. That is to say, that the Coast Contracting Company acted as the agent of Axman. It represented him in all these transactions with the materialmen. I therefore hold that the delivery of this material to the Coast Contracting Company, and the charge against that company, was the delivery and charge of material to Axman.

A further defense is that the Coast Contracting Company was a subcontractor, and that, therefore, the American Surety Company is not liable. This defense is answered by what has already been stated.

The next question that is raised by the defense is as to the statute of limitations. It is contended on behalf of the defendant that the statute of limitations has run with respect to these accounts. On behalf of the complainant it is claimed that this suit is brought upon this bond, upon this written contract, and that the statute of limitations applicable to the contract is a period of four years provided for under the laws of the state of California. If we accept that as being the law applicable to this case, then, of course, the statute of limitations has not run, and a liability existed when this suit was commenced for all of the amounts involved in this account. On the other hand, as I said before, it is contended on behalf of the defendant that this suit is brought on this account, and that the breach alleged in the complaint, and the one that has been proven, is a failure to pay for materials supplied, as shown by the account. A breach of the bond is therefore specifically a failure on the part of Axman or the Coast Contracting Company, as the agent of Axman, to pay for these materials as charged in this account. Now, as I construe this transaction, I think the statute of limitations of this state with respect to accounts as construed by the Supreme Court of the state is the statute that is applicable to this case. It is a question that has been discussed and numerous authorities cited in these briefs. I have not had the time to examine the question thoroughly in all the states, but the court is informed by the brief on behalf of the plaintiff that the only states that construe a suit of this kind as being a suit upon account and not upon the bond are the states of Kansas, Washington, and California. My own impres-

sion is that there are other states where this construction of the law has been followed. However, it is sufficient to say that it is admitted that this state has declared the law adverse to the position of the plaintiff. In the case of County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459, it was held that the liability of a county recorder for failure to pay to the county the fees required by law to be collected and paid over by him was a liability created by statute which was barred as to the recorder in three years after the breach of his official duty, and not in four years, as a liability upon a written contract. The case of Aldrich v. McClaine, 106 Fed. 791, 45 C. C. A. 631, has been referred to as declaring a doctrine applicable to this case. I am familiar with that case. I wrote the decision in the Circuit Court of Appeals. It was held in that case that the liability was not only upon a statute of the United States, but also upon a written contract; a suit upon contract because the persons who subscribed for this stock had subscribed, and had agreed to take the stock subject to the terms prescribed by law, and that having taken the stock, and accepted it by the terms of agreement in subscribing for the stock, the stockholder had become responsible in a contractual way. So that the Circuit Court of Appeals held that the case was one which arose not only under the statute, but also under a contract, and that the statute of limitations, while it had run with respect to the liability under the statute, had not run upon the written contract. The case was taken to the Supreme Court of the United States, and by a divided court it was held that the liability was statutory and not contractual. McClaine v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702. The court held that the statute of limitations of the state, as construed by the courts of the state, was applicable to the case. I shall therefore base this decision upon the law of this state, and hold that the statute of limitations of this state, as construed in the case of County of Sonoma v. Hall, supra, is applicable. Under this law the liability ceased after a period of two years.

There is a question when the statute of limitations began to run with respect to these items in this account. This suit was brought July 18, 1903, and, as I construe this statute, evidence would only be admissible to prove the delivery of material within two years; that is to say, between July 18, 1901, and July 18, 1903. But it is said with respect to this account that the items here charged were delivered upon 60 days' credit, and that, therefore, that would extend the statute back a period of 60 days. It would cover not only all the material that was delivered within 2 years, but also all material that was delivered within 2 years and 60 days; but upon an examination of this account and the bills that were rendered, I do not find that there are any bills providing for a 60-day credit with respect to the items 60 days prior to July 18, 1901. There are three items—June 8, 1901, for the delivery of goods and material amounting to $998.80; July 5, 1901, material, $998.60; and July 11, 1901, material, $1,231. These are the only items that are within 60 days. The items before that would be May 10th, beyond the statute. Those bills do not contain any provision about 60 days' credit. Some others do, but they do not. So I construe this account as running from the items commencing July 18, 1901, down to March 24, 1903.

There is another question to be considered. On December 5, 1902, Axman and the Coast Contracting Company gave to the Giant Powder Company a note for the sum of $5,000. It is contended on the part of the plaintiff that this note is evidence that on the date, December 15, 1902, Axman, and the Coast Contracting Company as his agent, he being responsible for it, was indebted to the Giant Powder Company upon this account in the sum of $5,000. If I understand Mr. Harrison, he claims that is evidence. Assuming now that the suit is upon the liability stated in the account, nevertheless here is a written statement to the effect that upon that date there was owing on this account the sum of $5,000. If that is accepted as evidence, and that it is such evidence as may be taken to bring within the statute of limitations the amount of this account, then, of course, the statute of limitations extends the account back so as to cover $5,000 prior to July 18, 1901.

There is still another matter involved in this suit. The Giant Powder Company, when it entered into this agreement, gave to the American Surety Company its certified check for $5,000. That check was to be an indemnity to the American Surety Company for whatever loss it might sustain by reason of the American Surety Company having become surety for the Giant Powder Company. The defendant American Surety Company has pleaded this check as a set-off. I shall allow it as a set-off, but not for $5,000, because the only evidence that there is in the case of liability on the part of the surety company is the liability for this particular account, and the liability in the Montague case.

The American Surety Company admit that they have also received indemnity to the amount of $50,000 from other sources. What the other sources were, the court has not been informed. They have been indemnified to the amount of $50,000, and this $5,000 is in addition to that $50,000. They have then as an indemnity $55,000 to pay any loss that it may sustain. It is therefore plain that the surety company is not entitled to claim the amount of the entire $5,000 note as indemnity for the loss sustained with respect to this particular suit. The loss will be shared pro rata on this note of $5,000. It will only have to suffer a deduction for such pro rata as it sustains by reason of its relation to the other indemnity of $50,000. It will only have to sustain its proportion of that loss. I shall leave that matter without further statement, except that if the evidence is here sufficient to indicate the pro rata, then I will allow this set-off to the amount stated. Mr. Harrison says he doubts whether this court has such jurisdiction in equity, but under the law of this state, under the common law of practice, there can be a set-off, and that may be admitted; but the only trouble that I can see is to determine the pro rata. If that can be determined upon the evidence before the court, I do not see any reason why this set-off pro rata shall not be allowed.

Plaintiff's counsel will prepare findings of fact in accordance with this opinion, and judgment will be entered accordingly.

DEEPWATER RY. CO. v. WESTERN POCAHONTAS COAL & LUMBER CO. et al.

(Circuit Court, S. D. West Virginia. April 9, 1907.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—CONDEMNATION PROCEEDINGS.

In a proceeding in a state court by a railroad company to condemn right of way, in which the owners of different parcels of land are joined as permitted by Code W. Va. 1899, c. 42, § 4 [Code 1906, § 1364], which provides that such owners may be joined or proceeded against separately, there is a separable controversy between the petitioner and the owner or owners of each tract, and, where all those defendants owning or having any interest in certain tracts are citizens of other states, and have no interest in any other tract, they may remove the cause as to them into the federal court, where the amount in controversy is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 103.

Separable controversy, see note to 18 C. C. A. 86; 35 C. C. A. 155.]

2. ACTION—PROCEEDINGS CONSTITUTING COMMENCEMENT—CONDEMNATION PROCEEDINGS.

Under Code W. Va. 1906, §§ 1363, 1366, which prescribe the procedure for condemnation of real estate for public use by the making of an application to the circuit court for the appointment of commissioners to ascertain a just compensation to be made to the owners and require 10 days' notice of such application to be given to such owners, which notice "may be given either before the application is presented or afterwards," the date of the institution of such a suit or proceeding is that of the presentation in court of the application, and not the date notice is served.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 725–734.]

3. REMOVAL OF CAUSES—PERSONS ENTITLED TO REMOVE—EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—PARTIES.

A corporation which had conveyed the legal title to certain lands to trustees by a mortgage which had been foreclosed and an order of sale entered, and which after such decree sold its equity of redemption to another, had no interest in the lands after such sale which made it a necessary party to proceedings for the condemnation of a right of way over such lands, even though a formal conveyance to the purchaser had not been executed at the time the proceedings were instituted, and a conveyance subsequently executed did not make the grantee a purchaser pendente lite and without standing to remove the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 113.]

4. SAME—SEPARATE CONTROVERSIES—REMOVAL OF SINGLE CONTROVERSY.

There is a clear distinction between controversies which are merely "separable," within the meaning of the removal statute, and those which are wholly separate and distinct, and only joined in one suit by express statutory permission, as in case of proceedings for condemnation of a railroad right of way in which as permitted by statute owners of different tracts of land are joined in the same proceeding, and in such a case a removal of the cause by the owner or owners of one tract does not carry with it the proceedings as against other owners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 110.]

On Motion to Remand to State Court.

Brown, Jackson & Knight and A. N. Campbell, for plaintiff.

J. Lewis Bumgardner, Simms & Enslow, and J. W. McCreery, for defendants.

DAYTON, District Judge (sitting specially). The Deepwater Railway Company, a corporation, on the 9th day of October, 1905, lodged with the clerk of the circuit court of Raleigh county, W. Va., its petition against numerous parties, among others the Western Pocahontas Coal & Lumber Company, a West Virginia corporation, J. C. Maben, and Charles Catlett (successor of Richard P. Bell, deceased), trustees, and James Knox Cain, seeking for public railroad uses to condemn various parcels of land, among others three parcels of 23.47, 2.59, and 2.8 acres, respectively, legal title to which it alleges is vested in the Western Pocahontas Coal & Lumber Company, subject to a mortgage executed by it to J. C. Maben and Richard P. Bell (who had died and been succeeded by Charles Catlett), trustees, nonresidents.

Notices that application would be made on December 11, 1905, to said circuit court of Raleigh county to appoint commissioners to assess damages and to condemn the various parcels of land proposed to be taken by the plaintiff corporation, and used in the construction of a branch line less than 50 miles long, from Slab Fork of Guyandotte river up Winding Fork, and down Soak creek, to Piney river, were given by the plaintiff and served at different times on the various parties, those on the Western Pocahontas Coal & Lumber Company on October 12, 1905, on James Knox Cain, in Philadelphia, on October 9, 1905, and again on October 20, 1905, and upon the nonresident parties, including Maben and Catlett, by publication commencing October 12, 1905, and running four weeks as required by statute. On the 11th day of December, 1905, in the circuit court of Raleigh county, the plaintiff by leave of the court filed its notices and docketed its proceeding, and thereupon Maben and Catlett, James Knox Cain, and the Western Pocahontas corporation, incorporated under the laws of Virginia, tendered a joint petition to "remove" to this court, which petition, upon objection made, was not allowed to be filed because the Western Pocahontas corporation was not a party, thereupon the latter filed its petition, setting up title to said three parcels of land, and was admitted as a party defendant. Then the said Maben and Catlett, trustees, James Knox Cain and the Western Pocahontas corporation, again tendered their petition to "remove" the cause to this court, tendering bond admitted to be sufficient, but the said court refused the prayer thereof and exception was duly taken. On the 3d day of April, 1906, the said defendants filed in this court a certified record, and the cause was ordered to be docketed. The plaintiff thereupon moved to remand the cause, and it is this motion I am now to determine.

In their petition to remove the said defendants allege that their interests in dispute exceed in value $2,000, that they are all nonresidents of West Virginia, Maben being a citizen of Alabama, Catlett of Virginia, Cain of Pennsylvania, and the Western Pocahontas corporation a Virginia one; that they have no title to or interest in any other of the lands sought to be condemned other than the said three parcels; that a separable controversy exists between them and the plaintiff as to these three, and that the facts as to the title of these three parcels were that the legal title was in Maben and Catlett (suc-

cessor of Bell, deceased), trustees in a mortgage executed by the Western Pocahontas Coal & Lumber Company; that James Knox Cain was the owner by purchase of the equity of redemption of the said Western Pocahontas Coal & Lumber Company, and so on the day plaintiff's petition to condemn was filed and notice thereof given to them the Western Pocahontas Coal & Lumber Company had no title nor interest whatever in said three parcels of land, but they were wholly owned at that time by Maben and Catlett, trustees, and James Knox Cain; that afterwards, on October 16, 1905, the whole tract of which the three parcels were part was sold under decree entered July 21, 1905, of the circuit court of Raleigh county, by a special commissioner appointed in a chancery proceeding of J. C. Maben et al. v. Western Pocahontas Coal & Lumber Company et al., at which sale the Western Pocahontas corporation became the purchaser of the whole tract, including the three parcels, which sale, by decree, was confirmed on November 1, 1905, and from that time became the sole property of the Virginia corporation, the Western Pocahontas corporation; that no notice to condemn was served upon it until October 27, 1905.

The jurisdiction of federal courts to try and determine controversies touching the condemnation of land, either by original proceeding or upon removal from state court, is now so well settled as to admit of no further argument. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Kirby v. C. & N. W. R. Co. (C. C.) 106 Fed. 551; Terre Haute v. E. & T. H. R. Co. (C. C.) 106 Fed. 545; U. T. Ry. Co. v. C. B. & Q. R. Co. (C. C.) 119 Fed. 209; In re Delafield (C. C.) 109 Fed. 577. Nor under the law and facts in this case can there be any question of there being a separable controversy between the plaintiff and those claiming these three distinct parcels sought to be condemned such as to authorize removal, if the necessary amount involved is large enough and the required diversity of citizenship exists. The fact that numerous other resident parties interested in other parcels sought to be taken are joined is immaterial. The West Virginia statute (section 4, c. 42, Code 1906) expressly provides that in such proceeding owners of different parcels may be joined in one proceeding, or be proceeded against in separate ones. The claimants of the three parcels here had and have no interest whatever in the other ones sought to be taken. The authorities are clear that such condition of facts presents a separable controversy or, speaking accurately, a distinct and separate controversy. Pacific Ry. Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Sugar Creek P. B. & P. R. Co. v. McKell (C. C.) 75 Fed. 34; N. Y., N. H. & H. R. R. Co. v. Cockcroft (C. C.) 46 Fed. 881; Chicago v. Hutchinson (C. C.) 15 Fed. 129. The controversy, therefore, narrows itself down to the question of whether at the time of the institution of the suit or proceeding the Western Pocahontas Coal & Lumber Company, the West Virginia corporation, had such title or interest in the lands sought to be condemned as to make it a necessary party, and thereby destroy the diversity of citizenship required for removal to this court.

On behalf of the plaintiff, it is insisted that this suit was "instituted" on October 9, 1905, when it lodged in the clerk's office of

Raleigh county its petition and served its first notice on parties of its purpose to apply to the court on December 11th following for the appointment of commissioners; that at this time the title to the parcels sought to be taken was in the West Virginia corporation, the Western Pocahontas Coal & Lumber Company, subject to the mortgage to Maben and Catlett, trustees; and that, jurisdiction being absent at the institution of the suit, the subsequent conveyances, pendente lite to Cain and the Virginia corporation, the Western Pocahontas corporation, cannot supply it. On the other hand, it is insisted that the suit was not "instituted" until December 11th, when the plaintiff's notices, petition, exhibits, etc., were filed and the cause by order duly docketed in court and by its order, and, further, that the West Virginia corporation did not have even on October 9th, when the first notice was served, any title or interest in the lands that then required it to be notified or made party. In short, two questions must be answered. First. When is a condemnation proceeding in legal sense instituted? Second. What interest on October 9th did the West Virginia corporation have in these three parcels sought to be taken? Considering the first proposition, it is never to be forgotten that in West Virginia the common-law practice prevails unless expressly modified by statute, and that at common law the beginning of a suit is the issuance of the original writ or summons from the clerk's office signed by the clerk. Va. Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754. It is further to be noted that no declaration or pleading in ordinary actions can be filed in the clerk's office save and except upon legally constituted rule days. While our statutes have provided certain exceptional actions may be brought other than by issuance of this original writ, yet in every instance, I think, the statute itself fully sets out the practice to be observed in such case. For example, ejectment may be instituted by service of the declaration with a notice appended that it will be filed upon some specified rule day in the clerk's office or upon a day named in court. Upon the filing of such declaration a rule issues to require defendant to plead at the next rule day or within the time fixed by the court. Again, under Code W. Va. c. 121, § 6 [Code W. Va. 1906, § 3786], provision is made for the recovery of money due on contract by notice and motion, but it is expressly provided that such notice shall be given for 30 days and returned to the clerk's office 20 days before the day fixed for such motion. And it has been expressly held that, while judgment in a suit regularly matured at rules and on the docket relates back to the first day of the term of court when taken, such is not the case of a judgment taken upon such notice. Nat. Bank v. Distilling Co., 41 W. Va. 530–533, 23 S. E. 792, 56 Am. St. Rep. 878.

In the case of condemnation proceedings, the statute of this state (Code, c. 42, § 3; Code 1906, § 1363) provides:

"In any case in which real estate may be lawfully taken for a purpose of public utility, application may be made to the circuit court of the county in which the estate is situated, to appoint commissioners to ascertain a just compensation to the owners of the estate proposed to be taken. * * * And when the judge of the court to which the application is made is so situated as

to render it improper for him to act thereon, and no judge to act in the case can be agreed on by the parties, and it be found for any reason impracticable to elect a judge to act in the case, * * * the application may be withdrawn," etc.

And section 6 of the same chapter (section 1366, Code 1906) provides:

"Of such application ten days' notice shall be served on the said owners, claimants and persons holding liens, and the notice may be given either before the application is presented or afterwards."

From these provisions it would seem to me that this proceeding must be regarded as a summary one provided by the statute, dependent solely and alone upon the presentation of the application to the court in session. It requires it to be addressed to the judge of the court, to have his personal consideration and action, and explicitly provides, in case of his disqualification, how it may be withdrawn and presented to another court in an adjoining circuit where it may receive such personal consideration and action on the part of the judge thereof. The giving of the notice seems to me to be made entirely subordinate to the application, as it may be given either before or after the making of the application. This being true, I am of opinion the date of the institution of such suit must be that of the presentation in court of the application, and not the date notice is served. The notice may be given and no application made, in which case the record of the court will not disclose that any suit was ever brought. If notice, which is only required to be given 10 days prior, can in fact be given two months prior, and thereby by this act, to an extent at least, the owner's right to sell and dispose of his property unclouded in title may be hindered, then such notice could as well be given two years prior and serious evil be done by private act alone, and which may never be known to the court by reason of the application never in fact being made.

But, if I am wrong as to my conclusion as to how the first question is to be answered, I have little doubt as to the answer to the second. It seems clear that on October 9, 1905, when notice was first served, the title to these parcels of land was not in the Western Pocahontas Coal & Lumber Company. It had been conveyed to this West Virginia corporation on January 29, 1903, and on that day it had conveyed the legal title by mortgage to Maben and Bell as trustees. Catlett was subsequently substituted as trustee, in proper legal proceedings, in this mortgage in place of Bell, who died. In March, 1905, after default made, suit in equity was instituted in the circuit court of Raleigh county to foreclose this mortgage, to which, it must be presumed, that all persons interested in this title were made parties, for on July 21, 1905, a decree was entered in this cause directing a sale of these lands. After the entry of this decree and before the 9th day of October, 1905, James Knox Cain bought out all the right and interest in said decree and lands of the West Virginia corporation. The plaintiff admits this substantially, and also that it had notice of the ownership of such interest by Cain prior to said October 9, 1905, for it is to be remembered that on that day it lodged in the clerk's office of Raleigh county, the petition or application which it subsequently on December 11, 1905,

presented to the court, and in this petition, touching these three parcels in controversy, are the following allegations:

"Your petitioner represents that the legal title to the three strips, pieces, or parcels of lands mentioned above and described and which are sought to be taken by this proceeding is vested in the Western Pocahontas Coal & Lumber Company, a corporation of the state of West Virginia; but petitioner avers that the said lands are subject to a mortgage executed by the said Western Pocahontas Coal & Lumber Company in favor of J. C. Maben and Richard P. Bell, trustees; that since the execution of the said mortgage the said Richard P. Bell has departed this life, and is succeeded, as trustee and as beneficiary in the said mortgage, by Charles Catlett. The said Charles Catlett and J. C. Maben, trustees, are interested in said lands as the holders of the mortgage aforesaid. Petitioner avers that both the said Charles Catlett and J. C. Maben, trustees as aforesaid, are nonresidents of the state of West Virginia. And petitioner is advised and alleges that the said lands have been sold to James Knox Cain, a resident of Pennsylvania, but not yet conveyed to him."

Under these circumstances, even if this suit be held to have commenced on October 9, 1905, two reasons exist why I must hold that even at that date the title to these lands was not vested in the Western Pocahontas Coal & Lumber Company in such way as to make the Western Pocahontas corporation (the Virginia corporation) a pendente lite purchaser or assignee, and for that reason destroy its right in company with Maben and Catlett, trustees, and James Knox Cain, to remove this cause to this court. First. Because it is to be assumed that by the terms of the mortgage the legal title of the lands vested itself in Maben and Catlett, trustees, and only the equity of redemption remained in the Pocahontas Coal & Lumber Company, and, this equity of redemption having been sold to Cain, nothing but a naked release or quitclaim deed from it was required. It had no real interest, and, at most, could at that time be considered only a nominal if necessary party. Second. The facts, however, disclose that prior to the institution of this suit on October 9, 1905, if it be held to have been instituted on that day, a court of competent jurisdiction had convened the parties interested in these lands, including this West Virginia corporation, and brought the title thereto, both legal and equitable in custodio legis, and on July 21, 1905, had vested by its decree this title, legal and equitable, substantially in its special commissioner with power to sell and convey subject only to the power of confirmation reserved by the court. Therefore it might well be held that this condemnation proceeding was a pendente lite one to this prior instituted chancery one, to be held in abeyance to wait the result reached in it as to the disposition of the title so in its custody, or to be filed by its permission, making its special commissioner party, or at least to be heard in connection therewith, so that damages awarded should be under its control. The sale having been made under this chancery decree on October 16, 1905, only seven days after the lodging of plaintiff's petition herein, whereby the legal and equitable title became vested in the Virginia corporation, relieved the plaintiff from the necessity of such proceedings, but because this is so it seems clear to me that this does not also allow the plaintiff or petitioner herein to claim that such purchaser is only a purchaser, assignee, or transferee pendente lite in this suit, and therefore not entitled to remove this cause to this court.

Since the foregoing was written and in view of the conclusions therein reached by me, another question has arisen which I must determine. As I have heretofore in substance set forth, under the express permission provided by section 4, c. 42, Code W. Va. (Code 1906, § 1364), the original petition in condemnation was filed not only against the parties interested in the three parcels of land of 23.47, 2.59, and 2.8 acres, respectively, which I have considered, but also against a number of resident defendants seeking to take from them wholly distinct and different parcels owned by them in which the nonresident Western Pocahontas corporation, and the nonresident individuals, Cain, Maben, and Catlett, have no interest of any kind or character. It is suggested by counsel for these nonresidents that under the second clause of the second section of the removal act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]), as construed in Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514, all these controversies between this resident railroad corporation and these resident landowners have been removed and must be settled and determined in this court. I do not regard this position as tenable.

As suggested by counsel for the railroad, it seems to me, a clear distinction is to be drawn here between "separable controversies," as contemplated by the statute, and separate and wholly distinct controversies, only joined in one proceeding by express statutory permission. In Barney v. Latham I think this distinction is indicated when, on page 214 of 103 U. S. (26 L. Ed. 514), it is said:

"It may be suggested that if the complaint has united causes of action, which, under the settled rules of pleading, need not, or should not, have been united in one suit, the removal ought not to carry into the federal court any controversy except that which is wholly between citizens of different states, leaving for the determination of the state court the controversy between the plaintiffs and the land company. We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin, and Massachusetts. Whether these defendants and the land company were not proper parties to the suit we do not now decide. We are not advised that any such question was passed upon by the court below. It was not discussed here, and we are not disposed to conclude its determination by the court of original jurisdiction, when it is therein presented in proper form. A defendant may be a proper, but not an indispensable, party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading he may be governed often by considerations of mere convenience; and it may be that there was, or is, such a connection between the various transactions set out in the complaint as to make all the defendants proper parties to the suit, and to every controversy embraced by it, at least, in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder."

It cannot be denied that under the "established rules" of common-law pleading, unaided by statutory permission, a demurrer for multifariousness and misjoinder would have to be sustained instantly to a declaration of debt demanding payment of different and distinct debts from different defendants joined, and the case would not be different in condemnation proceedings if the express statutory provision was wanting. This statutory provision is merely permissive, and, if the joinder is made, it is only to the extent of allowing speed, convenience, and economy to be exercised thereby. While it will allow this, as counsel has

well said, it jealously guards the rights of the parties by virtually providing for the complete separation of the different actions from the beginning.

Single notices to the defendants, describing to each alone the land in which he is interested, may be given: A.'s land may be held liable to be taken, B.'s not. One set of commissioners may be appointed to view A.'s land, a different set that of B.'s. Separate awards and reports are required for each man's tract. The report upon one may be confirmed, on another set aside. A. may agree to accept the compensation ascertained, while B. may not. Separate jury trials may be had as to different parcels and with different owners. Under these conditions I do not consider the cases of Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514, Hyde v. Ruble, 104 U. S. 407, 26 L. Ed. 823, Brooks v. Clark, 119 U. S. 502, 7 Sup. Ct. 301, 30 L. Ed. 482, and others cited, as applicable to this summary statutory proceeding, but, on the contrary, I do regard the Pacific Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, and In re Stutsman County (C. C.) 88 Fed. 337, as determining the true principle that must govern in a proceeding like this.

The motion to remand must therefore be overruled and jurisdiction maintained in this court as to the controversy relating to the condemnation of the three parcels of 23.47, 2.59, and 2.8 acres in which the nonresident Western Pocahontas corporation is interested, but not otherwise.

GOLDBERG, BOWEN & CO., Inc., v. GERMAN INS. CO. OF FREEPORT, ILL.

(Circuit Court, E. D. Louisiana. April 10, 1907.)

No. 13,443.

1. REMOVAL OF CAUSES—FILING TRANSCRIPT—TIME.

Act March 3, 1875, 18 Stat. 472, c. 137, § 7 [U. S. Comp. St. 1901, p. 512], provides that in all cases removable to the federal court, if the term of the Circuit Court to which the case is returnable then next to be holden shall commence within 20 days after the filing of the petition and bond in the state court for its removal, then the applicant shall have 20 days from such application to file the copy of the record in the circuit court and to enter appearances therein. Section 3 declares that a defendant applying for removal shall give bond for his or their entry in such circuit court on the first day of its then next session of a copy of the record in such suit. *Held* that, where a term of the federal Circuit Court was in session at the time an application for removal of a cause was made, the applicant was not in default for failure to file the record within 20 days, but was entitled to file the same on or before the first day of the next succeeding term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 190.]

2. SAME—EFFECT OF REMOVAL—JURISDICTION.

Though the filing of a petition to remove a cause to the federal court operates as a removal and vests complete jurisdiction over the cause for all purposes in the federal court, the regular course of proceedings is suspended until the return day for the filing of the transcript in the federal court, though such court has jurisdiction in the interim to take any ex-

traordinary proceedings required for the protection of any party to the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 204, 205.]

3. SAME—CAUSES REMOVABLE—RESIDENCE OF PARTIES.

Where the cause could not have originally been brought in a federal Circuit Court because neither the plaintiff nor the defendant resided within the district, it was not removable to such court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 32, 33.]

4. SAME—CONFLICT OF JURISDICTION—REMAND.

Where all the property of a nonresident corporation in Louisiana had been placed in the custody of receivers appointed by the state courts, and any judgment recovered in an action removed to the federal Circuit Court for trial would have to be referred to the state court for payment, which might lead to a conflict of jurisdiction, the case should be remanded to the state court.

On Motion to Remand and Set Aside Default.

Merrick & Lewis, Philip Gensler, and Ralph J. Schwarz, for plaintiff.
W. O. Hart and Max Dinkelspiel, for defendant.

SAUNDERS, District Judge. Plaintiff is a corporation incorporated and created under the laws of California, and the defendant is a corporation created under the laws of Illinois. The suit was originally brought by attachment in the civil district court for the parish of Orleans, where the petition was filed on October 26, 1906. The state court acquired jurisdiction over the defendant by attachment of the defendant's property in the city of New Orleans served on October 26, 1906. On November 7, 1906, the defendant was further cited "through M. A. Shumard, its agent in person." The record does not show how the defendant came to be cited through M. A. Shumard as its agent. The petition alleges that:

"The defendant is absent from the state, but has property, rights, and credits subject to seizure within the jurisdiction of this honorable court."

The prayer is:

"That the German Insurance Company of Freeport, Ill., be cited to answer this petition, and, if the court deems it necessary, a curator ad hoc be hereafter appointed to represent the defendant company, and said company be cited through said curator ad hoc."

Not only is there no averment in the petition that M. A. Shumard is the agent of the defendant, but the petition necessarily implies that there was no agent of the defendant here through whom it might be summoned so far as the plaintiff knew. The sheriff's return shows that the citation was served "through M. A. Shumard, its agent in person." On October 30, 1906, the defendant filed a petition to remove the case from the state court into this court, which was not sworn to, until November 8th, on which day the bond for the removal of the cause was given. On November 9th the state judge gave the usual order to remove the case into this court. There the matter stood until January 7, 1907, when the clerk made and signed a certificate of the transcript. This certificate was completed on January

9, 1907, and the transcript was taken by the attorney of the plaintiff and filed in this court on January 9, 1907. The parties admit that the plaintiff ordered the transcript, paid for it, and filed it in this court. On January 23, 1907, Mr. W. O. Hart, a member of the bar of this court, as amicus curiæ, filed a statement that receivers had been appointed, William C. Niblack and John C. Davey, Jr., to the defendant the German Insurance Company of Freeport, Ill., in the civil district court for the parish of Orleans; that they had qualified as such; that no appeal had been taken from the judgment; and that said receivers had not been made parties to this petition. Wherefore, he asked the court to take notice of the said proceeding. On January 31, 1907, the plaintiff entered a default in this court against the defendant. On February 2, 1907, the receivers for the defendant company filed a motion in this court requiring "that the plaintiff do show cause on Saturday, February 9, 1907, at 11 o'clock a. m., why the default herein entered should not be set aside because improvidently entered, for the reason that, though the plaintiff has recognized movers as receivers of the defendant by proceedings in this court, it has not made them parties to this proceeding; and on the further ground that this court is without jurisdiction in this case." On the same day the attorneys for the receivers filed a motion that the plaintiff "do show cause on Saturday, February 9, 1907, at 11 o'clock a. m., why this case should not be remanded to the civil district court for the parish of Orleans on the ground that this court is without jurisdiction, because neither the plaintiff nor the defendant in this case is an inhabitant of the district in which this court holds sessions and over which it has territorial jurisdiction, and, as this case could not have been brought up originally in this court, so this court cannot acquire jurisdiction by removal." The parties admit that the property which was attached in this suit in the state court had already been previously attached in another suit in the state court which has not been brought by removal into this court. It is also admitted that receivers have been appointed and qualified by the state court and have taken possession of all the property belonging to the defendant in the state of Louisiana.

1. As to the default: The statute provides:

"That in all causes removable under this act, if the term of the Circuit Court to which the same is returnable then next to be holden, shall commence within twenty days after the filing of the petition and bond in the state court for its removal, then he or they who applied to remove the same shall have twenty days from such application to file said copy of record in said Circuit Court and to enter appearance therein." Section 7, Act March 3, 1875. 18 Stat. 472, c. 137 [U. S. Comp. St. 1901, p. 512].

At the time that the application for removal was filed in the state court the November term of this court had already begun, and this court was in session, and the April term would not begin for over five months.

Section 3 also provides that the defendant applying for removal shall give bond "for his or their entry in such Circuit Court on the first day of its then next session a copy of the record in such suit." The statute thus requires as a general rule that the transcript of the removal case shall be filed in the federal court on the first day of the

then next succeeding term of the federal court; but, if that day comes less than 20 days from the time of the application for removal, then the applicant for removal shall have 20 days. No provision is made for a case when the Circuit Court into which the case is removable is actually in session at the time the application for removal is filed, and there is no general provision requiring the transcript to be filed within 20 days from the application. Accordingly the transcript in this case was returnable on the fourth Monday of April, 1907.

It is well settled that the filing of the petition to remove and the bond for removal in the state court operates the removal from the state court into the federal court. Thereafter the federal court has complete jurisdiction over the cause for all purposes; but the regular course of proceedings in the removed case is suspended until the arrival of the return day for the filing of the transcript in the federal court. In the interim, the federal court may, if necessary, take any extraordinary proceedings which may be required for the protection of either party in the case. But the regular procedure in the case is interrupted and cannot be resumed until the day arrives on which the transcript is required to be filed in the federal court. Hamilton v. Fowler (C. C.) 83 Fed. 321. The motion to set aside the default will therefore be granted.

2. As to the motion to remand: The sole ground on which the defendant moves to remand is that this court is without jurisdiction, because the suit could not originally have been brought in this court and the statute for removal provides:

"That any suit of a civil nature at law or in equity * * * of which the Circuit Courts of the United States are given original jurisdiction by the preceding section * * * may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district."

The contention is that this suit could not have been brought in the Circuit Court, and cannot therefore be removed into the Circuit Court, because neither the plaintiff nor the defendant resided within this district. I think this position is well taken. See Ex parte A. S. Wisner (decided by the Supreme Court December 10, 1906) 27 Sup. Ct. 150, 51 L. Ed. ——, and Yellow Aster M. & M. Co. v. Crane Co. (C. C. A.) 150 Fed. 580. Moreover, as it appears from the admissions of the parties that the only property which the judgment in this case could affect is already in the custody of the state court, and that all the property of the defendant in the state of Louisiana has been placed in the custody of the receivers appointed by the state court, I think the comity between this court and the state court requires that this case should be remanded. This court cannot reach any property of the defendant in Louisiana, because all of the defendant's property is now in the custody and control of the state court. Any judgment that might be rendered in these proceedings would have to be referred to the state court for payment. To retain the case might eventually lead to a conflict of jurisdiction between this court and the state court, and it would be better for the parties and more in keeping with the proper relations between the state and federal court to remand the case.

The case is therefore remanded. The same order will be rendered in the other suits against the same defendant.

In re NUSBAUM.

(District Court, N. D. New York. April 22, 1907.)

1. BANKRUPTCY—ACTS OF BANKRUPT—LIMITATIONS.
Bankr. Act July 1, 1898, c. 541, § 1, subd. 25, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 682], provides that the term "transfers" shall include the sale and every other and different mode of disposing of or parting with property, as a payment, pledge, mortgage, gift, or security. Section 3, subd. "a," declares that acts of bankruptcy shall consist of a person having (1) conveyed, transferred, 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 other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings as not having at least five days before the sale or final disposition of any property affected by such preference vacated or discharged the same. *Held*, that where a person, while insolvent, voluntarily confessed judgment in favor of certain creditors, and permitted them to levy executions on and sell his property thereunder without having vacated such sale, such proceedings constituted a "transfer" within clauses 1 and 2 of section 3, independent of clause 3, and therefore limitations against the creditor's right to file a bankruptcy petition ran from the day of the sale, and not from a period five days prior thereto.

2. SAME.
Bankr. Act July 1, 1898, c. 541, § 3, subd. "a," cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], declares that if a person, while insolvent, shall suffer or permit any creditor to obtain a preference through legal proceedings, and shall not at least five days before the sale or final disposition of any property affected by such preference vacate or discharge the same, he thereby commits an act of bankruptcy. *Held* that, while the failure to discharge a levy five days before sale is an act of bankruptcy, an independent act of bankruptcy is also committed by a failure to discharge the levy on each succeeding day, including the day of the sale.

3. SAME—PLEADINGS—ACTS OF BANKRUPTCY.
Petitioners in bankruptcy are entitled to allege and prove any number of acts of bankruptcy.

4. SAME—AMENDMENT.
Petitioners in bankruptcy are entitled to amend their petition for the purpose of setting up additional acts of bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 128.]

Motion to confirm report of special master refusing to dismiss the petition of creditors in involuntary proceedings on the ground the petition was not filed in time.

George F. Morss, for petitioners.
J. A. Goldstone, for alleged bankrupt.

RAY, District Judge. December 20, 1905, the alleged bankrupt, while insolvent, voluntarily confessed nine judgments to and in favor of certain of his creditors, to the exclusion of others, and under such circumstances as to show an intent and purpose thereby to cheat, hinder, delay, and defraud his other creditors, and allow and permit the creditors in whose favor he confessed such judgments to obtain a preference over his other creditors, and by such means and in this manner to

transfer his property to the said judgment creditors or for their benefit, in payment or satisfaction of their debts or claims against them. The judgments, aggregating $1,230.46 and $11.25 costs, were confessed in a court of a justice of the peace, not a court of record, and executions thereon were thereafter issued and levies made thereunder, and all his property was sold on such executions and others on the 22d day of December, 1905. On one judgment for $429.49 only $40 was made, and execution as to the balance was returned unsatisfied December 29, 1905. Many creditors remained unpaid, and April 21, 1906, within four months after the sale, this petition in bankruptcy was filed. The alleged bankrupt did not "at least five days before a sale or disposition of" his property under such executions vacate or discharge the judgments, executions, or levies.

Subdivision 25 of section 1 of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898 (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 682]), "Meaning of Words and Phrases," provides:

"Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

Subdivision "b" of section 3 of the same act provides that:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act."

Also:

"Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment."

There is no pretense here of any such notice. If there was a "transfer" by the alleged bankrupt, it was one which the law neither permits nor requires to be recorded or registered in any sense within the meaning of the act. Hence, if there was a "transfer," the statute of limitations ran from the day of sale.

Section 3 of the same act, in subdivision "a," provides that:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, 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," etc.

It is contended by the alleged bankrupt that all he did was to suffer, or permit, while insolvent, certain creditors to obtain a preference

through legal proceedings and fail to vacate or discharge the preference thus obtained at least five days before a sale of his property, that this was the act of bankruptcy, and that as the sale was December 22, 1905, the act of bankruptcy was committed five days before that date, or December 17, 1905, more than four months prior to the filing of the involuntary petition in bankruptcy. When the alleged bankrupt, Philip Nusbaum, being insolvent, voluntarily confessed judgment in favor of certain of his creditors with intent to hinder, delay, and defraud his other creditors, and also with the intent to prefer such creditors over his other creditors, and permitted them, as he knew they would and as they did, to issue executions thereon and levy upon and sell all his property by virtue thereof, and put the proceeds of such sale of such property in their pockets in payment and satisfaction of their respective debts, as he knew they would and intended they should, he transferred same while insolvent, with intent to hinder, delay, and defraud his other creditors, and with intent to prefer the creditors in whose favor he confessed such judgments. It was not a sale by him in form, but it was "a different mode of disposing of or parting with property, or the possession of property absolutely," and "as a security" first, and then, second, "as a payment" to such preferred creditors. It was an act of bankruptcy under both clause 1 and clause 2 of subdivision "a" of section 3 of the act, irrespective of clause 3 thereof. It was a "transfer" within the plain definition of the term found in clause 25 of section 1 of the act. The act of bankruptcy was consummated, the transfer made, when the executions were issued and the sale by virtue thereof actually made, and the petitioning creditors were in time if they filed their petition within four months after such sale, as it is alleged they did. It was a transfer made by the alleged bankrupt who confessed the judgments that executions might be issued, levies made, sales made, and his property or its proceeds conveyed or transferred to his preferred creditors in payment of their debts. It was done to hinder, delay, and defraud his other creditors.

But, while these facts are stated in the brief, I find no proof or admission that Nusbaum confessed the judgments and set on foot the transfer. The case is sent back to the special master to take proof of all the facts in this regard as to when and how and where the judgments were confessed, the execution issued, the sale advertised and made, etc., as it is very doubtful that the petition was in time on the mere ground of a preference through legal proceedings. These petitioners should not be sent out of court because of failure to present their case as it actually is. The petitioners may file an amended petition nunc pro tunc alleging an act of bankruptcy under all three clauses of subdivision "a" of section 3.

The following cases indicate, and one of them holds, that the act of bankruptcy under claim 3 is consummated the fifth day prior to the sale and that the limitation of four months then commences to run. The failure to vacate and discharge a judgment and levy on execution thereunder at least five days before the sale or day fixed for sale is an act of bankruptcy, and hence the petition may be filed before the sale. In re Rung Furniture Co., 139 Fed. 526, 71 C. C. A. 342; Bogen

& Trummel v. Protter, 129 Fed. 533, 64 C. C. A. 63; Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147; White et al. v. Bradley Timber Co. (D. C.) 119 Fed. 989; In re National Hotel & Café Co. (D. C.) 138 Fed. 947; Parmenter Mfg. Co. v. Stoever, 97 Fed. 330, 38 C. C. A. 200; Seaboard S. C. Co. v. W. R. Trigg & Co., 124 Fed. (D. C.) 76, 77. In Re National Hotel & Café Co., supra, Holland, District Judge, held that the act of bankruptcy is consummated and complete on the fifth day prior to the sale. This holding makes the fact of a sale immaterial. If a sale under the levy is advertised, the act of bankruptcy is complete. Judge Holland says:

"In other words, it seems to me that it was the intention to fix the consummation of the act of bankruptcy upon an alleged bankrupt five days before the day of sale, if at that time he had failed to lift a levy on his property. A petition can then be filed before the sale, and the property administered in bankruptcy for the benefit of all the creditors. While this precise question has never been determined, so far as I have been able to ascertain, the reasonings in the following cases sustain the above conclusions: In re Aaron Meyers, 1 Am. Bankr. Rep. 1; Metcalf Bros. & Co. v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Parmenter Mfg. Co. v. Stoever et al., 97 Fed. 330, 38 C. C. A. 200; Collier on Bankruptcy (5th Ed.) p. 42."

The syllabus in Parmenter Mfg. Co. v. Stoever et al., 97 Fed. 330, 38 C. C. A. 200, is misleading. First, all the court was called upon to decide was that the four months does not run from the time property is attached in a suit before judgment. That ended that case. What the court did say in addition is as follows:

"The petition in bankruptcy was filed on February 1, 1899. This was more than four months after the attachment was made, but within four months from the times of seizure and sale on execution. * * * Regard, however, must be had to the whole of clause 3; and, in view of that, what the appellant 'suffered or permitted' was the sale of its property through legal proceedings. This was clearly the true act of bankruptcy within the contemplation of the statute, although the statute is somewhat awkwardly expressed. In like manner, as the failure to vacate the execution before the sale was the act of bankruptcy, it is clear that the four months period runs, not from the attachment, but from a date connected with the proceedings after the judgment."

The following extract from the opinion of the court is directly opposed to the syllabus, to repeat:

"What the appellant suffered or permitted was the sale of its property through legal proceedings. This was clearly the true act of bankruptcy within the contemplation of the statute."

All the cases hold that an act of bankruptcy is committed on the failure to discharge the lien of the levy five days before the sale. In all but one a sale was made. In only one case did the question of the limitation arise. Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, is opposed to Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147. I am of the opinion that, while such failure to discharge a levy five days before the sale is an act of bankruptcy, such failure four and three and two days and one day before the sale are also distinct acts of bankruptcy as is the failure on the day of sale. In Bradley Timber Co. v. White et al., supra, it was held that the petitions may allege and prove any number of acts of bankruptcy, and it is far better, if petitioners are so advised, that they set up and prove all the facts.

I am disposed to give them the opportunity, and hence the matter is sent back to the special master for proceedings in accordance with this opinion. The amendment suggested may be made under the authority of Hark v. C. M. Allen Co. (C. C. A.) 146 Fed. 665.

In re JERSEY ISLAND PACKING CO.

(District Court, N. D. California. March 15, 1907.)

No. 4,821.

1. BANKRUPTCY—COMPOSITION—PETITION TO VACATE—LIMITATIONS.
Under the express provisions of Bankr. Act July 1, 1898, c. 541, § 13, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], a petition to set aside a composition with a bankrupt's creditors not filed within six months after the composition was confirmed *held* barred by limitation.

2. SAME—EXTENSION OF TIME.
Bankr. Act July 1, 1898, c. 541, § 15, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], providing that a judge, on application of the parties in interest, who have not been guilty of undue laches filed within a year after a discharge shall have been granted, may revoke it if on the trial it shall appear that it was obtained through the bankrupt's fraud, etc., does not apply where the discharge results by operation of law from the confirmation of the bankrupt's offer of composition.

3. SAME—CONFIRMATION OF COMPOSITION—EFFECT.
So long as an order confirming a composition with a bankrupt's creditors stands, it is effective to discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge as provided by Bankr. Act July 1, 1898, c. 541, § 14, subd. "c," 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428].
[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 610.]

H. A. McNoble, A. H. Carpenter, and L. T. Freitas, for petitioner.
Jellett & Meryerstein, for trustees.

DE HAVEN, District Judge. This is a petition to set aside and annul an order of this court made on the 23d day of February, A. D. 1906, confirming a composition offered by the bankrupt, and the discharge resulting therefrom, upon the alleged grounds of fraud in its procurement, and because the offer did not conform to the requirements of section 12, Bankr. Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]. The petition was filed on February 21, 1907. The trustees named in the offer of composition and in the order confirming the same have appeared and moved to strike the petition from the files, as sham, irrelevant, and trifling, and upon other grounds stated in the notice of motion. They have also demurred to the petition upon the ground 'that the said petition is barred by the provisions of section 13 of the acts of Congress relating to bankruptcy." Section 13 of the Bankruptcy Act provides:

"The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the

knowledge thereof has come to the petitioners since the confirmation of such composition."

In view of this section, there does not seem to be any escape from the conclusion that the present petition was not filed within time, and that the demurrer thereto must be sustained for that reason. The fact that the petitioner also asks that the bankrupt's discharge resulting by operation of law from the confirmation of the composition referred to may also be set aside and annulled does not bring this proceeding within section 15 of the bankruptcy act, which provides that a judge may, "upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it, if upon a trial it shall be made to appear that it was obtained through the fraud of the bankrupt," etc. This section does not apply in a case such as this, where the discharge of the bankrupt results by operation of law from the confirmation of the bankrupt's offer of composition. So long as the order confirming the composition stands, it must have the effect given it by subdivision "c," § 14, of the bankruptcy act, viz., the discharge of the bankrupt from his debts, "other than those agreed to be paid by the terms of the composition and those not affected by a discharge," and the order of confirmation can only be set aside within the time limited by section 13 of the bankruptcy act above quoted.

Having reached this conclusion upon the demurrer, it is unnecessary to consider the motion to strike the petition from the files.

The demurrer will be sustained, and the petition dismissed.

ANSLEY LAND CO., Limited, v. H. WESTON LUMBER CO.

(Circuit Court, E. D. Louisiana. March 16, 1907.)

No. 13,269.

1. CORPORATIONS—SALES OF LAND—POWER OF PRESIDENT.
Where it was not shown to be the custom of a corporation to permit its president to make sales of the corporation's lands, without authority of the board of directors, he had no power to sell such lands without a special or general resolution of the board of directors conferring such authority.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1629.]

2. SAME—FORGED RESOLUTIONS—VOID DEED.
Where no resolution of the board of directors of a corporation was ever passed at any time authorizing a sale of the corporation lands by the president, and the corporation's other officers and stockholders knew nothing of a deed to such lands executed by the president, to which was attached an alleged copy of a resolution conferring on the president authority to make the deed, which copy also bore the forged signature of the corporation's secretary, the deed was void.

In Equity.

Dinkelspiel & Hart and T. M. & J. D. Miller, for plaintiff.
Chaffe & Bowers, for defendant.

SAUNDERS, District Judge. The bill herein demands the cancellation and annulment of a deed of sale of certain real estate belonging to the complainant company executed on November 19, 1903, by M. E. Ansley, president of the company. It is averred that this deed of sale is signed by M. E. Ansley, as president, and purports to be signed by Charles D. Stuart, as secretary of the complainant company, by virtue of a pretended resolution of the board of directors of the complainant company attached to the act. It is averred that the signature of the said Stuart, the secretary, is a forgery, and the pretended resolution attached to the act is also a forgery; that no such resolution was ever passed; and that there was no meeting of the stockholders held on the day upon which the resolution purports to have been passed. It is also averred that the deed of sale was wholly unauthorized, and that no part of the price ever came into the possession of the complainant, and that the complainant did not hear of the execution of this deed until several months after it had been executed, and thereupon this suit was brought.

The answer avers that M. E. Ansley, who executed the deed, was authorized by virtue of his office and by the known custom of the complainant company to make sales of the company's property and to execute acts of sale, without any special resolution of the board of directors. The evidence was taken by consent out of court, and the case has been submitted without any note of evidence or oral argument or written brief.

The testimony shows that Mr. Weston, as president of the Weston Lumber Company, negotiated for the purchase of the timber on a cer-

tain tract of complainant's land with M. E. Ansley, the president of the complainant company. When the price had been agreed upon, the parties went to Bay St. Louis, the county seat of the county in which the land was situated, to ascertain if the recorded title was in the complainant company. When they did ascertain this fact, they instructed the clerk, Mr. Hoffman, to draw up a deed of sale. Mr. Weston, on behalf of the defendant company, then asked if the land was free from incumbrances, and, having learned that there was a mortgage upon it in favor of Mrs. Ansley, the mother of M. E. Ansley, the president of the company, he informed Mr. Ansley that he must procure a written release of this mortgage from his mother. He then asked for a certified copy of the minutes of the complainant company authorizing Mr. Ansley to make the sale. Mr. Ansley promised to produce this copy as soon as he could return to New Orleans. Thereupon Mr. Weston left the deed with the clerk, and also his check, and the notes of his company to represent the price agreed upon, and instructed the clerk to deliver the check and the notes as soon as Mr. Ansley should produce a copy of the resolution of the company authorizing him to sell and the written release of mortgage from his mother. Mr. Weston says:

"* * * As president, * * * I demanded that he [M. E. Ansley] furnish a certified copy of the minutes, attested by the secretary. I did not know about the laws of Louisiana, and did not know that it would be legal without it, or unless I had it. * * * He [the clerk] prepared it and held it [the deed] until Mr. Ansley could deliver him the certified copy of the minutes and the release from Mrs. Ansley. * * * He was not to deliver the check and notes nor give Mr. Ansley the deed until he produced the resolutions and release. Then he was to give it to him so he could attach it to it and have all signed. * * * Q. And you would not accept the deed without that resolution? A. No, sir; because my company, before our president or vice president is allowed to sign a document of that kind, they are required to have a resolution of the board of directors, and we decided that the same thing would apply in this case. Q. Then, Mr. Weston, you wanted your company to be fully protected in this matter, and you did not consider it received that protection, unless there was a resolution of the board of directors of the Ansley Land Company, Limited? A. No, sir; I did not, and I would not in any other transaction where there was a company concerned. Q. I understood you to say that, after Mr. Hoffman had prepared the deed, Mr. Ansley wanted to sign the deed and close the transaction on the spot, and you said, 'No, this resolution must be obtained'? A. Yes, sir; we were there in the morning about 10 o'clock, and Mr. Hoffman was to draw the deed that day, and he [Mr. Ansley] wanted to sign them either that day or the next morning, and I would not consent to his signing it until he produced this resolution and release from his mother. * * * Q. Do you mean that Mr. Hoffman was instructed by you to retain the deed until he received the resolution? A. Yes, sir; he was to hold the deed until he got this resolution and release from his mother, because if he did not get the resolution there was no use monkeying with it. * * * Q. Then what was your object in keeping the deed until he got these documents? A. The object in holding on to the deed was for Mr. Ansley to produce authority where he could sign it. Q. Then your idea of this transaction was that, until the resolution was presented, there was no contract? A. Because I did not know that Ansley had that authority. Q. Then you wanted Mr. Hoffman to see it? A. Yes, sir. Q. Then your idea was to get the authority first before it was to be signed by Mr. Ansley? A. Yes, sir."

These extracts from Mr. Weston's testimony show that he thoroughly understood the general rule of law to be, as it is, that Mr. Ansley,

merely by virtue of his position as president of the complainant company, had no authority to sell the land or timber belonging to the complainant company. He concluded the bargain with Mr. Ansley under the belief that Mr. Ansley was, or would be, authorized to sell the timber in question by a resolution of the board of directors of the complainant company. Mr. Ansley subsequently left with Mr. Hoffman a resolution which reads as follows:

"Extract from the minutes of a meeting of the board of directors of the Ansley Land Company, Ltd., held this day, November 19, 1903:

"On motion, seconded and carried, it was resolved, that M. E. Ansley, president of this company, be authorized and empowered to sell to the H. Weston Lumber Company, of Logtown, Miss., all the merchantable pine timber owned by the company as per contract this day signed.

"[Signed] Ansley Land Company, Ltd., M. E. Ansley, President.
"Attest: [Signed] Charles D. Stuart, Secretary."

It is conclusively shown that no meeting of the board of directors was held in November, 1903, and that no resolution such as that above copied was ever passed at any time, and that the other officers and stockholders of the company knew nothing of the proposed transaction, and the company never received any part of the price. The signature of Charles D. Stuart, secretary, was forged. As soon as the officers of the company learned of the transaction, the Weston Company was notified in writing that the sale had not been authorized, and they were warned not to cut any timber. The sale executed by M. E. Ansley, under the above circumstances, was null. He was not authorized by any special or general resolution of the board of directors, and it is not shown that it was the custom of the company to permit him to make sales of the lands of the company without authority from the board of directors. Merely as president, he had no power to sell the lands of the complainant company. The defendant company has recorded the deed, and its existence on the records casts a cloud upon complainant's title.

The complainant is therefore entitled to a decree declaring the nullity of this deed and ordering its cancellation.

In re LIBERTY SILK CO.

(District Court, S. D. New York. April 23, 1907.)

LIENS—EQUITABLE LIENS—RAW MATERIAL SOLD FOR MANUFACTURE.

Petitioners who were foreign commission merchants purchased certain silk filatures for the bankrupt for manufacture into silk. The contract provided that the goods were to be taken by the buyer on arrival, and that the buyer should receive an allowance should sea water damage exceed 5 per cent. The brokers were also excused from accidents of the seas and other specified unavoidable casualties, and were given a prior lien on the goods covered by the order or an equivalent value, until payment had been made. The filatures were delivered to the bankrupt, with the intention that the same should be made up and on a credit of 90 days, with a discount of 1½ per cent. or net six months note. *Held*, that such facts did not create an equitable lien on the goods in favor of the brokers as against the bankrupt's other creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Liens, §§ 26–28.]

S. S. Terry (Julius Henry Cohen, of counsel), for the motion.
Thomas & Oppenheimer and James N. Rosenberg, opposed.

HOUGH, District Judge. The bankrupt was engaged in the manufacture of silk; and one of the raw materials of such manufacturing business was "Japanese filatures," meaning threads of silk reeled off from the cocoon and imported from Japan.

Peabody & Co. are "foreign commission merchants," acting for whomsoever employs them as "buyers and agents throughout the world." On August 25, 1905, the bankrupt ordered Peabody & Co., in writing, to buy 27 bales of filatures to be shipped from Japan. The order produced is in effect a contract for the purchase of the merchandise specified, and provides specifically "silk to be taken by buyer upon arrival of goods," and that "buyers" are to receive an "allowance" should sea water damage exceed 5 per cent.; excuses Peabody & Co. from "accidents of the seas" and other specified "unavoidable casualties," and also declares that Peabody & Co. "are hereby given a prior lien upon the goods covered by this order, or an equivalent value, until payment has been made." On September 18, 1905, the goods were invoiced or billed to the bankrupt, the invoice stating the terms of payment (as did the order) "1½% 90 days or net 6 months note"; and also stating that "H. W. P. & Co. retain a prior lien upon the under-noted goods until payment has been made." On or about the same date the consignment was physically delivered to the bankrupt. There is no evidence as to any further course of dealing between the parties, nothing shown as to the frequency of similar transactions between them, and the court is left in entire ignorance of the method or methods of contract fulfillment actually pursued.

On the facts above stipulated or apparent from the bankruptcy record, the court is asked to declare a lien in favor of Peabody & Co. upon such of the filatures as passed into the possession of the trustee by adjudication following petition filed on January 4, 1906, or, in the alternative, to adjudge that at such time Peabody & Co. were owners

of such filatures, and therefore entitled to their immediate possession. This absence of evidence upon points obviously capable of elucidation, and possibly important in ascertaining the true intent of the parties, is not approved. Cases stated are always in danger of presenting academic questions only, and this stipulation is very near the line. From the few facts shown, however, I draw the inference that, upon the delivery of the filatures to the bankrupt, Peabody & Co. knew or were bound to know that they were to be used in a manufacturing business; were to be consumed in the sense that all raw material is consumed; and might in their changed shape be sold when and upon such terms as the bankrupt elected, and that with this knowledge Peabody & Co. made their bargain, delivered the goods, and thereafter exercised no control whatever over the bankrupt's proceedings. It is also either inferable or stipulated that no agreement was made as to the application of the sale price of either the raw material or the manufactured product to the reduction of Peabody & Co.'s claim. The contract above referred to was not filed in accordance with the law of this state either as a conditional sale or a chattel mortgage; and no explanation is given by the evidence or suggested at bar of the meaning of the words (contained in the contract or order) "or an equivalent value." The transaction above set forth cannot constitute a conditional sale. A seller cannot at the same time retain title to that which he sells and a lien on the article sold. A lien in favor of A., whether it be regarded as jus in re or jus ad rem, presupposes title in another, and A.'s acquirement of title extinguishes his lien.

The transaction in question somewhat resembles that shown in Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740. It undoubtedly sought to create a charge upon the property, and here, as in the case cited, the charge or lien must be regarded as of the nature of a mortgage, if any analogy can be found in ordinary legal terminology. It is admitted that regarded as a mortgage the lien asserted is void as against the trustee in bankruptcy under the law of New York, by Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, inasmuch as the instrument creating the lien was not filed in accordance with law. It is also admitted that, could the transaction be regarded as a conditional sale, it is valid under the law of the same state as interpreted in Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. But, under the authority of the same decision, it is asserted that, inasmuch as the trustee has no better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues, the contract of August 25, 1905, should be regarded as conferring an equitable lien—a something which is neither a mortgage nor a conditional sale, but a partial reservation of interest on the part of a vendor, not obnoxious to any law of the state of New York, and within the equity of the bankruptcy act as interpreted in the case last cited. It must be admitted that no actual fraud is shown or suspected in this transaction, and that the courts of this state have gone far in upholding the validity of hypothecations of personal property even where the goods hypothecated were to be turned into money by the mortgagor, bailee, or conditional vendee, provided

it was also agreed that the proceeds of such sale or use were to be applied in diminution of the debt secured by the goods themselves. Prentiss Tool, etc., Co. v. Schirmer, 136 N. Y. 304, 32 N. E. 849, 32 Am. St. Rep. 737. But I am not aware that it has been doubted since Southard v. Benner, 72 N. Y. 424, that a right existing in a chattel mortgagor to sell the mortgaged property and use the proceeds thereof generally in his own business is (however honest in intent) a fraud upon the law. The wholesome rule is summarily stated in Re Garcewich, 8 Am. Bankr. Rep. 149, 115 Fed. 87, 53 C. C. A. 510, that when property is delivered to a vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee. That rule in my judgment applies to this case. While I think as above indicated that the transaction is really a mortgage, and as such void for want of filing, yet it makes no difference whether it be denominated in one way or another, it still remains true that the filatures in question were delivered to the bankrupt with obvious intent that they should be used and consumed in the ordinary course of that bankrupt's business, and for the benefit thereof. Secret liens are to be discouraged, and where, even innocently, vendors seeking to create such liens permit so obvious a badge of fraud as here appears to exist in their contracts, they must take the legal consequences, and the matter is not bettered by a name. An equitable lien which involves a fraud upon the law is none the less obnoxious because so different in form from the better known mortgage or conditional sale as hardly to fall under either well-known category.

An order may be entered declaring that the applicants have no lien upon the goods in possession of the trustee.

In re ROANOKE FURNACE CO.

(District Court, E. D. Pennsylvania. April 5, 1907.)

No. 858.

BANKRUPTCY—CREDITORS—STATUS AS ESTABLISHED BY FORMAL PROOF OF CLAIM.

One who has filed a formal proof of claim against a bankrupt's estate has a prima facie status as a creditor, which cannot be collaterally attacked, but continues, unless his claim is objected to and disallowed either when first presented or on reconsideration, as provided in Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

In Bankruptcy. On exceptions to report of referee upon petition to discharge trustee.

Turner K. Hackman and Charles F. Eggleston, for petitioner.
Arthur G. Dickson and John Dickey, Jr., for trustee.

J. B. McPHERSON, District Judge. In June, 1901, the petitioner filed a formal proof of claim against the bankrupt estate, which has never been disallowed. Whether it has been assailed in one or another

of the regular methods pointed out by Bankr. Act July, 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], I do not know; but, if such attack has been made, the controversy is still pending, and the petitioner's formal proof has not yet been overthrown. This being so, the proof of claim is prima facie evidence that the allegations made therein are correct (Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584), and the petitioner's status as a creditor must stand until it shall be properly and successfully attacked.

Having this status, the petitioner presented certain charges against the trustee in February, 1907, and asked for his removal. Upon this petition the court granted a rule to show cause, and the trustee thereupon filed a plea that the petitioner was not a creditor of the bankrupt estate and had no claim upon the assets. The petition and the plea were sent to the referee—not, as seems to be supposed, in the character of a special referee, but in the character of general referee having the whole of the proceeding in his charge and under his supervision—and the report now under consideration sustains the plea, and finds that the petitioner is not a creditor and has no claim upon the assets of the estate. Without taking up the exceptions in detail, it is enough to say that, in my opinion, this conclusion is erroneous. The proof of claim not having been disallowed, the petitioner has the prima facie standing of a creditor, which cannot be made the subject of collateral attack. Section 57 prescribes the methods by which a claim can be objected to and set aside, either when it is first presented or after it has been formally allowed, and these methods, I think, are exclusive. Having once been allowed, a claim continues to be valid, unless it is afterwards set aside by the proper procedure.

It follows that the finding of the referee must be disapproved, and the plea of the trustee be set aside; and it is further ordered that the trustee answer the petition to remove on or before April 20th.

THE EVELYN.

(District Court, S. D. Georgia, E. D. February 25, 1907.)

SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL.

A vessel *held* liable for an injury to a stevedore's employé while engaged in stowing cotton in the hold, and resulting from the breaking of a fall which was being operated by the ship, and with which neither libelant nor any of his fellow servants had any connection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 350, 351.]

In Admiralty. Action for damages for personal injury.

W. W. Gordon and Daniel Charlton, for libelant.

William R. Leaken, for libelee.

SPEER, District Judge (orally). I have no doubt whatever as to the liability of the ship. This man was a longshoreman, engaged in his duty of stowing cotton in the hold. He had no connection, nor did

any one associated with him as a fellow servant, have any connection with the wire fall, the donkey engine, or the drums to which it was attached. That fall was intended, so far as he was concerned, to lift bales of cotton from the wharf into the hold of the ship, so that they might be stowed. It was attempted to attach this wire fall to a heavy stage or gang plank on the wharf, and lift that in position. The fall broke at the drum, and, running rapidly through the block suspended above the hatchway, it fell into the hold in a coil, and, according to his testimony, and that of other witnesses in the hold with him, struck this man on the head, back, and side. He was immediately knocked prostrate. He called out at first to know what did it. His injury was very serious. He was taken at once to the office of Dr. Norton in a hack. The doctor gave a very intelligent and satisfactory account of his injuries and the subsequent treatment. Dr. White, one of the most eminent members of the medical profession in this city, practically agrees with Dr. Norton as to the character of the injuries. He was called in at a subsequent time as consulting physician. They both agree that the arm of the libelant was dislocated, and that ribs were broken. Both agree that the injuries are probably permanent. If this is true, he is wholly disabled to perform the heavy tasks of longshoreman and stevedores' laborer, by which from youth he has earned his livelihood. Dr. Barrow differs with these gentlemen, after an examination which the court has witnessed, but we all know how experts differ on questions of this character, and I am convinced, not only from the testimony of the two first physicians, but from what the court saw of the libelant's manifest suffering while in the hands of Dr. Barrow, and the conduct of the man while the examination was being conducted, that the injuries are serious, and in all likelihood permanent. I do not think, however, that he is entitled to the large sum claimed as damages by his counsel. This is naturally made in the enthusiasm of advocacy; but I think he should have damages to compensate him for his suffering, and for the injury, which, as stated, the court is of opinion, from the evidence and examination in court, will in a large degree impair his capacity to labor for the rest of his life.

I think on the whole, a reasonable allowance of damages, the court sitting as judge and jury, is $1,800, which is accordingly allowed.

ST. LOUIS, K. C. & C. R. CO. v. WABASH R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

No. 2,426.

1. RAILROADS—RIGHT OF WAY—MEANING.

The term, "right of way," when used to describe the real estate of a railroad company, ordinarily signifies the entire strip of land which the corporation has found it necessary or convenient to acquire the right to use for railway purposes, and it is not limited to the specific part thereof secured or used for its main track or other particular improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 204–206.]

2. JUDGMENT—CONSTRUCTION—EVIDENCE.

When the terms of a decree are plain and free from ambiguity, their ordinary meaning and effect may not be lawfully extended or contracted by construction, in the absence of proof to a reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully expressed his deliberate intention therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 967.]

3. SAME—PRESUMPTION.

The absence from a decree of any limitation or exception to general terms of known significance raises a persuasive legal presumption that the court intended to make none.

4. SAME—CONCLUSIVENESS—MATTERS CONCLUDED.

In a second suit between the same parties or their privies upon the same cause of action not only every matter offered, but every admissible matter which might have been offered to sustain or defeat, in whole or in part, the cause of action, is rendered res adjudicata by a former judgment upon the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1241.]

5. EQUITY—DECREE—ENFORCEMENT—CONDITIONS.

A court of equity may condition its decree for the enforcement of a former decree for the continuous use of a right of way or of terminal facilities by equitable terms, or may refuse to enforce it, where subsequent to the entry of the original decree such radical changes in the situation, rights, or relations of the parties have been wrought that equity demands such terms or forbids its enforcement.

But, in the absence of such changes, the original decree concludes the rights and remedies of the parties, and it must be enforced.

6. RAILROADS—RIGHT OF WAY—DECREE—CONSTRUCTION.

In 1886 the Circuit Court rendered a decree that the Colorado Company should enjoy the joint and equal use of the "right of way, tracks, side tracks, switches, turn-outs, turntables and other terminal facilities" of the Wabash Company between the north line of Forest Park and Eighteenth street, in the city of St. Louis, on reasonable terms fixed therein.

Held: (1) This decree entitled the Colorado Company to the joint use of the entire strip of land between the north line of the park and Eighteenth street which the Wabash Company had acquired the right to use for railway purposes at the date of the decree and of all the tracks, side tracks, turn-outs, turntables, and other terminal facilities thereon.

(2) That decree was equitable, and, in the absence of proof of such a change of conditions since its entry as would render its enforcement unjust, the Colorado Company is still entitled to the joint use of this entire strip and of all the tracks, side tracks, switches, turn-outs, turntables, and other terminal facilities of the Wabash Company which are now upon said strip.

(3) But the Colorado Company is not entitled under that decree to the use of the industrial tracks, land or other railway facilities of the Wabash

Company outside the limits of that strip, the use of which it had acquired at the date of the decree of 1886.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 204–206.]

(Syllabus by the Court.)

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

W. F. Evans and Frank Hagerman (E. S. Robert and M. A. Low, on the brief), for appellant.

J. L. Minnis (Wells H. Blodgett, C. N. Travous, and H. S. Priest, on the brief), for appellee Wabash Railroad Company.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On December 31, 1886, upon a petition of intervention in the suit to foreclose the mortgages upon the Wabash, St. Louis & Pacific Railway Company, the court below rendered a decree to the effect that the St. Louis, Kansas City & Colorado Railway Company should have the joint use of the "right of way, tracks, switches, side tracks, turn-outs, turntables and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth street in the city of St. Louis," and that for this use it should pay 6 per cent. per annum upon $500,000, one-half of the value of this property, and its proportion of the cost of its maintenance upon a wheelage basis. The Wabash Company appealed from this decree, and it was affirmed by the Supreme Court. Central Trust Co. v. Wabash, St. Louis & Pacific R. Co. (C. C.) 29 Fed. 546; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.

Eighteenth street runs north and south. The Union Station is located upon the west side of this street. The east line of Forest Park is about three miles west of Eighteenth street. At the time this decree was rendered the Wabash, St. Louis & Pacific Railway Company owned a strip of land which varied in width from 30 feet to more than 200 feet, and which extended from Eighteenth street to the east line of the park, and it also had an easement for the passage of its trains and engines upon a strip of land 42 feet wide through the park from the east side to the north side thereof. It had constructed and was operating a main track, side tracks, switches, and terminal facilities upon this property. Under this decree the Colorado Company entered upon, and continued in the joint use of, this main track and some of the side tracks, switches, and terminal facilities until 1902, when the Wabash Railroad Company, which had succeeded to the rights of the Wabash, St. Louis & Pacific Railway Company, limited its use to that necessary for the ingress and egress of its trains to and from the station over the main track and the side tracks requisite for their passage. Thereupon the Colorado Company applied to the court for an order that the Wabash Company be required to permit it to use all the terminal facilities of that company between the north line of the park and Eighteenth street, including its tracks, switches, turn-outs and turntables. Issue was joined, testimony was taken, and after a final hearing the court adjudged that the Colorado Company was entitled, under the terms of the original decree, to the joint use of the tracks and rail-

way facilities of the Wabash Company upon that strip of land upon which the main track of the Wabash Company was laid 42 feet in width through the park and only 28 or 30 feet in width from the east line of the park to Eighteenth street, and to the use of none of the other terminal facilities of the latter company. Central Trust Co. v. Wabash, St. Louis & Pac. R. Co. (C. C.) 144 Fed. 476. This decree is challenged by the appeal. The Colorado Company asserts, and the Wabash Company denies, that the "right of way" meant by the original decree was the entire strip then owned by the Wabash Company between the east line of the park and Eighteenth street; and the real question in this case is whether the joint use decreed to the Colorado Company in 1886 extended to the entire strip and the railway facilities thereon, or was limited to that portion thereof 28 to 30 feet wide upon which the main track had been built and to the improvements upon this narrower strip.

The parts of the decree pertinent to this issue read in this way:

"And the court doth further find, order, adjudge, and decree that the equities are with said interveners and said interveners are entitled to the relief as prayed for in their amended bill of complaint herein. And the court finds, adjudges, and decrees that the basis of compensation to be paid by the intervener, the St. Louis, Kansas City & Colorado Railroad Company, for the use of the right of way and tracks, side tracks, switches, turn-outs, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street, in the city of St. Louis, shall be the value of said right of way, tracks, and other property last described as determined by the master in his said reports, and the compensation to be paid shall be, per annum, 6 per cent. on one-half of the value of said right of way, tracks, side tracks, switches, turn-outs, turntables, and other terminal facilities, and the said one-half value is and shall be taken to be $500,000. * * * And the court doth further order, adjudge, and decree that the running of all trains, engines, or cars of said intervener, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way and tracks and the use of said right of way, road, terminal facilities, and other property specified as aforesaid, shall conform to the rules and regulations now in force and such other reasonable rules and regulations as may hereafter be adopted. * * * And the court doth further order, adjudge, and decree that in all respects subject to the terms of this decree the said railroad company, intervener, shall enjoy the equal use and benefit of said right of way, tracks, switches, side tracks, turn-outs, turntables, and other terminal facilities with said Wabash, St. Louis & Pacific Railway Company, or its said receivers, and the said Wabash, St. Louis & Pacific Railway Company, * * * and all persons claiming by, through, or under them, * * * are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervener * * * from using with it for their engines and cars (loaded or empty) the said right of way, tracks, switches, side tracks, turn-outs, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company between the north line of said Forest Park and said Eighteenth street. * * * And the said intervener, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents, and employés, and each of them, is hereby authorized and permitted with its right of way, road, tracks, and property, engines, and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park and to use the said right of way, tracks, switches, side tracks, turn-outs, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company, or any one claiming by, through, or under it as to the same, between the north line of said park and Eighteenth street, on the terms, in the manner and subject to the regulations in this decree set forth in and for the transaction of the business and in the operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns."

The ordinary signification of the term "right of way," when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located. Joy v. St. Louis, 138 U. S. 1, 44, 45, 46, 11 Sup. Ct. 243, 34 L. Ed. 843; Territory of New Mexico v. United States Trust Co., 172 U. S. 171, 181, 182, 19 Sup. Ct. 881, 43 L. Ed. 413; Id., 174 U. S. 545, 546, 19 Sup. Ct. 784, 43 L. Ed. 1079; Chicago & Alton R. Co. v. People, 98 Ill. 350, 356, 357; Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660, 663; Pfaff v. Terre Haute & I. R. Co., 108 Ind. 144, 148, 9 N. E. 93, 95.

To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel, the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and, when the terms of a decree are plain and clear, their ordinary meaning and effect may not be lawfully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it essayed to prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street. Its contention in this respect is based upon the pleadings and proceedings in the intervention and upon the earlier relations of the parties and their predecessors in interest, and a brief statement of some of the salient facts which condition it is essential to its understanding, but reference is made to the opinion of Mr. Justice Brewer who rendered the original decree, in 29 Fed. 546, and to the opinion of the Supreme Court in Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, for a detailed statement of the origin and history of the rights and litigation of these parties.

On August 11, 1875, the St. Louis County Railroad Company owned the title of or the easement to use about 12 isolated strips of land, which varied in width and which now constitute parts of the entire strip of the Wabash Company east of the park, and it claimed a right of way through the park. It had laid out, and it intended to build over these tracts, a railroad from the north line of the park to Eighteenth street. The St. Louis, Kansas City & Northern Railway Company, the predecessor in interest of the Wabash Company, was operating its railroad, and was anxious to extend it through the park to the Union Station along this line. Thereupon, on this 11th day of August, 1875, and as a part of the same transaction, these corporations made an agreement, the County Company made a deed, and the two companies and the commissioners of Forest Park made a

tripartite agreement, whereby the County Company agreed to, and did, convey to the Kansas City Company a strip 28 feet in width through each of its tracts between the east line of the park and Grand avenue, a strip 30 feet in width through each of its tracts between Grand avenue and Eighteenth street, and an undivided half of its right of way through the park, the park commissioners assured to the County Company a right of way through the park 42 feet in width, the County Company covenanted by the ninth paragraph of the tripartite agreement to "permit under such reasonable regulations and terms as may be agreed upon other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable conpensation to be paid therefor as may be agreed upon by such companies," and the Kansas City Company, as was subsequently held in 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, accepted its right of way through the park subject to the condition in the ninth paragraph of the tripartite agreement that this right of way and also the right of way it might acquire east of the park to Eighteenth street might be used by other railroads.

It is important to note and bear in mind the times when and the sources from which the Kansas City Company and its successor, the Wabash Company, acquired the title to the entire strip east of the park which it owned when the decree of 1886 was rendered, and upon which it had then constructed and was operating its railroad. The isolated tracks owned by the County Company in 1875 extended over less than one-half the distance between the park and Eighteenth street. The Wabash Company derived its title to strips 28 or 30 feet in width through these tracts under the County Company's deed of August 11, 1875. It secured the remainder of them under a deed to the Kansas City Company made in 1878. It acquired tracts between these isolated lands from third parties by purchase and condemnation, and these tracts were of varying width and covered more than one-half of the length of the entire strip. Thus this strip was made up (1) of strips acquired in 1875, 28 or 30 feet in width, through the isolated tracts then owned by the County Company which covered less than half its length (2) of the remainder of these isolated tracts deeded to the Kansas City Company in 1878, and (3) of the tracts of land of varying width between these isolated tracts. The court below seems to have overlooked this fact, for it states, as one of the controlling reasons for its conclusion that the right of way of the decree was only 28 or 30 feet in width east of the park, that:

"At the time the original decree was rendered the Wabash, St. Louis & Pacific Railway Company owned a right of way through Forest Park 42 feet wide, and a right of way 28 or 30 feet wide from Forest Park to the Union Depot at Eighteenth street in St. Louis, Mo. It derived all this right of way through an instrument of writing spoken of in all this litigation as the 'tripartite agreement.' That this last statement is true is distinctly shown by the language of the Supreme Court of the United States in 138 U. S., at page 43, 11 Sup. Ct., at page 255, 34 L. Ed. 843, in these words: 'The tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way.'"

The facts were, however, that at the time of the original decree the Wabash Company not only had a right of way 28 or 30 feet in width east of the park, but a wider one; that it neither derived all of this right of way nor all of the alleged right of way 28 or 30 feet in width from the tripartite agreement, but it derived the former from the three sources which have been specified, a portion of the latter from the deed of the County Company of August 11, 1875, the agreement of the two corporations of that date and the tripartite agreement, but the larger portion from third parties by subsequent purchase and condemnation of the lands between the isolated tracts owned by the County Company at that time; and that the tripartite agreement conveyed no title to, but imposed a condition upon the use of the Wabash Company's right of way and property east of the park. The statement of the Supreme Court that "the tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way" was true only because it was their only muniment of title to that portion of the right of way through the park. The park commissioners never had any title to any of the property east of the park, and they could have granted none. They claimed to have, and by the tripartite agreement they granted, the right of way through the park upon the condition that their immediate and remote grantees would permit its use and the use of their right of way east of the park to Eighteenth street by other railroads which might desire to enter the city over it. But the muniments of their title to the property east of the park were their deeds from former owners, and the tripartite agreement, instead of being a muniment of title to it, was an incumbrance upon it. Joy v. St. Louis, 138 U. S. 39, 40, 41, 42, 11 Sup. Ct. 243, 34 L. Ed. 843.

In 1886 the Colorado Company filed its intervening petition and its amended petition, alleged that it was one of the "other railroads" which the County Company by the ninth paragraph of the tripartite agreement covenanted to permit to use its right of way through the park and up to the terminus of its railroad in the city of St. Louis, that the Wabash Company held its right of way from the north line of the park to Eighteenth street subject to the condition expressed in that covenant, and prayed that the petitioner might enjoy the joint and equal use of it. The Wabash Company answered, among other things, that the alleged covenant and condition attached to those portions of the isolated tracts owned by the County Company in 1875, which it still held after it had conveyed the 28 and 30 feet strips to the Kansas City Company, and that those strips and the intermediate tracts which it had obtained by purchase and condemnation from third parties were exempt from them. But the court held otherwise, and rendered the decree that the Colorado Company should "enjoy the equal use and benefit of the right of way and the tracks, side tracks, and switches, turn-outs, turntables, and other terminal facilities of the Wabash Company between the north line of Forest Park and Eighteenth street." A sufficient statement of the origin and history of the rights of the parties and of the previous litigation has now been made to enable us to consider intelligently the reasons

urged by counsel for the Wabash Company why this decree should be construed to mean the right of way of the Wabash Company through the park, its right of way only 28 or 30 feet in width east of the park, and its railway facilities thereon.

Their first contention is that the description in the decree of the right of way and railway facilities between the north line of the park and Eighteenth street must be interpreted to mean "that strip of land which railways take upon which to construct their roadbed," and hence that on which the Wabash Company had constructed its roadbed in 1886, because, in the absence of that construction, no land or property of the Wabash Company could be found between the north line of the park and Eighteenth street, for the reason that the two lines run at right angles. But this argument just as conclusively demonstrates that the right of way of the decree must be interpreted to have its ordinary signification, the entire strip which the Wabash Company owned or had acquired the right to use for railroad purposes between the north line of the park and Eighteenth street and the tracks and railway facilities thereon, and it fails to advance the investigation.

The second argument is that the right of way east of the park specified in the decree is limited by the prayer of the amended bill and this sentence in the decree:

"And the court doth further find, order, adjudge, and decree that the equities are with the interveners and said interveners are entitled to the relief as prayed for in the amended bill."

The prayer of the amended bill was that the Wabash Company be enjoined from preventing the Colorado Company "from using said right of way of said Wabash, St. Louis & Pacific Railway Company" between the north line of the park and Eighteenth street, "including the tracks of said Wabash, St. Louis & Pacific Railway Company between" those lines, and for general relief. A careful search of this bill has disclosed nothing which limits "said right of way" mentioned in the prayer to 28 or 30 feet in width, but has brought to light a very clear indication that this right of way was wider, and that its width was not indicated otherwise than by the ownership of the Wabash Company. The interveners allege in this bill that on August 11, 1875, the St. Louis County Company had acquired a right of way 42 feet in width through the park and was the owner of a large part of such right of way east of the park; that it agreed on that day to convey the joint use of its right of way through the park and a strip 30 feet wide off the south side of its right of way east of the park to the Kansas City Company; that by the tripartite agreement its right of way through the park 42 feet in width was assured to it on condition that it should permit other railroads to use its right of way through the park and up to the terminus of its road in St. Louis; that on December 24, 1878, the Kansas City Company became the owner of all the remainder of the County Company's right of way and property between the park and Eighteenth street; and that in 1879 the Wabash Company succeeded to the Kansas City Company, and since that date "has used, enjoyed, owned, and operated all the

property formerly owned by said St. Louis, Kansas City & Northern Railway, including the railroad, and right of way from said Union avenue to Eighteenth street." These averments demonstrate that "said right of way" of the Wabash Company east of the park for the joint use of which the Colorado Company prayed was more than 30 feet in width, because they assert that the County Company owned parts of it in 1875; that it agreed to convey 30 feet in width off the south side of these parts on August 11th in that year; that the Kansas City Company acquired the remainder of them in 1878; and that the Wabash Company owned and operated all of them in 1886. The right of way east of the park described in the decree was not, therefore, limited to 30 feet in width by its reference to the amended bill or its prayer (1) because these contain no such limitation, but describe a wider right of way; and (2) because the subsequent terms of the decree which proceed to grant specifically the relief prayed in the bill, which constitute the most cogent evidence of the intention of the court, contain no such limitation.

It is next said that the stipulations, testimony, and opinions in the intervention limit the width of the right of way of the decree east of the park to 30 feet. In support of this contention, attention is called to a stipulation in that proceeding to the effect that the property conveyed by the deed of August 11, 1875, was marked in blue on the Chart A and was 30 feet in width as a rule. But this admission fails to indicate that the right of way of the Wabash Company in 1886, parts of which had been derived from two other sources, was not wider, and the parties made other stipulations to the effect that the tracts marked "Grover" on Chart A, which constituted the remainder of the isolated tracts of the County Company after it had conveyed the 28 and 30 feet strips, were subsequently obtained by the Kansas City Company, and "that the several lots and tracts of land now constituting defendant's right of way between Forest Park and the Union Depot [many of which were more than 30 feet in width] not indicated in blue or marked 'Grover' on Chart A, were obtained by the St. Louis, Kansas City & Northern Railway Company from divers persons by purchase and condemnation," an admission inconsistent with the claim that the Wabash Company's right of way east of the park was only 30 feet wide. When these various stipulations are read together, they fail to define or limit the width of the right of way east of the park otherwise than by the ownership of the Wabash Company.

In the course of the proceedings in the intervention, the value of the right of way and of the railway facilities thereon became an issue in determining the basis of the compensation to be paid by the Colorado Company for the use it sought. That company produced its chief engineer, who testified that he had constructed the railroad of the Kansas City Company from the north line of the park to Eighteenth street, and that its right of way east of the park was 30 feet wide, and it produced witnesses who testified that the value of this 30-feet strip without the improvements thereon was $265,000. On the other hand, the witnesses for the Wabash Company testified that

the value of all the property of that company between the north line of the park and Eighteenth street, including its tracks, side tracks and other appurtenances necessary for doing the railway business, was from $1,250,000 to $1,500,000, and the master found the value to be $1,000,000. This appraisal was subsequently approved by the court.

Perhaps the most persuasive argument of counsel for the Wabash Company is that Emerson, the engineer of the Colorado Company, testified that the right of way east of the park was 30 feet wide, that there were occasional places where there was a side track upon it, and that there could be but one track besides the main track upon this 30 feet; that the master found that the evidence of Emerson and of Lincoln (who was the engineer of the Wabash Company and who testified that the greatest width of the roadbed through the park was 38 feet, and that he did not know that he could state the width of the right of way from the park to Eighteenth street, that it was of irregular width at different places) showed that, owing to the construction of the Wabash Road and its side tracks and switches, another track could not be built on the right of way throughout the whole distance, although it might be on some parts thereof; and that, as the Colorado Company could not construct another railroad over the entire length of this right of way, it was entitled to use the tracks and railway facilities of the Wabash Company thereon, and Judge Brewer, when he was discussing in his opinion the contention of the Wabash Company that by the tripartite agreement the Wabash Company was required to permit other railroads to use its right of way only and was not bound to allow them to use its tracks or roadbed, said:

"The language of the ninth paragraph, under which, as before noticed, interveners must claim, is that the party of the second part shall permit other railroads to use its 'right of way.' Now, the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract, and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed. Obviously, in this paragraph it is used in the latter sense. Through both of these contracts the term 'right of way,' 'track,' and 'roadbed,' frequently appear, and in all cases the term right of way is used as descriptive of the strip above referred to. * * * So the county road conveyed to the Kansas Road outside of the park a strip either 30 or 28 feet in width for its right of way. My thought, at first, was that the interveners could only claim a right to use so much of this right of way as was not in fact occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas Road's right of way as it did not itself occupy and use; but after reflection on the argument of counsel I have been led to the conviction that this was too narrow a construction, and was not the real intent of the parties. The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track, and, as there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash Company, if my first interpretation had been correct, the interveners would plainly be without any rights."

If the learned judge had been considering or deciding the width of this right of way or had been endeavoring to give an accurate and comprehensive definition of the term "right of way" when he delivered this

portion of his opinion, it might have indicated that he deemed the right of way east of the park 28 or 30 feet wide. But statements in the opinions of courts are authoritative upon the issue pending for decision and under consideration and upon that alone. Judge Brewer was distinguishing the right of way which consists in the right to travel over property from the right of way which consists of the strip of land acquired by a railway company for its railroad tracks and facilities. He was not deciding whether a right of way of the latter class includes land taken by a railroad company which is necessary and convenient for railroad purposes including tracts for roundhouses, turntables, turn-outs, and switches, or was limited to "that strip of land which railroad companies take upon which to construct their roadbed." If he had been determining this issue, there can be no doubt what his decision would have been. He was not determining what the width of the right of way of the Wabash Company was, but whether or not the Colorado Company was entitled to use the tracks and other railroad facilities upon that right of way. For this reason, he did not attempt to set forth and did not accurately state the origin or extent of that right. His declaration that "the county road conveyed to the Kansas Road outside of the park a strip either 30 or 28 feet in width for its right of way" was sufficient for the discussion of the issue he was then considering. But it was inaccurate, and would have been misleading in the determination of the width of the Wabash Company's right of way, because, as we have seen, the county road conveyed only isolated strips of land which in the aggregate covered less than 50 per cent. of its length, and a still smaller percentage of its area. So his statement that the master's report showed "that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track," is a declaration not that the entire right of way was thus occupied, but, as the master's report was, that it was so occupied at some places that there was no room for another and independent track the entire length of it. This conclusion appears to have been as true of the entire strip as it was of the 30 feet, so that there is nothing in this statement in Judge Brewer's opinion or in the master's report or in the testimony upon which it is based to prove with any reasonable certainty that the decree which he subsequently rendered, and which on its face subjects the entire strip and all the railway facilities thereon then owned by the Wabash Company to the joint use, did not express his deliberate conclusion, or that he intended to limit that use to a part of this strip 30 feet in width and the tracks thereon.

Counsel for the Wabash Company review the foregoing facts, and insist that the Colorado Company is estopped from claiming that the decree gives it the joint use of more than 30 feet in width east of the park (1) by its amended petition, but the Colorado Company prayed in that petition for the use of a broader strip, the width of which was undefined, save by the limits of the strip then owned by the Wabash Company; (2) by the stipulation that the property conveyed by the deed of August 11, 1875, was 30 feet in width as a rule, but the parties made another stipulation that the tracts of varying width between the detached strips conveyed by that deed were also parts of the right of way

of the Wabash Company; (3) by the evidence of its witnesses that this right of way was only 30 feet wide, and that its value, without the improvements thereon, was only $265,000, and by the position of its counsel, stated in an objection to evidence offered by the Wabash Company of the value of all its real estate between the north line of the park and Eighteenth street and of the tracks and side tracks thereon and the other necessary appurtenances, that the Colorado Company was not asking for the use of these tracks, side tracks, or appurtenances, but for the use of the strip of 30 feet without them only. But no estoppel arose here because the Wabash Company secured an overruling of the objection and a disregard of the testimony and obtained a decree upon the opposite theory. The record discloses no act or omission of the Colorado Company before the decree, which estopped it from claiming the full benefit of it.

It is strenuously contended, however, that counsel for that company conclusively estopped it from securing the use of more than 30 feet in width of the property of the Wabash Company east of the park by the answer they made in their brief upon the appeal to the complaint of the Wabash Company that the decree was too broad. That complaint was:

"The court erred in entering a decree broader than the contract. Even if the ninth clause of the tripartite agreement was binding on the Kansas City Company, it only required it to permit other railroads to use its 'right of way,' and yet a decree was entered giving respondent the use of 'the right of way, tracks, switches, turn-outs, turntables, and other terminal facilities of the Wabash Company' at St. Louis. Again, the decree is not only broader than the contract, but it is broader than the prayer of the petition. The prayer of the petition is that the Colorado Company be permitted to use the right of way of the Wabash Company, 'commencing at the north line of said park, thence over said right of way to Eighteenth street in said city of St. Louis, by running its engines and cars over and upon said right of way, including the tracks of said Wabash Company between said points.' The contract only related to 'right of way.' The prayer of the petition was for the use of 'right of way and tracks,' and the decree not only gives them the use of the 'right of way and tracks,' but it subjects to the use of respondent the 'switches, side tracks, turn-outs, turntables, and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use. Therefore, no matter what view may be taken of the case in other respects, the decree was erroneous in two particulars: First, because it is broader than the covenant; and, second, because it is broader than the prayer of the bill. Both of these objections are elementary."

And the counsel for the Colorado Company answered it in these words:

"The contract permits other roads to use the tracks of the County and Kansas City Roads, and the decree gives the use of the tracks, including turntables and other terminal facilities of the Wabash Company on its right of way. The record shows that the width of the right of way of appellants at Tayon avenue or Eighteenth street, being the terminus of the road at the Union Depot, is about 40 feet. This is shown by Chart A, in evidence. The side tracks, turn-outs, etc., mentioned in the decree at the terminus, are upon this 40 feet, which is the right of way. Appellants have no depot of any kind, freight or passenger, to be used by any other road. The turntable, of course, is necessary for use of the tracks, as also the switching and sidings. Respondents, under the decree, could only use what the evidence shows the appellants had; hence there is nothing in the contention that the decree is broader than the provisions of section 9, or the prayer of the bill. * * * The record further

shows that the Union Depot Company take charge of all trains, and have side-track facilities for loading and unloading trains."

The most striking thing about these arguments is that counsel for the Wabash Company nowhere claimed that the decree was too broad because it granted the joint use of all its right of way east of the park upon the ground that the condition on which the decree was founded extended to a strip only 30 feet in width through it, but conceded that the grant of its entire right of way and tracks was admissible and objected only to the grant of the use of its switches, side tracks, turnouts, turntables, and terminal facilities. Nor did it object to the grant of this use upon the ground that these were not upon its right of way or upon the 30-foot strip, but upon the sole ground that, while the decree admissibly gave to the Colorado Company the joint use of its right of way and tracks, the grant of the use of its "switches, side tracks, turnouts, turntables, and other terminal facilities" was unwarranted. Nor do we find in the answer of the Colorado Company any concession or statement that the width of the right of way of the decree was 30 feet. On the other hand, it contains the counter assertion that it was about 40 feet in width at its eastern terminus, and that the side tracks, turnouts, etc., at this terminus were upon this 40 feet. An assertion that a right of way is 40 feet wide at one end cannot work an estoppel from insisting that it is more than 30 feet in width at that or any other point. The objection of the Wabash Company which has been under consideration was overruled by the Supreme Court, the decree was affirmed, and thereby the question whether or not the decree was too broad became res adjudicata.

This court has not failed to appreciate the facts that the public interest and the pecuniary interests involved in this litigation are important and permanent, and that the effect of its decision may reach far into the future. All the reasons suggested by the court below and by the Wabash Company why the decree of 1886 should be limited to, or construed to mean, a right of way 28 or 30 feet in width east of the park and the railway facilities thereon only, have been thoughtfully and deliberately considered, and their main arguments have been discussed. They have failed to convince with any certainty that such is the true meaning of the decree or that such was the intention of the judge who framed it or of the Supreme Court which affirmed it. On the other hand, the facts that the Colorado Company described, and prayed for the use of a wider strip in its amended bill; that the turntables described in the decree and some of the side tracks and turnouts were not upon the 30-foot strip; that the right of way at Eighteenth street was stated to be 40 feet in width in the Supreme Court; that no claim was ever made by the Wabash Company during the litigation which resulted in the decree that the use of the Colorado Company should be limited to a tract of less width than the entire strip then owned by the Wabash Company; that this entire strip was necessary or convenient, and was secured by the Wabash Company for its tracks, side tracks, and terminal facilities; that the ordinary significance of the term "right of way" under such circumstances is the entire strip procured for such purposes, and the plain and unlimited provision of the

decree that the Colorado Company shall enjoy the use "of said right of way, tracks, switches, side tracks, turn-outs, turntables, and other terminal facilities" of the Wabash Company between the north line of the park and Eighteenth street—cogently persuade that the true meaning of the decree and the actual intention of the learned jurist who rendered it was to adjudge to the Colorado Company the use of the entire strip then owned by the Wabash Company and the railway facilities thereon. And, when to these considerations are added the fact that the partial defense that the condition of the tripartite agreement which was the foundation of the intervention attached to only 30 feet in width of the wider strip which the Wabash Company owned was open to that company in that proceeding in both courts, and was never presented, and the indubitable rule of law that in a second suit between the same parties or those in privity with them upon the same claim or demand a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand (Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Dickson v. Wilkinson, 3 How. 57, 61, 11 L. Ed. 491; Dimock v. Copper Co., 117 U. S. 559, 565, 6 Sup. Ct. 855, 29 L. Ed. 994; Commissioners v. Platt, 79 Fed. 567, 571, 572, 25 C. C. A. 87, 91, 92), there remains no legal or rational way of escape from that conclusion.

The evidence and arguments drawn from the acts and omissions of the parties since the decree of 1886, was rendered have been considered, but nothing has been discovered in them to avoid or modify this conclusion.

Finally, counsel contend that this is not a "hard and fast" decree; that the Colorado Company is applying to a court of equity to enforce it; that the court should not grant inequitable relief; and that any broader relief than that given by the decree challenged by this appeal would be of this character.

A decree for the joint use of railway facilities may be fair and just when rendered, and such radical changes may subsequently be wrought that its continued enforcement would work great injustice. A court of equity always has the power and the judicial discretion to refuse to compel inequity and to condition the relief it grants with the requirement that he who seeks equity shall do equity. If such changes in the situation, rights, or relations of these parties had occurred subsequent to the entry of this decree that its continued enforcement would be unjust, the courts would withhold their aid or condition it by new and equitable terms. But the original decree was conclusive of the rights and remedies of the parties at that time and thereafter until subsequent changes of conditions rendered some modification of the relief it granted just and equitable. It is to be interpreted and enforced in the light of the rules and principles of equity and of the opinions of the courts upon which it was founded. For example, the use granted to the Colorado Company is the surplus use, that use which the business of the Wabash Company does not require, and, as Judge Brewer said in the opinion upon which the decree is based, the time may come when that business will demand the entire use of the property, and the Colo-

rado Company's right to use it may entirely cease. Central Trust Co. v. Wabash, St. L. & P. R. Co. (C. C.) 29 Fed. 558. But there is no evidence in this case of any such requirement or of any change of conditions which now renders the original decree less just than when it was entered. Nor was it originally, nor is its enforcement now, inequitable or unjust. Questions of this nature have repeatedly received the consideration of this court, and its views upon them have been approved by the Supreme Court. Union Pac. Ry. Co. v. Chicago, R. I. & Pac. Ry. Co., 2 C. C. A. 174, 232, 234, 51 Fed. 309, 318, 319, 321; Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 585, 16 Sup. Ct. 1173, 41 L. Ed. 265; Union Pac. Ry. Co. v. Mason City & Fort Dodge Ry. Co., 64 C. C. A. 348, 358, 128 Fed. 230, 240; Union Pacific Co. v. Mason City, etc., Co., 199 U. S. 160, 171, 26 Sup. Ct. 9, 50 L. Ed. 134. In the case first cited we said:

"Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other."

And we sustained and enforced a contract of the Union Pacific Company to grant the surplus or waste use of its bridge and terminal facilities at Omaha and South Omaha to the Rock Island Company. In the Mason City and Ft. Dodge Case this court enforced a similar use of the same property by another railroad company under acts of Congress, and said in answer to the argument that the latter company might build its own bridge:

"The latter suggestion is unworthy of serious consideration. It is undoubtedly possible, but it is neither practicable nor advisable, either in the interest of the appellee or in the interest of the public whom it serves, that that company should invest the large amount of money that would be required to construct another bridge and to purchase a right of way through the city of Omaha, and that it should consequently impose upon the traffic of the country the tax that would be necessary to pay it a fair income upon such an investment."

It is undoubtedly possible for the Colorado Company to acquire the railway facilities in the city of St. Louis which it seeks under the decree of 1886 by purchase, condemnation, and construction or by a more expensive contract with the Wabash or with some other company, but such a proceeding would burden the traffic of the country with the tax necessary to pay a fair income upon the investment or the increased expense of the new contract. The Wabash Company has the use of the right of way and of railway facilities in the city of St. Louis a part of which its business does not require. It obtained it subject to a condition imposed by the park commissioners for the benefit of the city and of the citizens of St. Louis that the Colorado Company should enjoy this surplus use on reasonable terms. Those terms have been determined and have been approved by the highest court in the land. No change of conditions since the decree of 1886 was rendered has been proved which makes its enforcement oppressive, and it is just and equitable to it, to the public and to the Colorado Company that it should be enforced as it was rendered until some such change is wrought.

The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side tracks, turn-outs, turntables, and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial, or railway facilities of the Wabash Company beyond the limits of that strip. Union Pac. R. Co. v. Mason City & Ft. Dodge R. Co., 199 U. S. 171, 26 Sup. Ct. 19, 50 L. Ed. 134.

The question whether or not equity demands the decree in this case to be conditioned by the requirement that the Colorado Company shall henceforth pay, in addition to the amount specified in the decree of 1886, 6 per cent. per annum upon one-half of the cost or value of the improvements which the Wabash Company has placed upon this right of way since 1886 or by any other requirement and questions pertinent to an accounting between the parties have not been considered, because there is no cross-appeal, and this decision does not foreclose the consideration and determination of these issues, if any, by the court below previous to the entry of its decree. Guarantee Co. v. Phenix Ins. Co., 59 C. C. A. 376, 124 Fed. 170.

The decree below is reversed, and the case is remanded to the Circuit Court with instructions to render a decree not inconsistent with the views expressed in this opinion.

HOOK, Circuit Judge (specially concurring). I concur in the reversal of the decree of the trial court, and also for the most part in what is said in the foregoing opinion. I do not, however, concur in the exclusion of the industrial tracks from the operation of the decree of 1886. These tracks are the usual and necessary features of railway terminals in a large city, and are as much a part thereof as the limbs are of a tree. They go with the right of way as appendages thereto, and are always so regarded. Their use is essential to the enjoyment of the rights awarded. In my opinion they are clearly within the spirit of the decree of 1886, and also by fair construction within its letter. The decree granted to the intervener the "right of way, tracks, switches, side tracks, turn-outs, turntables, and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth street in the city of St. Louis." This is very broad language and it was repeatedly employed in the decree. That Judge Brewer intended to include such industrial tracks as were in existence when the decree was made also seems plain from his opinion (29 Fed. 559). The cost of their construction was included in the total cost upon which the percentage compensation to be paid by the intervener was based. Moreover, the consistent course of conduct of the parties for 13 years following the decree shows that they regarded them as being a part of the property the joint use of which was granted to the intervener. I am unable to see any persuasive reason for excepting them from the comprehensive enumeration of terminal facilities in the decree. That they extend beyond the side lines of the strip of land owned by the Wabash Company and upon the land of others seems to me to be a circumstance wholly immaterial and yet it must

be the circumstance upon which their exclusion from the decree is made to depend. The Wabash Company owns these industrial tracks and operates them as part of its right of way and terminal facilities. Of what importance is it that they are in part upon public highways and the land of others under license instead of being wholly upon land owned by that company? If the latter condition existed, it would doubtless be conceded that they fell within the decree. The scope of the decree is therefore determined not by the character of the tracks and their relation to the right of way and terminal facilities as a whole with which the court was dealing but by the character of the title of the Wabash Company to the ground upon which the tracks are laid. It seems to me there has been a narrowing of the decree in this particular.

The case of the Union Pacific Company v. Mason City Company, 199 U. S. 160, 171, 26 Sup. Ct. 19, 50 L. Ed. 134, is not an authority for this construction of the decree. The court was there considering a claim of the Mason City Company for the use of the Union Pacific bridge across the Missouri river at Omaha, and its approaches. Naturally this would not include industrial tracks and switches. Indeed, when rightly regarded, the decision of the Supreme Court makes for a conclusion contrary to that reached by my associates. An act of Congress conferring in most general terms upon other railroad companies the right to cross the bridge at Omaha was held to give the Mason City Company the right not only to cross the bridge, but to use several miles of main and passing tracks of the Union Pacific in the cities of Omaha and South Omaha. The decision well serves to illustrate the liberality with which provisions of the kind we are now discussing are construed when public interests are involved.

Of course, the right to use industrial tracks laid since the decree of 1886 was rendered would require consideration of the subject of compensation. The compensation specified in the decree does not include them.

There are also some other observations near the close of the foregoing opinion which I think are not necessary to the consideration of the case. They relate to conditions which it is conceded do not exist at present and which may never arise in the future. I do not wish to express or concur in any view concerning them until they arise and are presented for judgment in the usual way.

WHEELER-STENZEL CO. v. NATIONAL WINDOW GLASS JOBBERS' ASS'N.

(Circuit Court of Appeals, Third Circuit. February 28, 1907.)

No. 63.

1. MONOPOLIES—CONTRACTS AND COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—COMBINATIONS PROHIBITED.

A declaration alleged that defendant corporation was engaged in purchasing and contracting for the purchase of window glass from the manufacturers for certain named jobbers and wholesale dealers doing business in different states, who owned practically all of defendant's stock and

controlled it; that such dealers comprised over 75 per cent. of all those in the United States, and sold more than 75 per cent. of the window glass sold therein; that up to a certain date they were uncombined, and competed freely with each other and with other wholesale dealers, but that on such date defendant entered into a combination and agreement with them and with a manufacturer which owned and operated factories in different states and manufactured 70 per cent. of all the window glass made in the United States, by which defendant and such dealers agreed to buy window glass from no other manufacturer unless at materially lower prices, and such manufacturer agreed to sell to no other dealers, except at higher prices than it charged them; that such agreement further limited the quantity of window glass to be purchased by each of such dealers to such as should be arbitrarily fixed by defendant and the manufacturer, and also gave them the power to arbitrarily fix excessive and unreasonable prices which were to be charged retail dealers, which prices such wholesale dealers agreed to observe under penalty of fines to be assessed against and paid by them; that it further restricted and limited the territory within which each of such dealers should sell to retail dealers, the object and effect of such combination and agreement being to restrain interstate commerce in window glass, to destroy competition therein, and to practically monopolize the same, especially in the better grades, which were practically all made by such manufacturer. *Held*, that the declaration charged a contract or combination in restraint of interstate commerce, in violation of the Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], which, as construed by the Supreme Court, makes unlawful any contract or combination in restraint of such trade or commerce, and not merely those which are in unreasonable restraint of trade and therefore illegal at common law.

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

2. SAME—RIGHT OF ACTION FOR DAMAGES.

A contract or combination in restraint of interstate commerce, prohibited by Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], is not merely illegal in the sense that it is not enforceable, but is per se unlawful, and one who is harmed in his business or property by such a contract or combination has suffered a legal injury, within the meaning of section 7 of the act, and is by such section given a right of action therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 18.]

3. SAME—PLEADING.

Where a declaration sufficiently charges a contract or combination on the part of defendants in restraint of trade and commerce among the states, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], general allegations showing that the result of such contract or combination was to deprive plaintiff of customers, and prevent it from making a profit in its legitimate business as theretofore, are sufficient to support an action for treble damages, under section 7 of the act.

[Ed. Note.—Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

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

H. P. Lindabury, for plaintiff in error.

Theodore W. Morris, Jr., for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This suit was brought by the plaintiff in error in the court below, to recover treble damages, etc., from the de-

fendant in error, under section 7 of the act of Congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, commonly called the "Sherman" or "Anti-Trust" act. Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]. The first and seventh sections of this act are those with which we are here concerned, and are as follows:

"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 any 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. 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 three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The declaration contained two counts, one based upon an alleged combination and conspiracy in restraint of trade, contrary to the provisions of the anti-trust act, the other upon an alleged contract or agreement in restraint of trade, likewise contrary to the provisions of said act. In other respects, the two counts are the same. The first is sufficiently set forth in the margin.[1]

To this declaration, the defendant interposed a demurrer, stating the following grounds therefor:

"(1) The said plaintiff has not in the said declaration or in either of the counts of its said declaration alleged facts showing that it has been injured in its business or property by the said defendant by reason of anything forbidden or declared to be unlawful by the act of Congress of the United States referred to in the said declaration, and entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2d, 1890.

"(2) The said plaintiff has not in the said declaration or in either of the counts of the said declaration alleged any fact or facts constituting a violation by the defendant of any provision or provisions of the said act of Congress, or any fact or facts which bring the defendant within the condemnation of, or subject the defendant to any penalty or penalties imposed by the said act, or which in any wise rendered the defendant liable to the plaintiff for any damages.

"(3) The said plaintiff has not in the said declaration, or in either of the counts thereof, alleged any contract, combination in the form of trust or otherwise, or conspiracy made or entered into by the defendant in restraint of trade or commerce among the several states, or with foreign nations in violation of the said act of Congress.

"(4) The said plaintiff has not in the said declaration or in either of the counts of the said declaration alleged any facts showing that the defendant has monopolized or attempted to monopolize, or combined or conspired with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, in violation of the said Act of Congress.

"(5) The plaintiff has not in the said declaration or in either of the counts of the said declaration, alleged any facts showing that it has suffered any damage by reason of any of the acts or facts complained of in the said declaration.

"(6) That for the reasons and in the particulars aforesaid, the said declara-

[1] See note at end of case.

tion does not state facts sufficient to constitute a cause of action against the defendant."

After argument, the demurrer was sustained by the court below, upon the ground that the plaintiff had not, in its declaration, shown that it was injured or had been damaged by any of the acts of conspiracy, combination or agreement stated in the declaration, without referring to the point that the contract, combination or conspiracy set forth in the declaration was not in violation of the anti-trust act, except to say "that such argument was only incidentally made but not insisted upon." Judgment was rendered by the court sustaining the demurrer, and the writ of error thereto sued out by the plaintiff below brings the record into this court. The assignments of error may be taken as presenting the following questions:

First. Whether, as is contended by defendant in error to be true, the plaintiff fails to allege in the declaration anything forbidden or declared to be unlawful in the so-called anti-trust act, by reason of which any alleged injury or damage has resulted to itself.

Second. Whether, as is contended by defendant in error to be true, the declaration fails to allege or show any legal injury to the plaintiff, and therefore does not state a cause of action either at common law or under the statute.

Third. Whether, as is contended by defendant in error to be true, the declaration fails to state facts showing that the plaintiff sustained any damage whatever by reason of any act of the defendant.

The first of these questions confronts us at the threshold of our inquiry. If the conduct and acts of the defendant, as alleged in the declaration, do not constitute and show on their face a contract, combination or conspiracy, as denounced in the first section of the act of Congress above referred to, then the essential foundation of the action, authorized by the seventh section of said act, is wanting. Turning then to plaintiff's declaration, as set out in the record, do we find a sufficient statement of such a contract or combination? From a careful survey of this pleading, it seems very clear, that the combination or contract complained of, by its obvious scope, and by the exigency of its terms, concerned the purchase and sale of window glass between manufacturers in certain states and dealers in other and different states, which is the very definition of trade and commerce among the states. Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Montague v. Lowry, 193 U. S. 38, 47, 24 Sup. Ct. 307, 48 L. Ed. 608.

Indeed this is not here denied. Relating, therefore as it did, to commerce among the states, was the combination or contract described and set out in the declaration, in restraint of that trade and commerce within the meaning of section 1 of the act?

The scope of this question has been much narrowed by the later decisions of the Supreme Court. In the early cases in the federal courts, the purpose of the act was held to be applicable only to those contracts which were unlawful at common law, but which require the sanction of a federal statute, in order to be dealt with in a federal court. U. S. v. Freight Ass'n, 166 U. S. 290, 327, 17 Sup. Ct. 540,

41 L. Ed. 1007. It was held, therefore, that only such combinations or contracts as were in unreasonable restraint of trade, and therefore at common law illegal, were aimed at by the statute, whose true meaning was in consonance with the language of its title, viz., "An act to protect trade and commerce against unlawful restraints and monopolies." In the case above referred to, however (U. S. v. Freight Ass'n), the Supreme Court, speaking by Mr. Justice Peckham, says: "The term" (in restraint of trade and commerce) "is not of such limited signification." Having stated that the language used in the title refers to and includes, and was intended to include, those restraints and monopolies which are made unlawful in the body of the statute, the opinion proceeds:

"Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

Every contract or combination, therefore, whether reasonable or unreasonable, which directly restrains or which necessarily operates in restraint of trade or commerce among the states, is denounced and made unlawful by the act. The Supreme Court has also decided that a contract or combination, whose object or necessary result is to destroy competition in whole or in part, in trade or commerce among the states, is in restraint thereof, and therefore within the inhibition of the act. Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. In this case, the Supreme Court, by Mr. Justice Harlan, says:

"In all the prior cases in this court, the anti-trust act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce, was to restrain such commerce."

And it was held that such was the proper construction of the act, and that so interpreted it was within the constitutional power of Congress to enact under the commerce clause of the Constitution. The opinion then continues:

"Whether a free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce, is an economic question, which this court need not consider or determine. * * * Be all this as it may, Congress has, in effect, recognized the rule of free competition, by declaring illegal every combination or conspiracy in restraint of interstate and international commerce."

It is true that, in this case, the court were dealing with what was held to be a combination between two railway companies, the necessary operation of which would tend to destroy competition between them, as to the rates at which commodities would be carried from state to state. But, if the interpretation given by the Supreme Court to the act is applicable to those who control the mere instrumentalities of interstate commerce, such as common carriers are held to be, a fortiori it is applicable to those who initiate, carry on and control that commerce itself. U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Swift & Co. v. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

The declaration is long and somewhat redundant in phraseology and statement. Much of it is taken up with matter of inducement, as that the plaintiff was a wholesale dealer and jobber in window glass, doing business at Boston, a large part of which consisted of trade in window glass among the several states; that the defendant is and was a corporation engaged in purchasing window glass or obtaining contracts for the purchase of window glass for manufacturers in certain specified states, for certain jobbers and wholesale dealers doing business in other states and specified in a list set forth; that these wholesale dealers owned a large majority of the stock in and controlled the defendant corporation; that the American Window Glass Company, up to the time of the combination complained of, owned and operated factories in certain specified states, and sold and delivered its product to wholesale dealers in each of the states, and was thereby engaged in interstate commerce; that the plaintiff had had large dealings with the said American Window Glass Company and imported its product into Massachusetts and sold it in the New England states, where window glass is not manufactured; that the wholesale dealers specified constituted more than 75 per cent. of the jobbers and wholesale dealers in window glass in the United States, and had more than 75 per cent. of the wholesale business; and that, prior to the acts complained of, the wholesale dealers specified were uncombined, and were buying window glass in competition with each other and with other wholesale dealers, and selling such glass in open competition to retail dealers in the several states, including the New England States and New York.

The declaration then proceeds to allege:

"That on the fourteenth day of February in the year nineteen hundred and thereafter continuously until the fourth day of August, in the year nineteen hundred and three, in order unreasonably to restrain trade and commerce in window glass among the several states, and with intent to absorb and monopolize the inter-state trade and commerce in window glass, and to stifle and put an end to competition in such trade; and in order to control and restrict the output, and to control and regulate the prices of window glass manufactured and sold in and among the several states, and to increase and arbitrarily fix the prices at which window glass should be sold in trade and commerce among the several states, independent of the natural market price of such glass; and to enable the said wholesale dealers hereinabove named to obtain excessive and unreasonable prices in trade and commerce in window glass among the several states, and to enable these dealers to obtain substantially all the window glass of the best quality manufactured in the United States

and prevent all other wholesale dealers and jobbers from obtaining such glass except at unreasonable prices much higher than the prices paid by the said wholesale dealers hereinabove named, the defendant corporation combined and conspired with the American Window Glass Company and with the wholesale dealers hereinabove named, unreasonably to restrain, and in pursuance of this combination and conspiracy, did unreasonably restrain, * * * by restricting the sale of all of the glass manufactured by the American Window Glass Company to the wholesale dealers named as aforesaid, except at unreasonable prices, from two and one-half per cent. to five per cent. higher than the prices charged to these wholesale dealers named as aforesaid, by arbitrarily fixing unreasonable and excessive prices to be charged by these wholesale dealers named as aforesaid, to retail dealers in window glass throughout the United States, by restricting and limiting the quantity of window glass to be purchased by each of the said wholesale dealers hereinabove named to quantities to be arbitrarily determined by the defendant and the American Window Glass Company; by the refusal of the wholesale dealers named as aforesaid to purchase any window glass from any other manufacturer than the American Window Glass Company except at prices at least five per cent. below the prices charged by it, which lower prices were less than the cost of manufacturing such glass; by establishing rules and regulations forbidding the said wholesale dealers hereinabove named from selling window glass to other wholesale dealers at prices lower than the prices fixed under penalty of pecuniary fines to which each of the said wholesale dealers hereinabove named agreed with each other and with the defendant corporation to become liable; by mutually agreeing to refuse to purchase any window glass at any price from any manufacturer who should not close his factories and restrict the output of window glass produced by him at such times and in such manner as such restrictions of output should be arbitrarily imposed by the American Window Glass Company; and by restricting and fixing the territory within which each of the said wholesale dealers hereinabove named should sell window glass to retail dealers, so that none of them should sell to any retail dealer in any other territory except under arbitrary restrictions imposed by the defendant corporation."

We think, in the language quoted, there is sufficiently averred the existence of a contract or combination, to which the defendant was a party, which, by its necessary operation, was in restraint of interstate trade and commerce in window glass. It was obviously designed to destroy or minimize competition between certain wholesalers and jobbers in window glass, alleged to be 75 per cent. of the whole number so engaged in the United States, and, in the language of the Supreme Court, "to destroy or restrict free competition in interstate commerce is to restrain such commerce." It is argued with much force and ingenuity by the defendant in error, that the combination set out in the declaration, was only an agreement by which a certain number of wholesalers were to trade exclusively with a certain manufacturer, with the reciprocal understanding that the manufacturer was to sell to no one else, except at a price higher than that paid by the parties to the contract; that this was, in effect, nothing more than an agreement to sell to one person or to several at a price advantageously lower than the general price, on condition that such person or persons would buy exclusively from the manufacturer so agreeing. In other words, the American Window Glass Company had the right to select its customers and charge one price to one and another price to another. It had the right to offer certain inducements to certain customers in exchange for their exclusive trade. And it had the right to do all or any of these things. But it is always to be borne in mind, in considering arguments of this kind, that the act of Congress has

made, and was intended to make, illegal, many sorts of contracts and agreements that prior thereto were not only legal, but were regarded as meritorious and beneficial, and has materially restricted the area within which freedom of contract may be exercised.

There is something more, however, set forth in the declaration affecting the character and operation of this contract. Prices to retail dealers were to be arbitrarily fixed by those wholesale dealers, to which prices they were all required to conform. The quantity of glass to be purchased by each of said wholesale dealers was to be arbitrarily determined by the American Window Glass Company, and they were to be prohibited from purchasing from any manufacturer who should not close his factories and restrict the output of glass when and as required so to do by the American Window Glass Company. These stipulations clearly tended toward the creation of a monopoly, and if adhered to and carried out, manifestly restricted the scope of competition in the commodity referred to. It may be quite true, that such an agreement would have been valid at common law, or if invalid as to the parties, would not have been illegal, but the act of Congress has affected it with illegality, so far as the trade or commerce restrained by it is interstate in its character. We conclude, therefore, that the contract or combination set out in the declaration is one in violation of the first section of the anti-trust act, and that an action properly accrues under the seventh section to any one who has been injured in his business or property by reason thereof.

We come now to the second question raised by the assignments. It is strenuously insisted by the learned counsel for the defendant, that unless the injury to plaintiff's business or property, alleged in the declaration and for which he brings suit, is a legal injury, plaintiff does not state a cause of action under the statute. At great length, both in oral argument and in defendant's brief, it has been urged that the word "injured," in the seventh section of the statute, is used in a technical sense, and imports an injury as recognized at common law, that is, as a harm inflicted by commission of a wrong or tort; that injury and damage are different legal concepts, and the one should not be confounded with the other. Abstractly, this is all true, and the phrase, "damnum absque injuria," so often recurring in legal discussion, serves to emphasize the distinction on which defendant's counsel insists. In support of the proposition, that no legal injury resulting to the plaintiff, by reason of defendant's violation of the anti-trust law, has been or can be alleged by plaintiff, it is contended that at common law, agreements in restraint of trade, however clearly established, unless unreasonable in themselves, were not illegal, and if no unlawful means were practiced to carry them into execution, no action accrued to one who claims to have been harmed thereby. This is the doctrine of Mogul Steamship Co. v. McGregor (as finally decided in the House of Lords, in December, 1891) L. R. App. Cas. (1892) p. 25. It will be remembered that that celebrated case grew out of the formation, by a number of ship owners, of an association, to secure, at profitable rates exclusively for themselves, the carrying trade from Chinese ports to Europe. This was to be accomplished, in part, by a rebate of five per cent. on freights to all shippers who

shipped exclusively with members of the association, it being announced that any one, even though usually a shipper in ships of the association, who employed the ship of any outside owner, should not be entitled to the rebate during a certain period. It was also agreed that the association should send ships to any port where the ships of outside owners were seeking cargoes, and by lowering rates to an indefinite extent, even though cargoes had to be carried at a loss, drive out of business the competing vessels. One of such competing owners brought his action against the members of the association, on the ground that their agreement, being in restraint of trade, was an unlawful one, and that therefore a private injury suffered by plaintiff, by reason thereof, was actionable. The facts involved were not unlike those in the present case. The Lord Chancellor and the judges were unanimous in the judgment delivered by them to the House of Lords. They all concurred in the opinion that, though the contract was in restraint of trade, and might be illegal in the sense that it was not enforceable at law—was invalid inter sese—it was not unlawful or illegal in the stricter sense of those words, and that no action accrued to one who suffered loss thereby, unless the means used to enforce the agreement was itself unlawful; such as fraud, misrepresentation, physical compulsion, or the persuading of another to break a binding contract. The following language used by Lord Chancellor Halsbury, in delivering his opinion in the House of Lords, will exhibit in part the reasoning upon which plaintiff was held to have suffered no injury or actionable loss or harm:

"A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word 'unlawful' is not uncommonly, though I think somewhat inaccurately used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful,' which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as contrary to law, is not applicable to such contracts."

He adds:

"It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated."

Lord Bramwell states his position thus:

"I think, upon the authority of Hilton v. Eckersley, 6 E. & B., 47, and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. But that is not enough for the plaintiffs. To maintain their action on this ground, they must make out that it was an offence, a crime, a misdemeanor. I am clearly of opinion it was not. Save the opinion of Crompton, J. (entitled to the greatest respect, but not assented to by Lord Campbell or the Exchequer Chamber), there is no authority for it in the English law."

It was held, therefore, that the plaintiff had suffered no legal injury, and that no action would lie. The much argued and interesting case

of Allen v. Flood, L. R. A. C. (1898) 1, though differing in its facts from the case at bar, illustrates to some extent the general doctrine, that, however harmful to others individual or combined action may be, if it is not unlawful, the damage or harm so inflicted does not constitute legal injury at common law.

But it does not follow, as is argued by defendant that it does, that, because at common law contracts and combinations in restraint of trade were only illegal in the sense of being unenforceable, as being contrary to public policy, and that private wrongs cannot be predicated thereon, proper legislative authority has not, by making such contracts and combinations absolutely unlawful, created a right of private action in one who has suffered in business or property thereby, even though such damage or loss would not have been actionable at common law. There is the implication in all the judgments delivered in Mogul Steamship Co. v. McGregor, supra, that it is because agreements in restraint of trade are not per se unlawful, that, apart from unlawful means in carrying them out, no private rights of action can be predicated thereon, but that if such combinations were illegal, in the strict sense of that word, and constituted a public wrong, whether by common law or by statute, one who incurred substantial loss thereby suffered a legal injury for which a private action would lie. Of course the result must be the same, whether the public offense or misdemeanor exists by virtue of common law or statute. In either case, it exists by law. The defendant argues that, although the first six sections of the statute provide that such contracts or combinations shall not only be illegal and void, as they were at common law, but also constitute crimes against the United States, yet there is absolutely nothing in them referring in any way to private rights or private remedies, and that section seven, while it gives a private right of action, does so only where violation of the preceding sections results in a legal injury at common law to the plaintiff, and that nothing in this section can possibly be construed into making such contracts and combinations themselves wrongs or torts against the person who suffers harm thereby; that it is only where there has been such an injury, some tort or breach of contract resulting from the public offense, that the party injured may recover the three fold damages authorized in section seven. But so far as the right of action is concerned, that must be based upon an individual legal injury just as at common law. There is an obvious fallacy in this reasoning. Private actionable injury could not be predicated on such combinations in restraint of trade, as were considered in Mogul Steamship Company v. McGregor, for the reason, as we have seen, that such agreements were not criminal or unlawful by the common law; but such combinations, so far as they affect interstate commerce, are both unlawful and criminal by the statute law of the United States. It would seem, therefore, that the conclusion is obvious and unavoidable, that the private right of action in the latter case must be commensurate with the extent of the illegality thus by law established. In a common-law jurisdiction, express statutory provision of a right of action for damage resulting from a violation of law, would not have been necessary. Whether because of the want of common-law jurisdiction in federal courts, or

whatever may have been the reason for so doing, Congress has seen fit expressly to create a private right of action for one injured by reason of the violation of the act. The principle that every man has a right to insist that no provision of any law shall be violated, so as to work peculiar harm to him (with, perhaps, the qualification that the harm resulting from the breach of a statutory duty must be of the kind which the statute was intended to prevent), is well stated by Bishop on "Non-Contract Law," § 132:

"Whenever the law, a statute, a municipal by-law, or any other law, imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered especially therefrom."

It is manifestly the correct understanding of the seventh section of the act, that where a man is harmed in his business or property by a violation of the act, he has suffered a legal injury and is entitled to his action therefor. All this seems to have been recognized in the very recent opinion of the Supreme Court of the United States, in Chattanooga Foundry and Pipe Works et al. v. City of Atlanta, 27 Sup. Ct. 65, 203 U. S. 390, 51 L. Ed. ——. In speaking of the plaintiff below, which had brought its action under section seven of the act (the facts being very like those of the present case) Mr. Justice Holmes, who delivered the opinion of the court, says:

"It" (meaning the plaintiff) "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced, is injured in his property."

Little need be said as to the third point made by the defendant, viz., that no facts were alleged, showing that the plaintiffs sustained any damage whatsoever, by reason of any act of the defendant. Examination of the declaration in this regard does not sustain the defendant's contention. The gravamen of defendant's criticism is, that sufficient facts are not alleged to show that plaintiffs could not have purchased all the glass it required from the American Window Glass Company. But plaintiff has alleged the contrary in its declaration, and is not required to plead the evidence in support thereof. The same may be said as to the criticism, that there is nothing to show that it could not have procured all the glass it required, and have sold such glass to its customers at the same price as before, nor is it necessary, as urged by defendant, that plaintiff should allege that defendant, or the dealers represented by defendant, attempted to deprive it of its business, by offering lower prices to its customers. It is enough, that plaintiff charges that the result of the illegal combination was to deprive it of customers and prevent its making a profit upon its legitimate business, as theretofore existing. If, as we have found, a contract or combination in restraint of trade and commerce among the states has been sufficiently charged, we think the plaintiff has met the requirements of the law in the declaration, by the general statement made of damage to itself by reason thereof. The declaration might have been more specific, but if the illegal contract or combination has been stated with the requisite clearness, the statements of

the damage are not too general to lay ground for the evidence, if any there be, of the particulars of which it consisted. It is hard to see how the plaintiff should be required to be more specific in its allegation, that the effect of the illegal combination was to deprive the plaintiff of its entire business in the kind of window glass which its customers chiefly require, and to deprive it of all its customers whose names are given in the declaration, and of their trade, which, as already alleged, was interstate in its character, or that by means of said combinations, the plaintiff's business was destroyed and it rendered insolvent. As matter of pleading, these allegations are sufficiently clear and precise, and with the evidence to be offered in their support we are not now concerned.

For the reasons stated, we think the judgment below must be reversed.

NOTE.

The National Window Glass Jobbers' Association, a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, a citizen of said state and resident of said district, the defendant in this suit was summoned in an action in tort to answer unto the plaintiff, the Wheeler Stenzel Company, wherein the plaintiff demands three hundred thousand dollars, damages, and thereupon, the plaintiff, by Vreeland, King, Wilson and Lindabury, its attorneys, complains.

For that whereas, heretofore, to wit, on the fourteenth day of February, in the year nineteen hundred, at Boston, in the commonwealth of Massachusetts, to wit, at Jersey City, New Jersey, in said district, the plaintiff was a wholesale dealer and jobber in window glass, having its place of business at Boston, in the commonwealth of Massachusetts. A large part of its business consisted of trade and commerce in window glass among the several states. It purchased such window glass from manufacturers located and doing business in the states of Indiana, Pennsylvania, New York and New Jersey, and obtained delivery thereof to it at Boston, and sold and delivered this glass to its customers who were retail dealers doing business in the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York and the commonwealth of Massachusetts. A list of these customers and their respective places of business is as follows, to wit:

(Here follows list of 33 persons, firms and corporations in 7 states.)

That the defendant is and has been from the time of its organization, a corporation engaged in the business of purchasing, or obtaining contracts for the purchase of, window glass from manufacturers in the states of Indiana, Pennsylvania, New York and New Jersey, for the benefit of certain jobbers and wholesale dealers in window glass, doing business in various states. A list of these dealers and their respective places of business, so far as known to the plaintiff, is as follows, to wit:

(Here follows list consisting of 53 persons, firms and corporations, residing and doing business in 14 different states.)

A large majority of the shares of stock in the defendant corporation was owned by the wholesale dealers named as aforesaid, who were thereby enabled to control, and did control, the defendant corporation. The principal part of the defendant's business from the fourteenth day of February in the year nineteen hundred to the fourth day of August, in the year nineteen hundred and three, was the making of contracts for the benefit of these wholesale dealers by which the American Window Glass Company agreed to sell and deliver to these wholesale dealers window glass in large quantities, to be received and paid for them respectively, and to be transported by rail from the several factories of the American Window Glass Company to the places of business of these dealers. In accordance with such contracts between the defendant corporation and the American Window Glass Company, large quantities of window glass, amounting to more than two million boxes were sold in each

year during this period by the American Window Glass Company and transported by rail to these dealers at their respective places of business.

That on the said fourteenth day of February in the year nineteen hundred, the American Window Glass Company was and has ever since continued to be, a corporation organized under the laws of Pennsylvania, engaged in manufacturing window glass. Prior to that date it has acquired and has ever since owned and operated window glass factories and plants, located and doing business in the states of Indiana, Pennsylvania, New York and New Jersey, and throughout the period during which the acts complained of occurred, produced a large proportion, exceeding seventy per cent. of the window glass manufactured in the United States, and sold and delivered the glass manufactured by it to wholesale dealers in each of the states, and was engaged in trade and commerce in window glass among the several states.

That window glass is a staple article of trade and commerce among the several states. The window glass used in the commonwealth of Massachusetts and the states of Maine, New Hampshire, Vermont, Rhode Island and Connecticut is not manufactured in those states, but is purchased in and transported from other states, and a large part of it, exceeding seventy per cent., is purchased from the American Window Glass Company.

That prior to the fourteenth day of February, in the year nineteen hundred, the plaintiff and its predecessors in business had for many years purchased large quantities of window glass from the American Window Glass Company and its predecessors in its business, exceeding two hundred thousand boxes in each year and imported the glass so purchased into the commonwealth of Massachusetts, and sold it in that commonwealth and in the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York, to its customers, hereinabove named, and had an established business of interstate trade and commerce in so purchasing window glass and selling it to its customers in other states, and realized large gains and profits thereby, to wit, the sum of one hundred thousand dollars in each year.

That the wholesale dealers named as aforesaid constituted more than seventy-five per cent. of the jobbers and wholesale dealers in window glass in the United States and did more than seventy-five per cent. of the wholesale business in window glass in the United States. The American Window Glass Company manufactured and sold practically all the window glass of the better grades manufactured in the United States and controlled the production and sale to wholesale dealers of glass of those grades. Prior to the acts of the defendant herein complained of, a very large proportion of the glass bought and sold by the plaintiff was glass of those grades, and it required in its business large quantities of glass of those grades for sale and delivery to its customers, hereinabove named, and was unable to obtain any considerable quantity of glass of those grades except from the American Window Glass Company or its predecessors in its business; and the plaintiff and its predecessors in its business had purchased large quantities of window glass exceeding two hundred thousand boxes per year from the American Window Glass Company and its predecessors in its business, a large part, exceeding seventy-five per cent. of which was of the better grades manufactured in the United States only by the American Window Glass Company.

That prior to the acts herein complained of, the said wholesale dealers hereinabove named were uncombined and were purchasing window glass in competition with each other and with the plaintiff and other wholesale dealers, and selling such glass in open competition to retail dealers in the several states, including Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York and the American Window Glass Company and other manufacturers were selling window glass to the plaintiff and to the said wholesale dealers named as aforesaid and to all other wholesale dealers, as competing jobbers and by separate contracts, and the American Window Glass Company and all other manufacturers of window glass were competing with each other for the trade of the plaintiff and the said wholesale dealers hereinabove named and of all other wholesale dealers.

That on the fourteenth day of February in the year nineteen hundred and thereafter continuously until the fourth day of August, in the year nineteen hundred and three, in order unreasonably to restrain trade and commerce in

window glass among the several states, and with intent to absorb and monopolize the inter-state trade and commerce in window glass, and to stifle and put an end to competition in such trade; and in order to control and restrict the output, and to control and regulate the prices of window glass manufactured and sold in and among the several states, and to increase and arbitrarily fix the prices at which window glass should be sold in trade and commerce among the several states, independent of the natural market price of such glass; and to enable the said wholesale dealers hereinabove named to obtain excessive and unreasonable prices in trade and commerce in window glass among the several states, and to enable these dealers to obtain substantially all the window glass of the best quality manufactured in the United States and prevent all other wholesale dealers and jobbers from obtaining such glass except at unreasonable prices much higher than the prices paid by the said wholesale dealers hereinabove named, the defendant corporation combined and conspired with the American Window Glass Company and with the wholesale dealers hereinabove named, unreasonably to restrain, and in pursuance of this combination and conspiracy, did unreasonably restrain, from the fourteenth day of February, nineteen hundred, to the fourth day of February, nineteen hundred and three, trade and commerce in window glass among the several states, including the states of Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York, by restricting the sale of all of the glass manufactured by the American Window Glass Company to the wholesale dealers named as aforesaid, except at unreasonable prices, from two and one-half per cent. to five per cent. higher than the prices charged to these wholesale dealers named as aforesaid, by arbitrarily fixing unreasonable and excessive prices to be charged by these wholesale dealers named as aforesaid, to retail dealers in window glass throughout the United States, by restricting and limiting the quantity of window glass to be purchased by each of the said wholesale dealers hereinabove named to quantities to be arbitrarily determined by the defendant and the American Window Glass Company; by the refusal of the wholesale dealers named as aforesaid to purchase any window glass from any other manufacturer than the American Window Glass Company except at prices at least five per cent. below the prices charged by it, which lower prices were less than the cost of manufacturing such glass; by establishing rules and regulations forbidding the said wholesale dealers hereinabove named from selling window glass to other wholesale dealers at prices lower than the prices fixed under penalty of pecuniary fines to which each of the said wholesale dealers hereinabove named agreed with each other and with the defendant corporation to become liable; by mutually agreeing to refuse to purchase any window glass at any price from any manufacturer who should not close his factories and restrict the output of window glass produced by him at such times and in such manner as such restrictions of output should be arbitrarily imposed by the American Window Glass Company; and by restricting and fixing the territory within which each of the said wholesale dealers hereinabove named should sell window glass to retail dealers, so that none of them should sell to any retail dealer in any other territory except under arbitrary restrictions imposed by the defendant corporation.

The combination and conspiracy thus entered into between the defendant, the American Window Glass Company, and the said wholesale dealers hereinabove named was in restraint of trade and commerce in window glass among the several states, including the states in which the American Window Glass Company manufactured glass as herein alleged, the states in which the wholesale dealers named as aforesaid had their respective places of business, and the states of Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York, and was and is forbidden and declared to be unlawful by an act of Congress of July second, eighteen hundred and ninety entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

That on the fourteenth day of February in the year nineteen hundred and frequently thereafter until the fourth day of August in the year nineteen hundred and three, the plaintiff endeavored to purchase from the American Window Glass Company glass manufactured by it; but the American Window Glass Company on that date refused, and throughout said period continued to

refuse, in pursuance of the combination and conspiracy entered into by it with the defendant corporation and the said wholesale dealers hereinabove named to sell any window glass to the plaintiff except at unreasonable prices, largely in excess of the prices charged by it to the said wholesale dealers hereinabove named, and the plaintiff also frequently during the period named endeavored to purchase window glass from the defendant corporation; but the defendant, pursuant to the combination and conspiracy above referred to, refused, and during all this period, continued to refuse to sell any window glass to the plaintiff and the plaintiff was unable during this period to purchase any window glass from any of the said wholesale dealers hereinabove named except at the same prices charged by them to retail dealers; and, as a very large proportion of the glass dealt in by the plaintiff was of the quality and grades manufactured in the United States only by the American Window Glass Company, the plaintiff was unable to obtain glass of the quality and grades required to supply its customers, and thereby, during the period above named, lost a very large part of its trade and commerce in window glass among the several states, including the trade and custom of its customers named as aforesaid.

That the direct and immediate effect of this combination and conspiracy, during the entire period specified, was unreasonably to restrain trade and commerce in window glass among the several states, including all the states hereinbefore named, in the manner and by each of the means above stated: to restrict the output and curtail the production of window glass throughout the United States; to fix arbitrary and excessive prices charged to retail dealers, to stifle competition among the said wholesale dealers hereinabove named for the trade of retail dealers in window glass, and between the American Window Glass Company and other manufacturers of window glass for the trade of all wholesale dealers in window glass; to increase the price of glass to retail dealers and consumers; and to give the American Window Glass Company the complete control and virtual monopoly of the manufacture and give the said wholesale dealers hereinabove named a virtual monopoly of the sale and distribution of window glass manufactured in the United States, and a practically complete control and monopoly of the entire trade and commerce in window glass among the several states, including the states of Massachusetts, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York.

That the direct and immediate effect of this combination and conspiracy upon the plaintiff during the entire period above named was unreasonably to restrain its trade and commerce among the several states by restraining its business of purchasing window glass and selling window glass to its customers named as aforesaid, in the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut and New York and the commonwealth of Massachusetts; to prevent it from purchasing window glass of the kind chiefly required in its business, except at unreasonable prices, in excess of those charged to its competitors, the wholesale dealers named as aforesaid to prevent it from obtaining any window glass of the kind chiefly required by its customers heretofore named, as all of the window glass of those grades produced in the United States was manufactured by the American Window Glass Company; to stifle and destroy competition which before had been open and unrestricted, between it and its competitors, the wholesale dealers as aforesaid and to give them the absolute control and monopoly of the trade and commerce among the several states in window glass of the grades chiefly required in the business of the plaintiff to deprive the plaintiff of its entire business and trade in the United States above named and elsewhere, in the kind of window glass principally required by its customers; to prevent it from purchasing window glass of the quality and grades required to supply its customers, except at unreasonable and excessive prices, and to deprive it of all its customers named as aforesaid, and of their trade and custom; and by all these means to destroy the business of the plaintiff and prevent it from conducting its business at a profit and to render it insolvent.

QUINTON et al. v. NEVILLE et al.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1907.)

No. 2,222.

1. EQUITY—BILL OF REVIEW—HEARING AND DETERMINATION.
Where it is the purpose of a bill of review to obtain a reversal of a decree for error of law apparent on the record, consideration can be given to the record of the original cause only, the evidence at large cannot be examined or considered, and any facts averred in the bill of review inconsistent with the pleadings and decree in the main case can have no effect in determining the correctness of such decree.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1133, 1134.]

2. EXECUTORS AND ADMINISTRATORS—ADMINISTRATOR WITH WILL ANNEXED—POWERS.
An administrator c. t. a. duly appointed under the laws of Nebraska, which was the state of the testator's domicile, is charged by Comp. St. Neb. 1903, §§ 2983, 2987, with the execution of the trusts conferred upon the executor named in the will, and may maintain any suits necessary or incidental thereto which could have been maintained by the executor.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 493.]

3. QUIETING TITLE—TITLE OF PLAINTIFF—FOREIGN ADMINISTRATOR—KANSAS STATUTE.
Under Gen. St. Kan. 1901, §§ 7961, 7966, which provide that the recording of an authenticated copy of a foreign will relating to real estate within the state in the probate court of the county in which the real estate is situated, operates to pass the title thereto in like manner as is done by domestic wills, and section 3009, which empowers a foreign executor or administrator to sue and be sued in that state, a foreign executor or administrator c. t. a. directed by the will to sell lands in Kansas to pay debts of the estate, who is in possession of the land, and has so recorded a copy of the will, has such title and possession as entitles him to maintain a suit to remove a cloud upon the title which would interfere with his execution of the trust, and to redeem from an equitable lien on the land created by the testator.
[Ed. Note.—Necessity of possession in suits to quiet title, see note to Jackson v. Simmons, 39 C. C. A. 522.]

4. SAME—CONTRACT BY TESTATOR CREATING EQUITABLE LIEN—CONSTRUCTION.
An owner of lands who employed attorneys in certain litigation in respect thereto entered into a written contract with them by which it was agreed that, when the lands were sold, they should receive in payment for their services one-third of their net proceeds above $60,000 and which also provided that the lands should not be sold without the consent of all the parties. *Held*, that such agreement contemplated a sale of the lands for the purpose of fixing the amount of the attorneys' compensation and of paying the same, and that the clause requiring the consent of all parties to such sale, fairly and reasonably construed, must in subordination to such purpose be limited to a reasonable period of time; that after the lapse of 10 years, during which the attorneys had recorded the contract, the owner had died, and neither he nor his executor had been able to agree with the attorneys as to the price at which the land might be sold, his administrator c. t. a., directed by his will to sell the lands, was entitled to maintain a suit in equity to remove the cloud cast upon the title by the recording of the contract, and to have a sale made subject to the payment from the proceeds of the compensation to the attorneys stipulated for therein; and that a decree in such suit providing for the receiving of bids for the lands during a period of four months at not less than an

upset price fixed therein before it should be offered at public sale fully protected the rights of all parties under the contract.

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

In March, 1892, the appellee Neville, as administrator with the will annexed of the estate of Morrell C. Keith, deceased, and Morrell Keith Neville, the only heir at law, exhibited their bill to the Circuit Court of the District of Kansas against Eugene S. Quinton and Abram Bergen, and others setting out the ownership by the testator in his lifetime of land situated in Shawnee county, Kan., the complainant's relation to him as above stated, and the following facts: That the will had been duly probated in the county court of Lincoln county, Neb., where the testator resided at the time of his death; that Neville had "lately filed in the probate court of Shawnee county an authenticated copy of his appointment as administrator with the will annexed and caused the same to be recorded therein"; that debts amounting to $55,000 duly allowed against the estate remained unpaid; that the will empowered the executor as trustee and his successor, Neville, as administrator c. t. a., to sell the real estate of the testator for the purpose of settling the estate, and expressed a desire that such property as was located outside the state of Nebraska should be first sold for that purpose; that it was advisable in the opinion of the complainants and for the best interests of the estate that the land situated in Shawnee county should be sold to liquidate the remaining unpaid debts of the estate; that it was impossible to make such sale by reason of wrongful acts, claims, and pretensions of the defendants Quinton and Bergen, who, it was alleged, had performed certain legal services in litigation over the Kansas lands for the testator in his lifetime and had on March 14, 1893, entered into a written contract with him whereby it was agreed that, when the lands should be sold or disposed of, Quinton and Bergen should have for their professional services one-third of the net proceeds after deducting $60,000 therefrom; that the contract contained the following clause: "No sale or disposition to be made without the consent of all parties to this agreement" —that defendants had claimed and publicly given out that no valid sale could be made of the land without their consent and for the purpose of preventing the administrator c. t. a. from selling and disposing of it the bill alleged as follows: That they, Quinton and Bergen, "had refused and still refuse although often requested by your orators to consent to any sale or disposition of the land by him [the administrator c. t. a.] and in further aid of such purpose the defendants or some one of them have lately caused to be placed on record in the office of the registry of deeds of Shawnee county, aforesaid, a copy of the said agreement purporting to be so acknowledged as to entitle it to record"; that the administrator c. t. a. was in the possession of the land holding the legal title to it for the purposes of the trusts created by the will; that his co-complainant, Morrell Keith Neville as heir at law, was the beneficial owner of the land excepting in so far as the same was vested in the administrator c. t. a. for the purposes of the trusts.

The bill alleged that the only interest which defendants Quinton and Bergen or any of the defendants claiming under them had in the land by virtue of their agreement with Keith in his lifetime was a claim or lien in the nature of an equitable mortgage to secure a debt due them from Keith, with the right to have the land sold for the purpose of fixing their compensation according to the terms of the agreement and for the purpose of making the lien available.

The prayers of the bill, among other things, were that the part of the agreement of 1893, which provided that the lands should not be sold or disposed of without the consent of Quinton and Bergen be declared inoperative as repugnant to the main purpose of the agreement and in restraint of alienation, that the land be sold in order to fix the claim or interest of Quinton and Bergen to it, and that complainants be allowed to redeem from the lien by paying to Quinton and Bergen the amount of their interest in it when so ascertained. There was also a prayer for general relief.

After an unsuccessful demurrer the defendants Mary K. Quinton and E. W. Poindexter, assigns of all the rights of Quinton and Bergen, answered, admit-

ting by failure to deny the allegations of the bill, complainants' right, title, and interest in the land in question under the testator's will as stated in the bill; averring some misconduct on the part of the administrator c. t. a. which it is conceived has little pertinency to the merits of the controversy, and is therefore not detailed here; averring that complainant, the administrator c. t. a., had ample money on hand to pay the debts of the estate without selling the Kansas land; that no offer to sell had ever been made to defendants, and that Quinton and Bergen or their assigns had never refused to join in a sale or disposition of the land; that the provision of the contract of 1893 to the effect that the land should not be sold except by their consent was inserted solely for the benefit of Quinton and Bergen "as protection for them in their contingent fee * * * as protection to the said E. S. Quinton and Abram Bergen for a reasonable fee * * * so that they might have some way and power of protecting themselves against the sale of the property that would cut them off from any compensation for their services."

The general replication in equity was filed, and after the testimony was taken and the proofs closed complainants filed a motion to suppress certain depositions taken by defendants to show the actual value of the legal services referred to in the contract of 1893. The case was afterwards argued by counsel and submitted for a final decree, which was signed and handed down November 19, 1903. Simultaneously therewith the circuit court sustained the motion to suppress some of defendants' depositions.

The court specifically found in and by the final decree that the title and beneficial interest in the land was vested in complainants as stated in their bill, subject only to an equitable lien in favor of Quinton and Bergen or their assigns for compensation for their legal services; that the parties to the agreement of 1893 had been unable to agree upon a price at which the land could be sold or disposed of; that under the pleadings and facts established by the evidence the court had the power and ought to terminate the relations between the parties growing out of the agreement of 1893, and to adjudge and decree to them their separate and respective rights in the premises as nearly as practicable; that neither the testator in his lifetime nor the complainants as successors in interest to him had acted in bad faith or otherwise violated or refused to conform to the terms or intent of the agreement in failing or declining to sell or consent to a sale of the lands upon terms or conditions proposed or suggested by any other party in interest. The court then declared the rights of the parties, giving defendants an equitable lien upon the land for one-third of the net proceeds of its sale in excess of $60,000 according to the terms of the agreement, and appointed a master to invite and receive offers for the land for a period of over four months from any of the parties in interest or any other persons whom they might induce to make offers therefor and to report the same without delay to each of the parties interested for his or their acceptance or rejection, fixing an upset price, however, of $61,000 for the land. The court further ordered that, if any offer not less than $61,000 should be consented to by the parties, a sale should be made at that price, and the administrator c. t. a. should in the execution of his powers under the will of the testator convey the land to the purchaser. The decree further provided that, if no offer should be received or consented to on or before the time limited therefor, then the land should be advertised and sold for not less, however, than $61,000, and the proceeds of the sale should be brought into court for disposition and distribution to the parties according to their rights determined by the decree.

Subsequently, on May 18, 1904, the defendants Mary K. Quinton and E. W. Poindexter filed in the court which rendered the decree a bill of review to secure its reversal. That bill set out the original bill, demurrer, answer, replication, and final decree in extenso, and prayed that the latter be set aside because erroneous on the face of the record. Certain pleas and demurrers were filed which on hearing were sustained by the circuit court and the bill of review was dismissed. This appeal by the defendants in the original action challenges the correctness of the ruling resulting in the dismissal of the bill of review.

E. S. Quinton (G. C. Clemens and A. B. Quinton, on the brief), for appellants.

E. Wakeley (James A. Troutman and Robert Stone, on the brief), for appellees.

Before SANBORN and ADAMS, Circuit Judges.

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

The function of a bill of review is to obtain a reversal of a decree by the court which rendered it either for error of law apparent on the record or to secure a rehearing of the facts, on a showing of newly discovered evidence. 2 Daniell's Ch. Pl. & Pr. (5th Ed.) p. 1576. When the bill is for the purpose first mentioned, consideration can be given to the record of the original cause only. The evidence at large cannot be examined or considered, and any facts averred in the bill of review inconsistent with the pleadings and decree in the main case can have no effect in determining its correctness. Whiting v. United States Bank, 13 Pet. 5, 10 L. Ed. 33; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Shelton v. Van Kleeck, 106 U. S. 532, 1 Sup. Ct. 491, 27 L. Ed. 269; Enochs v. Harrelson, 57 Miss. 465.

In view of the foregoing rule we must indulge the conclusive presumption that the proof, which is not before us in this proceeding, sustained the issue tendered by the bill, did not sustain any affirmative defense pleaded in the answer and justified the decree as rendered if it was warranted by and not inconsistent with the pleadings. For the purposes of this case, therefore, the title and beneficial ownership of the land in question were in the complainants.

Inasmuch as we are chiefly concerned with the consideration of the original case wherein the appellants or complainants in the bill of review were the defendants and the appellees or defendants in the bill of review were the complainants, we shall, to avoid confusion, usually refer to them in this opinion as they were known and designated originally and notwithstanding the fact that Quinton and Bergen the defendants in the original case have assigned their rights and interest under the contract of 1893 to the appellants herein, we shall for convenience frequently refer to Quinton and Bergen the original defendants as the owners of the right.

It is first contended by defendants that complainants in the original bill could not maintain the action, that a union of possession and title were necessary, and that such a union is not found in either of the complainants. Without conceding that in this action to quiet title and redeem from an equitable lien both possession and title in the complainants were indispensable, it is sufficient to say that the record discloses a union of both of them in complainant Neville. He was administrator c. t. a. by lawful appointment in Nebraska, the domicile of the testator. As such he was charged with the execution of the trusts conferred upon the executor named in the will. Sections 2983 and 2987, Comp. St. 1903 Neb. By the statutes of Kansas (section 3009, Gen. St. 1901) he was empowered as such foreign executor or administrator to sue and be sued in the latter state. By the provisions

of sections 7961 and 7966 (Gen. St. Kan. 1901) the recording of an authenticated copy of a foreign will relating to real estate in the probate court of any county where the real estate is situated operates to pass title to the real estate in like manner as is done by wills made conformably to the laws of the state.

Inasmuch as it is averred in the original bill that complainant Neville had filed an authenticated copy of his appointment as administrator with the will annexed, in the probate court of Shawnee county, and had caused the same to be recorded therein, or if the averment is ambiguous as to whether the will itself as distinguished from the appointment was filed and recorded, inasmuch as the will might have been so recorded, the finding by the circuit court that the legal and equitable title were vested in the complainants as stated in the bill conclusively established the fact for the purpose of this case that such will was so recorded or that some other equally effective step was taken to confer legal title upon Neville, who only according to the pleadings could hold the legal title under the will of the testator. He was also in possession as admitted by the pleadings. From the foregoing we think it clearly appears that Neville as administrator c. t. a. not only had a legal right to sue in Kansas, but that, as owner of the legal title and in possession of the land in controversy, he also had a cause of action suable in Kansas to protect such title and possession.

If the heir at law was not a necessary party his joinder was not prejudicial. No objection to the joinder was made below either by demurrer or answer and it was thereby waived. It appears that the holder and owner of the particular estate, who was a testamentary trustee in possession of the premises, and the remainderman, both united in a bill to remove a cloud from their title (which was asserted to be an obstacle in the way of the execution of the trust imposed upon the former) and to redeem from an equitable lien or charge against the land, which had been created by the testator in his lifetime in favor of Quinton and Bergen. Inasmuch as all the parties who had any interest in or claim against the land were before the court there was no defect of parties.

It cannot be claimed that the agreement of 1893 was in any technical sense a mortgage. It, in terms, conveyed no interest or estate to Quinton and Bergen. Nevertheless, it is claimed by complainants that as between the parties it created an equitable charge or lien against the land in favor of Quinton and Bergen to secure the payment of their attorney's fees, when fixed on the standard created by the agreement.

Defendants aver in their answer that the clause prohibiting the sale of the land without their consent was intended as a protection to them for the payment of their fees. Accordingly, we might reasonably assume that the agreement should be treated as in the nature of a mortgage. But, as the case depends upon a proper interpretation and understanding of the agreement, it requires critical consideration. It first fixes a standard for determining the amount of compensation to be paid Quinton and Bergen for their services, by providing that, when the land should be sold, Keith should pay to them one-third of the net proceeds of the sale in excess of $60,000 as their fee. Here

was manifested a clear purpose that the lands should be sold for the preliminary purpose of fixing the fee and for the ultimate purpose of paying it. In the absence of any limitation of time, the usual rule would prevail that it should be sold within a reasonable time. Then follows the clause, "No sale or disposition of the property to be made without the consent of all parties to this agreement." Here is found what defendants in their answer called their "protection," and what was doubtless intended to effectually subject the land to the payment of their debt. The great and controlling purpose of the agreement was therefore to recognize and secure the payment of a debt. These are the substantial purposes of a mortgage, and they necessarily import the right to sell the security to accomplish the intended purpose. But, according to the terms as employed in their strict literal meaning, the agreement absolutely prevented Keith from making a sale of his property, from fixing the amount of his liability to Quinton and Bergen, from paying the same or clearing his title from a liability therefor without the consent of both Quinton and Bergen. It likewise prevented Quinton and Bergen from securing a liquidation of the amount of their claim against Keith or enforcement of the payment thereof by subjecting the land to a sale, without the consent of Keith. So it appears that the literal meaning of the language of the clause in question is inconsistent with the controlling intent and purpose of the agreement. It subjects either party to the will of the other, and, literally speaking, to the caprice or arbitrary disposition of the other. It prevents any disposition of the land as a matter of right, for the purpose of the agreement.

Some recognized rules for construing contracts may properly be stated. Inconsistent clauses must be construed according to the subject-matter and the motive, and, when the intent is plain, it must prevail over the strictness of the letter. Bent v. Alexander, 15 Mo. App. 181, 190. A rigid adherence to the letter often leads to erroneous results and misinterprets the meaning of the parties. Reed v. Ins. Co., 95 U. S. 23, 30, 24 L. Ed. 348. A clause or a word in a contract irreconcilable with its nature or general design of the parties should be rejected. Buck v. Burk, 18 N. Y. 337. "The letter killeth but the spirit giveth life." If the letter of a clause in an agreement is absolutely repugnant to the controlling and particular purpose of the agreement, it may, if necessary, be rejected. 3 Wash. on Real Property, 628; Cutler v. Tufts, 3 Pick. 272; Flagg v. Eames, 40 Vt. 16, 94 Am. Dec. 363; Canal Co. v. Hewitt, 55 Wis. 96, 12 N. W. 382, 42 Am. Rep. 701; Wilcoxson v. Sprague, 51 Cal. 640. Applying the foregoing principles, we might conclude our inquiry by subordinating the letter of the clause to its spirit, decreeing it to create an equitable charge against the land and conferring upon the complainants the right of redemption. Pinch v. Anthony, 8 Allen, 536; Chase v. Peck, 21 N. Y. 581; McQuie v. Peay, 58 Mo. 56; Blackburn v. Tweedie, 60 Mo. 505; Daggett v. Rankin, 31 Cal. 322.

A bill for the double purpose of declaring a deed absolute on its face to be a mortgage and to redeem therefrom is a well-recognized remedy in equity. Cline v. Robbins, 112 Cal. 581, 44 Pac. 1023;

Hollingsworth v. Campbell, 28 Minn. 18, 8 N. W. 873; Morrow v. Jones, 41 Neb. 867, 60 N. W. 369; Ency. Pl. & Pr. p. 964, and cases cited. In analogy with the principle just stated, we think a court of equity may properly decree on one bill that the agreement of 1893 created an equitable lien and that complainants were entitled to redeem from it.

But we do not find it necessary under the peculiar facts of this case to base our conclusion solely on any technical rules of construction of contracts. Neither is it necessary to reject any words of the agreement in question in order to arrive at what was the intention of the parties. The record discloses that the parties had not for a period of 10 years reached any agreement concerning a sale of the land; that in the meantime the owner had died leaving the land subject to the payment of his debts; that without any bad faith on the part of the owner or his legal representatives they and Quinton and Bergen had been unable to agree upon a price at which the land could be sold; that the defendants were asserting and publishing that no sale or disposition of it could be made for any purpose without their consent; that they had for the purpose of making their pretensions effectual caused the supposed prohibitive agreement to be recorded in the office of the land records of Shawnee county where the land was situated.

We cannot admit the possibility that the parties to the agreement intended to tie up the sale of the land forever. That would be such a restraint upon alienation as would render the agreement inoperative and void in that respect. We cannot presume, if there is any other reasonable alternative, that the parties intended to make a void agreement or do a senseless or useless thing. A reasonable interpretation of the clause in question, one in harmony with the spirit and purpose of the contract, would seem to be that the parties intended that they should have a reasonable time only to reach a personal agreement, and that, if they failed to do so, the right of either to resort to the courts of the land for appropriate relief should not be abridged or interfered with. We think the facts disclosed by the record clearly demonstrate that a reasonable time for voluntary action had elapsed before the original action was instituted, and we are of opinion that the recording of the agreement and the assertion of the right under it to effectually veto any sale or disposition of the land constituted a cloud on complainants' title, a serious impediment to their right of redemption from the lien, and created such an embarrassment to their right of alienation and to their right of appropriating the proceeds of the sale in execution of the trusts created by the will as fully justified the institution of the suit by complainants without violating the fair and reasonable intendment of the agreement.

We have carefully considered the earnest contention of defendants that, if the provision of the contract of 1893 requiring consent of all its parties to a sale of the land is to be ignored, the entire agreement, including the clause fixing defendants' compensation at one-third of the net proceeds of the sale of the land over and above $60,000, should be declared null and void, the defendants, to be placed in statu quo, and restored to their rights of action on a quantum meruit to recover from Keith's estate the reasonable value of the services rendered, and

not remain bound by the contract to take one-third of the net proceeds of the sale of the land less $60,000. This contention, we think, involves the erroneous assumption that the original bill either sought to rescind the agreement of 1893 or to set aside or annul any of its provisions. We regard the bill to be essentially one to redeem from an equitable lien, involving a preliminary construction of the agreement creating the lien, a declaration of its true character and the removal of a cloud from complainants' title occasioned by the recording of the agreement and the pretensions of the defendants under it. The original bill was to affirm and enforce the agreement as made and as intended by the parties, and not to disaffirm or avoid it. Accordingly, there was no occasion for putting Quinton and Bergen in statu quo or for restoring to them any rights which they had contracted away by the agreement. By the agreement as fairly and reasonably interpreted in the decree they are securing their full rights as intended by the parties.

We are not able to perceive that the decree was made on an erroneous theory, as claimed by the defendants. It recognized the rights of complainants as owners of the land and the subjection of the land to an equitable charge in favor of the defendants as claimed by them. It recognized the embarrassment occasioned by the defendants recording the agreement and their conduct and claims under it, and necessarily found that all these things stood in the way of the execution of the trust vested in Neville by the last will and testament of the owner, and stood in the way of complainants enjoying the usual incidents of ownership of real estate. Such was the theory of the bill and the decree is in full harmony with it.

Neither, in our opinion, was the decree, as made, unjust or oppressive to the defendants. They were held bound by the contract made by their assignors as reasonably interpreted. They were given four months and more in which to prepare to protect themselves by bidding at the sale or otherwise securing full value for the land and thereby enhancing the value of their interest. We think the decree as rendered safeguarded and protected the interests of all parties concerned to the full extent which the facts of the case and the remedy to which the complainants were entitled permitted.

Some other propositions were asserted and argued by counsel and to all of them we have given diligent attention; but we find in them no reason for disturbing the conclusion already indicated. Finding no error apparent upon the record of the original case, the bill of review was properly dismissed by the trial court, and its action is accordingly affirmed.

SCHOOL DIST. NO. 11, DAKOTA COUNTY, NEB., v. CHAPMAN et al.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1907.)

No. 2,173.

1. STATUTES—LEGALITY OF ENACTMENT—CONSTITUTIONAL REQUIREMENTS.
The provision of Const. Neb. art. 3, § 10, requiring the yeas and nays on the final passage of a bill by the Legislature to be entered on the journal of each house, as construed by the Supreme Court of the state, does not apply to a vote of concurrence by either house in an amendment adopted by the other, but only to the vote on the passage of the bill following its third reading in each house, which is treated as the vote on its final passage.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 20.]

2. SAME—SILENCE OF LEGISLATIVE JOURNAL—PRESUMPTION.
Under the Nebraska decisions, an act of the Legislature is not invalidated because the journal of the house in which the bill originated is silent in respect to its concurrence in an amendment by the other house which appears in the act as enrolled and signed.

3. SAME—READINGS OF BILL—CONCURRENCE IN AMENDMENT.
The provision of Const. Neb. art. 3, § 11, requiring every bill to be read in each house on three different days, as construed by the Supreme Court of the state, does not make it necessary that there shall be three readings of a bill in the house in which it originated, and by which it has been duly passed, on its return for concurrence in an amendment adopted by the other house.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 16.]

4. SAME—TITLE OF ACT.
Where a legislative act as enrolled and authenticated bore the same title as the bill when introduced, and the journals contain no affirmative statement that the title was at any time changed or amended, the act is not invalidated by the fact that in the journal entries relating to the bill during its passage it is sometimes identified by an abbreviated title and its number.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 27.]

5. SAME—ERROR IN TITLE.
Act Neb. March 31, 1887 (Laws Neb. 1887, p. 597, c. 76), is entitled "An act to amend 'An act to provide for the issuing and payment of school district bonds' approved February 26. A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes." The only preceding Revised Statutes were those of 1866, which being prior to the passage of the original act did not contain the same, but it constituted subdivision 15 of chapter 79 of the Compiled Statutes of 1881, and such Compiled Statutes were named in the body of the amendatory act. *Held*, that the obvious error in the title did not produce any uncertainty as to the subject of the amendatory act such as to render it invalid as in violation of the constitutional mandate that the subject of a bill shall be clearly expressed in its title.

6. SAME—AMENDATORY ACT—CONSTITUTIONAL REQUIREMENTS.
The provision of Const. Neb. art. 3, § 11, that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," does not require that the purpose to repeal the original sections shall be expressed in the title of the amendatory act, nor is an amendatory act void, where it correctly recites the sections amended, because in the repealing clause there is an obvious error in giving the number of the chapter containing such sections.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 207.]

7. SAME.

Under the rule of decision in Nebraska, an amendment of a prior law, coupled with a formal repeal of such law, does not operate as a repeal of the original act in a constitutional sense, but continues it in effect in its amended form, and a subsequent amendatory act is not void because it refers to and purports to amend the original and not the amended act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 202, 203.]

8. TRIAL—WAIVER OF JURY—DISCRETION AS TO FINDINGS.

Where an action at law in a federal court is tried to the court without a jury, by stipulation pursuant to Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], which provides that in such case the finding may be either general or special, whether such finding shall be general or special rests in the discretion of the court, and its refusal to make special findings is not subject to review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 920–926.]

9. SAME—DIRECTION OF VERDICT—REFUSAL—WAIVER OF EXCEPTION.

The denial of a request for a finding in favor of a defendant, in the nature of a directed verdict, made at the close of plaintiff's evidence, and an exception to such denial, are waived by the subsequent introduction by defendant of evidence in its own behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 983.]

10. PLEADING—ISSUES—ADMISSIONS QUALIFYING GENERAL DENIAL.

Under the rule of practice in Nebraska, which governs in actions at law in a federal court in that state, a general denial in an answer is treated as qualified by admissions made in other defenses; and where, in an action on school district bonds, the answer contained a general denial, but also an admission of the execution and genuineness of the bonds, and pleaded their invalidity, the admission governs, and the plaintiff was not required to prove their execution and genuineness.

11. SCHOOLS AND SCHOOL DISTRICT—BONDS—INNOCENT PURCHASER.

Where bonds of a school district in Nebraska payable to bearer contained recitals that they were issued for a certain purpose "and in pursuance of" a certain statute, which authorized their issuance for such purpose, and also bore a certificate of the state Auditor of Public Accounts that they were duly registered, and another by that officer and the Secretary of State showing that they were issued pursuant to law, as required by the statute, evidence that such bonds were purchased before their maturity in New York in the regular course of business by a dealer in such securities at practically their face value, and in reliance on such recitals and certificates, is sufficient to sustain a finding that he was an innocent purchaser for value, and entitled to protection as such.

12. SAME—VALIDITY—NEBRASKA STATUTE.

Act Neb. Feb. 26, 1879 (Laws 1879, p. 170) as amended by Act March 31, 1887 (Laws 1887, p. 597, c. 76), which authorizes school districts to issue bonds "to purchase a site for, or erect a school house, or houses, or for furnishing the necessary furniture or apparatus for the same, or for all of these purposes," authorizes such issuance for either one or all of the purposes stated, and such bonds are not invalid because they recite that they were issued "for the purpose of building a schoolhouse" only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 224.]

13. SAME—RIGHTS OF PURCHASER—NOTICE OF INVALIDITY.

Bonds of a Nebraska school district were sold by a banker in New York, and bore certificates of registration and regularity by designated officers of the state, as required by the statute under which they were issued. The purchaser was told by the banker that a suit had been brought to enjoin such registration and certification, but that it had been dismissed, and the banker produced the bonds bearing certificates by such officers of due registration and regularity. In fact the suit had not been dismissed, and it

subsequently resulted in the granting of a permanent injunction as prayed for. *Held*, that such facts sustained a finding that the purchaser was not chargeable with actual notice of the pendency of the suit.

14. SAME—PENDENCY OF SUIT—CONSTRUCTIVE NOTICE.

A purchaser of negotiable bonds issued by a school district, which are regular on their face and bear the certificates of state officers that they were issued pursuant to statutory authority, is not chargeable with constructive notice of a pending suit to contest the election at which the bonds were authorized, brought under a general statute of the state authorizing suits to contest the election of any person to office, or the adoption of any proposition submitted to a vote of the people, but containing no provision for superseding the result of any election as declared by the canvassers pending such a suit; nor is such a purchaser chargeable with constructive notice of a temporary injunction granted in such suit restraining the issuance of the bonds, they having been in fact issued in due form.

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

Elbert H. Hubbard, B. H. Dunham, and Eric A. Burgess, for plaintiff in error.

James M. Woolworth and W. D. McHugh, for defendants in error.

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

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment recovered by the defendants in error against the school district in an action at law upon certain coupons clipped from bonds issued by the school district in pursuance of a statute of the state of Nebraska, approved February 26, 1879 (Laws 1879, p. 170), and other acts amendatory thereof, including that of March 31, 1887 (Laws 1887, p. 597).

The chief contentions presented by the assignments of error are to the effect that the amendatory act of 1887 is invalid because certain of the requirements of article 3 of the Constitution of the state were not observed in its enactment. Three sections of this article are as follows:

"Sec. 8. Each house shall keep a journal of its proceedings, and publish them. * * *"

"Sec. 10. The enacting clause of a law shall be 'Be it enacted by the Legislature of the state of Nebraska,' and no law shall be enacted except by bill. No bill shall be passed except by assent of a majority of all the members elected to each house of the Legislature. And the question upon final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered upon the journal.

"Sec. 11. Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed. The presiding officer of each house shall sign, in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the Legislature."

The legislative journals, as published by authority, disclose these facts respecting the bill for the act in question: It originated in the

House of Representatives, where it was passed by the constitutional majority, the vote being taken by yeas and nays which were entered upon the journal. In the Senate it was amended and passed in its amended form by the requisite majority; the vote being taken and entered as in the House. It was then returned to the House with the request that the amendment be concurred in, but whether this was done, and if so by what majority, and in what manner the vote was taken, are matters in respect of which the journal of the House is silent. As enrolled under the supervision of the joint committee on enrollment, as signed by the presiding officer of each house, and as presented to and approved by the Governor, the bill embodied the amendment.

It is insisted that the amendment could only have been concurred in by a vote of the house in which the yeas and nays were taken and entered upon the journal, and that the absence of such an entry renders the act void. Whether or not the insistence is well taken is to be determined by ascertaining what is the proper construction and application of the state Constitution, as settled by the decisions of the court of last resort of the state. South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154; Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204. Turning to the decisions of that court, we find that in Hull v. Miller, 4 Neb. 503, it was held that a provision in the state Constitution of 1866, substantially the same as that in section 10, supra, respecting the entry upon the journal of the yeas and nays on the passage of a bill, did not apply to a vote of concurrence by either house in an amendment of the other, but only to the vote taken upon the passage of a bill following its last or third reading in each house, which was treated as the vote on its final passage. And in State ex rel. v. Liedtke, 9 Neb. 490, 4 N. W. 75, which related to an act passed after the adoption of the present Constitution, the court, after observing that "the words 'final passage,' as applied to matters of legislation, were well known to the framers of the Constitution, and presumably to the people who adopted it," held that the requirement of section 11, supra, that "the bill and all amendments thereto shall be printed before the vote is taken upon its final passage," does not apply to an amendment proposed by a committee of conference after disagreeing votes in the two houses, but only to amendments proposed before the vote following the last or third reading in each house, which was again treated as the vote on final passage. These decisions show that, under the authoritative interpretation of the state Constitution, a concurrence by one house in an amendment of the other is not the final passage of a bill on which the yeas and nays are required to be taken and entered upon the journal.

It is next insisted that, though such concurrence be not the final passage of a bill within the meaning of section 10, supra, the entire silence of the journal respecting a concurrence by the House renders the act void. But the rule in Nebraska is otherwise, at least in respect of matters like this which are not specially required by the Constitution to be entered upon the journal. It was so held in Hull v. Miller, supra, where the court said of the requirement that every bill shall be read on three different days:

"But inasmuch as it is not required, as it is in respect of bills on their final passage, that each house shall enter upon its journal and preserve the evidence of its having obeyed this rule, it will be presumed that they did so, unless the contrary clearly appear."

In other cases, notably Webster v. Hastings, 59 Neb. 563, 568, 81 N. W. 510, and State v. Burlington & Missouri River R. R. Co., 60 Neb. 741, 746, 84 N. W. 254, the rule relating to the impeachment of a duly authenticated and enrolled act by reference to the legislative journals is stated in this way:

"The rule established by our former decisions is that the due authentication and enrollment of a statute affords only prima facie evidence of its passage, and that the legislative journals may be examined for the purpose of ascertaining whether the measure was enacted in the mode prescribed by the Constitution. If the entries found in the journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail. The journals, being the records of legislative proceedings kept in obedience to the command of the Constitution, are considered the best evidence of what affirmatively appears in them regarding the enactment of laws."

And in State v. Frank, 60 Neb. 327, 333, 83 N. W. 74, 75, it was said, after refering to prior decisions:

"What they decide is that the journals are unimpeachable evidence of what they contain; not that their silence convicts the Legislature of having violated the Constitution. Every presumption is in favor of the regularity of legislative proceedings; and it is rather to be inferred that the journals are imperfect records of what was done than that the Legislature failed to perform the more solemn and important duties enjoined upon it by the Constitution. In Ex parte Howard-Harrison Iron Co., 119 Ala. 484, 491, 24 South. 516, 519, 72 Am. St. Rep. 928, cited in State v. Abbott, 80 N. W. 499, 59 Neb. 106, it is said: 'Of course, the presumption is that the bill signed by the presiding officers of the two houses and approved by the Governor is the bill which the two houses concurred in passing, and the contrary must be made to affirmatively appear before a different conclusion can be justified or supported. So here it must be made to affirmatively appear that amendments of the house bill in question were adopted by the Senate, and were not concurred in by the House.' The enrolled bill has its own credentials, it bears about it legal evidence that it is a valid law, and this evidence is so cogent and convincing that it cannot be overthrown by the production of a legislative journal that does not speak, but is silent. Such seems to be the conclusion reached by a majority of the courts; and such, certainly, is the trend of modern authority. To hold otherwise would be to permit a mute witness to prevail over evidence which is not only positive, but of so satisfactory a character that all English and most American courts regard it as ultimate and indisputable."

The last case upon the subject is State ex rel. v. City of Wahoo, 62 Neb. 40, 86 N. W. 923, and it was there held that an act originating in the Senate was not invalidated, because the journal of that body was silent in respect of its concurrence in an amendment of the House which was embodied in the enrolled act.

The validity of the act is also questioned because the bill, after its amendment by the Senate, was not read at large on three different days in each house. But of this it is enough to observe that it is authoritatively settled by the decisions of the Supreme Court of the state that amendments made during the process of enactment do not take from a bill the status obtained by prior readings or make it necessary to begin the readings anew. Cleland v. Anderson, 66 Neb. 252, 262, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; State v. Liedtke, 9 Neb. 490, 4 N. W. 63.

Another objection urged against the act is that it did not pass both houses and receive the approval of the Governor under the same title. The facts bearing upon the objection are these: When the bill was introduced, its title, as is alleged in the answer of the school district, was that of a bill for "An act to amend an act entitled 'An act to provide for the issuing and payment of school district bonds,' approved February 26, A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes." And such is the title of the enrolled act as authenticated by the presiding officers of the two houses and as approved by the Governor. The journals contain no affirmative statement that the title was at any time changed or amended. Save in one unimportant instance, they identify the bill by the number given to it when it was introduced. In some instances they also give the full title as here set forth, but more frequently, as in the entries reciting its final passage, they designate it as "A bill for an act to amend an act to provide for the issuing and payment of district bonds." The objection rests upon the assumption that each form of identification must be accepted as conclusively establishing what the title was at that time. The assumption is not well founded. There is no constitutional or other requirement that the journal entries shall identify the bill to which they relate by a recitation of its title. State v. Burlington & Missouri River R. R. Co., 60 Neb. 741, 748, 84 N. W. 254; Nelson v. Haywood County, 91 Tenn. 596, 20 S. W. 1; Field v. Clark, 143 U. S. 649, 671, 12 Sup. Ct. 495, 36 L. Ed. 294. And a careful examination of all the entries relating to this bill discloses without any question that the shorter form of identification was employed as an abbreviated and convenient means of description, and not as a full or accurate statement of the title. To illustrate: Although the bill originally bore the full title here set forth, the entry of its introduction in the House employs the shorter description. The report of its engrossment in the House, preparatory to its being read a third time and put on final passage, gives the full original title, but the entry of such reading and passage employs the shorter description. So also the report of its engrossment in the Senate gives the full original title, but the next succeeding entries employ the shorter description. After its passage by both houses it was enrolled with its full original title and was so reported by the joint committee on enrollment, and yet the subsequent entries of its authentication by the presiding officers of the two houses employ the shorter description. And of the entries of its presentation to the Governor by the appropriate joint committee that in the Senate Journal gives the full original title while that in the House Journal employs the shorter description. Thus the journals themselves show that when the shorter description was employed it could not have been, and was not, intended as a full or accurate statement of what the title was at that time. And this conclusion is strengthened by the communication from the Governor's office, set forth in the House Journal, announcing his approval of the enrolled act, and designating it by the shorter description, although the act then bore the full original title. In these circumstances it cannot be reasonably said that the journal entries containing the shorter form of identifica-

tion purport to fully or accurately state the title or to do more than employ an abbreviated and convenient description of the bill. As has been shown, the evidence of due enactment, furnished by the authenticated and enrolled act, is overcome only when it is unequivocally contradicted by the journals. There is no such contradiction here, so the objection must be overruled. The cases cited to support it are distinguishable because the journal entries there under consideration purported to fully and accurately state the title as it was at the times to which they severally related and affirmatively and unequivocally disclosed that it had been changed without the assent of part of the lawmaking power.

The title of the act is "An act to amend an act entitled 'An act to provide for the issuing and payment of school district bonds,' approved February 26, A. D. 1879, being subdivision 15 of chapter 79, Revised Statutes" (Laws 1887, p. 597, c. 76). The only preceding Revised Statutes were those of 1866, and they did not provide for the issuing or payment of school district bonds. This, it is urged, renders the title uncertain, and violates the constitutional mandate that the subject of the act shall be clearly expressed in its title. It must be ruled otherwise. The title definitely and accurately gives the title and date of the original act intended to be amended. That act could not have been embraced in the Revised Statutes of 1866, because it had not then been enacted. It did, however, constitute subdivision 15 of chapter 79 of the Compiled Statutes of 1881. They, and not the Revised Statutes, are named in the body of the amendatory act. In these circumstances the obvious error in the title produces no uncertainty as to the subject of the act, and is immaterial. The case is unlike that of State v. Burlington & Missouri River R. R. Co., 60 Neb. 741, 84 N. W. 254, cited by counsel, because there the erroneous reference to the Revised Statutes was not accompanied by any adequate reference to the original act, but stood alone.

Conformably to one of the requirements of the Constitution before set forth, the act, as will be shown presently, formally repeals the original sections which it amends, and because the title does not express the purpose to do this it is said to be fatally defective. The contention is both narrow and unsound. As was held in Union Pacific R. R. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46:

"An amendatory act cannot become effective without expressly repealing the amended statute, and repealing by implication all repugnant or inconsistent laws; hence an intention to repeal is always necessarily implied, and need not be expressed [in the title] in order to apprise the members of the Legislature and the public that the new law, if adopted, will take the place of the old one."

While the act amends sections 4 and 5 of subdivision 15 of chapter 79 of the Compiled Statutes of 1881, it purports to repeal the like sections of chapter 59; and because of this it is claimed that the Legislature did not respect the constitutional mandate that the sections amended shall be repealed. Chapter 59 contains no subdivision numbered 15, nor any section numbered 4 or 5, and is entirely foreign to the subject of the act as expressed in the title. So it is obvious that the reference to that chapter is an error. But the chapter which was

actually in contemplation is not left in doubt. When the act is considered in its entirety, and in the light of the presumed purpose of the Legislature to respect the constitutional mandate, as it must be, it is perfectly plain that it was intended to repeal the sections which were amended. They were correctly described in the title as being in chapter 79, and that description corrects and controls the obviously erroneous one in the repealing clause. Richards v. State, 65 Neb. 808, 812, 91 N. W. 878; 2 Sutherland, Stat. Con. (2d Ed.) § 410; Black on Interpretation of Laws, 80; Broom's Legal Maxims (7th Eng. Ed.) 470.

The sections which are amended had been amended and repealed, conformably to the Constitution, by the act of February 24, 1883 (Laws 1883, p. 301, c. 73). This, it is said, entirely eliminated them from the original statute, and made it indispensable that any subsequent amendatory act should deal with them as part of the act of 1883. The contention rests upon a misapprehension of the effect of such a combined amendment and repeal. The uniform rule of decision in Nebraska is that the original sections are not thereby completely abrogated or abolished, but thenceforth have operation and effect in their amended form as part of the statute in which they were originally enacted. State v. Babcock, 23 Neb. 128, 36 N. W. 348; State v. Kearney, 49 Neb. 325, 68 N. W. 533; State v. Wahoo, 62 Neb. 40, 86 N. W. 923; State v. Bemis, 45 Neb. 724, 64 N. W. 348. In the last case an amendatory act similar to the one now under consideration was sustained, and a contention like that now made was disposed of in this way:

"The fallacy of that argument lies in the assumption that the effect of the amendatory acts is in any proper sense a repeal of the original section. True, as provided by section 11, article 3, of the Constitution, 'No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed,' but the term 'repeal' is therein evidently employed in the sense in which it was understood at the time the Constitution was adopted. It had before that time been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of the same statute in terms or in substance is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term. * * * The act of 1891 (Laws 1891, p. 121, c. 7) did not abolish section 145 as originally enacted (Laws 1887, p. 187, c. 10), or as amended in 1889 (Laws 1889, p. 142, c. 13), but, on the contrary, re-enacted it in terms with the exceptions above noted. Nor is the fact that the act of 1891 refers to the section as it appears in the Compiled Statutes at all material, since it was the original act which was amended, the reference to the compilation being for convenience only."

As the objections urged against the validity of the legislation under which the bonds were issued have been found untenable, it becomes necessary to consider the other assignments of error.

The trial was to the court, without the intervention of a jury, pursuant to a stipulation in writing filed with the clerk, and the finding upon the issues of fact was general. A proposed special finding tendered by the defendant was not adopted, and this is in effect made the subject of several assignments of error. But the ruling is not subject to review. When the trial is to the court, without the intervention of a jury, whether the finding shall be general or special rests in the discretion of the court in like manner as it rests in its discre-

tion, when the trial is with a jury, to require that the verdict be general or special. The statute (Rev. St. U. S. § 649 [U. S. Comp. St. 1901, p. 525]) declares that the finding "may be either general or special," but it does not give to one of the litigants the right to determine which it shall be.

At the close of the plaintiffs' case in chief the defendant requested a finding in its favor in the nature of a directed verdict, assigning as reason therefor that there was no substantial evidence to sustain a finding for the plaintiffs. The request was denied, and complaint is made of this. But it need not be noticed further than to say that the defendant subsequently proceeded with the introduction of evidence in its own behalf, and thereby waived the request and the exception taken to its denial. Hughes County v. Livingston, 43 C. C. A. 541, 555, 104 Fed. 306; Barnard v. Randle, 49 C. C. A. 177, 110 Fed. 906; Burton v. United States, 73 C. C. A. 243, 142 Fed. 57.

At the conclusion of all the evidence the defendant made a like request which was also denied. That ruling was excepted to at the time, and is now properly presented for review, so it is necessary to consider whether or not there was any substantial evidence to sustain a finding for the plaintiffs. If there was, the ruling was right, otherwise it was an error of law.

There was no evidence of the execution and genuineness of the bonds and coupons. But whether or not that was fatal to the plaintiffs' case depends upon the correct construction of the defendant's answer. One of the defenses was substantially a general denial, but others admitted the execution and genuineness of the bonds and coupons, and sought to avoid liability upon the latter by reason of various matters which were alleged, such as that "at the time of the issuing of said bonds" the assessed valuation of the taxable property in the school district was not such as to permit the incurrence of such an indebtedness, that the bonds were "fraudulently issued" for an unlawful purpose and without any consideration to the school district, and that they were "delivered" in violation of a subsisting injunction restraining the officers of the district from so doing. The action being at law, the answer should be construed as it would be in the courts of the state. Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684]; Northern Pacific R. R. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513. In those courts it is the uniform practice in respect of such a pleading to treat the denial as qualified by the admission. Thus, in School District v. Holmes, 16 Neb. 486, 20 N. W. 721, which was an action to recover upon a bond alleged to have been issued by the school district, the answer contained a general denial and also a plea of partial payment, and it was held that the former was inconsistent with and qualified by the latter. In Bierbower v. Polk, 17 Neb. 268, 278, 22 N. W. 698, which was an action for the conversion of a stock of merchandise, the answer contained a general denial and also a plea justifying the taking and sale of the stock, and of this the court said:

"We will not try to harmonize the general denial with the other allegations of the answer, but will only say that it must be quite difficult to deny a proposition and admit its truth in the same verified pleading. The denial must yield to the admission."

And in Dwelling House Ins. Co. v. Brewster, 43 Neb. 528, 61 N. W. 746, where the reply contained a general denial of what was alleged in the answer, and also set up certain matters in avoidance, it was held that the latter part of the reply qualified the denial and should be treated as an admission of what was sought to be avoided. See, also, Dinsmore v. Stimbert, 12 Neb. 433, 11 N. W. 872; State v. Hill, 47 Neb. 456, 497, 66 N. W. 541; Home Fire Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047; First National Bank v. Grosshans, 61 Neb. 575, 579, 85 N. W. 542; Northern Pacific R. R. Co. v. Paine, supra. It follows that the answer, when correctly construed, did not put in issue, but admitted, the execution and genuineness of the bonds and coupons, and therefore that no evidence upon that subject was required.

It is said that there was no evidence of the plaintiffs' ownership of the coupons sued upon. The contrary, however, is plainly shown by the record. Both the bonds and the coupons were payable to bearer. Edward D. Shepard, the original purchaser of the bonds, to whose testimony further reference will be made, testified that he sold three of the bonds to William Bostwick, and retained the others; that the coupons sued upon consisted in part of coupons clipped from Bostwick's bonds and in part of coupons which were clipped from Shepard's bonds and then sold to Bostwick. And at the trial the coupons were in the possession of, and were produced in evidence by, the plaintiffs, who were Bostwick's administrators and were suing in that capacity.

Assuming, but without deciding, that the circumstances in which the bonds were issued were such that there could be no recovery thereon, or upon any of the coupons, save by an innocent purchaser, or by one who acquired them through such a purchaser, unnecessary discussion will be avoided by at once coming to the question whether or not there was evidence to sustain a finding that Edward D. Shepard was an innocent purchaser. The bonds contained a recital that they were issued "for the purpose of building a schoolhouse in said district, and in pursuance of" the act of February 26, 1879, and the amendments thereto, and also bore a certificate by the Auditor of Public Accounts that they were duly registered, and another by that officer and the Secretary of State showing that they were issued pursuant to law, as was required by said act. Shepard was a witness for the plaintiffs, and his testimony, which was uncontradicted, was in substance as follows: As an investor in municipal securities he purchased the bonds in New York City in the regular course of business, paying therefor 97 per cent. of their face value with accrued interest. (The check by which payment was made was produced in evidence.) None of the bonds, nor any of the coupons attached to them, was then due. He read one of the bonds, and relied upon the recital therein and the certificates thereon, and also upon the written opinion of a reputable attorney of wide experience in matters pertaining to municipal securities, to the effect that the issuance of the bonds had been regularly authorized, and that they were in due form and were legally binding upon the district. At the time of the purchase the banker through

whom it was made told him that a suit had been brought to prevent the registration of the bonds by the state officers, and that it had been dismissed, but he did not otherwise hear or know of their validity being questioned until three or four months thereafter. When due effect is given to the recital in the bonds, and to the certificates of the state officers indorsed thereon (see Hughes v. Livingston County, 43 C. C. A. 541, 104 Fed. 306; Platt v. Hitchcock County, 71 C. C. A. 649, 139 Fed. 929; Gamble v. Rural Independent School District [C. C. A.] 146 Fed. 113), it is quite plain that this testimony was sufficient to sustain a finding that Shepard was an innocent purchaser for value before maturity, unless there be merit in some of the contentions now to be considered.

The bonds contained the recital, "Total amount of bonds issued by said district $24,000," and it is said that this, together with the last assessment of the taxable property of the district, disclosed that the statutory limitation upon the amount of bonds which could be issued had been exceeded. The contention is disposed of by the ruling which sustains the validity of the amendatory act of 1887, whereby the limitation was increased from 5 to 10 per cent. of the assessed valuation. This issue of bonds amounted to $22,000 and with a prior issue of $2,000 made the total stated in the recital, which was within the increased limitation.

The first section of the statute declared that school districts could issue bonds "for the purpose of purchasing a site for, and erecting thereon, a schoolhouse or schoolhouses, and furnishing the same," and because these bonds recited that they were issued "for the purpose of building a schoolhouse," it is said that they disclosed that they were not issued for a lawful purpose. Differently stated, the contention is that the statute permitted the issuance of bonds for the threefold purpose of purchasing a site, erecting a schoolhouse thereon, and furnishing the same, but not for the single purpose of erecting a schoolhouse, though the district may have had a suitable site therefor and other means of furnishing the building when erected. The statute was not so unreasonable. Its purpose, as stated in section 3, was to enable a school district to issue bonds "to purchase a site for, or erect a schoolhouse, or houses, or for furnishing the necessary furniture and apparatus for the same, or for all of these purposes." Whether or not the statement in the bonds of the purpose for which they were issued sufficiently conformed to the statement in the proceedings leading to their issuance is not material to the present inquiry because there was evidence to sustain a finding that Shepard purchased without notice of the want of conformity, if there was such.

At the time of his purchase a suit was pending in one of the courts of the state in which the election at which the bonds were voted was being contested and in which a temporary injunction restraining their registration and issuance had been granted. The suit was subsequently prosecuted to a successful conclusion of the contest, and the injunction was made perpetual. That he purchased with actual notice of the pendency of this suit is said to be a necessary conclusion from the fact that the banker through whom he purchased told him at that time that a suit had been brought to prevent the registration of

the bonds by the state officers. The claim is fallacious. It ignores a material part of what the banker said, that is, that the suit had been dismissed, which could have been reasonably regarded as confirmed by his possession of the bonds bearing certificates of their due registration and issuance signed by the designated state officers. Thus, a finding that Shepard purchased without actual notice of the pendency of the suit was at least an admissible one under the evidence. Clark v. Evans, 13 C. C. A. 433, 66 Fed. 263; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Cromwell v. County of Sac, 96 U. S. 51, 58, 24 L. Ed. 681.

Finally, it is said that the statute, under which the election at which the bonds were voted was being contested, superseded the result of the election as declared by the canvassers, and suspended the power of the district officers to act thereon, during the period prescribed for beginning a contest, and during the pendency of any contest begun within that period; and, upon the assumption of the correctness of this contention, it is argued that Shepard, being chargeable with knowledge of the statute, could not become an innocent purchaser pending a contest begun within the prescribed period, as this one was. The contention has no support in the statute which gave authority for issuing the bonds, for there was no provision therein for contesting the election. Nor does it have any support in the general statute which provides for contesting "the election of any person to any public office, the location or relocation of a county seat or any proposition submitted to a vote of the people" (Comp. St. Neb. c. 26, § 64 et seq.), for there is nothing therein indicative of an intent to supersede the result of an election as declared by the canvassers, or to suspend action thereon, during the period prescribed for beginning a contest or during the pendency of a contest begun within that period. And that such is not the intent of this statute is manifest when it is considered that it puts the contest of an election on a proposition submitted to a vote of the people upon the same footing as the contest of an election of a person to a public office, for it is the accepted rule that, unless there be some provision therein to the contrary, a statute authorizing contests of the latter sort does not at all postpone or suspend the right of one, whose election is declared by the canvassers, to qualify and exercise the functions of the office. McCrary on Elections (3d Ed.) § 267. Doubtless it was in this view of the statute that the contestants sought, and the court granted, a temporary injunction restraining the registration and issuance of the bonds pending the contest. Counsel for the school district, while frankly confessing their inability to find any decision directly in point, place much reliance upon the opinion in Stewart v. Lansing, 15 Blatchf. 281, Fed. Cas. No. 13,432. That was an action upon coupons cut from bonds issued on behalf of the town in aid of the construction of a railroad. The statute giving authority for the issuance of such bonds made it a condition that it should satisfactorily appear to the county judge that their issuance was desired by a majority of the taxpayers, representing a majority of the taxable property of the town, and provided that, if it should so appear, he should appoint commissioners to issue them, and that his decision should have the same force and effect as other

judgments of courts of record in the state. Another statute authorized the review by the Supreme Court of the state upon writ of certiorari of all questions of law and fact determined by the county judge in such a proceeding. Upon a petition presented to him the county judge determined that the issuance of the bonds, from which the coupons in suit were cut, was desired by the requisite number of taxpayers, and appointed commissioners to issue them. The proceeding was then removed upon writ of certiorari to the Supreme Court of the state, where the judgment of the county judge was reversed. But before the reversal the commissioners, notwithstanding the pendency of the writ, issued the bonds, and thereafter the coupons in suit came to be held by the plaintiff. The Circuit Court held that he was chargeable with constructive notice of the proceedings upon the writ of certiorari, and therefore could not be an innocent purchaser, and in its opinion said:

"It is also true that, as these bonds are negotiable commercial securities, an ordinary lis pendens would not affect them in the hands of an innocent purchaser. Warren Co. v. Marcy, 97 U. S. 96, 24 L. Ed. 977. But this litigation upon the certiorari was different. It affected the judgment itself, which was the foundation of all authority to issue the bonds, and not the parties merely, and, until it should be ended, leaving the judgment in force, there could be no such authority. In this case it was ended by holding the judgment for naught altogether, so that there never was a time from the commencement of the proceedings upon certiorari, by service of the writ, to their termination, when there was authority, or color of authority, for issuing the bonds. They were issued under a general law of the state of New York providing for their issue only upon such a judgment, which was, by another general law, subject to review by such proceedings, and the proceedings were all upon the open and known public records of the courts of the state; and, probably, all persons dealing in them would be bound to know the general laws concerning them, and to look for the proceedings under the law by which only they could ever have any vitality, if they desired to know, the same as all persons are bound to know the general laws, and the necessity and effect of proceedings under them, relating to other subjects. But dealers in these bonds were not left to make good their presumed knowledge of the law by searching it out. The bonds themselves on their face referred to the law of their origin. This affected them directly with notice of all the requirements of that law. McClure v. Township of Oxford, 94 U. S. 429, 24 L. Ed. 129. By that they would be informed, or be bound to act as if informed, that the authority to issue the bonds would depend wholly upon a judgment with which the commissioners had nothing of the making to do, and concerning which they would have the same opportunities to learn, by examining the records, as any other persons. An examination of the records would have shown them that the proceedings had been removed and that there was no judgment in force remaining."

It may be that what was thus said gives color to the present contention; but, if so, it was effectually disapproved when later on the case came before the Supreme Court of the United States, for that court, although affirming the judgment, distinctly recognized that the pendency of the writ of certiorari did not preclude the plaintiff from becoming an innocent purchaser, and proceeded to inquire whether or not there was evidence that "he was in a commercial sense the bona fide holder of the coupons sued for." Stewart v. Lansing, 104 U. S. 505, 509, 26 L. Ed. 866. See, also, Lytle v. Lansing, 147 U. S. 59, 62, 13 Sup. Ct. 254, 37 L. Ed. 78. That court had before held that one who was in fact a bona fide purchaser of bonds issued in the like

circumstances was not affected with constructive notice of the pending proceeding to review the judgment of the county judge. Orleans v. Platt, 99 U. S. 676, 25 L. Ed. 404. These cases, however, did not announce a new rule, but merely gave effect to the prior decision in County of Warren v. Marcy, 97 U. S. 96, 24 L. Ed. 977, wherein the doctrine of constructive notice arising from a pending suit was pronounced inapplicable to negotiable securities, as is shown by the following extracts from the opinion:

"It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions. * * * Its object is to protect the commercial community by removing all obstacles to the free circulation of negotiable paper. If, when regular on its face, it is to be subject to the possibility of a suit being pending between the original parties, its negotiability would be seriously affected, and a check would be put to innumerable commercial transactions. These considerations apply equally to securities created during, and to those created before the commencement of, the suit, and as well to controversies respecting their origin as those respecting their transfer. Both are within the same mischief and the same reason."

It sometimes happens, as in the present case, that such securities are issued or negotiated in violation of a subsisting injunction in a pending suit, but that can make no difference in the rights of one who is in fact a bona fide purchaser, for the obvious reason that constructive notice of the injunction cannot be charged against one who is in no way charged with notice of the suit. Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809; County of Warren v. Marcy, 97 U. S. 96, 109, 24 L. Ed. 977; County of Cass v. Gillett, 100 U. S. 585, 593, 25 L. Ed. 585; Tregea v. Modesto Irrigation District, 164 U. S. 179, 187, 17 Sup. Ct. 52, 41 L. Ed. 395.

The several matters presented in support of the claim that the defendant's request for a finding in its favor in the nature of a directed verdict should have been sustained have now been considered, and none of them has been found to be tenable.

Error is assigned upon some of the rulings in the admission and rejection of evidence, but special notice of such of them as would otherwise merit attention is rendered unnecessary by what has been said.

No error being disclosed by the record, the judgment is affirmed.

STEARNS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1907.)

No. 2,411.

1. CONSPIRACY—INDICTMENT—CONSTRUCTION.

While a charge of conspiracy to defraud the United States under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which wholly omits some essential element of the offense, cannot be aided by the statement of acts done to effect its object, this does not prevent reference to such state-

ment for the purpose of ascertaining the sense in which terms are used in charging the conspiracy.

2. SAME.

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which charges a conspiracy to defraud the United States of certain of its lands by means of false forged and fraudulent entries thereof under the homestead law, and avers that such lands were "in the district of lands subject to entry under the homestead laws of the United States" at a certain land office, and also in stating the acts done pursuant to such conspiracy charges the filing of applications for homestead entry of certain described "public lands of the United States subject to homestead entry," is not fatally defective, because in charging the conspiracy it does not expressly aver that the lands of which it was the purpose to defraud the United States were public lands, subject to homestead entry.

3. PUBLIC LANDS—MEANING OF TERM.

The words "public lands," used in connection with entries in the land offices of the United States, if nothing be said to the contrary, relate to lands of the United States which are subject to disposition in some form under the public land laws, and not to those which are set apart and used for some special public purpose, such as post office sites, military reservations, and the like.

4. SAME—HOMESTEAD ENTRIES—USE OF TO DEFRAUD UNITED STATES WHEN LANDS NOT SUBJECT TO DISPOSAL IN THAT WAY.

Not all public lands are subject to homestead entry, and yet such an entry may be employed as a means of defrauding the United States of public lands not subject to disposal in that way, as where the exception turns upon a question of fact, such as whether the lands contain valuable coal or mineral deposits.

5. CONSPIRACY—INDICTMENT—STATEMENT OF MEANS OF EFFECTING OBJECT.

Quære, whether it is necessary, in an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], to set forth the means of effecting the object of the conspiracy charged, or to describe them so fully as to make their adequacy apparent.

6. CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—GROUNDS.

The objection that an indictment for conspiracy to defraud the United States of certain public lands does not make it altogether clear to what lands the conspiracy related cannot be taken by a motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2454.]

7. SAME—MOTION FOR DIRECTION OF VERDICT—GROUNDS.

A verdict of acquittal in a criminal case will not be directed because of a defect in the indictment, unless it is one which would be fatal on motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1727.]

8. SAME—WAIVER OF EXCEPTION TO RULING.

An exception to the overruling of a motion for a directed verdict of acquittal at the close of the government's case on the ground of the insufficiency of the evidence is waived by the defendant by introducing evidence in his own behalf.

[Ed. Note—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2124.]

9. CONSPIRACY—DEFRAUDING UNITED STATES—POSSESSION OF PUBLIC LANDS.

A conspiracy to defraud the United States of the possession of public lands by means of fraudulent homestead entries is within Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], although there is no purpose to carry the preliminary entries to final entry and patent.

10. PUBLIC LANDS—"ENTRIES"—MEANING OF TERM.

In statutes and in common parlance the word "entries," when applied to proceedings in the land office under the homestead law, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole.

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

R. W. Stewart (John F. Hughes, on the brief), for plaintiff in error.

Charles C. Houpt, U. S. Atty. (Joel M. Dickey, Asst. U. S. Atty., on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. Royal B. Stearns, with another, was convicted in the District Court of a conspiracy to defraud the United States, a crime denounced by section 5440, Rev. St., as amended May 17, 1879, 21 Stat. 4, c. 8 [U. S. Comp. St. 1901, p. 3676], which reads:

"If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

The indictment charges the conspiracy in this way:

"The said Royal B. Stearns and William T. Horsnell did then and there unlawfully, wrongfully, feloniously, and knowingly conspire, combine, confederate, and agree together to defraud the United States of the title and possession of certain lands of the said United States, of great value, under the homestead laws of the said United States, by means of false, feigned, forged, fraudulent, and fictitious entries of said lands under the homestead laws of the United States, which said lands were then and there situate in the state and district of South Dakota, and in the district of lands subject to entry under the homestead laws of the United States at the local land offices of the United States, in the Pierre land district and in the Chamberlain land district, both of said land districts then and there being in the state and district of South Dakota."

And it then charges with much particularity the doing of several acts to effect the object of the conspiracy, the substance thereof being that the defendants caused to be presented and filed in said local land offices certain described homestead applications accompanied by certain affidavits, which purported to have been subscribed and sworn to by bona fide homestead applicants in conformity with the homestead laws of the United States and the regulations of the General Land Office, but which, as was well known to the defendants, were false, forged, and fraudulent in this: They had not been subscribed or sworn to before the officer whose jurat was thereto attached, and were not made by bona fide homestead applicants. This part of the indictment fully describes the specific lands embraced in these applications, and states that they were "public lands of the United States, subject to homestead entry," at said land offices.

Before the trial the sufficiency of the indictment was not questioned in any way, but after verdict it was challenged by a motion in arrest

of judgment, the denial of which is assigned as error. The contention is that the indictment charges a conspiracy to defraud the United States of the title and possession of some of its lands by means of fraudulent homestead entries, without charging that the lands were public lands, subject to homestead entry, and that it is therefore fatally defective, first, as not showing that the object of the conspiracy could be effected by the means stated, and, second, as not enabling the accused to prepare their defense, because leaving it uncertain whether they would be confronted at the trial with proof that the conspiracy related only to public lands, subject to homestead entry, or extended to other lands of the United States, not public or subject to homestead entry, such as post office sites, military reservations, and the like.

Lands of the United States, which are used as post office sites, military reservations, and the like, are not within the operation of the public land laws, and no attempt to make entries of them in the land offices can be effective for any purpose, because the land officers have no authority to dispose of them. Wilcox v. McConnell, 13 Pet. (U. S.) 498, 513, 10 L. Ed. 264; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403; Burfenning v. Chicago, etc., Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Smelting Co. v. Kemp, 104 U. S. 636, 641, 26 L. Ed. 875. So long and firmly has this been settled, and so generally is it recognized throughout the public land states and territories, that when mention is there made of entries in the land offices it is immediately understood, if nothing be said to the contrary, that they relate to lands which are subject to disposition in some form under the public land laws, and not to those which are set apart and used for some special public purpose. True, the former, when there is occasion to distinguish them from the latter, are usually spoken of as "public lands" (Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 614), but this is not essential if the meaning be otherwise plain. Leavenworth, etc., Co., v. United States, 92 U. S. 733, 23 L. Ed. 634.

Not all public lands are subject to homestead entry, but it does not follow that attempts to make homestead entries of such as are excepted from that mode of disposal are never effective. When the exception turns upon a question of fact, such as whether the lands contain valuable coal or mineral deposits, the determination of which is committed to the land officers and must rest upon proofs outside the records, it is always possible for applicants, by making false proofs, to impose upon these officers, and secure the allowance by them of homestead entries of lands of the excepted class. Of course such entries are fraudulent, but, being allowed in the exercise of a lawful authority, they are not void, but voidable merely, and may be the means of defrauding the United States. Burfenning v. Chicago, etc., Co., supra; United States v. Mackintosh, 29 C. C. A. 176, 85 Fed. 333; United States v. Minor, 114 U. S. 233, 240, 5 Sup. Ct. 836, 29 L. Ed. 110; Steele v. Smelting Co., 106 U. S. 447, 453, 1 Sup. Ct. 389, 27 L. Ed. 226; United States v. Winona, etc., Co., 15 C. C. A. 96, 103, 67 Fed. 948; Parsons v. Venzke, 164 U. S. 89, 92, 17 Sup. Ct. 27, 41 L. Ed. 360; In re John O'Dea, 6 Land Dec. Dep. Int. 819. And they may

also be fraudulent for other reasons, applicable to all original homestead entries, as where they are made in pursuance of collusive agreements by the applicants to give to others the benefit thereof, or are made by persons who falsely represent themselves as possessing the requisite qualifications when they do not possess them.

We are aware that there is persuasive authority for the position, taken by the learned judge who presided at the trial, that under section 5440 the means of effecting the object of the conspiracy do not constitute an element of the offense and need not be stated in the indictment, or, if stated, need not be so fully described or so supplemented by the statement of other matters as to make their adequacy apparent. United States v. Dustin, 25 Fed. Cas. 944, No. 15,011; United States v. Dennee, 25 Fed. Cas. 818, No. 14,948; United States v. Gordon (D. C.) 22 Fed. 250; United States v. Benson, 17 C. C. A. 293, 298, 70 Fed. 591, 596; Gantt v. United States, 47 C. C. A. 210, 108 Fed. 61. See, also, United States v. Cruickshank, 92 U. S. 542, 558, 23 L. Ed. 588; Pettibone v. United States, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419; Dealy v. United States, 152 U. S. 539, 544, 14 Sup. Ct. 680, 38 L. Ed. 545. But as in the present case the result must be the same whether this position be correct or otherwise, and as its correctness was neither affirmed nor denied in argument, we deem its consideration at this time unnecessary.

With these preliminary observations, some of which will serve to avoid any misapprehension of what is here decided, we proceed to consider the objections made to the indictment. The act of conspiring, the purpose to defraud the United States of the title and possession of certain of its lands, and the doing of several acts to effect this purpose are all directly and plainly stated. And in like manner it is stated that the unlawful purpose was to be effected under color of the homestead law, by means of false, forged, and fraudulent homestead entries. This, without more, strongly implies that the conspiracy had in view lands which were public and possible of acquisition through such entries. But the matter is not left to implication merely. It is further stated that the lands were "in the district of lands subject to entry under the homestead laws of the United States" at designated local land offices, a permissible meaning of which is that the lands were part of those which were subject to homestead entry at these land offices. And that this is what was intended is apparent when the statement of the overt acts is examined, for it is there said that "to effect the object of such conspiracy" the accused caused certain homestead applications to be made at these land offices for specific "public lands of the United States, subject to homestead entry" thereat. We recognize that a charge of conspiracy under section 5440, which wholly omits some essential element of the offense, cannot be aided by the statement of acts done to effect its object (United States v. Britton, 108 U. S. 199, 205, 2 Sup. Ct. 531, 27 L. Ed. 698), but this does not prevent reference to such statement for the purpose of ascertaining the sense in which terms are used in charging the conspiracy. Dealy v. United States, 152 U. S. 539, 545, 14 Sup. Ct. 680, 38 L. Ed. 545.

Our conclusion is that the indictment, although susceptible of improvement, makes it clear to the common understanding that the

conspiracy had in view public lands which were possible of acquisition by means of homestead entries, and that the accused, attended by counsel as they were, could not reasonably have understood it otherwise. But if it were conceded that the indictment does not make it altogether clear to what lands the conspiracy related—which is the most that is claimed—the defect would not be available on motion in arrest of judgment. As was said by Mr. Justice Brewer in Dunbar v. United States, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390:

"While it may be true that a defendant by waiting until that time [after verdict] does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion, or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged to have violated the law."

It follows that the motion in arrest of judgment was rightly denied.

At the close of the government's case in chief the accused requested the court to direct a verdict of acquittal, advancing as reasons therefor that the indictment would not sustain a conviction, and that the evidence was not sufficient to take the case to the jury. The request was denied, and error is assigned thereon. It is not usual to question the sufficiency of an indictment in this way, and is not admissible, save for a defect which would be fatal on motion in arrest of judgment, all others being waived, if advantage thereof be not taken in advance of the trial. As has been shown, the indictment was sufficient as against a motion in arrest. In so far as the request questioned the sufficiency of the evidence, it was waived by the action of the accused in subsequently proceeding to offer evidence in their own behalf, Burton v. United States, 73 C. C. A. 243, 142 Fed. 57; School District v. Chapman, 152 Fed. 887.

The matter which next claims our attention is an objection to a portion of the court's charge to the jury. As a preliminary to its statement and consideration it will be well to recite briefly the facts which the evidence tended to establish. Certain ranchmen and stockgrowers were maintaining unlawful inclosures of public lands in the Pierre and Chamberlain land districts in South Dakota, were apprehensive that they would be required to remove their inclosures by proceedings under the act of February 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], and had solicited the defendant Stearns to devise some plan which would enable them to maintain their exclusive use and occupancy of the lands inclosed. Stearns was a land locator at Pierre, S. D., and the defendant Horsnell was conducting an employment office at St. Paul, Minn. At the latter place the defendants entered into this arrangement: Horsnell, upon inducements to be offered by him, was to secure homestead applications, homestead and nonmineral affidavits, and also five-year leases, to be signed in blank by persons visiting his office, and was to transmit these papers to Stearns, who was to insert therein descriptions of public lands so unlawfully inclosed; was to secure false certificates from some officer,

authorized to administer such oaths, that the affidavits were subscribed and sworn to in his presence by those whose names were signed to them; was to present the applications and affidavits, as so perfected in form, at the local land offices and secure the allowance thereon of preliminary homestead entries; and was then to deliver the leases, with the blanks suitably filled in, to those who had the lands unlawfully inclosed. The purpose in this was, not to initiate and secure lawful homestead entries on behalf of bona fide applicants, but to enable those who had the lands unlawfully inclosed to continue in the exclusive use and occupancy of them, as against the United States and the public, during the five-year period prescribed for earning title under the homestead law. Many acts, including those specified in the indictment, were done by one or both of the defendants to effect this purpose. Whether or not it was also the purpose that the preliminary entries should be carried to final entry and patent for the benefit of the defendants, or the ranchmen and stockgrowers in whose behalf they were acting, was the subject of conflicting evidence.

The court, in effect, instructed the jury that, if the charge was otherwise established, it was within the statute, even though the purpose was confined to defrauding the United States of the possession of the lands by means of fraudulent homestead entries, and did not include the acquisition of the title. This, it is urged, was error, because, first, the United States could not be defrauded of the possession by anything short of what would pass the title; second, its possession of public lands is theoretical only and not a thing of value; and, third, the indictment, in charging the conspiracy, uses the word "entries" only in the sense of final entries. We cannot assent to these contentions.

The homestead law plainly confers the right of possession upon the entryman when the preliminary entry is made, for it makes actual settlement, followed by residence and cultivation for a period of five years, a condition to obtaining the title, and requires the applicant to make and file, with the application for the entry, an affidavit "that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for." Rev. St. § 2290; Act March 3, 1891, c. 561, § 5, 26 Stat. 1095 [U. S. Comp. St. 1901, p. 1389]; Rev. St. § 2291 [U. S. Comp. St. 1901, p. 1390]; Shiver v. United States, 159 U. S. 491, 497, 16 Sup. Ct. 54, 40 L. Ed. 231; Peyton v. Desmond, 63 C. C. A. 651, 662, 129 Fed. 1, 12. But the right to the possession, like the right to make the entry, is extended only to those who intend to earn the title by faithfully and honestly complying with the law. To secure the entry by feigning such an intention is to secure it fraudulently, and to then use it as a mere cover for obtaining or prolonging an unlawful possession is to defraud the United States of the possession.

While the government pursues a liberal policy in respect of its public lands, and requires that they shall remain open in order that settlement and entry thereof under the general land laws may not be discouraged or impeded, and that such as are adapted to grazing purposes may be freely accessible to all (Act Feb. 25, 1885, c. 149, 23 Stat.

321 [U. S. Comp. St. 1901, p. 1524]; Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260), it does not thereby surrender its possession of them, or render it of no value. On the contrary, this is but an exercise of its right of possession in a manner deemed of advantage to it in the proper execution of the general land laws, and in the accomplishment of the purposes which prompted their enactment.

In statutes and in common parlance the word "entries," when applied to proceedings in the land offices under the homestead law, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole. In this indictment it is evidently used in the sense of the proceedings as a whole, because it refers to that whereby the possession and the title are acquired, and so embraces preliminary entries.

We find no error in the record, and the judgment is accordingly affirmed.

CUNNINGHAM v. CITY OF CLEVELAND, TENN., et al.

(Circuit Court of Appeals, Sixth Circuit. March 24, 1907.)

No. 1,586.

1. MUNICIPAL CORPORATIONS—JUDGMENT AGAINST CORPORATION—MISAPPLICATION OF REVENUE.

Where a city is given by statute authority to borrow money for the erection of public buildings and to issue its bonds therefor, it has not the right to use its current revenues for that purpose as against a judgment creditor, whose judgment is payable only from the surplus of such revenues above current expenses.

[Ed. Note.—Constitutional and statutory limitations of municipal indebtedness, see note to City of Helena v. Mills, 36 C. C. A. 6.]

2. SAME—ENFORCEMENT OF JUDGMENT—MANDAMUS.

A writ of mandamus requiring a city to levy taxes for municipal purposes to the full amount permitted by statute, and to apply the surplus remaining after paying current expenses chargeable thereon in payment of a judgment against it, is continuous in its operation, and the court may modify its order from time to time to meet the exigencies of the case. It may bring in as parties officers elected after its order was made, and, while it cannot control their discretion if honestly exercised, it may exercise a supervisory power over their acts so far as necessary to insure an observance of its mandate in good faith.

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

Frank Spurlock, for plaintiff in error.

J. B. Sizer, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This cause is now here for the fourth time. On the first occasion, it was brought up on an appeal by the complainant from a decree of the Circuit Court dismissing the bill. The decree was reversed, with directions to enter a decree for the

complainant for the full amount claimed by the bill, with interest and costs. The decision of this court was of the date of December 9, 1899. The facts of the case and the opinion of the court were reported in 98 Fed. 657, 39 C. C. A. 211. Pursuant to the mandate, on April 11, 1900, a decree was entered in the Circuit Court in favor of the complainant for the sum of $9,852.12 and costs. Execution was issued thereon and returned nulla bona. On July 11, 1900, the complainant filed a petition in the Circuit Court praying for a mandamus to compel the city to levy and collect a sufficient tax and therewith to satisfy the decree. To an alternative writ the city returned that it had already assessed a tax for that year of 75 cents on each $100 for the maintenance of its municipal functions, that this assessment was the limit of its power of taxation under its charter, and that no surplus would remain after applying the amount assessed to the necessities of the city government. The complainant demurred to this return, and the demurrer was sustained; the court being of opinion that the city had the power, and it was its duty, to levy a special tax, notwithstanding the limitation of 75 cents on the $100, which the court thought was a limitation upon its power to tax for ordinary municipal purposes. The court was further of opinion that the return was insufficient in that it failed to state the purposes for which the general tax had been levied. A judgment was entered in accordance with this opinion, and the defendant sued out a writ of error to this court. It was here held upon consideration of the relevant provisions of the city's charter that the Circuit Court was in error in holding that the aforesaid limitation did not exclude the power to levy a special tax to satisfy the decree; and we reversed the judgment. But on doing this we indicated to the Circuit Court our opinion in respect to the judgment which that court should enter. The case, as then presented, and the opinion of this court, are reported in 111 Fed. 341, 49 C. C. A. 383. As the judgment which we then indicated as the proper one was made the judgment of the Circuit Court upon the reception of the mandate, and was, and still continues to be, the guide for subsequent proceedings, we here set forth a copy of so much thereof as is now material:

"That the defendant below be directed to pay over any surplus which may remain from the proceeds of the total levy made for all purposes in 1900, after defraying the current expenses chargeable upon the ordinary revenue of the city, and that it make a further return showing the amount of the tax so collected, and how same has been applied. That the defendants below be commanded to levy for each year succeeding the entry of this judgment the full tax of 75 cents on the $100 of assessable city property, and the full poll and privilege taxes permitted by the charter of 1893, until the judgment of relator, with interest and costs, shall be fully paid; and, after defraying all ordinary expenses payable out of the revenue so raised each year, it will pay over to the relator any surplus remaining each year, until his judgment shall be paid, and that it make all such other returns as shall be required by the court below, showing how it has obeyed this judgment."

After the Circuit Court had entered the judgment we directed, the city made a further return as therein required, and evidence relating to the matters stated in said return was taken before a master as in equity proceedings; but the relator had taken no issues either of fact or law

upon the return. The master did not report the evidence, but stated his own conclusions of the state of the city's finances, reached by him with the assistance of an accountant. Upon his report of the sum which ought to be in the treasury for the satisfaction of the decree exceptions were filed, which being overruled the court ordered that the defendant pay into court within 20 days the sum of $5,631.19 to be applied upon the decree. Upon a writ of error, because no issues had been made and for other irregularities, in consequence of which we were unable to review the proceedings to any purpose, the order was reversed and the cause remanded, with instructions to permit a further return, to require the relator to demur or plead, or take exception thereto as he might elect, and to take further proceedings in conformity with the opinion which we filed. The report of the case on that writ of error is to be found in 127 Fed. 667, 62 C. C. A. 393. These directions being entered in the Circuit Court, the city made a further return showing the revenues it had collected and the disbursements it had made for the years 1900, 1901, 1902, and 1903, respectively, and the parties pleaded to issue thereon, and the relator also filed exceptions to the return. The case was finally submitted upon the return, the exceptions thereto, and certain agreed facts. The court overruled all the exceptions, and adjudged the return to be sufficient, and that the relator pay the costs of the proceeding. The case is now here upon a writ of error to reverse that judgment.

We take the facts as we gather them from the return of the city and the agreed statements. The return for the year 1900 shows that taxes to the amount of 75 cents on the $100 of the valuation were collected. It also shows that the whole amount thus collected was disbursed, but that no part was applied to the relator's decree. The exceptions of the relator to the disbursements of that year challenge the following items: An item of $250 paid to attorneys for services rendered in 1899. It does not appear at what time in 1900 this item was paid; nor is it important, as we think, to fix the precise date. The petition for mandamus, filed in July of that year, did not seek to impound the general taxes for 1900, or any part of them. It was filed for the purpose of compelling a special levy to satisfy the decree, and that was what the Circuit Court ordered. Until the date of the judgment of this court, which was October 8, 1901, there was no order or judgment which interfered with the power of the city to pay any valid obligation. The order then made could only apply, so far as the revenues of that year were concerned, to any surplus arising from the collections of that year which still remained in the treasury. The same observations apply to the second exception, which is to the disbursement in that year of $843.70 to pay a note given for a rock-crusher, and to the third exception, to the payment of $533.40 due on a judgment against the city for attorney fees. It is not charged that any of these three items were not valid obligations of the city.

The return for 1901 shows that taxes to the full amount of 75 cents on the $100 were collected, that they were all disbursed, but none to the relator. Among the disbursements was an item of $2,125 for the purpose of building an addition to a public school building, and this disbursement formed the subject of the relator's fourth exception.

The date in 1901 when this item was disbursed, as is the case with all the items of disbursements in this and the previous year, is not shown. If it was paid before October 8, 1901, it was not within the scope of the judgment of this court of that date, and for the reason above stated in regard to previous exceptions no order of the court was pending which forbade the disbursement, and the city or its officials would not be in contempt for making it. The burden was on the relator to prove that it was after that date in order to bring the respondent under the operation of the order. We are not to be understood as saying that the particular disbursements above mentioned and now challenged by the relator were made with due regard to his rights. We only say that upon this writ and the order thereon directed by this court in October, 1901, the court was restricted to the limits of the writ and order. We make these observations respecting the disbursements challenged with a qualification which we propose to consider here, though it relates as well to the exception following, which has regard to another disbursement of $2,548.85 made during the year 1902 for another addition to the school building. We preface what we are now to say with the statement that in 1902 the full amount of 75 cents on $100 was levied and collected and disbursed without any relief to the relator. And so of 1903. Counsel for the relator contends that these appropriations for additions to the school building were not justified as against him for the reason that section 21 of the charter authorized the city to borrow money and issue its bonds therefor to erect public buildings, and that it was its duty to avail itself of that power, if it had not enough to pay its other obligations falling due. We are strongly inclined to think this point is well taken. It seems probable that the Legislature contemplated just such a situation as this as likely to happen. The building of such large structures would necessarily involve the use of large sums of money, several times larger than the municipality was authorized to raise for its current annual expenses, which for those purposes were meager enough already. It is true it was a grant of authority, and it may be said that a discretion existed. But, if the city owed an honest debt which it could not otherwise pay, it would seem to be due to the owner of that debt that the discretion should be exercised in his favor. Supervisors v. United States, 4 Wall. 435, 18 L. Ed. 419; City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Deere v. Commissioners, infra. During the years 1901 and 1902, the city disbursed for these new buildings $4,673 out of funds which were raised for ordinary expenses, and therefore applicable to the debt due the relator, if not necessary for current use. We think he had a lawful right to expect this, and that if, after paying its ordinary expenses, it should have no funds to erect school buildings, the city should exercise its power under the statute providing for raising funds for that purpose, if, indeed, there was a real necessity. It was not a case where the city would have to appropriate its ordinary revenues to erect school buildings or go without. No such necessity could be appealed to in order to justify the city in withholding from the relator the debt due him and defeating his just expectation that the city would in good faith exercise its powers in such a way as to pay him. When we speak of the city, we mean to include the

officials who, from time to time, represented it in the levying and collecting its taxes and appropriating its revenues.

We are therefore of opinion that the Circuit Court erred in holding that the return was sufficient, and specifically in regard to the disbursement of $2,548.85 for school buildings in 1902, and in so far its judgment should be reversed, with directions to adjudge the return insufficient in the regard mentioned. And it is authorized, if it shall be so advised, to order a more specific return as to the time when the disbursement of the $2,125 for school buildings was made in 1901, and, if it shall appear that it was made after the 8th day of October of that year, the said return in that respect should be judged insufficient. The costs of the proceeding were erroneously adjudged to be paid by relator. The relator was entitled to a return to the writ. The circumstances justified him in pursuing his remedy, and, as above indicated, we think the court erred in holding the return sufficient, and that the relator should have been awarded costs.

The return made for the year 1903 shows that the full 75 cents on each $100 was levied and collected and disbursed by the city, and that nothing has been paid to the relator. It also shows that there was a "cash balance in the hands of the city treasurer for 1903" of $722.61. Nothing is said about this in the judgment of the court below; and, from the fact that no error is assigned because the court did not order it to be paid over, we do not concern ourselves with it. There is no assignment of error in dealing with the return for 1903, except as it may be indirectly involved in the assignments presently to be noticed. Apparently that surplus would be paid to the relator.

The other assignments of error seem to be intended to raise two questions of an interesting character, of which one is whether the act of the Legislature of Tennessee of 1895 which transfers the duty of valuing the property of the city for assessing taxes from the recorder of the city to the county assessor, who makes, under that act, a single valuation for state, county, and municipal purposes, impaired the obligation of the city in respect of his contract, which was of earlier date. Under the then existing law the recorder valued the property in the city only, and he was by the statute required to value it at its true cash value. This the relator was entitled to have done, and he might probably have compelled the recorder to make such a valuation. In Deere v. Board of County Com'rs (C. C.) 33 Fed. 823, it was held by Mr. Justice Brewer, then Circuit Judge, that, where at the date of the obligation the commissioners were authorized in their discretion to levy a poll tax to meet the obligations of the county, a mandamus might properly be issued to compel them to do so, notwithstanding their authority to levy poll taxes had since been taken away by a law of the state; the case being one where a judgment creditor could not be satisfied by other methods of taxation. By the act of 1895 the valuation is to be made by an officer who is not an officer of the city, but one who, when he values property, values it not only for city purposes, but for those of the state and county, and he could not be compelled to make a valuation for the former without also doing it for the latter. In normal circumstances the mere transfer of such a duty from one officer to another would not impair any contract obliga-

tion. But here the difficulty, as pointed out by the relator, is that the county assessor values property, and has been during recent years valuing the property in this city, at only 70 per cent. of its true cash value. The result is that 30 per cent. of value cannot be taxed for city purposes at all. Nor has he any available remedy as he would have if the recorder of the city were charged with the duty. A valuation of the latter would be made for city purposes only, and compulsory process would be adapted to its proper purpose. But a valuation by the county assessor of the property in the city could not be made by him at its true cash value without drawing upon it an unequal burden of state and county taxes, unequal as respects the state taxes with all other property in the state, and as regards the county taxes with the other property in the county. Apparently the result would be to effect an inequality of taxation which is forbidden by the Constitution of the state and affect the legality of taxation elsewhere. See Taylor v. Louisville & N. R. Co., 88 Fed. 537, 31 C. C. A. 537. But we are prevented from expressing a definite opinion upon the question thus presented by the fact that there is no adequate foundation laid in pleading and procedure for invoking the judgment of the court upon it.

The other question is whether the court might compel the city to make a distinct levy of 75 cents on each $100 of the 30 per cent. of valuation which has not been taxed, and apply this to the payment of the judgment. But here we have the same difficulty. The conditions required for awarding this special relief are not found in anything which the relator has done or asked in the requisite legal form of procedure.

The judgment of the court below will be reversed, with costs, and the cause remanded with directions to enter a judgment for the relator as indicated in the foregoing opinion.

We have thought it necessary to review the order of the Circuit Court which adjudged the return sufficient, and to reverse the same to the extent that we hold the order erroneous, lest the order might conclude the relator in any subsequent proceeding he might be advised to take against the board or the individuals composing the same for a breach of duty in respect of the levying and appropriation of taxes which should have been applied to the payment of his debt. In saying this, however, we are not to be understood as expressing any opinion as to whether such a remedy is open to the relator or not.

When, on October 8, 1901, we directed the order hereinbefore in part recited, we assumed that the board of mayor and aldermen of the city, its duties being defined, would in good faith proceed to exercise its legitimate powers so as to provide for the payment of the relator's judgment. It is now complained that it has acted in bad faith, and has industriously so shaped its conduct as to exclude the relator from the relief due to him. We do not need to express an opinion upon that subject. There is, however, an aspect of the case which we should not ignore. The court below expressed the opinion that whatever the fault of the board in respect of the appropriation of the taxes levied in previous years, inasmuch as those taxes had been already disbursed and could not now be reached, and the membership of the board had been changed so that other persons now composed it, the court was

without power to remedy the mischief. And counsel for the defendant lays stress upon these conditions and urges the impossibility of the relator's obtaining any relief for former conduct of the board, as matters now stand. It cannot be denied that there is much force in these objections. The court may not order what is impossible, and it should not visit upon an innocent party the consequences of another's fault. But the writ is of continuous operation and the order of the court is subject to such amendments as the exigencies of the case may from time to time require. It may bring in new parties, and it may reform its requirements so long as the substantial object of the proceeding remains the same and is not yet accomplished. And, in view of subsequent events, we think the court below, if it should be so moved, should, and it is permitted to, amend the order directed by this court in October, 1901, so as to bring in said board as a respondent in this proceeding, and to require the said board in each year to seasonably estimate what sums are required for the ordinary expenses of the city for that year, and for what particular expenses and in what amounts such sums are required, and what sum it proposes to levy for the payment of the relator's judgment; and forthwith, upon the making such determinations, make report to the Circuit Court in which this cause is pending, stating fully and particularly the several sums and for what several purposes it has determined to levy and collect taxes during that year, and in such form, and to the end, that the court may fully understand whether its mandate is being observed; and the Circuit Court is directed, as soon as practicable after receiving such report, to review the same and ascertain whether its order is being obeyed, and, if it shall be of opinion that it is not, and that the conduct of the board is not taken in good faith toward the relator, then to make such specific order and direction as shall require the said board to so modify its previous determination as to conform to the determination of the court. So long as the board acts lawfully and in good faith, its discretion cannot be supervised by the court. But it cannot, under the guise of its discretion, be permitted to accomplish an unlawful purpose. And the court below is directed to give notice to said board of the amendment of the former order directed by this court, in case such amendment shall be made, and of the further requirements herein directed, which notice the said board will file for its information in each subsequent year. It is proper to say that, in the foregoing direction in regard to making the board a respondent in the process, it is not to be inferred that we think it is not so already in legal contemplation. Our purpose is to relieve any doubt which the board might entertain in regard to its relation to the proceeding.

Order reversed, with directions as herein indicated.

OTIS STEEL CO. v. WINGLE.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1907.)

No. 1,614.

1. MASTER AND SERVANT—NEGLIGENCE—INJURIES TO THIRD PERSON.
Plaintiff, a servant of an independent contractor, went to defendant's mill for the purpose of hauling certain steel plates for defendant. The plates were uniformly loaded on the wagons by two movable cranes, which operated simultaneously and placed the plates on the wagon in the position indicated by the driver. Plaintiff took a position on one side of the front wheels of the wagon, and directed defendant's servant in charge of the cranes to move them forward a trifle in order to drop the plates in the correct position on the wagon. The front crane was started forward by defendant's servant in charge of it without waiting to see that the other was also moving, which resulted in pulling out the front hook and permitting the plates to swing toward plaintiff and strike him, before he could escape. *Held*, that defendant was actionably negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1217–1225.]

2. SAME—CONTRIBUTORY NEGLIGENCE.
Plaintiff was not, also, negligent as matter of law in standing in the position taken by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1274.]

3. SAME—FELLOW SERVANTS—SERVANT OF INDEPENDENT CONTRACTOR.
Plaintiff was the driver of one of several teams owned by his father, who hauled steel plates for defendant as an independent contractor. The driver of another wagon had placed the same to receive plates which were lowered by two overhead cranes, and requested plaintiff to superintend the placing of the plates in position on his wagon. Plaintiff directed the cranes to be moved slightly ahead, when defendant's servant in charge of one of the cranes moved it forward before the other crane was started, which resulted in plaintiff's injury. *Held*, that plaintiff was not a fellow servant for the time being of the crane operator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 482.

Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

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

The defendant in error, a teamster, while engaged in taking on a load of steel plates at the mill of the plaintiff in error, sustained an injury from the slipping of a bundle of suspended plates out of the hooks, and lost a leg. Michael Wingle, the father of the defendant in error, Francis Wingle, owned a number of teams, and did hauling as an independent contractor. The Otis Steel Company, makers of steel plates, had a contract with him to do such hauling for them as they should be unable to do with their own facilities, at a fixed price per ton. Upon the occasion in question, two of his wagons had been sent to the steel mill to receive loads. One of these wagons was driven by a teamster named John Nuss; the other was driven by the defendant in error. But one wagon could be loaded at the same time, and the wagon of Nuss was first backed into the mill and placed in position for loading. The plates to be hauled were about 25 feet in length and 4 feet wide. It was the business of the Otis Company to place these plates upon the wagons in such position as the teamster might indicate as best for their safe carriage. To carry these plates to the loading platform and place them on the wagons, two overhead cranes were used, moving independently, but in unison, and operated by

the servants of the company. To lift and move these plates there was attached to each crane a set of hooks connected with the cranes by means of a chain. These plates were only about one-half inch thick, and a bundle of seven or eight were customarily carried at one time for loading. One set of hooks would be attached to the forward end of the plates, and the other set to the other end. When the hooks were thus attached, the plates could be securely lifted and moved into position over the wagon; but to do so without danger of their slipping out of the hooks it was essential that the cranes should be operated together. On the day when Francis Wingle was hurt, a usual number of plates had been brought from the rear of the mill to the wagon and were suspended over the wagon driven by Nuss and there stopped. Nuss was inexperienced in loading, and at this stage he called on defendant in error, who was outside the mill with his own team, to come in and show him how to proceed with the loading. He came in accordingly, passed by Nuss' horses, and took a place on one side of the front wheels of his wagon. Seeing from the position of the suspended plates that, if lowered then on the Nuss wagon, they would rest too far back on the wagon and be liable to slide off while being hauled, he called out to the boys in charge of the cranes, "Come ahead, boys," and motioned with his hand. The front crane was started forward by the boy in charge of it, without waiting to see that the other was also moving. The result was that the plates did not move, but the front hook, on the side of the plaintiff below, pulled out. The plates were at this moment suspended 1½ or 2 feet above the wagon, and were prevented from falling on the wagon by the hook on the opposite side of the front end, so that they were caused to swing toward plaintiff and slide to one side, catching him before he could get out of the way.

D. H. Tilden, for plaintiff in error.

F. M. Cobb and R. B. Newcomb, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

The court below instructed the jury that Wingle was not the fellow servant of the boys operating the cranes, and that the negligent act of moving one crane in advance of the other, thereby causing the plates to slip out of the hooks attached to the forward crane, was one for which the Otis Steel Company was responsible. The question as to whether the defendant in error had contributed to his own injury by standing unnecessarily in a place of danger, he submitted under proper instructions to the jury. There was a verdict and a judgment for the plaintiff. It is now insisted that the court erred in instructing the jury that the defendant below was guilty of negligence, and in not instructing them, as requested, to find for the plaintiff in error.

That there was negligence in failing to move these two cranes forward at the same moment is demonstrable. The effect of moving one before the other would be to leave the plates in their suspended position over the wagon, and would, inevitably, pull the forward hooks or one of them loose and cause the plates to slide, as they did, to one side. It was therefore not error to say that the movement of the forward crane by the servant of the plaintiff in error, without seeing that the other crane was started at the same time, was negligence. Neither was Wingle the fellow servant of the man operating the crane. Wingle was the servant of his own employer, who was an independent contractor. It was the business of the plaintiff in error to place the plates in such position upon the wagon as should be indicated

by the driver. If, in doing this, it was done negligently, it was the actionable negligence of the Otis Steel Company. But it is said that, in respect to this particular transaction of loading this wagon with these plates, the plaintiff became for the time the servant of the Otis Company, and those in charge of the cranes his fellow servants. The fact that Wingle was the general servant of his father would not, as matter of law, prevent him becoming the particular servant of the Otis Company. That he was employed and paid only by his father would not preclude his becoming ad hoc the servant of the plaintiff in error in a particular transaction. Powell v. Construction Co., 88 Tenn. 692, 701, 13 S. W. 691, 17 Am. St. Rep. 925; Byrne v. K. C., etc., Ry. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. In Powell v. Construction Co., cited above, it was said that:

"The better test would seem to be: Was he, in regard to the particular matter in which he was employed, doing the work of a general master, or was he engaged in doing the work of another, over whom the general master had no control?"

It was undoubtedly the business of the driver of the wagon being loaded to indicate the position of the plates on his wagon in which they might be most safely and advantageously carried. But it was the business of the Otis Steel Company to place the plates upon the wagon in such position as should be indicated. Plainly there was no lending of the cranes and the men operating them to Wingle, the hauling contractor, or his drivers, for it was not the business of Wingle to load the plates. Neither was there any lending of the driver to the Otis Company for the purpose of assisting that company in its duty. Each had a distinct duty to perform, and Wingle's did not begin until the loading was finished. The only direction he gave, or had a right to give, was to move the cranes forward slightly, and this because, if the plates were dropped from the hooks at the point where the movement of the cranes had been stopped, they would not ride well on the wagon. The simple giving of a direction or a signal for the cranes to move forward a little, that the load might be better placed, was no transfer to the service of the Otis Steel Company, but a proper discharge of his duty as the servant of the owner of the team, to see that the loading was properly done by the Otis Company. In obeying the signal to move forward, the operator was acting only as the general servant of the Otis Company. The duty to comply was a duty imposed by his contract of general hiring, and not by reason of any authority the driver had or any which he could enforce. The Otis Company undertook to move the plates into proper position for carriage, and it was its duty to obey the signals of the driver indicating when the plates were in proper position on the wagon. The circumstances of the case bring it quite within the principles applied in The Lisnacrieve (D. C.) 87 Fed. 570, McGough v. Ropner (D. C.) 87 Fed. 534, and The Slingsby, 120 Fed. 748, 57 C. C. A. 52, where stevedores were injured by the negligence of a servant of the ship in operating a winch, although the winchman operated the winch by direction or signal from the stevedore. The carriage cases of Quarman v. Burnett, 6 M. & W. 499, Jones v. Liverpool, 14 Q. B. D. 890, and Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed.

652, are also in point. In those cases it was held that one who hires a hack or cab with a driver is not responsible for the driver's acts of negligence, where he assumes no further control than to tell him where to drive, or stop, or start. The negligence of the plaintiff in error was so demonstrable upon the undisputed facts of the case that there was no question for submission to the jury, and the court was quite within its authority when it instructed the jury to that effect. "When but one inference can be reasonably drawn from the evidence, the question of negligence or no negligence is one of law for the court." District of Columbia v. Moulton, 182 U. S. 579, 21 Sup. Ct. 840, 45 L. Ed. 1237.

Neither did the court err in submitting the question of contributory negligence to the jury. The weight of evidence did establish that it was usual for the driver of a wagon receiving a load of steel plate to stand between his horses, upon the wagon tongue. This was, doubtless, due to the fact that he would be out of the way, and, in case they should slip or fall, be in a reasonably safe place and in a position to control his horses and guide the plates by his hand, if necessary. Nuss, the driver of this wagon, was at the time on the wagon tongue, and escaped injury. Wingle stood on the ground, not under the suspended plates, as seems to have been the theory of counsel, but out upon one side of the front wheels. If the plates had fallen, they would not have hit him. One hook slipped. The plates were slued around toward and slid sideways against him before he could get away. The inference of negligence or no negligence in standing where he did is not so plain and indisputable as to become a question of law. The facts of the case bring it within the rule applied by this court in Erie R. R. Co. v. Moore, 108 Fed. 986, 46 C. C. A. 683, Michigan Headlining & Hoop Co. v. Wheeler, 141 Fed. 61, 72 C. C. A. 71, and Taggart v. Republic Iron & Steel Co., 141 Fed. 910, 73 C. C. A. 144.

Judgment affirmed.

SOUTHERN RY. CO. v. POWER FUEL CO.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 681.

1. RAILROADS—FIRES.

Civ. Code S. C. 1902, § 2135, provides that every railroad corporation shall be responsible in damages to any person or corporation whose building or other property shall be injured by fire communicated by its locomotive engines or originating within the limits of the railroad's right of way in consequence of the act of any of its authorized agents or employés. *Held*, that where a fire was started by the negligence of the subboss of a railroad bridge and trestle crew, while using a boarding car as a place to sleep during the night, when he was not on duty, he was neither an agent nor employé of defendant within such section, and hence the company was not liable for the result of his acts thereunder.

2. MASTER AND SERVANT—ACTS OF SERVANT—LIABILITY OF MASTER.

Where a fire was negligently set by a railroad's subboss of a bridge and trestle crew, while he was sleeping in one of the railroad's boarding cars, when not on duty, his act was not performed in the business of the

railroad company. Hence the latter was not liable for the result thereof at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1225.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

C. P. Sanders (Sanders & De Pass, on the briefs), for plaintiff in error.

Stanyarne Wilson (J. A. Sawyer, on the brief), for defendant in error.

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

McDOWELL, District Judge. This was an action at law brought by the defendant in error—to be hereafter referred to as the plaintiff—against the plaintiff in error, to recover damages for the injury to the stock, equipment, and buildings of the plaintiff at Union, S. C., from fire which originated in a boarding car belonging to the defendant.

It appears that the defendant had a work train for the use of one of its bridge and trestle crews, consisting of a car used as a cooking and dining place, a sleeping car for the two white members of the crew, a sleeping car for the negro members, and one or more cars for timber and tools. For a considerable time prior to the fire, which occurred about 11 o'clock on the night of October 22, 1904, this construction train had been placed at night after coming in from work on a short spur track close to the premises of the plaintiff. This spur track belonged to the Union & Glenn Springs Railroad Company; but it is abundantly shown that the defendant was authorized to use it for the purpose above mentioned. The foreman of the crew was a white man by the name of Pope. The only other white member of the crew was one Ayres, who died some time after the fire and prior to the trial. During the forenoon of the day preceding the fire Pope quit work and left the crew under the charge of Ayres. After the day's work was finished Ayres had his supper in the dining car, and then went into the town. He returned about 8 o'clock, and went to bed in the white sleeping car in the bed regularly used by him. In this car there was a portable kerosene lamp, provided by the defendant for the use of the occupants of the car. When this car was in motion, the lamp was usually placed in a wall bracket. On the night of the fire the lamp was on a table very near the foot of the bed used by Ayres. About 11 o'clock of that night the negro cook was awakened by cries of fire, and, on making his way into the sleeping car where Ayres was, he found the car filled with kerosene smoke and the bed and bedding ablaze. There is much evidence tending to show that Ayres, who at this juncture was standing at the window of the car, making no effort to subdue the fire, was very drunk. The alarm quickly brought numerous people to the scene, and the evidence of nearly every one who saw Ayres indicates that he was drunk. In fact, the cook appears to have found it necessary to bodily carry him from the burning car. The result of the fire was the destruction of

several of the cars and of the property of the plaintiff. It appears that Pope, the foreman, and McClurkin, the cook, were employed by the month. The remaining members of the crew, including Ayres, were paid monthly at a fixed rate per day, according to the number of days of work. Ayres was in some sense a "subboss." During working hours, in the absence of Pope, he had charge of the crew. There was some evidence tending to show that at night, Pope being absent, the negro members of the crew regarded Ayres as having charge of the work train. But all of the evidence was to the effect that after work hours Ayres was a "free man." He could sleep in the car or not as he saw fit, and it was clearly shown that he returned to the car merely in order to go to bed. Since 6 o'clock that afternoon he had done no work whatever, and had none to do until the following morning at least. At the time the fire started he was in no sense engaged in performing any duty for the defendant.

The complaint is drafted under 1 Civ. Code S. C. 1902, § 2135, and also contains as a second cause of action a charge that the injury was the result of the negligence of the defendant. The statute referred to reads as follows:

"Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in property upon its route for which it could be so held responsible and may procure insurance thereon in its own behalf."

The assignments of error, in so far as they are now material, are based on the refusal of the trial court to direct a verdict and on the refusal to give certain instructions based on the theory that Ayres was not in the employment of the defendant at night after working hours. We regard the language of the statute, "its authorized agents" as being, so far as we are now concerned, synonymous with "employés." There was evidence tending to show that Ayres was drunk and also evidence tending to show that he in some way turned the lamp over. The one question for discussion is whether or not Ayres was at the time the fire was started an employé within the meaning of the statute.

So far as we are advised the Supreme Court of South Carolina has never ascribed to this statute any purpose other than to relieve one complaining of injury from fire originating on a railroad company's right of way of the necessity of proving negligence. Thompson v. Railway Co., 24 S. C. 369. It seems to have been repeatedly held by that court that this statute is to be strictly construed. Rogers v. Railroad Co., 31 S. C. 378, 9 S. E. 1059; Hunter v. Railroad Co., 41 S. C. 86, 19 S. E. 197; Lipfield v. Railroad Co., 41 S. C. 285, 19 S. E. 497. In 1 Sherman & Redfield Negligence, § 147, it is said:

"In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though

the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master."

See, also, 1 Thompson, Negligence (Last Ed.) § 526; 20 Am. & Eng. Ency. (2d Ed.) 168; Morier v. Railway Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, and authorities there cited. We cannot in reason ascribe to the Legislature in enacting this statute an intent to make the railroad companies liable for the acts of their employés when not on duty and when not engaged in the performance of some business of the master's. In the case at bar Ayres was not on duty. He was not performing any business of his employers. He was simply making use of facilities allowed him by the defendant for his own purposes. We hold that his act was not, within the intent of the statute, the act of an employé.

From the fact that Ayres was not engaged in performing any duty as an employé, it also follows that the defendant is not liable under the common-law cause of action. We are therefore constrained to hold that the learned trial court was in error in refusing to direct a verdict for the defendant.

Reversed.

PRITCHARD, Circuit Judge. I concur in the conclusion reached, but not in the reasons assigned.

The complaint contains two causes of action, the first being based on the provisions of the 1 Civ. Code S. C. 1902, § 2135, as follows:

"Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route for which it could be so held responsible, and may procure insurance thereon in its own behalf."

In order to enable plaintiff to recover on the first cause of action, it is not necessary, as at common law, to show that the injury was caused by the negligence of the defendant company, but it must be shown by competent proof that the fire occurred by the act of an authorized agent or employé of the company. It would not be sufficient to simply show that a fire occurred on the right of way or premises of the company. Plaintiff was not only required to show how the fire originated, but was also required to show that the damage was caused by the act of an authorized agent or employé. Circumstances which barely create a suspicion as to how the fire may have occurred are not sufficient.

In the case of Manning v. Insurance Co., 100 U. S. 698, 25 L. Ed. 761, the court, among other things, said:

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences of facts proved."

It cannot be reasonably insisted from the evidence that the fire originated from the act of Ayres. It was shown by uncontradicted evidence that immediately after the fire occurred Ayres said he "did not know whether it was a lamp exploded or not." He was the only person who could have had knowledge as to the origin of the fire, and he stated positively that he did not know how it occurred. It appearing that he did not know how it occurred, it would be unreasonable to say that the jury could infer from the circumstances that the fire was caused by the acts of an employé or authorized agent of the defendant company.

There is considerable conflict of testimony as to whether Ayres was at any time the authorized agent of the defendant company; it being insisted by the plaintiff in error that at the time the fire occurred that he was not in the employment of the company, his employment being such that, when his duties ended for the day, he was no longer responsible to the company and simply occupied the position of any other laborer, and therefore could not be deemed to be either an authorized agent or employé of the defendant company. However, the testimony of the witness Wm. McClurkin is to the effect that Ayres was a subforeman. He also testified that the night the fire occurred Pope was absent, and that Ayres was left in charge of the cars, and that he was acting as the representative of the company at the time the accident occurred. In my opinion it was not error in submitting this evidence to the jury as bearing upon the question as to whether Ayres was the authorized agent or employé of the company. The evidence was such as to raise an issue about which reasonable men might reasonably differ, and under these circumstances, as I understand the rule, it was the duty of the presiding judge to submit the same to the jury for their consideration. But I do not deem this phase of the question important, inasmuch as there was not sufficient evidence as to the origin or cause of the fire to warrant the jury in arriving at the conclusion that the acts of an authorized agent or employé of the company caused the same.

The facts and circumstances offered in evidence as to how the fire occurred are purely conjectural. According to the evidence, the fire may have originated by an explosion of the lamp or it may have originated by the lamp having been overturned by some one, but as to the particular manner of its origin there is not a single circumstance from which the jury could have inferred that it was caused by the acts of an authorized agent or by an employé of the plaintiff in error. There are many ways by which the fire could have originated from a kerosene lamp. It is a historical fact that the great Chicago fire was caused by a cow kicking over a kerosene lamp, and in that instance it was an easy matter to determine how the fire originated. The evidence of the milkmaid who was present at the time the fire originated showed conclusively that the cow kicked over the lamp, but in the case at bar the only person present stated immediately after the accident that he did not know whether it was the lamp exploded or not, which can only be interpreted to mean that it was not due to any act of his, and, although he was present, he did not know the real cause of the fire.

The second cause of action is at common law, and in considering the same it would be necessary to determine whether the alleged damage was caused by the negligence of the defendant company, its agents, or employés, but it is not necessary to consider this phase of the case, inasmuch as I am of opinion that there was not sufficient evidence to entitle the plaintiff to recover on the first cause of action.

For the reasons hereinbefore stated, I think the judgment of the Circuit Court should be reversed.

PALATINE INS. CO., LIMITED, OF MANCHESTER, ENG., v. O'BRIEN.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 697.

INSURANCE—ADJUSTMENT OF LOSS—ARBITRATION—AWARD.

Plaintiff owned three buildings, two of which she insured in defendant company against loss by fire, and also procured from defendant a policy insuring the rents of all the buildings. The buildings having been totally destroyed by fire, arbitrators were appointed, and awarded plaintiff three months' rent on all the buildings, and $3,835.56 on the two buildings insured. No date was set in the award from which the three months was to run, nor did the award specify the monthly rent which was to be allowed, whereupon defendant construed the award to entitle plaintiff to three months' rent from the date of the award, and paid into court what it claimed to amount to the rent for five months, together with the additional loss on the buildings. *Held*, that such award was fatally defective for uncertainty as to the amount allowed for the rent, and, this being inseparable from the balance, the whole award was void.

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

John J. Donaldson (Daniel H. Hayne on the brief), for appellant.
Hyland P. Stewart, for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

McDOWELL, District Judge. The appellee, complainant below, owned three buildings in Baltimore, known as 4, 6, and 8 East German street. She insured with the appellant the two buildings, 4 and 6 East German street, in the sum of $6,000 against loss or injury by fire. She was also insured by the same company against loss of rents by fire on the said two buildings in the sum of $1,800, and had a similar policy against loss of rents of the building known as No. 8 East German street in the sum of $1,040. In both the rent policies it is stipulated:

"Loss to be computed from the date of the fire and to cease upon the premises again becoming tenantable."

The three buildings were totally destroyed in the great Baltimore fire of February, 1904.

On March 25, 1904, the parties entered into an agreement which so far as is now material reads as follows:

"It is hereby agreed by estate of Thomas J. O'Brien, of the first part, and the Palatine Insurance Company of Manchester, of the second part, that J. J. Walsh and Henry Z. Niblett (together with a third person to be chosen by them in advance, to decide only upon matters of difference between them), shall estimate and appraise at the actual cash value the loss and damage caused by fire on the 7th day of February, 1904, to the property belonging to building and rents as specified below, or in the accompanying schedule, which estimate and appraisement by them, or any two of them in writing as to the amount of such loss and damage, shall be binding on both parties hereto, it being understood that this appointment and submission is without reference to any other questions or matters of difference between the terms and conditions of the insurance and is of binding effect only so far as regards the actual cash value of and the loss and damage to said property."

And then follows the substance of the three policies.

An umpire appears to have been agreed upon, but he was not called upon to act.

On March 30, 1904, the appraisers made the following award:

We, the undersigned, have carefully estimated and appraised the actual cash value of and damage to the property of ———. In conformity with the foregoing appointment and declaration, we hereby report that we have determined the actual cash value of any loss and damage thereon to be as follows:

Time required to erect buildings complete as follows:

	Cash Value.	Loss and Damage.
No. 8 E. German St.	3 months	
" 4 & 6 E. German St.	3 months	
Loss on Bldg. 4 & 6 E. German St.	$3,835.56	$3,835.56
Total	$3,835.56	$3,835.56

Witness our hands at Baltimore this 30th day of March, 1904.

[Signed] J. J. Walsh,
Henry Z. Niblett,
Appraisers.

After learning of the nature of the award, and feeling aggrieved thereby, the appellee declined to abide by it, and instituted an action at law in the state court for a recovery on the insurance policies. As a defense to this action, the insurance company pleaded the submission and award, and paid into court as the damages to the two buildings the sum of $3,835.56, with interest and costs. As a compliance with the award under the two rent policies, the defendant also paid five months' rent, with interest and costs, alleging the rent on the two buildings insured by appellant to have been $230 per month, and the rent on the remaining building to have been $85 per month. Thereupon appellee filed her bill in equity in the state court, praying that the award be set aside, and that the insurance company be restrained from using the award as a defense to the action at law. The equity suit was removed to the federal court, and after an amended bill had been filed the appellee answered. Replication was filed, evidence was taken, and the trial court set aside the award and enjoined the insurance company from setting it up in defense. There are many other facts in the record which, in view of the conclusion reached by us, need not be here stated. It appears that one of the results of the fire was that the city authorities of Baltimore refused to grant permits for rebuilding for a considerable time after the fire.

We shall first consider that part of the award which relates to loss of rents. In this respect the award fixes no sum of money, but merely finds a loss of rents for a period of three months. It is argued that this award is sufficiently certain as it is a mere matter of calculation to ascertain the sum intended to be awarded. Inasmuch as the parties had not agreed what the rent was, and as it may not have been a money rent, it seems clear that an award in this form leaves open to dispute a possible ground of contention. How the insurance company learned the rentals to be $230 and $85 per month does not appear. So far as we can learn these figures may not be correct. However, we need not base our conclusion on this point alone. In another respect the award as to the rents is wholly uncertain. The policies specify that the loss of rents insured against is from the date of the fire, and the policies are incorporated in the submission. Whether the appraisers intended to allow a sum equal to the rent for a period of three months from the date of the fire, or from the date of the award, is left entirely uncertain. In making its payment into court, the award having been made nearly two months after the fire, the insurance company construed the award as meaning three months after the award. In view of the continued refusal of the city authorities to allow rebuilding, and the fact that nearly two months of loss of rents had occurred when the award was made, such construction was necessary to relieve the award of gross unfairness to the appellee. But we are entirely unable to say that this is what the arbitrators intended.

It is contended that this feature of the award is separable from the part of the award fixing the loss under the policy insuring the two buildings which were insured by the appellant, and that the invalidity of the part of the award relating to loss of rents does not affect the remainder. We cannot accede to the correctness of this contention. In Russell on Arbitration, p. 316, it is said:

"Though before the time of King James the First, according to Holt, C. J., an award void in part was considered void altogether (a) it is now quite clear that an award bad in part may often be good for the rest. If, notwithstanding some portion of the award is clearly void, the remaining part contained a final and certain determination of every question submitted, the valid portion may frequently be maintained as the award, though the void part be rejected."

See, also, Morse on Arbitration, pp. 454, 455; 3 Cyc. 713, and authorities cited; 2 Am. & Eng. Ency. (2d Ed.), 741, 742, and authorities cited.

The matter submitted here was the total damage to the appellee by the fire. The purpose of the parties in submitting this matter to the appraisers was to avoid controversy and litigation. To sustain in part an award which is void for uncertainty as to a very considerable part of the matter submitted is in effect to make and enforce a contract which the parties did not make, and one which they doubtless would not have been willing to make. The award does not respond to the submission. It leaves undetermined, and hence open to controversy and litigation, an important part of the matter submitted. It is not, on its face, a final settlement of the matter submitted, it is not the award the parties authorized, and it does not accomplish the purpose intended.

Again, we are wholly unable to say that the appraisers would have agreed on the sum awarded as loss on the buildings, had the appraisers known that their award as to the loss of rents was invalid. While the appraisers did in their award separate the two items, it does not follow that either item of allowance was arrived at independently. For instance, assuming for the present that both appraisers intended the loss of rents to be three months after the award, or five months all told, it may be that Walsh regarded the sum fixed upon as loss on the buildings as too small, but agreed to it, because he thought five months' rent loss more than appellee was entitled to claim. In McCormick v. Gray, 13 How. (U. S.) 27, 39, 14 L. Ed. 36, it is said:

"There are cases in which, after rejecting part of an award, the residue is sufficiently final, certain, and in conformity with the submission to stand; but it is indispensable that the part thus allowed to stand should appear to be in no way affected by the departure from the submission."

From every standpoint we are satisfied that the award here cannot be sustained in part and set aside in part.

It follows that the decree of the trial court must be affirmed.

WADDILL, District Judge (concurring). I concur in the affirmance of the decision of the lower court for the reasons given above, and, moreover, because I think it sufficiently appears in the record that the award sought to be set aside was but the action and judgment of a single, instead of both arbitrators. The purpose of the arbitration was to ascertain the loss under certain policies of insurance arising by reason of the destruction of the insured premises by fire. The buildings were totally destroyed. Only one of the arbitrators was familiar with and saw the buildings, and knew of their value before the fire. Nevertheless, they undertook without proof of any sort before them, or any opportunity afforded the assured to furnish proof, to ascertain the loss sustained by her. Such an award was but the finding of a single arbitrator, instead of two, as required under the agreement of submission, which provided for the action of both, and, in case of disagreement, an umpire was to be called in to decide the question in dispute.

OLD NICK WILLIAMS CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 12, 1907.)

No. 709.

1. CRIMINAL LAW—WRIT OF ERROR—TIME OF TAKING EXTENSION.
   The six months granted by Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], within which a writ of error may be taken in a criminal case, cannot be extended.

2. SAME—COMMENCEMENT OF PERIOD.
   The time within which accused may sue out a writ of error begins to run from the date judgment was entered.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2697.]

3. SAME—ASSIGNMENT OF ERROR—BILL OF EXCEPTIONS.
Rev. St. § 997 [U. S. Comp. St. 1901, p. 712], providing that an assignment of errors shall be annexed to and returned with a writ of error, does not necessitate the settlement of a bill of exceptions prior to the filing of the writ and the assignment of errors.

4. SAME—EFFECT—TIME.
A writ of error sued out by accused does not become effective until deposited with the clerk of the trial court.

5. SAME—ENLARGEMENT OF TIME.
Where a writ of error sued out by accused is filed in time, the time for complying with it may be enlarged by proper orders.

6. SAME—NUNC PRO TUNC ORDER.
Where delay in suing out a writ of error was the act of accused, it could not be cured by a nunc pro tunc order.

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro.

On motion to dismiss.

Charles A. Moore and William P. Bynum, Jr. (E. T. Cansler, Thomas Settle, and J. E. Alexander, on the brief), for plaintiff in error.

A. E. Holton, U. S. Atty.

Before PRITCHARD, Circuit Judge, and MORRIS and DAYTON, District Judges.

MORRIS, District Judge. This is a motion to dismiss the writ of error because not sued out within six months after the entry of the judgment.

It arises in the case of an indictment against the Old Nick Williams Company, a corporation which was authorized to carry on the business of a rectifier, and which by the verdict of a jury was convicted of violating the second paragraph of section 3317 of the Revised Statutes [U. S. Comp. St. 1901, p. 2164], being found guilty of carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by it. On November 28, 1905, the jury rendered its verdict, and on the same day the defendant moved in arrest of judgment, which motion was overruled. The defendant then moved to set aside the verdict and for a new trial, which motion was also overruled. The attorney for the United States then prayed the judgment of the court, and on the same day, November 28, 1905, the court entered its judgment by which it sentenced the defendant to pay a fine of $5,000 and be taxed with the costs.

It thus appears from the record that the judgment was entered November 28, 1905. On the same day it was ordered that the defendant have ninety days to prepare its bill of exceptions and that the attorney for the United States have 30 days after being served with the defendant's bill of exceptions to prepare any objections thereto, and that the court would settle the bill of exceptions upon 10 days' notice to the attorneys of the parties, and, when filed, the bill of exceptions should be deemed as made in apt time. Afterwards, January 17, 1906, by consent of the parties, the court by its order further extended the time for preparing and filing the defendant's bill of exceptions to

March 15, 1906, and afterwards, in like manner, the time was extended to April 1, 1906. On July 27, 1906, the court over the objection and protest of the attorney for the United States made an order which recited that the defendant had filed with the clerk its bill of exceptions to which the attorney for the United States had filed certain objections and proposed amendments, so that the bill of exceptions had not been settled and signed by the court within six months from the date of the entry of the judgment, and, the court being of opinion that the defendant was entitled under the circumstances to have the bill of exceptions settled and a writ of error and citation issued and served nunc pro tunc as within the time required by law to procure a review of the judgment, the said order of the court directed that the attorneys should appear before him at Greensboro on August 7, 1906, to have the bill of exceptions settled and signed by the court, and further ordered that, when the bill of exceptions was settled and signed and after a petition for a writ of error and assignments of error had been filed by the defendant, a writ of error and citation in due form should be issued and served, all to bear date as of the 15th April, 1906, said date being the date on which the defendant filed its proposed bill of exceptions with the clerk and which was within six months from the entry of the judgment. Thereafter, on September 12, 1906, the defendant having presented its petition for the allowance of the writ of error and its assignment of errors, the court signed an order allowing the writ of error, and directed that the writ of error and citation when issued bear date April 15, 1906, as theretofore ordered by the court. Thereupon the writ of error was issued on September 12, 1906, as of April 15, 1906, as ordered by the trial judge. The attorney for the United States now moves to dismiss the writ of error because not sued out within six months after the entry of the judgment.

The statute restricting the time for writs of error in such cases is section 11, Act Cong. March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552], and reads:

"Sec. 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals, under the provisions of this act, shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

It has been so frequently and so uniformly decided that the limit of time after the entry of the judgment for the issuing of writs of error admits of no extension that the rule is now firmly established.

In Brooks v. Norris, 11 How. 204, 13 L. Ed. 665, the Supreme Court said:

"The writ of error is not brought in the legal meaning of the term until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk or the day on which it is tested are not material in deciding the question."

In Polleys v. Black River Co., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed 938, it was held that the plaintiff in error had a right to his writ

on the day the judgment was entered and on that day the time within which his right existed began to run. Scarborough v. Pargoud, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824; U. S. v. Baxter, 51 Fed. 624, 2 C. C. A. 410; Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379.

In Credit Co. v. Ark. Cent. Ry., 128 U. S. 258–261, 9 Sup. Ct. 107, 32 L. Ed. 448, it was held that, although the appeal had been allowed and the bond for costs approved and the citation signed by a Supreme Court justice within the time prescribed by law, yet because the papers were not filed with the clerk until five days after the time expired, the appeal was too late. The court said:

"The attempt made in this case to anticipate the actual time of presenting and filing the appeal by entering an order nunc pro tunc does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

In Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246, it was held that a cross-appeal in equity, like other appeals, must be entered within the time limited, calculating from the date of the decree, and because in that case the petition, order, and bond were not filed in the Circuit Court until after the lapse of two years from the entry of the decree the cross-appeal was dismissed. It was held in the same case that the failure to file an assignment of errors, although required by the act of Congress and the rule of court, was not jurisdictional, and might be waived. City of Waxahachie v. Coler, 92 Fed. 284, 34 C. C. A. 349; City of Wilmington v. Ricaud, 90 Fed. 212, 32 C. C. A. 578; Threadgill v. Platt (C. C.) 71 Fed. 1.

In the present case reliance is placed by the plaintiff in error upon the alleged fact that the delay in settling the bill of exceptions was not the fault of the plaintiff in error, but was attributable to the judicial engagements of the trial judge, and it is argued that, until the bill of exceptions was settled, counsel for the plaintiff in error could not intelligently prepare the assignment of errors which should accompany the petition for a writ of error. Rev. St. § 997 [U. S. Comp. St. 1901, p. 712]. But it is not a fact that the assignment of errors requires the previous settlement of the bill of exceptions. The exceptions are noted during the progress of the trial, and are known to the counsel for the plaintiff in error, and this notation is, in fact, the basis upon which the bills of exceptions are prepared. The assignment of errors can be formulated before the settling at length of the formal bills of exception. It does not follow, because Rev. St. § 997, provides that there shall be annexed to and returned with the writ of error an assignment of errors, that the bill of exceptions must be first settled. The bill of exceptions must be settled as provided for by the rules and practice of the court, or the time may be enlarged by orders of court specially entered in particular cases. In the case of Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453, the judgment was entered July 10, 1890, and the writ of error was dated July 15, 1890, but the bill of exceptions by consent of the parties was not settled during the term, and because of subsequent delays was not settled until February, 1891, yet the Supreme Court held it to be in time because done by an agreement of the parties made during the term.

But this is not so with regard to writs of error. The writ of error is the writ of the appellate court addressed to the judge of the trial court, directing him to send the record and proceedings in the case to the appellate court, and, when deposited with the clerk of the trial court, it is served, but not before. After the writ is so filed, the time for complying with it may, by proper orders, be enlarged. Missina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810. "A writ of error is the process of this court, and it is issued therefore only upon our authority." Brown v. McConnell, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495. In School District v. Hall, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237, it was held that a writ of error will not be dismissed as for want of jurisdiction by reason of a failure to return therewith an assignment of errors. The assignment of errors is not a jurisdictional requirement, although it is true that by rule 11 (90 Fed. cxlvi, 31 C. C. A. cxlvi) errors not assigned will be disregarded, still the court may at its option notice a plain error not assigned or specified.

It appears to us that the delay in the present case in taking out the writ of error was not the act of the court, but of the p'aintiff in error (Sage v. Central R. R. Co., 93 U. S. 412–417, 23 L. Ed. 933), and in such a case a nunc pro tunc order cannot be made effectual. The case of Kingman v. Western Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192, cited by the plaintiff in error, is merely to the effect that in a case where a motion for a new trial is pending the limitation of time does not begin to run until the motion for new trial has been overruled, for the reason that until the court has acted on the motion for a new trial, filed in due time, the judgment is not final, but is still under the control of the trial court and not ripe for invoking the jurisdiction of the appellate court. The case of In re Chateaugay Ore & Iron Co., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508, also cited by the plaintiff in error, treats only of the time within which a bill of exceptions may be properly settled and not of writs of error.

We feel ourselves reluctantly constrained to hold that we are without jurisdiction to examine the alleged errors, for the reason that the writ of error was not sued out within six months from the entry of the judgment.

Writ of error dismissed.

PORTLAND CHEMICAL & PHOSPHATE CO. et al. v. BLODGETT.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1907.)

No. 1,640.

VENDOR AND PURCHASER—VENDOR'S LIEN—CONSTRUCTION OF CONTRACT.

By one of three separate instruments, executed on the same day, complainant conveyed certain real estate to an individual; the latter, by the second, conveyed it to a corporation, while, by the third, which was between complainant and such corporation, said conveyances were recited, and provision was made for deferred payments of the purchase money. Each provided expressly that the grantee should not sell or incumber the property during the ensuing five years, which was the time given by the third for payment of the purchase money in full. The instruments each described the property, and were so executed as to be entitled to record,

and all were recorded in the county where the land was situated. The purchasing corporation, after having made the first of the deferred payments, was adjudicated a bankrupt, and its interest in the property was sold by its trustee subject to all valid existing liens; the purchaser having actual notice of one at least of said instruments. *Held*, that they were to be construed as a single instrument, and gave the complainant a lien upon the property for the unpaid purchase money which was enforceable in equity as against the purchaser.

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

Previous to the 1st of July, 1902, negotiations had been carried on between Warren K. Blodgett, who was the president of the Albion Chemical & Export Company, a Maine corporation, with the plaintiff, the Portland Chemical & Phosphate Company, also a Maine corporation. These negotiations ripened into three instruments of writing, each bearing date the 1st of July, 1902, and that day finally agreed upon between the phosphate company, party of the first part, and Warren K. Blodgett, party of the second part, by one of which the phosphate company, party of the first part, "does grant, bargain, sell and convey unto the said Warren K. Blodgett, the said party of the second part, and his heirs and assigns forever, all those certain lots, tracts and parcels of land," etc., describing the premises here involved, with limitations not here material, and continuing: "It is agreed between the parties hereto that the party of the second part shall not, nor shall his heirs, representatives or assigns, during the five years next ensuing from and after the date of this deed, make any sale, deed, or conveyance of the within granted premises or any part thereof, without in either case the express assent thereto in writing of the said party of the second part being had and obtained."

By another of the three instruments just referred to, Warren K. Blodgett, as party of the first part, conveyed the premises to the Albion Chemical & Export Company, party of the second part, in which this provision occurs: "It is agreed between the parties hereto that the party of the second part shall not, during the five years next ensuing from and after the date of this deed, make any sale, deed or conveyance of the within granted premises, or any part thereof, or make or suffer any incumbrance, mortgage or lien of any nature whatsoever upon the within granted premises, or any part thereof, without in either case the express assent thereto in writing of the said Portland Chemical & Phosphate Company being first had and obtained, in accordance with a provision in the deed of said company to me, of even date herewith, to which reference is hereby made."

The other of the instruments referred to, as far as material, is as follows: "Agreement made this the 1st day of July, A. D. 1902, between the Albion Chemical & Export Company, a corporation organized under the laws of the state of Maine, of the first part, and the Portland Chemical and Phosphate Company, a corporation organized under the laws of the state of Maine, of the second part.

"Whereas, the party of the second part has this day sold to Warren K. Blodgett, of Cambridge, Massachusetts, who has by his deed this day conveyed to the said party of the first part, the following lands lying and being in Levy and Alachua counties, Florida, to wit [here the premises are described], upon the following conditions and terms, to wit, for the sum of one hundred thousand dollars; thirty thousand dollars thereof to be paid in cash, and the sum of seventy thousand dollars, the balance of said purchase money, to be paid as follows: One dollar per ton upon each and every ton of phosphate rock mined upon and sold from said land, either by the said party of the first part or its representatives or successors, said payments to be made annually at the end of each and every year from this date to the party of the second part, or until the said sum of $70,000.00 shall be fully paid, and the mining of said phosphate rock is to begin within five months from this date and at least 14,000 tons of such rock to be mined and sold and the sum of $14,000, paid each and every year until the said sum of $70.000.00 is fully paid, and no conveyance, mortgage, bonds, liens or other incumbrances of any

kind is to be made or placed of or upon said lands so conveyed, either by the said party of the first part or its representatives or successors until the said sum of $70,000.00 is fully paid.

"Now, therefore, this agreement witnesseth that the said party of the first part, in consideration of the premises and of one dollar to it in hand paid by the party of the second part, doth hereby agree, promise and bind itself and its successors, that the stipulations and agreements heretofore in this instrument set out shall be strictly performed and the said sums of money fully paid; and further, that it will at the beginning of each and every year, until the final performance of this agreement, give to the party of the second part the promissory note of the party of the first part properly executed, payable in one year from that date without interest, for the amount of fourteen thousand dollars, provided so much still remains due under the terms of this agreement; and further, in the event of the nonpayment of any one of these said notes at their maturity, or any removal of or attempt to remove from said lands, by the said party of the first part, any property, except the phosphate rock mined by it, before said lands are fully paid for, the said party of the first part, for itself and its successors, hereby expressly consents and agrees to an immediate attachment of all of its property, except said phosphate rock, in the state of Florida, by the said party of the second part, for its failure to comply with this its agreement, and expressly agrees that such attachment shall be valid and binding."

These writings were, each and all of them, duly and in due time recorded in the county of Florida, in which the lands described are situated. Of the $100,000, $30,000 thereof, stipulated to be paid in cash, was so paid at the time the negotiations were consummated, and $14,000, which was to become due at the end of a year from that date, was paid, and a note for the second payment, which became due the 1st of July, 1904, was given according to the terms of the agreement; but, before it matured, or anything was paid on it, the maker, the A. Company, was adjudged a bankrupt, leaving a balance of $46.000 of the purchase money unpaid at the time of the adjudication. The petition in bankruptcy against the A. Company was filed in the proper court March 4, 1904. The proper schedules were filed in that court on the 21st of March, 1904. Schedule A (2), creditors holding securities, was as follows:

"Ledger fol.		Value of Securities. $ cts.	Amount of Debts. $ cts.
	.....		
	.....		
14 & 16	Portland Chemical & Phosphate Co., or James Willis Taylor as assignee of this account; Portland, Me., street number unknown. Real estate & plant at Albion, Florida, on which lien is claimed by Portland Chemical & Phosphate Co., under agreement in writing. Boston, Mass., July 1st, 1902.....	Unknown	(14,000 note 42,000 due bill not yet payable.) 56,000.00"

On the 21st of March, 1904, the company was adjudged bankrupt, and such further proceedings were had in the court of bankruptcy that in May, 1904, the trustee in bankruptcy of the estate of the A. Company sold at public sale all his right, title, and interest as such trustee in and to all of the said property, subject to all valid and existing liens and incumbrances, for the sum of $1,050, to Edward E. Blodgett, the defendant, who is a brother of Warren K. Blodgett. The latter part of the year 1905, the plaintiff company filed its bill in the court below against the defendant, the purchaser at the bankrupt sale, setting up substantially all of the above-stated facts, claiming a creditor's lien on the property it had conveyed for the payment of the $56,000 of the purchase money remaining unpaid, for a decree to enforce the lien; and prayed, in the alternative, that in event the court was of opinion that the contract by its own terms created a lien on the property which waived the grantor's lien, then for a decree to enforce that lien by a sale of the property, and from the proceeds

of said sale to pay the balance of the purchase money. There were demurrers to the bill, which were overruled. Defendant answered, and the decree from which this appeal is taken recites: "This cause coming on for hearing upon the bill, answer, replication, and testimony taken and filed by the respective parties herein, and the same having been argued by the counsel and considered by the court, it is now ordered, adjudged, and decreed: (1) That the equities of the case are with the defendant, and that the plaintiff, in and by his said bill and testimony taken in support thereof, has not made out such a case as this court, as a court of equity, can grant any relief therein." To reverse that decree this appeal is prosecuted.

H. Bisbee and George C. Bedell, for appellants.

E. C. Maxwell and Lucius J. Reeves, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, having stated the case as above, delivered the opinion of the court.

There is substantially no dispute as to the facts affecting this controversy. There is no room for the application of the doctrine and learning applied to protect an innocent purchaser against a secret lien. The respondent represents, in reference to the issues here presented, the bankrupt debtor, and does not in any sense occupy the position of a creditor. The papers referred to, and as far as material quoted in the statement of the case we have made, present features which require that they should be treated in their construction as one instrument. They show clearly the property which was the subject of the sale, the parties who were the seller and the buyer, the price that was agreed upon, the amount that was paid at the time of the sale, and the amount that remained unpaid. There is no dispute as to the sum that has been paid since, and as to the amount that still remains unpaid. It is therefore a plain case where the plaintiff has parted with its property to the respondent—for, as we have already said, the respondent represents the original purchaser—which the respondent now holds, and for which he has paid not half of the agreed purchase money. The written instruments which evidence the sale were such as by law are entitled to registration in the county and state where the land is situated. They were all duly authenticated for registration and duly registered in due time. With abundant care they provide that the purchaser shall not, during the five years next ensuing after their date, make any sale, deed, or conveyance of the granted premises, or any part thereof, without, in either case, the express assent thereof in writing of the seller. This provision is contained in full force and the clearest expression in each one of the papers, which we construe as a single writing evidencing the transaction between the seller and the buyer. Their due registration gave constructive notice of their material contents to all parties undertaking to deal for or on the credit of the granted premises. Besides this constructive notice, the respondent had actual knowledge of the existence and terms of at least one of the three writings set out in the statement of the case. It seems to us to be wholly immaterial whether technically a vendor's or grantor's lien sprang out of these transactions, or whether the plaintiff's right took the shape of a contract lien. It is plain that, besides the money paid at the time of the sale and the $14,000 paid, it has re-

ceived nothing in the way of other security to take the place of its natural right to look to the thing sold for the unpaid part of the purchase price. This appears to us to be so clearly shown on the face of the papers themselves as to exclude room for argument and the citation of authority. In support, however, of the seller's right, under such circumstances, to look to the property sold for the complete satisfaction of the agreed price, we content ourselves with citing Lucas v. Wade, 43 Fla. 419, 31 South. 231; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802.

We are of the opinion that the Circuit Court erred in decreeing that the equities of this case are with the defendant, for which error the decree must be reversed.

It is therefore ordered that the decree appealed from is reversed, and the cause is remanded to the Circuit Court, with directions to pass its decree in favor of the complainant therein for the amount remaining unpaid of the purchase money as shown, and decree that the complainant has a valid and subsisting lien on all of the premises described for the satisfaction of its debt, and providing for a foreclosure thereof in manner and terms agreeable to equity.

KINNEAR MFG. CO. v. CARLISLE.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1907.)

No. 1,596.

1. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The decisions of the Supreme Court of a state, as to the common-law liability of a master for injuries caused by the negligence of fellow servants, are not binding on the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 977.

Conclusiveness of judgment between federal and state courts, see note to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 486.]

2. MASTER AND SERVANT—DUTY OF MASTER—PLACE AND APPLIANCES.

The positive, personal, and nondelegable duty of a master to provide a reasonably safe place in which, and reasonably safe appliances with which, to work, or a reasonably safe method of doing the work, is a duty of construction and provision, and not of operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171–176.]

3. SAME—LIABILITY FOR INJURY OF SERVANT—NEGLIGENCE OF FELLOW SERVANT.

A petition, in an action by a servant against the master to recover damages for a personal injury, does not state a cause of action, where the only negligence alleged is that of a foreman under whom plaintiff was working in directing the manner of using or handling machinery which is not alleged to have been defective or unsafe, if properly used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 469–472.]

4. TRIAL—DIRECTION OF VERDICT—REFUSAL—WAIVER OF EXCEPTION.

An exception to the ruling of the court denying a motion to direct a verdict for defendant, made at the close of plaintiff's evidence, is not waiv-

ed, where the defendant does not thereafter introduce any evidence, and a formal announcement that he rests his case is not necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 983.]

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

H. B. Arnold, for plaintiff in error.

L. G. Addison, for defendant in error.

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

COCHRAN, District Judge. This was an action by the defendant in error, James H. Carlisle, hereinafter referred to as plaintiff, against the plaintiff in error, hereinafter referred to as defendant, to recover damages for a personal injury sustained October 12, 1903, and consisting in the loss of his left arm. It resulted in a verdict and judgment for $4,500. The case was heard and determined on plaintiff's evidence. At the close thereof defendant moved the court to direct the jury to find for it. This motion was overruled. The ruling was duly excepted to and is assigned as error here. As we hold that this assignment is well taken, it is not necessary to consider any other.

The facts appearing from plaintiff's evidence, are about these:

The defendant was engaged in the business of manufacturing steel doors and shutters at Columbus, Ohio, and plaintiff was its employé. He belonged to the galvanizing department, and his work, in the main, consisted in helping to run sheets of steel through the galvanizing machine. There was another helper besides himself, and a foreman, named Grossman, set over the two. That department consisted of this machine and these three employés. The blacksmith department was in the same room, operated by a blacksmith and helper. The entire plant was in charge of a superintendent, named Volp. When plaintiff was employed by Volp, he placed him in charge of Grossman, and told him that Grossman would tell him what to do. He had been in defendant's employ since the preceding June 16th.

The motive power which ran the galvanizing machine was generated by a gas engine and the connection between the two was made by means of shafts, pulleys, and belts. The work in which plaintiff was engaged when injured was ungearing the machine. They had run out of galvanizing material, and it was necessary to shut the machine down. The custom was when the machine was shut down for any length of time to ungear it. More particularly, he was engaged in trying to hook up the belt by which the power was transmitted from the main shaft to the machine after it had been thrown off the pulley on said shaft upon which it ran. This he was doing by Grossman's direction. It had been so thrown off either by plaintiff with his hand, or with a pole, or by Grossman with a pole. The pulley and shaft were about 10 or 12 feet south of the south end of the machine, and about 10 or 12 feet from the floor. The hook on which he was trying to hook the belt was iron and movable. One end was bent so as to hook on to a gas pipe behind and above the shaft, and the other end was provided with a hook to hook up the belt. It could have been

hooked up by removing the hook from the gas pipe, and after inserting the other end therein replacing it thereon. Instead, plaintiff tried to hook it by inserting his left hand within the belt and placing it on the hook. This brought his hand between the belt and the shaft. The shaft was revolving rapidly. He had on gloves and was standing on top of an unsteady stepladder. In making the effort his hand caught upon the shaft, and at once his arm and the belt began to revolve around the shaft and continued so to do until his whole body had been thrown around it twice, his arm had been wrenched from its socket, and he had fallen to the floor.

The accident happened on Monday. This method of disposing of the belt whilst the machine was shut down had been put in operation for the first time the previous Saturday. It was so put by Grossman, the foreman. It had been suggested by the blacksmith's helper, and the blacksmith had made the hook. The belt had been hooked up by Grossman on Saturday, but not in plaintiff's presence. He had not hooked it up or seen it hooked up before the accident. The method of disposing of the belt previous thereto had been this: After it had been thrown from the pulley on the main shaft, it was also thrown from the pulley on the countershaft. It was then taken around the end of the main shaft and hung up in front of it on a piece of wood nailed there. Plaintiff, by Grossman's direction, had hung the belt up in this way at least two or three times. Obviously this method was less dangerous than the other. By throwing the belt off the pulley of the countershaft more play was given to it, and, instead of being hooked up with the revolving shaft within it, it was removed therefrom, and then hung up.

When plaintiff first made the effort to hook up the belt, he found it difficult to do so. He thereupon requested Grossman to throw the belt from the pulley on the countershaft. In response to this request, Grossman caught hold of the stepladder, and said that it was not necessary to do this; that he had hooked it up himself, and to go ahead and hook it up. It was in compliance with this direction that the effort was made which resulted in the injury. Plaintiff, at the time he made it, knew that the shaft was revolving within the belt, and that the removal of the other end thereof from the pulley of the countershaft would make it safer and easier to handle it. It was because of this that he requested its removal.

Such, then, are the facts which appeared from plaintiff's evidence. It is possible that, apart from any other consideration, they were sufficient to require that the case be submitted to the determination of a jury under proper instructions; this, on the ground that the matter of providing a method of disposing of the belt, when thrown from the pulley of the main shaft, was defendant's absolute, positive, personal, and nondelegable duty as master, and it was open for plaintiff reasonably to claim that Grossman had been intrusted by defendant with its performance; that the method provided by him was not reasonably safe, and in providing it he failed to exercise reasonable care; and that he (plaintiff) had not assumed the risk arising from said lack of safety or been guilty of contributory negligence. It is not necessary, however, that we determine this, and by referring to it we are

not to be understood as expressing any opinion in regard thereto. The want of necessity for our so doing is due to the fact that such is not plaintiff's case as set forth in his petition. He proceeds upon no such theory therein.

The facts therein alleged are that defendant, through its foreman, Grossman, negligently directed plaintiff to climb up on the stepladder and throw the belt off the pulley while the machine was in motion and connected with the motive power; that after ascending the stepladder he requested the foreman to loosen or unfasten the belt from the opposite pulley so as to enable him to remove the belt in safety; that the defendant, through its foreman, negligently refused to remove the belt from the other pulley and negligently directed him to remove it whilst it (the pulley) and the machine were revolving at such a dangerous rate of speed as to render the removal of the belt highly dangerous to him; and that in attempting to carry the directions out his hand was caught, and the injury complained of sustained. It will be noted that the allegation is that the act that plaintiff was doing when injured was throwing the belt off the pulley whilst the machine was in motion and connected with the motive power. Such, in fact, was not the case. The act that he was then doing was trying to hook the belt up whilst the shaft was revolving within it after it had been thrown from the pulley and the machine stopped. We simply direct attention to this variance without basing our action upon it.

The petition states no cause of action against the defendant. The negligent acts of which it complains are the directions of the foreman, Grossman, to plaintiff, before and after his refusal to throw the belt from the pulley on the countershaft, to throw the belt from the pulley on the main shaft, and that refusal. Such negligence was the negligence of a fellow servant. The fact that Grossman was the superior servant and plaintiff subordinate to him is not sufficient to take the pleaded case out of the fellow-servant rule. Louisville & Nashville R. Co. v. Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696; Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Martin v. Atcheson, T. & S. F. R. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Alaska Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; Baltimore & Ohio R. Co. v. Brown, 146 Fed. 24, 76 C. C. A. 482. It is true that the Ohio Supreme Court holds otherwise: Little Miami R. Co. v. Steven, 20 Ohio, 415; C. C. & C. R. Co. v. Keasy, 3 Ohio St. 201; P. Pt. W. & C. R. Co. v Devinny, 17 Ohio St. 198; Railway Co. v. Lewis, 33 Ohio St. 196. And that the doctrine of the Ohio Supreme Court has been embodied to a certain extent in a statute, which is binding upon the federal courts. Railroad Co. v. Camp, 65 Fed. 952; 13 C. C. A. 233; Pierce v. Van Dusen, 78 Fed. 695, 24 C. C. A. 280, 69 L. R. A. 705; Kane v. Erie R. Co., 142 Fed. 683, 73 C. C. A. 672. But this statute is limited to railroad companies, and the position of the Ohio Supreme Court as to the common-law rule is not binding on the federal courts. N. N. & M. V. Ry. Co. v. Howe, 52 Fed. 362, 2 C. C. A. 121. B. & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

Nor is the case as presented in the petition taken out of the fellow-servant rule on the ground that Grossman's negligence was a breach

of the defendant's absolute, positive, personal, and nondelegable duty, as master, to provide a reasonably safe place in which to work, or a reasonably safe appliance with which to work, or a reasonably safe method of doing its work. This duty, as has been pointed out, is a duty of construction and provision, and not of operation.

In the case of Pennsylvania Co. v. Fishback, 123 Fed. 465, 59 C. C. A. 269, in speaking of the matter with reference to railroads, we said:

"So far as safety depends upon the manner of construction and maintenance of the tracks, the duty is upon the railway company to use due care to see that they are reasonably safe. In connection with the operation of trains thereon, it is its duty to use due care to employ an adequate force of hands reasonably competent to operate them, to promulgate adequate rules and regulations for their conduct, and to exercise an adequate supervision over it; but its duty here goes no further. The duty of complying with the rules and regulations and of carefully operating the trains is a duty incumbent upon those employés to whom their operation is intrusted. All employés so engaged are fellow servants, and no recovery can be had against the railway company for an injury sustained by one of such employés due to the negligence of another."

In that case we held that no recovery could be had for a negligent direction of a yard master to an engineer and conductor to take their train over a track on which another train was standing.

In the case of American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, Judge Sanborn said:

"It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work and a reasonably safe place in which they may render their service, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limits. It does not extend to the guarding of the safety of a place or of a machine against its negligent use by the servant. The risks that a safe place will become unsafe, or that safe machinery will become dangerous, by the negligence of the servant who uses them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. It is a risk of operation, and not of construction or provision, and the duty to protect place and machinery from dangers arising from the negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them."

In that case a workmen engaged upon the construction of a bridge, whilst returning upon a loose plank from the stringers of the false work of the bridge across an open space between the stringers and rails parallel thereto upon which a traveler ran carrying block and tackle and other machinery, whence he had gone by direction of the foreman to hitch the runner of the tackle to some iron cords, was injured by reason of the foreman giving the man, who operated the block and tackle by means of an engine, a signal to raise the load rapidly and its swinging as it arose against him and the plank and knocking them to the ice below. It was held that no recovery could be had because of the negligence of the foreman. This case is valuable as containing a reference to all relevant authorities and for the clearness and force with which it presents the law.

Here there is no allegation that defendant negligently provided a place in which to work, or an appliance with which to work, or a method of working, that was unreasonably unsafe. The allegations are

that through its foreman, Grossman, it negligently directed plaintiff to throw the belt off the pulley of the main shaft, negligently refused to throw it from the pulley of the countershaft after plaintiff requested Grossman so to do, and, after the refusal, directed plaintiff to so throw the belt. The substance of the allegations, therefore, is that, through its said foreman, defendant negligently directed plaintiff to throw the belt from the pulley of the main shaft without its being thrown from the pulley of the countershaft. The allegation that defendant, through Grossman, so did, cannot be construed to mean that it expressly authorized Grossman to give such direction, or that the method provided by defendant for ungearing the machine was as directed by Grossman. It can be construed to mean no more than that Grossman gave such direction, and that it was defendant's act, because of Grossman's superiority over plaintiff. Indeed, it is apparent, from the manner in which plaintiff presented his case before the jury by the evidence, that the theory thereof which he had was that defendant was responsible for Grossman's act, because Volp, when he was employed, put him in charge of Grossman, and told him that Grossman would tell him what to do, a fact of no greater legal significance than the fact that Grossman was superior to plaintiff. This is evident from the fact that it was only upon the cross-examination of plaintiff's witnesses that facts were developed which possibly may reasonably be claimed as tending to show that defendant negligently provided an unreasonably unsafe method of ungearing said machine.

The negligence as alleged in the petition, therefore, was simply the negligence of Grossman in the operation of the machinery provided by defendant, and consequently the negligence of a fellow servant. The fact that defendant had provided a reasonably safe method of ungearing the machine, such, for instance, as was in use before the change made the Saturday preceding the injury, was not inconsistent with any allegation of the petition. The decisions of this court in the cases of Western Union Tel. Co. v. Burgess, 108 Fed. 26, 47 C. C. A. 168; National Steel Co. v. Lowe, 127 Fed. 311, 62 C. C. A. 229, Chambers v. American Tinplate Co., 129 Fed. 561, 64 C. C. A. 129, and National Refining Co. v. Willis, 143 Fed. 107, 74 C. C. A. 301, have no application to the case as presented by the petition. It must be held, then, that the petition did not state a good cause of action against the defendant, and certainly not the possibly good cause of action developed by the evidence, and on this ground defendant was entitled to have the jury directed to return a verdict for it; the defectiveness of the petition being in nowise aided by the answer.

It is urged, however, that the defendant in some way waived its exception to the ruling of the court denying its motion to instruct the jury to find for defendant made at the close of the plaintiff's evidence. It is difficult to make out the exact basis of this position. Decisions such as the following, to wit, Columbia & Puget Sound Ry. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, and Union Pac. Ry. Co. v. Callahan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628, are cited in support thereof. In those cases it was held that error in overruling the motion for a peremptory instruction made by defendant, at close of plaintiff's testimony, was waived by defendant thereaft-

er introducing evidence; but no such thing happened here. Defendant introduced no evidence after its motion was overruled. In the cross-examination of plaintiff's witnesses, they were asked about certain photographs of the place of injury by defendant, and possibly it may be said that they were then introduced in evidence by defendant. It would seem that it is claimed that because these photographs were used by defendant's counsel in argument before the jury at the close of the evidence, a fact, however, not appearing from the record, and subsequently attached to the bill of exceptions, if not made a part of it, this case comes within the above rule. But so using and attaching them as having thus been introduced in evidence was not the introduction of them in evidence after the overruling of the motion. They were introduced in evidence, if introduced at all, before the motion in the course of the cross-examination of plaintiff's witnesses.

Again, it is emphasized that, in these and such like decisions, it is stated that the refusal to give such motion cannot be assigned as error, unless the defendant rests its case. It would seem that it is thought that the defendant must formally announce that he rests his case: but this is not necessary. All that is meant is, as before stated, he must not thereafter introduce any evidence. If he does, he does not rest his case. If he does not, he does rest it, and rests it on plaintiff's evidence alone.

The judgment of the lower court must therefore be reversed, and the cause remanded, with directions to award a new trial.

CUMBERLAND COAL & COKE CO. v. GRAY.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,610.

1. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS—MINES AND MINERALS—TENNESSEE STATUTE.

Acts Tenn. 1903, p. 520, c. 237, regulating the operation of mines, requires the employment by the operator or owner of every mine, of a mine foreman who shall have a certificate of competency from an examining board, and who shall give his attention to the frequent inspection of the mine, and give all necessary directions for securing the health and safety of employés, and provides that he shall not be subject to the control of the owner or operator in the discharge of the duties required by the act. It further provides that no coal mine shall be operated for a period longer than 30 days without such certified mine foreman under penalty of a fine for each and every day after the expiration of such time. As construed by the Supreme Court of the state, such act relieves the owner or operator of a mine from liability for injuries to a miner caused by the negligence of the certified foreman in the performance of his duties. *Held*, that the provision permitting a mine to be operated for 30 days without a licensed foreman, without being subject to penalty, does not give an unlicensed foreman the standing of a lawful foreman under the act during the first 30 days of his employment, even though he is subsequently licensed, but that until so licensed the owner or operator is in control as before the act and his liability is not affected thereby.

2. SAME—ACTION FOR INJURY TO MINER—QUESTIONS FOR JURY.

In an action against a mine owner to recover for the death of a miner, alleged to have resulted from the negligence of defendant in failing to

keep its mine in safe condition, or to instruct the deceased, who was inexperienced, in respect to the peculiar dangers to which he was subjected, the evidence in support of such allegations *held* sufficient to require the submission of the case to the jury.

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

S. B. Smith, for plaintiff in error.

T. A. Wright, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an action founded upon a statute of Tennessee, giving a remedy in such cases, to recover damages sustained by the father, who is also administrator of the estate, in the death of his son, which it is alleged resulted from the negligence of the Cumberland Coal & Coke Company, which we shall herein call the "Company." There was a verdict and judgment in favor of the plaintiff for $2,500. The declaration alleged that the defendant company was a corporation, owning and operating a coal mine in Cumberland county, Tenn., in which many agents and laborers were employed, among them the deceased son of the plaintiff; and that it "was the duty of defendant to furnish plaintiff's said intestate with a safe place in which to work, to keep its mine in safe condition, instruct plaintiff's said intestate in the duties of his employment and inform him of the risks incident thereto, and have said work done under the supervision of skilled and competent agents, superintendents and foremen." Thereupon the declaration proceeds to charge that the company neglected to employ competent agents for supervision of its work and did not keep its mine in a safe condition; that on November 3, 1904, it took the plaintiff's intestate, who was young and without experience, from the work of driving a team in the mine which was free from danger and put him to work at "robbing the mine" (as the work is called) which was very hazardous, and in which he had not had experience, and did not understand the dangers; that the company failed to instruct him in regard to such dangers or how to do the work, but required him to do it in an unsafe manner which produced a dangerous and unsafe condition in the mine; that in consequence of the work being improperly done a piece of rock or slate from the roof or wall of the mine fell upon and killed him. "Robbing" a mine means taking out the pillars of ore or coal which have been left standing to support the roof while the mass is being taken out. The company filed a plea of not guilty. Upon the trial the parties produced evidence directed to the issues. At the close of the plaintiff's case, counsel for the company requested an instruction to the jury to return a verdict for that party. This the court refused, and after the taking of evidence for defendant, the request was renewed and again refused. The defendant excepted. Upon this exception the principal questions which have been presented and argued arise.

1. The first point which is urged by counsel against the judgment is this: The Legislature of Tennessee enacted a statute (Acts 1903, p.

520, c. 237), regulating the operation of mines, which required the employment by the operator of a mine, of a mine foreman who should have a certificate of competency from an examining board, and who should give his attention to the frequent inspection of the mine and of the operations going forward therein, and give all necessary directions for securing the health and safety of the employés. One of the provisions of section 20 of the chapter was:

"That said mine foreman shall not be subject to the control of the operator or owner in the discharge of the duties required of said mine foreman by this act. It shall be the duty of the mine foreman, or foremen, to see that the provisions of this section and the other duties herein defined are faithfully discharged and carried out; and in case of his or their failure to comply with such provisions, and upon conviction, he or they shall be subject to a fine of one hundred dollars each and imprisonment for a period of not less than ninety days at the discretion of the court."

It is contended that the provisions of this act deprived the company of the power of control over the operation of its mine, and therefore relieved it of responsibility for accidents occurring in such circumstances as those which existed in the present case. The principle upon which this insistence rests is no doubt sound, and is well supported by authority. This point, however, was not raised at the trial, which occurred in April, 1906. The defendant relied upon the statute of 1881 which did not contain the provision above quoted from section 20 of the act of 1903 conferring the power of control in respect to the operation of mines; and, so far as appears, the defendant did not refer to or invoke the provision of the later act. Nor was the provision referred to in the motion for a new trial subsequently entered by the defendant. Nor is the point raised by the assignment of errors filed July 11, 1906, unless it should be regarded as sufficiently assigned by the general assignment that the court erred in refusing to give a peremptory instruction to the jury to find a verdict for the defendant. In October following, the Supreme Court of Tennessee decided the case of Sale Creek Coal & Coke Co. v. Priddy, 96 S. W. 610, and therein held that, in consequence of the act of 1903, the relation "of master and servant did not exist between the mine owner and his certified foreman with reference to the duties imposed on such foreman by the statute, and that the master was therefore not liable for injuries to a miner, caused by the foreman's negligence in the performance of such duties." This ground of defense is now advanced in support of the general assignment of error in refusing the instruction asked. We cannot but think that this particular ground for the instruction was not thought of at the trial, and that it was first opened out to counsel by the decision of the Supreme Court of Tennessee in the case referred to. And we, therefore, seriously doubt whether the point was saved by the exception. In the Priddy Case, supra, the court considered the effect of the above quoted provision of the act of 1903 upon just such an exception, but whether that ground of defense was stated to the lower court, so that the ruling of the court was made in view of it, does not appear. Nor are we informed what rules the Supreme Court of Tennessee has upon the subject of exceptions and assignments of

error. As no objection of this kind is made by the defendant in error, we conclude to consider the effect of the statute upon the rights of the parties. It does not extend the control of the foreman over the discharge of all the duties which the mine owner owes to its employés. It does include the duties of inspection and the preservation of reasonably safe conditions for the work. But apparently it does not include the duty of the employer to instruct his inexperienced employés of the dangers in putting them into a kind of business or a place of work which is peculiarly hazardous; and the negligent discharge of this duty was, as we have seen, alleged in the declaration. And as there was some evidence to prove it, a verdict for the plaintiff might be rested on that ground, notwithstanding the statute. A contrary instruction would therefore have been erroneous. Moreover the foreman employed, Barnett by name, was not a licensed foreman, and therefore not such a foreman as the statute intended to intrust with such power. He had applied for a license on November 9 or 10, 1904, but it was not then granted to him, nor had it been at the time of the accident on the 23d of that month, nor did he obtain a license until the 7th day of February, following. It is true, as pointed out by counsel for the plaintiff in error, that the statute in question provides that "no coal mine shall be operated for a period longer than thirty days without such certificated mine foreman," and that "any owner, operator, or superintendent, operating a coal mine in this state for thirty days without such certificated foreman shall, upon conviction of same, be subject to a fine of $25 per day for each and every day operated without such foremen or foreman," and it is contended that a foreman without license is privileged to act as a lawful foreman during the first 30 days of his employment. But we conceive that such is not the meaning of this language. It seems to us to mean that the owner might go on with his business for 30 days with an unlicensed foreman without being subject to the obligations and the penalties prescribed by the act. Meantime he would be operating without a licensed foreman and be in control as before the act. We cannot conceive how the license granted in the February following could retroact so as to give the foreman's acts an authority which he did not theretofore possess; or how the conditions of things done in November could be affected by the license in February any more than they would be if the license had never been granted. We therefore conclude that the liability of the company was not affected by the statute.

There was evidence tending to show that the foreman negligently performed the duty of inspection. Scarcely 15 minutes had elapsed after his inspection of this room where the accident happened before the rock fell upon the deceased and killed him. Of course this would not conclusively prove negligence, but it had a tendency that way. There was other evidence of a similar tendency.

Another reason assigned in support of the assignment of error, in refusing to instruct the jury to find for the defendant, is that the father, who is plaintiff in the action and the beneficiary, was guilty of negligence in respect to the safety of his son, and was therefore

not entitled to recover. Assuming that the circumstances of this case were such that the jury might have acted upon the principle invoked, if they had found facts to justify it, yet no request was made that the court instruct the jury upon this point. We do not see any ground for a holding that as matter of law, either the deceased or the plaintiff was guilty of negligence, and the most that could be said is that the jury might have found that the plaintiff was negligent in not preventing the son from going into the room where the accident happened when he saw that a pillar supporting the roof was crushing. But how much it was crushing, or what other supports the roof might have, or what means he might at the instant have had for preventing the son, and other such questions were all for the jury to consider under proper instructions from the court in respect to the law applicable to the facts which the jury might find.

There are no other questions of any merit. And, indeed, it is only fair to say that the stress of the case was laid by counsel, in the argument, upon the question first discussed herein, namely, whether the statute of 1903, and the employment of a mine foreman, in the circumstances stated, exonerated the defendant from the charge of negligence toward the deceased.

Finding no error, we direct that the judgment be affirmed, with costs.

CODER v. ARTS. In re CODER. In re ARTS. ARTS v. CODER.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

Nos. 2,451, 65, 74, 2,452.

1. APPEAL—REVIEW—QUESTIONS OF FACT—BANKRUPTCY PROCEEDINGS.

Where one engaged principally in farming made a mortgage upon a large part of his lands for $98,503.32 to secure a pre-existing debt within four months before he filed a voluntary petition in bankruptcy and the court below sustained it, *held* (1) where the court has considered conflicting evidence and made a finding or decree, it is presumptively correct, and, unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand; (2) no such error or mistake was disclosed by the record, and the finding of the court below, that the mortgagee did not have reasonable cause to believe that it was intended to give a preference by the mortgage, and that the mortgagor did not intend thereby to hinder, delay, or defraud any of his other creditors, must be affirmed.

2. BANKRUPTCY—ADMINISTRATION OF ESTATE—PREFERENCES—EFFECT.

A transfer by an insolvent, within four months prior to the filing of a petition, for the purpose of securing or paying a pre-existing debt, without any intent or purpose to affect other creditors injuriously beyond the necessary effect of the security, is lawful, if not violative of other provisions of law, and it does not evidence any intent to hinder, delay, or defraud creditors within the meaning of Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

3. SAME—MORTGAGES.

The transfer specified in Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], includes a mortgage or a lien voluntarily created by the debtor. If such a mortgage or lien creates a preference under section 60a, it is nevertheless not voidable under section 60b unless the creditor who receives it or is benefited thereby, had reasonable cause to believe that it was intended to give a preference by it.

4. SAME.

A transfer or mortgage made by a person adjudged a bankrupt, to secure a pre-existing debt, within four months of the filing of the petition, is not void, under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], unless it was either made with the intent on his part to hinder, delay, or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory, or district in which the property is situated.

5. SAME—PROCEEDS OF MORTGAGED PROPERTY.

Where a trustee sells mortgaged property of the bankrupt free of the mortgage, and the proceeds thereof are sufficient for that purpose, the mortgagee is entitled to the payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.

(Syllabus by the Court.)

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

On Petition for Review.

For opinion below, see 145 Fed. 202.

M. L. Learned (John L. Kennedy and George W. Paine, on the brief), for Coder.

John N. Baldwin (J. P. Conner, P. E. C. Lally, and George S. Wright, on the brief), for Arts.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The court below sustained a mortgage to William Arts to secure a pre-existing debt of $98,503.32, which Alexander Armstrong, the mortgagor, owed him. This mortgage was dated May 2, 1904, recorded May 3, 1904, described 2,360 acres of land in Carroll county, Iowa, owned by Armstrong, who subsequently, and on July 27, 1904, filed his voluntary petition in bankruptcy, which was afterwards granted. The trustee assails the conclusion of the court below that this mortgage is valid by an appeal, and also by a petition to revise upon the grounds (1) that Arts had reasonable cause to believe that by this mortgage it was intended to give him a preference (section 60b, 30 Stat. c. 541, pp. 562, 560 [U. S. Comp. St. 1901, p. 3445], 32 Stat. c. 487, § 13, p. 799 [U. S. Comp. St. Supp. 1905, p. 689]); (2) that Armstrong gave the mortgage with the intent on his part to hinder, delay, and defraud his creditors (section 67e); and (3) that it was made within four months prior to the filing of the petition, and is void, although the mortgagee had no reasonable cause to believe that it was intended to give a preference by it, and the mortgagor did not make it with the intent to hinder, delay, or defraud other creditors. As the consideration of some of these contentions involves the investigation of the facts and circumstances under which the mortgage was given, the case will be considered upon the appeal and the petition to revise will be dismissed.

1. There was much conflict in the evidence, but these facts were established: Armstrong was engaged principally in farming; Arts in banking. The latter had been sole owner of a state bank in Carroll in the state of Iowa for six years, and his son, W. A. Arts, had been his cashier. As early as 1900 Arts had loaned $28,000 to Arm-

strong, and from that time until the mortgage was made he continued to loan him money in amounts varying from $20,000 to a few thousand dollars at a time, and to renew old loans until, on May 2, 1904, Armstrong owed him upon his promissory notes $98,503.32, and was overdrawn about $2,000 in his bank. The debtor had the reputation of being one of the wealthiest men in Carroll county. He held the title to 2,440 acres of land in that county, to 616½ acres in Monona county, to a residence in the town of Glidden, for which he paid about $12,000, to 200 or 300 cattle, some 30 horses, a large number of hogs, and some farm machinery. There were mortgages upon some of these lands, but they amounted to but a small proportion of the value of the real estate. In July, 1903, Armstrong had made a statement to Arts in which he estimated the value of his property at $220,000 and mentioned one mortgage for $5,900. The capital of Arts' bank was $50,000 and he had loaned to Armstrong this $98,503.32 without any security. In March and April, 1904, Arts became very seriously ill, and F. H. Arts, one of his sons, who was in business in Nebraska, was called home to attend him in his illness. While he was at Carroll, he and W. A. Arts, the cashier, examined the loans made by their father, and he suggested that as the loan to Armstrong was very large, and the facts regarding it might soon be discovered, the interests of the bank demanded that this loan should be secured. One of the sons then telephoned to Armstrong who lived several miles distant, and asked him to come to the bank. He came the next morning, and they expressed their wish to him and the reason for it. He returned to his home, sent them his tax receipts, they caused the mortgage to be drawn, and four or five days later, on May 2, 1904, he and his wife came in and executed it. On the next day Arts recorded it. At the time it was recorded Arts requested the recorder not to enter the mortgage upon a book which he kept for the convenience of newsmongers, but which was not one of the legal records of the county, and the recorder complied with his request. At the time this mortgage was made Armstrong was overdrawn in the bank about $2,000, and no security was taken for this overdraft, nor was it paid. Armstrong continued to draw checks upon the bank, and, during the month of May and a part of June, Arts paid out for him without farther security $3,000 more. Arts and his sons testified that they did not know that Armstrong was insolvent, and that they had no cause to believe that there was any intention to give Arts a preference by the execution of the mortgage. The truth was that Armstrong was insolvent. He owed about $295,000, and his property was worth about $182,000. He testified that he knew he was insolvent when he gave the mortgage. He did not inform Arts or his sons of this fact, and he made a statement in December, 1903, that he owed $36,000, and that the value of his property was $210,750, and another on June 13, 1904, more than a month after the mortgage was recorded, in which he disclosed property worth, at his estimate, $59,340 more than his debts. The mortgage to Arts covered 2,360 acres of land in Carroll county; but Armstrong held the title to 616½ acres of land in Monona county which he estimated worth $40,040, subject to a mortgage of $20,000, 80 acres near Glidden, which he estimated worth $6,400, and

personal property, which he estimated worth $28,600, which were not included in this mortgage, and which, according to these estimates made in June, 1904, were worth more than $45,000 above the incumbrances he then reported upon them. Armstrong and his wife testified, and Arts and his sons denied, that the sons agreed with Armstrong and his wife that the mortgage should be kept from the record for six months, and that when they told Arts of this contract he replied: "I guess not, too much inquiry. It will go on record." The mortgage was recorded the day after it was made. One Sterling testified, and W. A. Arts denied, that in March or April, 1904, the latter told Sterling that Henry Armstrong was no good, and the old man was no better. One Hess testified that in 1900 Armstrong owed and paid his bank $28,000, and that he then learned that he was in debt to the amount of $75,000. One Carter testified, and Arts denied, that the former, in February, 1904, tried to sell to the latter two promissory notes signed by Armstrong, and that Arts declined to buy them, and said that he was carrying the Armstrongs for all that he cared to, and that they would have to pay up before he would let them have any more money.

In this state of the evidence the court below was of the opinion that Arts did not have reasonable cause to believe that there was any intention to give him a preference by the making of this mortgage. When the court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand. Warren v. Burt, 7 C. C. A. 105, 110, 58 Fed. 101, 106; Paxson v. Brown, 10 C. C. A. 135, 144, 61 Fed. 874, 879; Stuart v. Hayden, 18 C. C. A. 618, 622, 72 Fed. 402, 406; Fitchett v. Blows, 20 C. C. A. 286, 290, 74 Fed. 47, 51; 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; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649.

Armstrong was engaged principally in farming, and he was not subject to adjudication in bankruptcy upon an involuntary petition. The preference voidable under the bankruptcy law, therefore, could not arise, unless he voluntarily invited an adjudication in bankruptcy against himself. In the absence of such an adjudication a bona fide mortgage whereby a creditor obtains a larger percentage of his preexisting debt than other creditors of the same class is valid. Armstrong was reputed to be one of the wealthiest citizens of Carroll county. He made a financial statement to Arts less than a year before this mortgage was made, which disclosed property owned by him which was worth at least $100,000 above the debt to Arts, and the other debts he then mentioned. Arts had been loaning money to him without security for many years. All the testimony, which tended to show any reasonable cause for Arts to believe that there was any intention to give him a preference by the execution of this mortgage, was denied under oath. The mortgage was not taken hastily. It did not include all the debtor's property, but left personal and real estate worth many tens of thousands of dollars uncovered by it, and Arts still ex-

tended credit to Armstrong for the $2,000 overdraft, and within the next 50 days after the mortgage was made paid out for him $3,000 more without taking any security until after it had been expended. These facts support the finding below. To our minds the record discloses no mistake in the consideration of the evidence, and no error in the application of the law in the investigation of this question by the court below. Our conclusion is that Arts did not have reasonable cause to believe that there was any intention to give him a preference over other creditors by the execution of the mortgage of May 2, 1904.

2. Upon the record which has been recited the court also found that Armstrong did not make this mortgage with the intent or purpose on his part to hinder, delay, or defraud his creditors, or any of them, and no error of law or mistake of fact has been discovered in its consideration of the evidence relative to this question which would warrant a disturbance of this conclusion. The contention that the intent to hinder, delay, and defraud other creditors must be inferred from the fact that the inevitable effect of the mortgage was to deprive them of the opportunity to collect their claims in full, and from the rule of law that every one is presumed to intend the natural and probable effect of his acts, is not tenable here. It is every intent to hinder, delay, or defraud creditors unlawfully only, not every intent to hinder or delay them, that avails to avoid a transfer made for a pre-existing debt under section 67e. An insolvent debtor until the commencement of proceedings in bankruptcy still has the jus disponendi of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or the payment is not violative of any of the acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free from actual and intended fraud, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay and defraud as will make it void or voidable under section 67e. "Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's property, and to pledge or otherwise dispose of it, is neither an unjust nor lawful interference with the rights of others and is not within the terms of the statute making void conveyances intended to hinder or delay creditors." Sabin v. Columbia River Lumber & Fuel Co., 34 Pac. 692, 695, 25 Or. 15, 42 Am. St. Rep. 756; Lampson v. Arnold, 19 Iowa, 479, 484, 485; Stewart v. Dunham, 115 U. S. 61, 66, 5 Sup. Ct. 1163, 29 L. Ed. 329. A transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of a petition in bankruptcy by or against him constitutes no evidence of an intent on his part to hinder, delay, or defraud other creditors, within the meaning of section 67e of the bankruptcy law, notwithstanding the fact that its necessary effect is to hinder and delay them, and to deprive them of the opportunity they might otherwise have had to collect their claims in full.

There is no other substantial evidence in this case of any purpose

on the part of Armstrong to hinder, delay, or defraud any of his creditors. He honestly owed the entire debt he secured. He owed a banker, who for years had loaned him money whenever he desired it, without security. A part of his debt was due, and a portion had not yet matured. His creditor was ill, and his sons feared for his life. He owed him more than the entire capital of his bank, and the cashier feared that if this fact were known it might cause a run upon the institution. He was requested to protect and secure an obligation he could not immediately pay. He did so with no apparent purpose or intention except to honestly secure the payment of that which he undoubtedly would have paid as he had promised if the money to do so had been at his disposal. His act was free from fraud or unlawful intent, and the finding of the court upon this question must be affirmed.

3. Was the mortgage voidable by the trustee although the mortgagee did not have reasonable cause to believe that there was an intention to give a preference thereby under section 60b and although the mortgagor had no intent or purpose on his part to hinder, delay or defraud his creditors, or any of them, under section 67e, because the mortgage was given to secure a pre-existing debt within four months of the filing of a petition in bankruptcy? Counsel for the trustee argue that an affirmative answer should be given to this question because sections 60a and 60b have no application to liens voluntarily created, and section 67e avoids mortgages for a pre-existing debt although the mortgagor had no intent to hinder, delay, or defraud his creditors. The portions of these sections pertinent to their argument are:

"Sec. 60. Preferred Creditors.—a. A person shall be deemed to have given a preference if, being insolvent, he has procured, or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

"Sec. 67. Liens.—d. Liens given or accepted in good faith and not in contemplation of, or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

"e. 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 of 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."

The following, and many other authorities cited by counsel to sustain their contention, have been examined by the court: City National Bank v. Bruce, 109 Fed. 69, 48 C. C. A. 236; In re Sanderlin (D. C.) 109 Fed. 857; In re Jones (D. C.) 118 Fed. 673; In re Belding (D. C.) 116 Fed. 1016; In re Wolf (D. C.) 98 Fed. 84; In re

Pease (D. C.) 129 Fed. 447, 448; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377; Keppel v. Tiffin Savings Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 557. But the word "transfer" in section 60a both by the express terms of the bankruptcy law and by authoritative decision includes "the sale and every other and different mode of disposing of, or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." Section 1, par. 25; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 444, 21 Sup. Ct. 906, 45 L. Ed. 1171; In re Ed. W. Wright Lumber Co. (D. C.) 114 Fed. 1011, 1013. A mortgage is a security and a transfer, and subject to the provisions of section 60a and section 60b. Such a mortgage or transfer as constitutes a preference under section 60a is not voidable under section 60b by the plain words of that section, and by its adjudicated construction unless the creditor who receives it, or is benefited by it, or his agent, has reasonable cause to believe that it was intended thereby to give a preference. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 446, 21 Sup. Ct. 906, 45 L. Ed. 1171; McNair v. McIntyre, 113 Fed. 113, 114, 51 C. C. A. 89, 90; Hussey v. Richardson-Roberts Dry Goods Co. (C. C. A.) 148 Fed. 598, 599; Pittsburgh Plate Glass Co. v. Edwards (C. C. A.) 148 Fed. 377.

And finally, mortgages or transfers, to secure pre-existing debts made within four months of the filing of a petition in bankruptcy, are legal and valid, unless voidable by reason of some provision of the bankruptcy law, or of some state law, notwithstanding the fact that they create preferences. They are valid unless avoided; not void unless validated. The provision of section 67d, that liens for present considerations given and accepted in good faith shall not be affected by the bankruptcy law, does not strike down or render voidable those given and accepted for past considerations, and section 67e, which declares that all transfers made or given by a person adjudged a bankrupt within four months before 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," is necessarily limited by the force of its terms to those transfers which are given with that intent only, and it leaves those given and accepted without such an intent unaffected by it and valid. A transfer or mortgage made by a person adjudged a bankrupt to secure a pre-existing debt within four months of the filing of the petition is not voidable under section 67e, unless it was either made with the intent on his part to hinder, delay or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory, or district in which the property is situated. The result is that the mortgage to Arts was properly sustained by the court below.

The lands described in this mortgage were sold by the trustee free of incumbrances for $135,000, and the collection of the proceeds was completed on March 1, 1906. Out of these proceeds the court below allowed to the mortgagee the principal of his debt and interest thereon until August 26, 1904, the date on which he filed his claim. He has appealed from the decree, and has also filed a petition to re-

vise it because interest was not allowed to him until March 1, 1906, the date when the proceeds of the sale had been collected. As no issue of fact is presented, and the only question here is one of law, it will be considered upon the petition to revise, and the appeal will be dismissed. By the terms of the note and mortgage the mortgagor agreed to pay interest on his debt until it was paid, and that the mortgaged lands might be sold by the mortgagee, and that their proceeds might be applied to the payment of this debt and interest. The covenant for the sale and the application of the proceeds of these lands to the payment of the debt and interest was valid and binding, and it ran with the land, so that when the latter came to the hands of the trustee it was mortgaged for the payment of the interest as much as for the payment of the principal, and the proceeds of its sale necessarily came to his possession subject to the same charge. Another rule might prevail if the proceeds of the mortgaged property were insufficient to pay the mortgage debt and its interest in full and the mortgagee was seeking to collect an unpaid balance by sharing with other creditors in the distribution of the common property. He might not be entitled, then, to recover from the proceeds of the common property interest upon his debt to any later date than the unsecured creditors would recover interest upon their claims. But the proceeds of these mortgaged lands appear to be ample to pay the principal and interest of the debt to the mortgagee Arts, and where a trustee sells mortgaged property of the bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage. Thompson v. Fairbanks, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782; In re Devore, Fed. Cas. No. 3847; In re J. H. Alison Lumber Co. (D. C.) 137 Fed. 643, 649.

The decree below must be revised and modified, so that the portion which directs the payment of $97,497.40 to Arts out of the proceeds of the sale of the property mortgaged to him will read:

"It is further ordered, adjudged, and decreed that said claims of William Arts on account of said four notes, including the principal and the interest thereon to March 1, 1906, aggregate $109,107.56, and that this amount be paid in full to said William Arts, the claimant, by the trustee, out of the funds and moneys in his hands which he received on account of the sale of the lands covered by the mortgage to Arts hereinbefore described, after payment of all prior liens and claims thereon as determined by the District Court."

Arts may recover his costs in this court against the trustee upon the latter's appeal, and upon the petition of Arts to revise in matter of law. The appeal of Arts, and the petition of the trustee to revise in matter of law, must be dismissed, and the case must be remanded to the court below, with instructions to modify the decree as indicated in this opinion; and it is so ordered.

CODER v. McPHERSON.

In re CODER.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

Nos. 2,453, 66.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—GROUNDS—PREFERENCE — TRANSFER OF PROPERTY.

A debtor stated to his creditor on December 24, 1903, that his property was worth $246.750, and that he owed only $36,000. On May 2, 1904, he made a mortgage on a part of his property for $98,503.32 to another creditor. On June 13, 1904, he made another statement to his creditor that his property was worth $254,740, and that he owed $195,400, of which $147,500 was secured by mortgages upon his real estate. Thereupon, the creditor to secure its claim for $22,000, took from him three mortgages which together covered substantially all the debtor's unexempt property except a few hogs and horses, including his tools, machinery, and crops, and the debtor, who was then insolvent, thereby gave a preference under section 60a of the bankruptcy law, Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. *Held*, the creditor had reasonable cause to believe when it took the mortgages that it was intended thereby to give a preference.

2. NOTICE—CONSTRUCTIVE NOTICE—FACTS PUTTING ON INQUIRY.

Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Notice, §§ 4, 6.]

(Syllabus by the Court.)

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

On Petition for Review.

Myron L. Learned (John L. Kennedy and George W. Paine, on the brief), for Coder.

T. J. Mahoney (John N. Baldwin and George S. Wright, on the brief), for McPherson.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On June 6, 1904, Alexander Armstrong who was engaged principally in farming, made a note for $22,000, payable to G. W. Wattles, who was the president of the Union National Bank of Omaha. On June 13, 1904, Armstrong gave to Wattles three mortgages—one on 2,440 acres of land in Carroll county, Iowa, one on 616½ acres of land in Monona county, Iowa, and a chattel mortgage on his crops, farm implements, and machinery—to secure the payment of this note. At the same time, and for the same purpose, he made an assignment of his claims against one of his sons which amounted to $27,000, but which were probably of little value. Wattles took and held this note and these securities for the bank. On July 27, 1904, Armstrong filed a voluntary petition in bankruptcy and was subsequently adjudged a bankrupt. The consideration of the note for $22,000 was an indebtedness for about that amount which Armstrong owed to the bank upon his promissory notes which were not then due. About July 15, 1904, Wattles indorsed and delivered

this note for $22,000 to Thomas B. McPherson, and in October of that year McPherson presented a claim upon this note to the referee in bankruptcy and asked that the mortgages which secured it be sustained and enforced and that his claim be paid in full out of the proceeds of the mortgaged property in preference to those of unsecured creditors. The court below rendered a decree to that effect which the trustee challenges here by an appeal and by a petition to revise. As the question at issue involves a consideration of the facts disclosed by the evidence, the case will be considered upon the appeal and the petition to revise is dismissed.

After McPherson had presented his claim, he turned the note back to the bank in the summer or fall of 1905, and counsel concede that he stood in the shoes of that corporation, so that the only question remaining to be determined in this case is, did the bank have reasonable cause to believe when the mortgages were taken for its benefit on June 13, 1904, that it was intended thereby to give it a preference under section 60b of the bankruptcy law? Act July 1, 1898, 30 Stat. c. 541, p. 562 [U. S. Comp. St. 1901, p. 3445]; Act Feb. 5, 1903, 32 Stat. c. 487, § 13, p. 799 [U. S. Comp. St. Supp. 1905, p. 689].

Armstrong was the owner of the property described in the three mortgages, of some horses and hogs and of a homestead upon which he lived in the town of Glidden in Carroll county, Iowa. He was reputed to be one of the wealthiest men in his county, and, prior to May, 1904, his credit was unquestioned. Wattles had known him for more than 20 years, but had not been so intimately acquainted with him during the 12 years just preceding 1904 as he had been for eight years before that time. The bank had purchased in the year 1903 one of Armstrong's notes for about $5,000, and when, in December of that year, this note became due, Armstrong went to the bank and sought to renew it or to borrow money to pay it. Wattles asked him for a financial statement, and he made one in which he briefly described his property, estimated its value to be $246,750 and stated that he owed in all $36,000. In reliance upon this declaration the bank loaned him about $22,000 between December 23, 1903 and June 2, 1904. On May 2, 1904, Armstrong made a mortgage on 2,360 acres of his land in Carroll county to secure a debt of $98,503.32 which he owed to William Arts, and this mortgage was recorded on May 3, 1904. During the last days of May or the first days of June of that year Wattles, and Thomas the cashier of the bank, became aware of this mortgage, and on June 6, 1904, Thomas asked Armstrong, who appeared at the bank, for security for the debt he owed to the bank, and he promised to give it and signed the note for $22,000. He neglected to give any security for about a week and then Thomas went to Glidden and obtained the three mortgages on June 13, 1904. At the time these mortgages were made Armstrong told Thomas that he did not owe Arts more than $70,000 and he made another financial statement in which he estimated the value of his property at $254,740, and the amount of his debts at $195,400, thereby showing the value of his property to be $59,340 more than the aggregate amount of his debts. According to this declaration

the amount of Armstrong's debts secured by mortgages was $147,500. This statement was in fact incorrect, and, if Thomas had investigated the value of the property, had examined the records of the mortgages upon the lands, and had inquired of the creditors named in the statement, he would have discovered that Armstrong was insolvent. He made no investigation or inquiry of any one but Armstrong. He testified that at this time his general understanding was that Armstrong owned a great deal of property and was heavily in debt with a good substantial margin, and Wattles testified that he understood and believed that Armstrong had a very large excess of assets over his liabilities, and that he was perfectly good for all he owed. Armstrong had substantially the same property, and owed substantially the same debts on June 13, 1904, that he had and owed on July 14, 1904, when he verified his schedules in bankruptcy, and, according to these schedules he owed about $290,000, and his property was worth only about $190,000. Upon this evidence the referee found that the bank and its officers "were in possession of such facts as would have put a reasonably prudent man upon inquiry which, if made, would have shown that the bankrupt was insolvent," and the court below reversed that finding, and concluded that Armstrong did not intend to give the bank a preference, and that neither the bank nor any of its officers had reasonable cause to believe that it was intended to give a preference by means of the mortgages.

The finding of the court upon this question of fact is presumptively correct, and it should be sustained unless some obvious error of law or serious mistake of fact intervened in the consideration of the case. The fact that the referee who saw and heard the witnesses and who enjoyed the best opportunity to judge of the credibility of their testimony came to a different conclusion detracts much, however, from the strength of this presumption. As Armstrong was insolvent when he gave the mortgages, their necessary effect was to enable one of his creditors to obtain a greater percentage of its debt than others of the same class, and they therefore created a preference under section 60a.

Nearly all of the property of this debtor was real estate. According to his statement made on June 13, 1904, he owed $195,400, and had real estate with a very limited amount of personal property estimated at only $254,740 with which to pay it. It is common knowledge that lands and other real estate are converted into money and applied to the payment of debts by those who owe 75 per cent. of their estimated value with much difficulty, and the nature of this property, the large amount of the indebtedness in proportion to the estimated value of the real estate, and the known difficulty of converting such property into money to pay debts, were obvious danger signals, which would not have failed to incite a creditor of ordinary prudence to searchingly investigate the solvency of the debtor.

Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose. The bank knew that Armstrong had stated that he owed only $36,000 in December, 1903,

that he had given a mortgage to Arts for $98,503.32 in May, 1904, and that he had stated on June 13, 1904, that he owed $147,500 secured by mortgages upon his lands and $47,900 that was unsecured. According to these two statements which he had given to the bank, his indebtedness had increased $159,400 between December 24, 1903, and June 13, 1904, and his assets less than $9,000. Two such statements would inevitably incite the ordinary creditor to inquire what had become of the $150,000 which the increased indebtedness indicated that the debtor had received and had not added to his property during these six months, and such an inquest would have developed the fact at once that Armstrong's statements were not true.

He had given a mortgage of $98,503.32 to Arts, and he had informed the bank that he owed Arts only $60,000 to $70,000. The alleged fact that a debtor had given a mortgage to one of his creditors for about $30,000 more than he owed him would have stimulated a creditor of reasonable prudence to an investigation of the actual amount of this debt, and a very simple inquiry addressed to the creditor would have developed the fact that Armstrong had not told the truth here. His statement of December 24, 1903, his mortgage to Arts, and his statement of June 13, 1904, demonstrated the fact that he had not truthfully set forth his indebtedness, and constituted full notice to this bank that his indebtedness was more than he had declared it to be. In the face of this knowledge, it took these mortgages which, in the aggregate, covered substantially all the unexempt property the debtor owned except a few hogs and horses. The real estate was already mortgaged according to Armstrong's second statement for $147,500, and it took mortgages upon this land and a chattel mortgage upon his tools, machinery, and crops. The inevitable effect of these incumbrances was to deprive the unsecured creditors of every means of collecting their debts; for these mortgages withdrew from attachment and execution substantially all the debtor's unexempt property. The legal presumption is that parties intend the inevitable effect of their acts, and, in view of all these facts, the conclusion is irresistibly borne in upon our minds that the court below committed a serious mistake of fact in the examination of this case, and that the bank on July 13, 1904, when it took these mortgages, had reasonable cause to believe that it was intended thereby to give it a preference over other creditors of the same class.

The decree below must accordingly be reversed, and the case must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion; and it is so ordered.

FIDELITY & DEPOSIT CO. v. AGNEW.

(Circuit Court of Appeals, Third Circuit. April 10, 1907.)

No. 31, March Term, 1906.

1. PRINCIPAL AND SURETY—WORKING CONTRACT—PAYMENTS ON ARCHITECT'S ESTIMATES—DISCHARGE OF SURETY.

The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and, upon payment being made in disregard of it, there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 283–285.

2. SAME—ESTIMATES OF ARCHITECT—APPROVAL OF INVOICES.

Where, under an agreement to furnish material for the construction of a building, to be paid for in monthly installments, upon estimates made by the architect in charge of the work of the material on the ground delivered during the preceding month, of which 10 per cent. was to be retained until 30 days after all the material had been delivered and accepted, and satisfactory proof made that there were no liens, the only evidence as to such estimates was that the supervising architect approved the invoices on which the material was billed from the quarry, after going over them at the end of each month with the contractor of the building, or his representative, in a suit against the surety on the bond given to the contractor by the materialmen for the performance of their agreement, *held*, that the defendant was entitled to a verdict.

3. CONTRACTS—ESTIMATES BY ARCHITECT—REQUISITES OF.

Under such an agreement, the estimates to be made by the architect there provided for necessarily involved, not only an approximate judgment upon inspection by the architect or his representative of the quantity and value of the material delivered, having regard to its character as to which there may be a difference, but the relative value of it to the total quantity which had been contracted for.

4. PRINCIPAL AND SURETY—INEFFICIENCY OR MISTAKES OF ARCHITECT—FAILURE TO ACT—KNOWLEDGE OF—INFORMAL CERTIFICATES.

No doubt in such a case the builder to whom the material is to be furnished is not chargeable with the inefficiency or mistakes of the architect, provided an attempt at an estimate is really made; and, in the absence of notice to the contrary, an approval of the invoices may be sufficient for him to act upon, without a formal certificate, nothing being said about that in the agreement. But not only may the deficiencies be so gross as to put him on inquiry, but where to his certain knowledge the only basis for the architect's approval is the invoices on which the material was shipped and the representations made at the time by the builder himself or his representative, being thus fully advised as to how such approvals are obtained, they are only available to him for what they stand.

5. SAME—ADVANCE PAYMENTS—LOANS ON ACCOUNT OF MATERIAL TO BE DELIVERED.

Where, early in the performance of an agreement of the character specified, and when but little material had been delivered, the materialmen, needing money, applied to the builder for an advance, to be paid back by the shipment of material, and, the builder not being able to accommodate them himself, it was arranged that they should execute a note, which he indorsed and had discounted at the bank where he did business, the materialmen receiving the proceeds, and the understanding being that it

should be met by the shipment of material, no payment thereafter being made to the materialmen, but the value of the material shipped by them being accounted for to the bank by the builder and there credited, and the first loan which was paid being succeeded by others from time to time, all of which were finally met in this way, *held*, that the transaction could not be treated as merely an accommodation loan, to which the builder lent the security of his name, but that it constituted an advance of money upon the agreement, to be repaid by a delivery of material; the materialmen as the result having put into their hands a large sum in advance and anticipation of deliveries, in disregard of the agreement, depriving the surety of the protection and incentive of restricted payments to its prejudice, thereby releasing it from its undertaking.

6. SAME—AGREEMENT TO INDEMNIFY AND SAVE HARMLESS.

While, in a bond for the fulfillment by materialmen of an agreement to furnish certain material to one who was constructing a building, a provision to indemnify and save harmless from all damages in the premises may impose something more than the mere obligation to see to the fulfillment of the agreement so far as concerns the delivery of material, the obligation is none the less one of suretyship, imposing the reciprocal duty on the other party to not depart from it to the surety's detriment.

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

Norman Grey and John G. Johnson, for plaintiff in error.
John Harding, of Griggs & Harding, for defendant in error.

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

ARCHBALD, District Judge. The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom, until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and, upon payment being made in disregard of it, there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released. The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as holding out an incentive; and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as matter of law. Steam Navigation Co. v. Bolt, 6 Com. Bench N. S. 550; Calvert v. London Dock Co., 2 Keen, 639; Prairie State Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; Shelton v. American Surety Co. (C. C.) 127 Fed. 736, affirmed 131 Fed. 210, 66 C. C. A. 94; Welch v. Hubschmitt, 61 N. J. Law, 57, 38 Atl. 824; Village of Chester v. Leonard, 37 Atl. 397, 68 Conn. 495; Fitzpatrick v. McAndrews, 12 Pa. Co. Ct. Rep. 353. This is too well established to be controverted, and the only question is how far it applies here.

The bond upon which suit is brought was given by the Avondale Marble Company, as principal, with the Fidelity & Deposit Company

of Maryland, as surety, to W. H. H. Van Houten, in the sum of $66,000, for the faithful performance of an agreement entered into by the marble company, to furnish and deliver marble and granite for the new courthouse, in process of construction at Paterson, N. J., of which Mr. Van Houten was the contractor or builder. By the agreement referred to it was, among other things, stipulated that "the sum to be paid by the party of the second part [Van Houten] to the party of the first part [the marble company] for the said materials shall be one hundred and ten thousand dollars" (subject to deductions as therein provided), and that the said sum should be paid in current funds on or about the 5th day of each and every month, "upon estimates made by the architect in charge of said work, of the material on the ground, delivered during the preceding month," the marble company to be paid 90 per cent. of the amount of these estimates, and 30 days after the architect should have accepted all the material the retained 10 per cent. to be paid to the marble company upon its furnishing satisfactory evidence that no liens existed thereon. The marble and granite was to be delivered f. o. b. at the quarry, at Avondale, Chester county, Pa., and shipped to Van Houten, the contractor, with the cost of the freight from the quarry to the city of Paterson "to be allowed and deducted" by him from the contract price; and upon failure to deliver it, as required by the agreement, he was to be at liberty, upon five days' written notice, to supply the material and deduct the cost from the moneys due. The complaint of the surety is that, instead of adhering to the terms of the agreement and paying upon estimates of the architect as the work went on, no estimates, or at least none worthy of the name, were made, with the result that, with the knowledge of the contractor, payments were allowed which were greatly in excess of the material delivered; and, further, that, when but a fraction of the agreement had been performed, the marble company, needing money to conduct its operations, was favored with large advances to be met by future deliveries, this arrangement continuing down to the close of the transaction, the restrictions provided by the agreement being thereby virtually abrogated. Instructions appropriate to these issues were asked at the trial, and, in view of the undisputed evidence with regard to them, the request was made by the surety that a verdict be directed in its favor. This was refused, and, the case having been submitted to the jury, a verdict of some $40,000 was rendered against it, upon which the record is now brought here for review.

The question whether estimates were in fact made was for the jury under proper instructions, provided there was evidence upon which to predicate it. But, unfortunately, all that there was upon this subject was that Mr. Reed, the supervising architect, approved the invoices, on which the material was billed from the quarry by the marble company, after going over them at the end of each month with the contractor or his son, who had charge of this part of his father's business. This was clearly not a compliance with the agreement. An estimate such as is there spoken of necessarily involved, not only an approximate judgment, upon inspection by the architect or his representative,

of the quantity and value of the material delivered, having regard to its character, whether granite, marble, or carved marble, as to which there was a considerable difference, but the relative value of it to the total quantity which had been contracted for. And when it is considered that, out of a total contract price of $110,000, representing 82,000 weighed feet to be delivered, bills for some $105,000 were approved and paid, when but 60,000 weighed feet, having a relative value of but $73,000, had been furnished—an overpayment of $32,000—it is altogether too much to ask that the mere looking over of the invoices in the way described shall be accepted as in any sense constituting an estimate such as was contemplated. The prejudice of this to the surety is manifest, the overpayment made being substantially the amount above the contract price, which is now demanded, which, had it been kept back by the contractor as provided in the agreement, he would have had in hand enough to cover the material unfurnished, without calling upon the surety.

No doubt the contractor was not chargeable with the inefficiency or mistakes of the architect, provided an attempt at an estimate was really made; and, in the absence of notice to the contrary, an approval of the invoices may have been sufficient for him to act upon without a formal certificate, nothing being said about that in the agreement. But not only were the deficiencies in the deliveries so gross as to put him upon inquiry, but the only basis for the architect's approval, to his certain knowledge, being the invoices on which the material was shipped, and the representations made at the time by himself and his son, one or both, with regard to them, he was fully advised as to how the approvals were obtained, and just what they amounted to, and they are only available to him here, in consequence, for what they stand. That Mr. Van Houten was also aware, at least in a general way, from the outstart, of the discrepancy in deliveries, is shown by his letters—one of January 5, 1898, complaining that not a hundredth part of the material had been furnished, which would only have entitled the marble company to about $1,000, after deducting the percentage, although bills to the extent of $4,450 had been already approved and paid; and another of August 4th, declaring that not quite a quarter was on the ground, at which time $30,311 had been paid, as against $24,750 due, an advancement of some $5,000. It is not necessary to consider whether, even though no estimates were made, Mr. Van Houten would have been within the terms of the agreement and the surety have no cause to complain, if the payments for material delivered did not in fact exceed 90 per cent. of its relative value. The jury were so instructed, it is true, but the evidence was so overwhelmingly the other way, that, if the case turned upon that, a verdict for the defendant was inevitable, and should have been directed. But, passing that by, it could not be successfully contended, in view of what has been referred to, either that estimates were really made or that the contractor was without knowledge, and, relying upon the apparent action of the architect in approving invoices, was therefore protected. One or the other, however, was vital to be shown, and in the absence of it the surety was released by the overpayments made in disregard of

the agreement, and the verdict to the contrary cannot be sustained.

This disposes of the case; but it is further contended that, entirely aside from whether estimates were made, the delivery of material was anticipated by advances of money, equally in contravention of and prejudicial to the rights of the surety, which also operated to release it. The facts upon which this is based are as follows: In the spring of 1898, when comparatively little material had been delivered, the marble company being short of funds, Mr. Hepburn, the manager, went to Mr. Van Houten to see whether he could not get some money for the company, asking for a lump sum, to be paid back by the shipment of material. Mr. Van Houten was willing to accommodate him, but, not having the money himself, it was suggested that they should see whether it could not be obtained elsewhere. He and Mr. Hepburn and Mr. Shaw accordingly went to the Paterson National Bank, where Mr. Van Houton did business, and, after discussing the matter there with the cashier, it was arranged that the marble company should give its note, which Mr. Van Houten would indorse and the bank discount for him, the marble company receiving the proceeds. This was carried out, a two months' note for $10,000, bearing date May 10, 1898, being made and discounted, the proceeds being credited to Mr. Van Houten, who turned the money over to the marble company. This note was subsequently paid off, as arranged, with two months' shipments; no payments being made to the marble company on these deliveries, but the value of the material being turned into the bank by Mr. Van Houten and there credited. This first note came due in July, when another note of like amount at three months' time was given and discounted; the money on this occasion being turned over to the marble company direct, against which it made payment by deliveries of material as before, through August and September, the whole being taken care of in that way. Before the second note came due, however, still another was given and discounted, September 16th, for three months, also for $10,000, overlapping the other. This one came due December 16th, and certain payments were made on it by material as before, but not enough to fully meet it, by some $6,410, which being still unpaid at its maturity was renewed by a further note for that amount at three months' time, not however by the Avondale Marble Company, whose quarry had been sold out meantime by the sheriff, but by certain individual members, who succeeded that company and organized another—the Pennsylvania Marble & Granite Company—which took over the quarry and continued the delivery of material under the existing agreement. The last-named note came due in March, 1899, and was extended by another due in May, which was itself succeeded by still another for the increased sum of $10,000, on which $3,000 was paid July 14th; a renewal for the balance, made in August, being finally paid when it came due.

The learned trial judge was of the opinion that these note transactions were merely accommodation loans having no other significance; Mr. Van Houten simply lending the security of his name by indorsing the notes of the marble company and the parties who succeeded it, which with the several renewals and extensions the bank discounted for

them. But the case is not so simple; nor is the transaction able to be separated from the existing agreement between the parties with regard to the delivery of material. As already observed, the money obtained was obtained in direct response to an application by the marble company for an advance on account of the agreement and the delivery of material to be made under it, and by the arrangement which was made for its repayment it was expressly tied up to this. No doubt, as to the bank, it was a loan; but as to the others it was essentially an advance of money upon the agreement, to be repaid by a delivery of the material there contracted for. This also was the course pursued; the value of the material subsequently delivered being turned over to the bank by Mr. Van Houten, and the marble company credited accordingly, no payments on account of material being otherwise made so long as there were these outstanding notes. It is true that the 10 per cent. was still withheld from the amounts credited, but that does not help the matter. The point is that, instead of being paid as marble and granite were delivered, as provided in the agreement, the marble company had put in its hands by the transaction a large sum of money in advance and anticipation of this. Thereafter it was not a question of payment according to deliveries, where the agreement puts it, but a repayment by deliveries outside of it. This deprived the surety of the protection and the incentive of restricted payments, and was just as prejudicial as if the advance were less disguised. The money so obtained not only helped to swell the grand total of overpayments made, but until material to correspond had been delivered, if this, indeed, was ever entirely the case, it carried these payments meanwhile by just so much more beyond bounds; the surety in either case being released by the plain departure from the terms of the agreement.

There are other questions which might require discussion, if the case were going back for a retrial, such as the deduction of freight bills before the calculation of the percentages to be withheld, instead of afterwards, and whether, upon a default by the marble company, the surety was liable to the extent contended for at the trial. But the case is to stop here, and it is not material. The point now made for the first time that the contract in the bond was something more than one of mere surety, the final clause of the condition being to indemnify and save harmless from all damages in the premises, is not only open to the objection that it was not raised in the court below and so its influence upon the disposition of the case cannot be determined; but there is no force to it, in our judgment, if it had been. It may have imposed on the surety, as argued, something more than the mere obligation to see to the fulfilment of the agreement so far as the delivery of material was concerned, but it none the less made the obligation one of suretyship, imposing the reciprocal duty on the opposite party of not departing from it to the detriment of the surety in respect of what is involved in this issue, as was clearly done.

The judgment is reversed.

NEW AMSTERDAM CASUALTY CO. v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,593.

INSURANCE—EXTENT OF LIABILITY OF INSURER—INDEMNITY INSURANCE.

A policy, issued by a casualty company, insured against loss from liability for damages on account of bodily injuries accidentally suffered by any person caused by the negligence of the assured, "and against the expense of defending any suit for such damages." It limited the company's liability arising from the injury or death of one person to $5,000, and provided for notice to the company of any injury and any claim or suit for damages therefor, that the company should defend or settle any such suit, and prohibited the assured from making any settlement or incurring any expense or interfering in any negotiations for settlement or in any legal proceeding without the company's consent. *Held*, that the limitation did not include the costs and expenses of a suit on a claim for damages for the death of a person which was defended by the company pursuant to the terms of the policy, and that on recovery of a larger sum by the plaintiff therein the assured was entitled under the policy to be reimbursed for the costs and expenses which it was compelled to pay in addition to the $5,000 indemnity against the damages recovered.

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

Clarence T. Boyd, for plaintiff in error.

Wm. L. Cranbery, for defendant in error.

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

SEVERENS, Circuit Judge. This is an action brought by the defendant in error, hereinafter called the "Telephone Company" against the plaintiff in error, hereinafter called the "Casualty Company," upon a policy of insurance—

"against loss from common law or statutory liability for damages on account of bodily injuries fatal or nonfatal, accidentally suffered by any person or persons not employed by the assured at or about any of the work of the assured described in the schedule indorsed hereon, caused by the negligence of the assured, and resulting from the work described in said schedule, and against the expense of defending any suit for such damages."

While the policy was in force, and on or about February 8, 1901, Thomas Ware, an employé of the Telephone Company was killed at the city of Owensboro, Ky., by coming in contact with a telephone wire resting upon the wire of the Electric Light Company in said city, heavily charged with electricity, and the provisions of the policy became operative, as follows:

"(1) The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars to the home office of the company at New York City, or its duly authorized agent. He shall give like notice, with full particulars, of any claim which may be made on account of such accident.

"(2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate no-

tice thereof shall be given to the company, and the company shall defend such suit in the name and on behalf of the assured, or settle the same.

"(3) The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere with any negotiation for settlement or in any legal proceeding without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information and evidence and in effecting settlements, and in case the company calls for the attendance of any employé or employés as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time."

Notice of the accident was given by the Telephone Company to the Casualty Company. Suit was brought by the administrator of Ware against the Telephone Company for damages arising from his death under a statute of Kentucky, and notice of that was also given to the Casualty Company, and that company thereupon employed counsel to defend said suit in the name and on behalf of the Telephone Company, and upon the trial judgment was rendered against the latter company for $12,500 and costs. An appeal from said judgment was prosecuted to the Court of Appeals of the state of Kentucky, and final judgment was rendered against the Telephone Company by said Court of Appeals of Kentucky for the sum of $12,500 with interest at 6 per cent. per annum and 10 per cent. damages additional. The total judgment of the Court of Appeals of Kentucky, including interest, damages, and costs, amounted to $15,447.26, which was paid by the Telephone Company on November 25, 1903.

Of the expenses of the suit on the trial and the appeal the Casualty Company paid $989.45. The Telephone Company paid the costs of the plaintiff in that suit and other costs and expenses to an amount in all, which, upon the proportion of $5,000 to the entire judgment appealed from, as directed by the court below, resulted in a balance in favor of the Telephone Company of $1,167.98. The judgment was for $5,000 plus this balance of $1,167.98 with the interest thereon from the date of the judgment of the trial court in the Ware Case. Upon the trial, which was before the court without a jury and upon an agreed statement of facts, the Casualty Company contended that its liability under a limitation in the policy did not extend beyond the sum of $5,000, and that the judgment should be limited accordingly, without enlargement from the costs and expenses which the Telephone Company had incurred by reason of the suit. And it further contended that the $5,000 should be reduced by the $989.45, which it had paid of the expenses of the suit, as above stated. Both of these contentions were overruled by the court below, and the plaintiff in error renews them here.

The policy contained the following provision:

"(A) The company's liability as aforesaid arising from an accident resulting in injuries to or in the death of one person is limited to five thousand dollars ($5,000.00), and subject to the same limit for each person the total liability arising from any one accident resulting in injuries to or in the death of any number of persons is limited to ten thousand dollars ($10,000.00)."

And the Casualty Company contends that this limitation includes all the consequences of the accident, such as the expenses of a law-

suit brought to recover damages therefor. But we think, as did the court below, that when construed with the other provisions of the contract, as it should be, that is not its meaning. The insurance was against two kinds of liability—one of which was for damages on account of bodily injury sustained by any person, and the other was for expenses in defending any suit brought therefor. This last provision was not included in the first, and if it had not been expressly made, the insurance against the accident would not have included the cost and expenses of a suit to recover on account of it. They were not the necessary consequences of the accident, and so would not have been within the contemplation of the parties. For the same reason the restriction of the liability of the company in respect to injuries resulting from an accident would not extend to costs and expenses of a suit, for such language without more would not import that the parties had that subject in contemplation. And there is abundant reason shown by the contract why it would be most unlikely that the parties should intend such a limitation. By one of the conditions of the insurance, the Telephone Company was prevented from making any settlement, or incurring any expense, or interfering in any negotiation for settlement, or in any legal proceeding. If the Casualty Company should see fit to resist the claim, it could make any defense it pleased, hire such and as many lawyers as it wanted, and prolong the litigation to the last extremity. If its liability for the accident were converted into a fund for carrying on the contest, it could be done without the ordinary risks of litigation, and the only prospect for the assured would be in the remnant, if there should be any. A contract ought not to be construed to an absurd conclusion, if a reasonable one is possible. Moreover, a policy of insurance prepared with much care for the interests of the insurer should be construed favorably to the other party, if the language employed leaves the matter in doubt. These considerations lead us to think that when the Casualty Company reserved all power of control of the defence to actions brought by injured persons to establish the liability for the accident and recover damages, and insured the Telephone Company "against the expense of defending any suit for such damages," although it must needs be that the defense would be carried on in the name of the Telephone Company, and an adverse judgment would go against that company for damages and costs, yet in fact the Casualty Company would be defending the cause in its own interest, and for the purpose of performing its contract of indemnity against the expenses of any such suit; and at all stages of the litigation it would be for it to determine what expenses it would risk in the chances of defeating the claim.

It makes no difference that ultimately a larger liability was established against the Telephone Company than the limit of insurance, for the Casualty Company reserved the right to make the defense without regard to the amount claimed by the party injured by the accident, and the Telephone Company was as completely excluded in a case where the amount which might be recovered was as much as $25,000 as where it might not exceed $5,000. By its agreement it was ex-

posed to the hazard of the course which the Casualty Company might see fit to pursue. If the defense proved successful, the Casualty Company would have done no more than it had agreed to do. If unsuccessful, still that company had done only that. There is no room for holding that the liability of the Casualty Company for the expenses of making the defense were at all dependent upon the result of the litigation. The court below gave judgment to the plaintiff for the $5,000, and for only a proportionate part of the expenses of the defense, upon a theory of an equitable division between the parties. The Casualty Company has no ground for complaint. It was not entitled to deduct from the amount insured what it had paid in making the defense, and it was bound to make good to the Telephone Company the expenses which the latter had been compelled to pay because primarily liable.

The judgment must be affirmed, with costs.

BROWN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 61.

1. PRINCIPAL AND SURETY—BOND OF BIDDER FOR GOVERNMENT WORK—LIABILITY OF SURETIES.

A bond given by a bidder for government work conditioned that if his bid was accepted he would enter into a contract and furnish a bond for its performance within 10 days, or, in case of his failure to do so, the sureties would pay to the United States "the difference in money between the amount of the bid of said bidder so accepted and the amount for which the proper officer of the United States may contract with another party to do the work proposed, if the latter amount be in excess of the former," contemplates that, if the bidder fails to enter into a formal and binding contract in accordance with his proposal, the government may relet the work and enter into an essentially similar contract with another party, and then look to the sureties for indemnity to the extent of its loss. When such second contract is let, the measure of the sureties' liability is fixed at the difference in price under such contract and the bid of their principal, and cannot be affected by the fact that the contractor fails to complete the work and a third contract is made whether at greater or less cost to the government.

2. SAME—DEFAULT OF BIDDER—MEASURE OF SURETY'S LIABILITY.

Defendants became sureties on the bond of a bidder for a government contract for furnishing and laying in place toward the construction of a riprap breakwater such a quantity of stone "dependent upon the price per ton of stone bid" as could be furnished in place for $45,000; the bond being conditioned that if the bid was accepted and the bidder failed to enter into the contract defendants would pay to the United States the difference in money between the amount of the bid so accepted, and the amount for which the government might contract with another party to do the work proposed, if the latter amount should be in excess of the former. The bid was accepted, but the bidder failed to enter into contract, and the work was let under the same conditions to a second bidder at an increased price per ton for stone; the necessary result being that the second bidder was required to furnish a smaller quantity of stone. *Held*, that such fact did not render the second contract one for doing substantially different work from that proposed by the first bid, so as to relieve defendants from liability, but that they were liable for the value of the stone in

place which the government would have obtained under the first bid in excess of that which it obtained under the second at the price bid by their principal.

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

Writ of error by the defendants in the court below to review a judgment for the plaintiff.

H. E. Lippincott, for plaintiff in error.

F. W. Bird, Winfred T. Denison, and Henry L. Stimson, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. This in an action against Brown and Fleming as sureties on a bond executed to the United States. By the bond, they undertook that if the bid of Charles Frey, Jr., "herewith accompanying, dated June 12, 1899, for building a riprap breakwater at Larchmont Harbor, Long Island Sound" should be accepted within 60 days from the date of the opening of proposals therefor, Frey would, within 10 days after notice of such acceptance, enter into a contract with the proper officer of the United States to do the work proposed by said bid, at the prices offered by said bid, and in accordance with the terms and conditions of the advertisement inviting said proposals, and that he would give bond with good and sufficient sureties for the faithful and proper fulfillment of such contract; and they further undertook to pay to the United States, in case Frey should fail to enter into such contract or give such bond within 10 days after said notice of acceptance, "the difference in money between the amount of the bid of said bidder so accepted and the amount for which the proper officer of the United States may contract with another party to do the work proposed, if the latter amount be in excess of the former."

By the advertisement mentioned in the bond the government invited proposals from bidders for furnishing and laying in place toward the construction of a riprap breakwater such a quantity of stone, "dependent upon the price per ton of stone bid," as could be furnished in place for $45,000. The proposal or bid of Frey mentioned in the bond was to "furnish the riprap stone in place at 43 cents per ton." Frey's bid was accepted by the government; but, after due notification thereof, he failed to enter into the contract, and, more than 10 days after such notification having expired, the government readvertised the work and invited proposals similar to those originally invited, and, having accepted the bid of one Conkling pursuant thereto, entered into a contract with him. By the bid of Conkling he undertook to furnish the stone and lay it in place at the price of 51 cents per ton. Conkling partly performed his contract, but subsequently abandoned it; and thereupon the government contracted with Anderson & Murphy to complete the work, and they fully performed it.

Upon the trial both parties moved for the direction of a verdict, and the court directed a verdict for the plaintiff.

The assignments of error challenge merely the ruling of the trial judge in directing a verdict for the plaintiff. Most of the questions which have been argued by the plaintiffs in error are not presented by the facts of the case. The only contention which merits consideration is that the contract with the government made with Conkling was not one to do the same work which Frey offered to do by his proposal. If this is true, the amount for which the sureties became liable was not established upon the trial according to the mode provided for in their undertaking; that amount being the "difference in money between the amount" of Frey's bid and "the amount contracted for with another party to do the work proposed," and only nominal damages were recoverable.

It is the meaning of the undertaking that the sureties will be responsible that Frey will enter into a formal and binding contract pursuant to his proposal, and if he fails the government may relet the work and enter into an essentially similar contract with another party, and then look to the sureties for indemnity to the extent of its loss. The undertaking does not contemplate that if the second contract is not performed the government may enter into a third, and still look to the sureties for indemnity for the performance of the contract; but it contemplates that when the second contract shall be made the government is to rely for its protection against loss upon that contract, and the responsibility of the party who enters into it. It contemplates that, if by the second contract the government secures as favorable terms as it would have obtained by the original contract, no occasion for indemnity from the sureties can arise; but, if the terms are not as favorable, the occasion will arise, and the loss is to be measured by the difference in the contract prices of performance. It does not mean that if the second contract shall not be performed, and a third is made, the sureties are to be thereby released from their obligation. It does mean that, if by the terms of the second contract no apparent loss has accrued to the government, they are no longer liable; but, if by its terms an apparent loss has accrued, they shall be liable; and whether a third contract is made or not, or whether the government incurs a larger or smaller subsequent loss, or whether it abandons the work altogether, are matters of no concern to them.

The obligation of a surety is not to be extended beyond its terms, and it follows that if the contract made by the government with Conkling was not to do substantially the work which Frey proposed to do, the deviation precludes the government from establishing the amount of the loss.

It appears that the contract which Frey should have entered into would have required him to furnish 104,000 tons of stone, while the contract entered into with Conkling only required him to furnish 88,000 tons. Such a difference in the quantities of stone to be furnished would render the two contracts radically different were it not that the difference was created necessarily by the difference in the two bids for doing the same work. Both contractors by their bids promised to supply such a quantity of stone as at the prices per

ton mentioned by them, respectively, should amount to the sum of $45,000, and the difference in the quantities of stone results simply from the difference between their bids in the price per ton. Frey's bid at 43 cents a ton was equivalent to a proposal to furnish 104,000 tons. Conkling's bid at the price of 51 cents per ton was equivalent to a proposal to furnish 88,000 tons. The contract with Conkling was a contract to do the work proposed to be done by Frey; but with a limitation in quantity necessitated by the difference in the price. This difference was an incident contemplated by the undertaking of the sureties, and the purpose and object of the bond was to protect the government from any loss which might arise in consequence thereof.

Owing to the failure of Frey to enter into and perform his contract, the government obtained under the Conkling contract 16,000 tons less stone than it would have obtained from Frey. It was obliged to pay $45,000 for 16,000 tons less than it would have obtained by the terms of Frey's proposal. The phraseology of the bond is not happily chosen, but, read as it must be, with the advertisement and the proposal of Frey, which are annexed to and form a part of it, we are unable to doubt that it obligated the defendants to pay to the government the difference, at the price fixed in Frey's proposal, between the quantity of stone which he promised to deliver, and the quantity which the government was able to obtain by the Conkling contract. It follows that a verdict was properly directed for the plaintiff.

The assignments of error do not challenge the correctness of the computations adopted by the trial judge in directing a verdict, and consequently we are not called upon to consider whether or not the computation was correct.

The judgment is affirmed.

WILLIAM H. PERRY CO. v. KLOSTERS AKTIE BOLAG.

(Circuit Court of Appeals, First Circuit. April 18, 1907.)

No. 694.

1. COURTS—JURISDICTION OF FEDERAL COURTS—SUFFICIENCY OF RECORD.

While parties cannot confer jurisdiction on a federal court by consent, still where the jurisdictional facts are properly alleged, and thus properly appear on the record, and the parties proceed to trial on pleadings which go to the merits, and, particularly, when the jurisdictional facts are not subsequently put in issue by the defendant nor seriously denied, the case ordinarily will not be dismissed for want of jurisdiction, where the proofs do not create a legal certainty that it is not within the jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 155, 156.]

2. SALE—DELIVERY—PASSING OF TITLE.

Under a contract for the sale of a cargo of foreign iron to be delivered from the ship, custom house charges paid, the unloading of the iron on a wharf, from which it was being removed by the purchaser without any objection to the quality or quantity at the time of its loss, and the payment of the duties constituted such a delivery as to pass the title.

Appeal from the Circuit Court of the United States for the District of Rhode Island.

Walter H. Barney (Barney & Lee and James B. Littlefield, on the brief), for plaintiff in error.

Henry A. Wise (Gardner, Pirce & Thornley and J. S. & H. A. Wise, on the brief), for defendant in error.

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

ALDRICH, District Judge. It is alleged in the declaration that the plaintiff Klosters Aktie Bolag, is a corporation duly created, established, and organized by and under the laws of the Kingdom of Sweden, a foreign state, and a citizen and subject of said foreign state, and that the defendant is a corporation and a citizen of Rhode Island. These allegations are quite sufficient to give the Circuit Court jurisdiction. To this declaration the defendant pleaded the general issue, and gave notice of a claim of recoupment; and the cause came on for trial upon the merits. The case, therefore, does not stand at all like one where a jurisdictional question is raised upon motion or upon pleadings in limine, when jurisdiction must clearly appear upon the record. During the course of the trial, and after the plaintiff had rested its case, the point was taken by the defendant that the plaintiff had not shown either the fact of incorporation or foreign citizenship. The plaintiff contended that jurisdictional proofs were waived by pleading to the merits; but, without deciding the question of waiver, the court opened the case, and the plaintiff introduced a paper of which the following is a copy:

(Translation.)

It is hereby certified that the Royal Patent and Registry Office has on the 6th day of September, 1897, granted registration of the Klosters Aktie Bolag and that in the register of Joint Stock Companies on the 11th day of September, 1905 is filed, that the Board of Directors with domicile at Klosters Brukin the parish of Husby in the government of Kopperberg consists of Mr. Carl Hartin Samuel Nisser, Manufacturer, at Stjernsund in the parish aforesaid, Mr. Harald Funch, Engineer, and Mr. Arvid Gustaf Mikael Hermarck, Manager, both at Stockholm, with Mr. Carl Wilhelm Nisser, Manufacturer, also at Stockholm as substitute, that the firm of the Company is signed by any and each of the members of the Board of Directors and that up to this date no other entry concerning the Board of Directors of the Company has been filed in the register of Joint Stock Companies.

Stockholm the 17th of April, 1906.

Ex Officio. [Signed] E. F. Bjorkman.

The defendant then proceeded by the introduction of evidence. After both parties had rested their case, the defendant took the point that the paper failed to prove the plaintiff to be a corporation, but did prove it to be a joint stock company in the nature of a partnership, and therefore did not sustain the allegation of jurisdictional facts.

This is not a case upon removal from the state court, but one instituted originally in the Circuit Court; nor is it a case where the plaintiff failed to sufficiently allege jurisdictional facts.

We do not deem it necessary to inquire or decide how far the authorities, which hold that pleading to the merits is a waiver of the ne-

cessity of the plaintiff's proving the existence of the corporation, tend to sustain the proposition that pleading to the merits is a waiver of a defective allegation of jurisdictional facts, because this case, in our view, does not stand at all upon that ground.

The federal courts being courts of special and limited powers, jurisdictional questions disclosed by the record are always open; and, if it turns out that the parties and the court have inadvertently overlooked points in the record which are fatal to the jurisdiction, the case may and ordinarily will be dismissed, either with or without motion. Still, while the parties cannot confer jurisdiction by consent, where the jurisdictional facts are properly alleged, and thus properly appear upon the record, and the parties upon pleadings which go to the merits, proceed to trial, and particularly where the jurisdictional facts are not subsequently put in issue by the defendant or seriously denied, the case ordinarily will not be dismissed for want of jurisdiction, and this is especially so where the proofs do not create a legal certainty that the controversy involved is not within the jurisdiction. Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729. See, also, Gubbins v. Laughtenschlager (C. C.) 75 Fed. 615; Railroad Company v. Quigley, 21 How. 202, 16 L. Ed. 73; Conard v. Atlantic Insurance Company, 1 Pet. 386, 7 L. Ed. 189; Evans v. Gee, 11 Pet. 80, 9 L. Ed. 639; Wickliff v. Owings, 17 How. 47, 15 L. Ed. 44; Deputron v. Young, 134 U. S. 241, 250, 10 Sup. Ct. 539, 33 L. Ed. 923; Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; Blackburn v. Mining Company, 175 U. S. 571, 574, 20 Sup. Ct. 222, 44 L. Ed. 276.

The certificate of organization in Sweden was not strictly a part of the record of the Circuit Court. Upon the record the jurisdictional facts appear. The certificate is a part of the evidence in the case, and, if we were to assume that the issue in respect to the jurisdictional fact alleged in the declaration was open for proofs aliunde after the case was put upon trial upon the general issue and without any plea to the jurisdiction, we should have to hold that the articles of association, unexplained by evidence or by the law of the foreign country, did not create a legal certainty that the plaintiff was a joint stock company in the nature of a partnership rather than a corporation, as alleged in the record. The registration was granted by the Royal Patent and Registry Office, and the company apparently has a board of directors, which would indicate that it was in the nature of a corporation. The fact that registration was had in the registry of joint stock companies does not make it at all certain that the association was a joint stock company in the nature of a partnership rather than a corporation.

Entertaining the contention of the defendant, as to the effect of the certificate as a piece of evidence, so far as to see that it does not clearly disclose facts fatal to the jurisdiction, we need not consider or decide the general question, immaterial here, whether a jurisdictional allegation of fact, properly appearing in the record, can be opened at the end of a jury trial upon the general issue, in a case where, at such a stage of a trial, aliunde evidence clearly establishes facts fatal to the jurisdiction.

The line of cases beginning with Everhart v. College, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623, which, upon reversal, permit the Circuit

Court to allow amendment of the allegation of citizenship according to the fact, are cases where the record itself did not show jurisdiction, and thus do not apply to a situation like the one in question here.

The remaining question relates to the merits of the case, where the point is raised that the title to the property had not passed through a necessary delivery. The contract was a contract of sale of 250 tons of Swedish charcoal iron ex ship, including custom house charges, etc.

Without regard to the question whether the title passed upon delivery of the release, we think it quite clear, upon the conceded facts, that unloading the entire cargo of iron in question upon the wharf, which was completed a considerable time before the loss, was a sufficient delivery to pass the title; and the defendant, without any objection as to the quantity or quality, having given orders to its teamsters to remove the iron, and having so far accepted the delivery as to remove it in part, it is too late to stand upon the position that the title had not passed. The duties having been paid, we do not think the fact that the custom house weighing was incomplete would control the status of the title as between the parties.

Judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

HYAMS v. FEDERAL COAL & COKE CO. et al.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 673.

1. EQUITY—PROOFS—MODE OF TAKING.
   Judiciary Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88, authorizing federal courts to require a party to adduce his evidence orally in open court on final hearing was repealed by Rev. St. § 862 [U. S. Comp. St. 1901, p. 661], declaring that the mode of proof in equity causes shall be according to rules now or hereafter prescribed by the Supreme Court, except as otherwise specially provided.
2. SAME—EQUITY RULES—INSTRUCTIONS.
   Amendment May 15, 1893 to Equity Rule 67 [149 U. S. 793, 13 Sup. Ct. iii], providing that on due notice given as prescribed by previous order, the court may, in its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing does not authorize the court to require an unwilling party to so adduce evidence and forego his right to use the methods prescribed by the rule prior to amendment.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

John W. Davis (G. M. Alexander and Davis & Davis on the brief), for appellant.

John Bassel and John M. Freeman (W. S. Meredith and Watson & Freeman on the brief), for appellees.

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

McDOWELL, District Judge. This suit in equity was instituted by the appellant on December 26, 1905; the bill being filed in the

clerk's office on that day. Six days prior thereto complainant had given the defendant the Federal Coal & Coke Company notice that he would, on December 26th, present his bill to the judge of the trial court and move for the appointment of a receiver of all the property of said defendant. It is said in the brief of counsel for appellant that the motion for the appointment of a receiver was not made on that day, and we find in the record no order by the court showing that the motion was on that date made or continued. Counsel for the appellees, defendants below, appear to have believed that the motion was tacitly continued. On December 26, 1905, the answer of the defendants was filed.

On February 24, 1906, the following order was entered:

"Upon application of the defendants herein, it is ordered that the motion for a receiver in this cause, together with any other matters pertinent thereto, be set for hearing at Clarksburg, West Virginia, on the first day of March, 1906, and it is further ordered that the witnesses and written testimony, if any, shall be examined and offered orally at the bar of the court, instead of by depositions, upon the hearing of said motion.

"It is further ordered that a copy of this order be served upon the plaintiff or any of his counsel."

"Indorsements.

"Enter: Febry. 24, 1906, Alston G. Dayton, Judge."

It seems that the motion was not made under this order and on March 10th, a notice was served on counsel for complainant below reading as follows:

"Notice is hereby given you that application will be made to Honorable Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, at his office in Philippi, in said district, on March the 12th, 1906, to set the above-styled cause for hearing upon the application for the appointment of a receiver at Clarksburg, West Virginia, on March 22nd, 1906, and that an order be entered by him requiring that the evidence adduced in support of and against said application be offered orally at the bar of the court, in lieu of by deposition or depositions, upon such hearing.

Watson & Freeman,
"Bassel & Meredith,
"Counsel for Defendants."

In the meantime, on March 5th, the March rule day, complainant filed his replication.

On March 12th, the following order was entered:

"Due notice in writing having been given by the defendants to the counsel of the plaintiff or to one of them, that application would be made this day, March 12th, 1906, to set the above-styled cause for hearing at Clarksburg, in said district, on March 22nd, 1906, upon the application for the appointment of a receiver of the property of the defendant, Federal Coal & Coke Company, and notice in writing having also been given to counsel for plaintiff that the court would be requested to have the evidence for and against said motion or application adduced orally at the bar of the court, instead of by deposition or depositions, it is ordered that said motion or application for such receiver be heard at Clarksburg, in said Northern District of West Virginia, on March 22nd, 1906, and that the evidence be adduced orally at the bar of the court upon such hearing. To the action of the court in setting this hearing for said 22nd day of March, 1906, and requiring the evidence to be adduced orally at the bar of the court upon such hearing, the plaintiff, by counsel, objected."

On March 15th, the following notice was served on counsel for complainant:

"Plaintiff in the above-styled cause will take notice that defendants, will, on the 16th day of March, 1906, make application to Hon. Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, at his office in Philippi, West Virginia, to set down the above-styled cause for final hearing at Clarksburg, West Virginia, on March 22nd, 1906, as well as upon the application for the appointment of a receiver.

"Watson & Freeman,
"Bassel & Meredith,
"Counsel for Defendants."

On March 17th, the following order was entered:

"Application having been made this day to the Judge of the District Court of the United States for the Northern District of West Virginia, to set down the above-styled cause for final hearing at Clarksburg, in said district, on March 22nd, 1906, as well as upon the application for the appointment of a receiver, and it appearing that due notice in writing of said application has been given to John W. Davis, one of the counsel for plaintiff, it is ordered that said cause be set down for final hearing upon said date, as well as upon the application to appoint a receiver."

On March 22d, complainant filed certain affidavits, not necessary to be here recited, and a written objection setting out sundry reasons why a final hearing of the cause should not be had at that time. Thereupon, the complainant having adduced no evidence, the following final decree was entered:

"This day, March 22nd, 1906, came the parties, by their counsel, and thereupon the plaintiff, by counsel, objected to the final hearing of this cause on this day, and filed his affidavit in support of said objection, and thereupon, the defendants filed the affidavit of Charles Donnelly, president of the defendant Federal Coal & Coke Company in opposition to further delay in the hearing of the cause, and the plaintiff thereupon filed, in support of his objection to the hearing, the joint affidavit of John W. Davis and George M. Alexander, his counsel, and the affidavit of himself, which objections the court overruled and directed the cause to be heard, and thereupon the plaintiff filed his protest or statement of objections in writing to the hearing of this cause, all of which affidavits and protest are ordered to be filed and made part of the record herein.

"And thereupon the cause came to be finally heard this day and was argued by counsel, the plaintiff declining to offer any testimony, and thereupon, on consideration thereof, it is ordered, adjudged and decreed, that the plaintiff's bill be dismissed, and that the plaintiff do pay the defendants their costs herein.

"Indorsements.

"Enter: March 22, 1906. Alston G. Dayton, Judge."

Even if section 30, Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 88, authorized the federal equity courts to require a party to adduce his evidence orally in open court on final hearing under any and all circumstances, this statute was repealed by section 862 Rev. St. [U. S. Comp. St. 1901, p. 661]. Blease v. Garlington, 92 U. S. 1, 6, 23 L. Ed. 521. There is therefore, no statute which gave the trial court authority to require the complainant to adduce his evidence orally. The amendment to Equity Rule 67, May 15, 1893 (149 U. S. 793, 13 Sup. Ct. iii), provides that:

"Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court, on final hearing."

This language does not seem to us to authorize the court to require an unwilling party to thus adduce his evidence on final hearing. This rule gives the court a discretionary power to allow a party, or both parties, desiring so to do, to thus adduce evidence; but we find nothing to sustain the contention that this rule authorizes the court to compel an unwilling party to forego his right to use the methods authorized by Equity Rule 67 as it stood previous to this amendment. The language "may permit" cannot properly be held to mean "may require" or "may compel."

The propriety of the action of the learned trial court in ordering a final hearing of this cause prior to the expiration of three months allowed by Equity Rule 69 presents an inviting subject for discussion. But, following the usual practice of this court (sanctioned by what is said in the opinion in Mutual Insc. Co. v. Hill, 193 U. S. 551, 553, 24 Sup. Ct. 538, 48 L. Ed. 788), we refrain from expressing an opinion on a question not necessary to be decided in order to dispose of this appeal.

From what has been said, it follows that the decree of the trial court must be reversed, and this cause remanded.

Reversed.

THE OAK

THE DAUNTLESS.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 719.

1. TOWAGE—CARE REQUIRED OF TUG.

A towing tug is not an insurer of its tow, and is bound only to the exercise of a reasonable degree of care and skill in the work undertaken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 11.]

2. SAME—SINKING OF TOW—UNSEAWORTHINESS.

A finding affirmed that the sinking of a barge, which was first in a tow of five, on a voyage from Baltimore to Norfolk, while passing into Hampton Roads through the Swash Channel, was not due to her grounding or to any fault of the tug, but to her unseaworthiness and inability to stand the strain as leading tow, where she was placed at the request of her master; it being shown that the master of the tug was a competent and careful navigator, that he took the usual channel, and that the tug and other tows which were of equal or greater draft passed safely.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

In Admiralty.

For opinion below, see 148 Fed. 1005.

This libel, in admiralty, was instituted to recover for the loss of the barge Oak, and her cargo of fertilizer, alleged to have been caused by the negligent and unskillful navigation of the steam tug Dauntless, which had undertaken to tow the barge from Baltimore to Norfolk. The barge sank about 10 o'clock in the morning in the Swash Channel of the Thimble Shoal, about one mile west of the Thimble Light, near the entrance to Hampton Roads. The steam tug was in charge of a very experienced master of high reputation for competency and had a full complement of officers and crew, and with five loaded barges in tow left Baltimore bound for Norfolk on March 14, 1905. The tow con-

sisted of five barges; the first one being the Oak, which sank, and with her cargo was a total loss. She was next to the tug on a hawser about 600 feet long, and the other four barges were on cables of about 450 feet in length, so that including the length of the hawsers and the boats it was about one-half a mile from the stern of the tug to the stern of the last barge. The tug was one of the most capable in use for towing on the Chesapeake Bay, and had frequently proved herself able to manage similar and even heavier and longer tows. The Oak was placed next to the tug at the head of the tow by the express desire of her captain, who insisted on having that place. On account of snow, they put in to Annapolis the first night and anchored, and when the weather was favorable they proceeded until they arrived off the Patuxent river, when, the weather being threatening, they again made harbor until the morning. They then proceeded until the morning of the 19th, and on that morning about 7 o'clock they were abreast of Back river, and, as the master testifies (and in this he is corroborated by disinterested witnesses) from 2½ to 3 miles distant from Back River Light. There was then a good breeze from east southeast, but not sufficient to excute apprehension, and no indication of a storm. The wind, however, did increase as they proceeded until it blew 20 miles an hour, and later it increased to 25 or 30 miles. From the point abreast of Back river, the master of the tug testifies that he steered by landmarks which were visible, and with which he was very familiar, and by which, through many years of experience in navigating tugs and tows of a similar draft of water, he had found had always brought him safely through the Swash Channel of the Thimble Shoal, which channel is at least 1,000 feet wide with 13 feet depth at mean low tide. He testified that, as he proceeded southwardly from Back river on account of the southeast wind meeting the ebb tide, the water grew rougher, but not sufficiently so to suggest that the barges were in any danger, and that, even if it had occurred to him that it was expedient to seek a harbor, there was none nearer or more accessible than Hampton Roads, for which he was then making a direct course.

The master of the tug testified there was no indication that the barge Oak was in distress until about 20 minutes before she sank, when the lookout who was watching the barges reported that the barge Oak was making a signal, and looking back the master saw the Oak's stern was under water, and her bow afloat, and that she had grounded. He stopped the tug, and the other barges ran up alongside of him and anchored. The master testifies that he sounded the depth of water when the tug stopped and found 18 feet depth, and sounded where the barge was sunk and found 14 feet.

The tug drew 11½ feet and the barge Oak drew from 9 to 10 feet forward and 11 feet aft, and none of the other four barges drew less than 11 feet, and some a few inches more. The master of the tug testified that the tow made no leeway, for the reason that the ebb tide tended to carry them to the eastward, while the wind tended to drive them westward, and that the tide was the stronger influence, as the barges were deeply ladened in the water and presented very little freeboard surface to the wind. It was fully proven that the barges followed directly after the tug. The depth of water at the time of the sinking of the barge was greater than shown on the chart, which is calculated for mean low tide, because it was then the early ebb, and the water was kept back from running out by the strong wind from the sea.

It was charged as a fault against the tug that she took a course through the Swash Channel, when she should have gone in the deeper water on the seaward side of the Thimble Shoal; but the master testified, and was corroborated by several witnesses, that the Swash Channel was a safe channel, customarily used by all similar tows, and that by going outside by a longer route and through rougher water he would have imposed upon the tow increased risk for no sufficient reason.

The barge Oak was about 13 years old. She had been purchased as an old boat by Seward, the master, about five months before, and he was her sole owner, she was placed at the head of the tow next the tug by the express desire of the master, who wished to avoid the labor of handling the hawser, which as to the first barge devolved upon the crew of the tug, but on the other barges falls upon the crews of the barges. Her position as head barge brought upon her the strain of hauling the four following barges, and has

some tendency, it was testified, to open the seams of an old boat. The testimony of several of the captains of the other boats in the tow was that the tow was proceeding in the course usually taken, and that they did not touch the bottom anywhere, and that they did not see anything to indicate that the Oak struck the bottom off Back river. There was a great deal of testimony that at the place where the barge Oak was found after she sank there was 14 feet of water. The testimony of the captain and mate of the Oak was that she first struck the ground while passing Back River Shoal, and then began leaking, and that when she reached the Swash Channel of the Thimble Shoal, a distance of two miles, requiring nearly an hour in time, her stern was well down in the water. It was not testified by any one on the tug or on the other barges that any signal on the Oak was seen until 10 or 15 or 20 minutes before she sank.

The faults alleged against the tug are: (1) That she took a course so near to Back River Light as to permit the barge to strike on the Back River Shoal and start her leaking; (2) that the tug did not regard her signal of distress; (3) that the tug did not go to the east of Thimble Light and into deeper water; or (4) return and anchor at the mouth of either Back river or York river.

The district judge held that the tug had not been shown to be in fault, and dismissed the libel. The libelant has appealed.

Edward R. Baird, Jr., for appellant.

John W. Oast, Jr., and Floyd Hughes, for appellee.

Before PRITCHARD, Circuit Judge, and MORRIS and DAYTON, District Judges.

MORRIS, District Judge. (after stating the facts). There were some 20 witnesses examined in open court and seen and heard by the district judge. It is a case, therefore, in which the findings of fact come to us with that strong presumption of correctness which attaches in admiralty to the findings of a judge who has seen and heard the principal witnesses. The findings of the District Court were that the allegation that the barge Oak first grounded on the Back River Shoal was not sustained; that the course taken by the tug was, under the existing condictions, the proper and customary one; that the master of the tug was an exceptionally prudent and experienced navigator; that the Swash Channel across the Thimble Shoal was over 300 yards wide, with sufficient depth of water for the barge Oak, and she sank in the channel; that, the accident resulted from the unseaworthiness of the barge and not from any fault on the part of the tug.

It seems to us that, independently of the presumption of correctness in favor of the findings of the District Court, the great preponderance of evidence in the record sustains them. There is, in addition, the significant fact, not in any way explained, that although the barge Oak was the leading barge, and next to the tug which drew 11½ feet, and that she was followed by four other barges, all drawing as much and some a few inches more than she, no one of the barges encountered trouble or suffered damage, except the Oak. The competency, skill, and prudence of the master of the tug being established, the sufficiency of the power of the tug being undisputed, the general safety and constant use of the route under similar weather and other like conditions being proved, it appears to us that even if the very improbable, if not impossible, theory, be adopted that in some way the head barge did strike on an unknown lump which the tug and the

other four following barges passed over without striking, still the tug would not be responsible. The tug is not an insurer, and there is not even required of her the highest possible degree of skill and care, but only the exercise of reasonable skill and care in accomplishing the work undertaken by her. The Margaret v. Bliss, 94 U. S. 494–496, 24 L. Ed. 146. In the recent case of Pederson v. John D. Spreckles, 87 Fed. 938–944, 31 C. C. A. 308, the leading cases applying this rule are collated, and it is not necessary to cite them here.

We think the decree was right, and it is affirmed.

Affirmed

BUTLER v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 170.

RAILROADS—PERSONS NEAR TRACK—DEATH.

Intestate, an intelligent girl, 16 years of age, was struck and killed by an engine as she was walking along a cinder path at the ends of the ties, which path had been used by the public as a short cut from a street to a depot. There was a semaphore so located about half the length of the path that, if one passed on the side toward the rails, he would get so close to them as to be struck by a passing engine, and this was what intestate did, without looking behind her to see whether a train was approaching, though by getting over or under the semaphore wires, and walking on some rough stones for a few steps, she could have passed the semaphore on the opposite side in safety. It was not shown that the engineer was reckless or grossly negligent in operating the train, nor in failing to anticipate that decedent would walk inside the semaphore. *Held*, that decedent's act constituted a violation of Railroad Law N. Y. § 53 (Laws 1892, p. 1394, c. 676), prohibiting persons not employés from walking along railroad tracks, except where the same should be laid along or across streets or highways, in which case he shall not walk on the track, unless necessary to cross the same, and that defendant was therefore not liable for decedent's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1285–1296.]

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

This cause comes here upon writ of error to review a judgment of the Circuit Court, Western District of New York, which was entered upon a verdict directed by the court in favor of the defendant at the close of plaintiff's case. The action was brought to recover for the death of plaintiff's intestate, a bright intelligent girl, 16 years of age, who was struck by an engine operated by defendant while she was walking alongside of that part of its track which runs diagonally across a block in the city of Niagara from Niagara street to Second street.

S. Wallace Dempsey and King, Leggett & Brown, for plaintiff in error.

C. A. Pooley and Pooley & Spratt, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The railroad law of the state of New York (chapter 676, p. 1394, Laws 1892) provides:

"Sec. 53. * * * No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same."

The piece of track in question was not laid across or along a street or highway, and at or about the place where deceased was struck it was not necessary for her to cross the same. There was evidence that a cinder path along and some two feet or more from the rails, originally intended for employés, had for a long time been used by the public as a short cut from the street to the depot.

The statute above quoted was considered in the state Court of Appeals, and it was held that—whatever might be the result of long user by the public of a crossing at a point not a street or highway—where the question concerns the user of a way along the track, no length of acquiescence could create a right of user by license or by sufferance in view of the statute, which was intended to protect the traveling public as well as the railroad companies. "It is not easy, if at all possible, to see how any right, as by license, could be acquired through acquiescence to do something which was so clearly in violation of the statutory inhibition. Whoever walks upon or along the tracks of a railroad, except when necessary to cross the same, * * * violates the law, and is like a trespasser, and the company's servants are under no other obligation than to refrain from willfully or recklessly injuring him. * * * As it has been shown, the use was merely for convenience in making a short cut between the streets." Keller v. Erie R. R., 183 N. Y. 67, 75 N. E. 965.

The evidence shows that the cinder path which was outside the ends of the ties was at such a distance from the rails that a person walking on it would not be struck by any part of a passing engine or train. At about half the length of the path there was a semaphore so located that, if one passed it on the side towards the rails, he would get so close to them as to be struck if an engine were passing at the time. If, however, taking the trouble to get over or under the semaphore wires (it is not clear whether there were one or two of them, nor at what height from the ground) and accepting the inconvenience of walking on rough, broken stones, instead of cinders, for a few steps, he should pass the semaphore on its off side, he would be entirely safe. The evidence does not warrant a finding that the engine driver was reckless or grossly negligent in running his train along the path upon which a person was walking at a safe distance from the rails, nor in failing to anticipate that, when the semaphore was reached, the deceased would, without any glance behind to see what the conditions were, step from a position of safety to one of deadly peril.

The judgment is affirmed.

GOODLANDER-ROBERTSON LUMBER CO. et al. v. ATWOOD.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 694.

BANKRUPTCY—ACTS OF BANKRUPTCY—PAYMENT OF DEBTS—INTENT TO PREFER.

Defendant, at the time he made certain alleged preferential payments in order to continue in business and avoid suit, was indebted to about $20,000, and his salable property did not exceed $1,500. Much of his indebtedness was not due, and he possessed a knowledge of a rather technical business and a custom or good will which was valuable. He did not regard himself as doomed to failure but expected to continue in business and meet his obligations as they matured. The payments were of $160 and $121.15, respectively, made to bona fide creditors in the ordinary course of business. *Held*, that such payments were not made with intent to prefer, required by Bankr. Act 1898, c. 541, 30 Stat. 544, § 3, cl. 2 [U. S. Comp. St. 1901, p. 3422], and did not therefore constitute acts of bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 72, 73.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

James G. Martin and W. H. T. Loyall (Edward R. Baird, Jr., Allan G. Burrow, and Robert W. Shultice on the brief), for appellant.

G. A. Hanson and Daniel Coleman, for appellee.

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

McDOWELL, District Judge. On March 27, 1906, three of the creditors of W. J. Atwood, a dealer in lumber in Norfolk, Va., filed a petition, praying that Atwood be adjudicated an involuntary bankrupt. The alleged act of bankruptcy was the payment by Atwood to the Hardwood Lumber Company, a creditor, of $160 on February 27, and of $121.15 on March 6, 1906, being then insolvent, with intent to prefer the said lumber company over his other creditors. The plea of the bankrupt to the petition consisted of a denial of the commission of the act of bankruptcy alleged in the petition. A jury trial was not demanded, and the evidence was adduced orally before the trial court, whereupon an order was entered dismissing the petition. The petitioning creditors have appealed.

It appears that the Hardwood Lumber Company sustained no relation to the alleged bankrupt other than that of one of several creditors, and that no sort of reason existed why Atwood should have desired or intended to prefer such creditor to any other creditors. The collections were made by an attorney, and the payments were made in the ordinary course of business and to avoid suit. At the time the payments were made Atwood was insolvent in the sense in which the word is used in the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544, § 1, cl. 15 [U. S. Comp. St. 1901, p. 3419]. He was indebted to about the sum of $20,000—but much of this was not then due, and his salable property did not exceed $1,500. He did have, however, a knowledge of a rather technical and not easily learned

business and a custom or "good will" which has been apparently disregarded by counsel for appellants. The question in the case is whether or not the payments were made (Bankr. Act. § 3, cl. 2) with intent to prefer. From a careful reading of the evidence we are satisfied that Atwood did not regard himself as insolvent; that he made the two payments in question, as he had been doing previously, in the ordinary course of business, and without intent to prefer the creditor. He did know that his cash receipts were not at all times sufficient to enable him to meet the bills against him promptly. But he did not regard himself as doomed to failure. In fact the evidence leads us to believe that he expected to continue in business, to meet his obligations as they fell due and that he had by no means lost hope of ultimate success. The sums which he paid were just debts, then due, rather trifling in amount when considered in connection with the business he was doing, and they were paid in order to be able to continue in business and to avoid suit. If Congress had intended that a payment made under such circumstances as we have here should be an act of bankruptcy, the language of section 3, cl. 2, of the act would have been very different. As it is written, the law makes such payments acts of bankruptcy only when made with "intent to prefer."

It is argued that every man is presumed to intend the necessary consequences of his acts. But the defendant had no reason to suppose that such consequences would be an involuntary petition in bankruptcy, the seizure of his property by a receiver and the consequent ruin of his credit and destruction of his business. The consequences of making the payments in question reasonably to be expected were a continuance in business with the prospect of an ultimate payment of all of the creditors in full. An intent to prefer is an intent that some particular creditor shall receive a greater percentage of his debt than the other creditors of the same class. In the case at bar the evidence negatives the existence of such intent.

The judgment of the trial court is affirmed

GINTY v. NEW HAVEN IRON & STEEL CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 180.

MASTER AND SERVANT—INJURIES TO SERVANT—DUTY TO WARN—QUESTION FOR JURY.

In an action for injuries to a servant by the explosion of certain molten iron he was assisting to roll, evidence *held* to require submission to the jury of defendant's negligence in failing to properly warn plaintiff of the danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1044–1050.]

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

See 143 Fed. 699.

This cause comes here upon appeal from a judgment of the Circuit Court, District of Connecticut, in favor of defendant in error, which was defendant

below. The action was brought to recover damages for personal injuries sustained in defendant's mill, while plaintiff was employed in the handling, with an iron hook, of some hot iron which had been taken from a furnace and run through the roughing rolls. At the close of plaintiff's testimony, defendant put in no testimony, but moved for a direction of verdict in its favor. The motion was granted.

J. T. Smith, David E. Fitzgerald, and Walter J. Walsh, for plaintiff in error.

P. W. Chase and R. J. Woodruff, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The operation which was being conducted was the heating and rolling of a box pile. A box pile apparently consists of a collection of pieces of scrap iron inclosed by four slabs so as to form a sort of boxlike structure held together by wires. This is heated in a furnace, and when nearly molten is brought out and run, one or more times, through rollers, which operate to transform it into a sheet or bar. The plaintiff testified that on the occasion in question, after the iron had been through the rolls for the first time, and while he was about to lift it to put it back again, "the iron exploded" and "he got burned all over and lost his eye." The plaintiff, a young man of 19, had been employed in similar mills for a considerable time, but in rolling box piles for five weeks only. For five months prior to that he had worked at rolling puddle balls, which consist of iron in a different condition from that of box piles.

The complaint contained two different specifications of negligence. It averred that it "was a reasonable precaution for the safety of the men employed in handling the molten mass to have a very careful and rigid inspection made of the scrap iron while it was being formed into the piles, and before it was put into the furnace, in order to detect the presence of any substance which, when coming in contact with the rollers after coming from the furnace, would be likely to cause the molten iron to explode." The answer, referring to this part of the complaint, admitted "that it might be considered a reasonable precaution, for the safety of the men employed in the same occupation as was the plaintiff, to have an inspection made of the scrap iron," etc. The complaint further averred that on the date of the accident defendant failed to make a reasonably careful inspection of the scrap iron, and failed to discover the existence in the molten mass of dirt, slag, cinder, or other foreign substances, and failed to make any inspection whatever of the pile of scrap iron. These averments were denied in the answer, which averred specifically that defendant "did take such reasonable precaution to inspect the scrap iron at all times, and did at the time the plaintiff claims to have received his injuries." The evidence did not show any failure to provide for an inspection of the scrap iron, and the court's attention at the time motion for verdict was made seems to have been entirely directed to the charge of "negligence, in that there was no inspection." If this were all of the case, we should be inclined to affirm the judgment; but there is another branch of it which seems to have been overlooked. It is conceded by the answer that, in the rolling of box piles, it will sometimes occur

that the molten mass will explode and scatter about. The answer avers that plaintiff well knew that such result might happen. The complaint avers that he was inexperienced in the business, and was "never informed, warned, or instructed concerning the same," which latter averment is denied in the answer.

Upon a careful examination of the testimony, we have reached the conclusion that there was sufficient, in the absence of further proof, to warrant the jury in finding that there was a liability to some misbehaviour of the iron when box piles were being rolled, which was more serious than the ordinary spark throwing which would be observed in a few hours experience at the work. That there was some hidden imperfection which only manifested itself occasionally, and which a man who had worked elsewhere in the mill might not discover in a brief experience at the box-pile rolls, and of which he might take precautions to avoid the consequences, if warned that it might be expected. Plaintiff testified he had not been warned or instructed. We think it best not to discuss the testimony at any greater length, because upon a new trial the case may present an entirely different aspect. The two witnesses to the accident were unintelligent, and proof was taken under such a multitude of objections, many of them quite unimportant, that it must have been difficult at the close of the case for any one to tell what had, and what had not, been proved. Had the defendant put in its own testimony, and explained by older, more experienced, and intelligent workmen the various processes, experiences, and results in the treatment of box piles, puddle balls, and other varieties of molten iron, a different situation might have been shown. It is sufficient to say that, when defendant elected not to put in any testimony, there was evidence, unsatisfactory indeed, and not especially persuasive, but sufficient to call upon defendant for an explanation of the conditions existing at the time of the accident.

The judgment is reversed.

THE ELLIS.

THE GALICIA.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1907. Rehearing Denied May 20, 1907.)

No. 1,599.

COLLISION—STEAM VESSELS MEETING—VIOLATION OF SIGNAL RULES.

Two steamships meeting in the Mississippi both *held* in fault for a collision, the descending vessel for giving the first passing signal contrary to the statutory rule, and after it had been accepted in giving a contrary signal, intended for another vessel astern of the first, but which was mistaken by the latter and acted on, directly contributing to the collision, the ascending vessel for so mistaking the second signal and acting on it, instead of sounding a danger signal and stopping until the signals were fully understood.

[Ed. Note.—Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Appeal and Cross-Appeal from District Court of the United States for the Eastern District of Louisiana.

J. D. Rouse and Wm. Grant, for appellant.
Edgar H. Farrar, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The collision in this case resulted from a confusion and misunderstanding of signals. The first signal was given by the descending steamer Ellis, and was in violation of the letter of statutory rule 1 governing pilots on western rivers, which provides, among other things, that the pilot of the ascending steamer shall be the first to indicate the side on which he desires to pass, and that the descending steamer is entitled to the right of way. This violation, however, did not directly contribute to the collision, because it was fully understood and accepted by the ascending steamer Galicia. The second signal of two blasts given by the Ellis and intended for the ascending transfer steamer, then somewhere astern of the Galicia, was also in violation of the said rule, and led directly to the collision, for the Galicia misunderstood it, and changed her course so as to run directly across the course intended and maintained by the Ellis, rendering a collision extremely probable, if not inevitable. At the time this signal was given by the Ellis, the transfer steamer for which it was intended, if outside of its slip at all and in the river, was over 1,200 yards distant from the Ellis, and therefore such signal was premature, even if under a fair construction of rule 1 the descending steamer may signal when the ascending steamer has failed to signal, and the vessels have come near to or within the 800-yard limit. If the rule had been followed and the transfer steamer astern of the Galicia had signaled for passing by one or two blasts of its steam whistle, the Galicia, although having no special lookout astern, would have been charged with knowledge that the two blasts signals from the Ellis were in answer to and intended for another steamer, and no confusion would have resulted, except at the sole fault of the Galicia. The actual violation at the time of the collision of a statutory rule intended to prevent collisions is presumably a fault, and, if not the sole cause of the collision, at least a contributory cause. The Pennsylvania, 19 Wall. (U. S.) 136, 22 L. Ed. 148. When, after the passing signals had been given and accepted between the Ellis and the Galicia, the Ellis followed after more or less interval with a two blast signal, the Galicia should have taken it as intended for some steamer astern, but, if understanding it as intended to change the course of passing already arranged betwen the two steamers, the Galicia should have sounded the danger signal, stopped her engines, and backed if the vessels were in close proximity until the passing signals were fully understood. The Galicia did neither. She accepted the signals as intended for herself, and so changed her course as to make the collision next to certain. In this we are clear that she was in fault.

The judge of the District Court found that the faults of the Ellis

were the main causes of the collision; also, that the steamer Galicia contributed to the accident by her fault, and by the use of reasonable care and prudence she could have avoided the injury. There is much conflict in the evidence as to whether the transfer steamer was really in the river and as to the conduct of the Galicia in stopping and reversing after the danger signals were given; but, as we view the case, we are not called on to reconcile the evidence or further pass on the points involved.

We concur with the District Court in finding both vessels in fault, and the decree appealed from is affirmed. The costs of appeal and cross-appeal, including the transcript, to be divided equally between appellant and cross-appellant.

CALHOUN COUNTY BANK v. CAIN.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 675.

BANKRUPTCY—PREFERENTIAL PAYMENTS—BURDEN OF PROOF.

Where a payment made by a bankrupt was in discharge of a valid obligation, the burden was on the bankrupt's trustee seeking to recover the same to show that the creditor paid had reasonable cause to believe that the bankrupt intended thereby to give a preference, as required by Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

Appeal from the District Court of the United States for the Northern District of West Virginia, at Clarksburg

W. N. Miller, for appellant.

T. A. Brown, for appellee.

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

McDOWELL, District Judge. It seems quite unnecessary to state in detail the facts of this case. It was a suit brought by a trustee in bankruptcy to set aside certain fraudulent conveyances of property by the bankrupt to certain defendants, and to recover from the Calhoun County Bank an alleged preferential payment. We do not pause to discuss the possibility that the transaction between the bankrupt and the bank was not a payment, but a mere exchange of notes. Assuming that it was a payment, yet it was in discharge of a valid obligation from the bankrupt to the bank, and we fail to find evidence supporting the contention that the bank knew, or had reasonable cause to believe, that the bankrupt intended thereby to give a preference. Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. The burden of proof was on the trustee—complainant below and appellee here. See authorities cited in Loveland on Bankruptcy (2d Ed.) p. 609. This burden the trustee, in our opinion, failed to sustain. We are therefore constrained to hold that the decree of the learned trial court is erroneous in so far as it decrees against the appellant.

An order will be entered reversing the decree below, with costs, remanding the cause, and directing that the trial court enter a decree dismissing complainant's bill as to appellant, and adjudging to said appellant its costs in the trial court.

Reversed

McCORMICK v. SOLINSKY.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1907.)

No. 1,633.

BANKRUPTCY—CONTRACT TO FURNISH MONEY FOR COMPOSITION—ILLEGAL CONDITIONS.

A contract by a bank to advance the money to pay a composition made by a bankrupt, in part consideration for which it was to receive payment of its own debt in full, is illegal, and will not support an action by the bank to recover from another creditor the amount he received under the composition, and which by such contract, to which he was a party, he agreed to return to the bank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 587.]

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

F. D. Minor, for plaintiff in error.

A. T. Watts and Lewis F. Chester, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the case made, the contract by the Citizens' National Bank of Beaumont, under which it advanced the money to pay the composition to creditors in the bankruptcy of E. N. Brown, was illegal, because a part of the consideration thereof was that the bank's debt against the bankrupt should be paid in full, notwithstanding the composition.

Solinsky was a party to the illegal contract, and therein agreed as a part of the inducement that he would return to the bank the amounts received by him under the composition as one of the creditors of the bankrupt, Brown. The present suit, being one to recover from Solinsky the amounts received by him under the composition, is clearly a suit to recover moneys knowingly advanced under an illegal contract.

The judgment of the Circuit Court is therefore affirmed.

POWERS REGULATOR CO. v. NATIONAL REGULATOR CO.

(Circuit Court, N. D. Illinois, E. D. March 15, 1907.)

No. 26,777.

PATENTS—VALIDITY AND INFRINGEMENT—HEATING AND VENTILATING APPARATUS.

The Powers patent, No. 558,610, for improvements in heating and ventilating, which consist of a heating and ventilating apparatus wherein double dampers controlling separate ducts for hot and cold air are held in mixing position by a gradually-acting thermostatically-controlled motor, the purpose being to automatically regulate the temperature of the

air discharged into a room through a single pipe, was not anticipated and discloses invention, the device shown differing from anything in the prior art, in that the dampers are moved gradually, and not by steps from one fixed point to another; and in such respect the invention is so far a pioneer in its particular field as to entitle the patentee to claim the use of any of the well-known gradually acting thermostatic devices in the same combination as equivalents. As so construed, *held* infringed.

In Equity. On final rehearing.

Offield, Towle & Linthicum (Charles C. Linthicum, of counsel), for complainant.

Jones, Addington & Ames (W. Clyde Jones, Keene H. Addington, Robert Lewis Ames, and Arthur B. Seibold, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainant files its bill to restrain infringement of claims 1, 2, and 3 of patent No. 558,610 granted to W. P. Powers on April 21, 1896, for improvements in heating and ventilating, and for other relief. The bill also included patent No. 722,251, granted to W. P. Powers on March 10, 1903, for an improvement in means for regulating temperature in connection with heating systems. The latter patent has been practically withdrawn, and no relief is now asked as to it, so that it will not be here considered. The claims in suit read as follows, viz.:

"(1) In an air-heating and ventilating system, separate ducts for currents of air at different temperatures, in combination with means for controlling the flow of the air-currents and a gradually-acting thermostatically-governed motor for controlling said means and operating to vary the position of the controlling means according to changes of temperature, substantially as described.

"(2) In an air-heating and ventilating system, separate ducts for currents of air at different temperatures, in combination with means for forcing the air, means for heating the current of air passing through one of the ducts, means for controlling the flow of the air-currents, and a gradually-acting thermostatically-governed motor for controlling said means, the construction of said duct-controlling means being such as to close one of the ducts in proportion to the extent to which the other is opened, whereby the air is directed proportionally through each of said ducts according to the variations of temperature in the apartments to be controlled, substantially as described.

"(3) In an air-heating and ventilating system, separate ducts for currents of air at different temperatures in combination with valves or dampers for controlling the ducts, a pneumatically-operated pressure device for controlling the valves or dampers and operating against a gradually-increasing resistance and a thermostat for maintaining the air-pressure proportionally to the temperature of the apartment to be controlled, substantially as described."

Defendant's device, which is not patented, relates to the same art, which art may be stated, in the language of the patent in suit, "to be a system of heating and ventilating by means of two currents of air at different temperatures, automatically mixed so as to maintain a uniform temperature in the apartment into which they are delivered; this delivery of the mixed air being made through a single pipe." It relates to means for heating and ventilating apartment buildings, schoolhouses, and other edifices containing a number of rooms, from a single plant. Both devices show "a heating and ventilating apparatus wherein double dampers, controlling separate ducts for hot and cold air, are held in mixing position by a gradually-acting thermostatically-controlled motor." The difference claimed by the defendant

between the two consists in the character of the "gradually-acting devices" and in the form of the dampers. Complainant's counsel summarizes its position in the sentence: "No one before Powers arranged a gradually-acting thermostat with double dampers, so as to hold them in mixing positions."

It is conceded by complainant that the specific form of thermostat shown in the patent is old; that dampers which "move throughout their whole range of movement, when once set in motion, whereby alternate discharges of hot and cold air into the room were effected automatically," were old; and that manually operated dampers, whereby separate currents of hot and cold air were mixed before delivery into the apartment, were also old. The gist of the invention claimed is the attainment of this last result automatically.

The patent calls for a thermostatic device working in connection with a fluid column, a mercury chamber, a second chamber in communication with the mercury chamber, which second chamber contains a float, the movements of which are made to operate the dampers. The air-column is compressed and made to act upon the mercury within the mercury chamber by the movement of a flexible diaphragm which divides the thermostat into two chambers. The same thermostatic device, the specification recites, "is clearly shown and described in Patent No. 416,947, granted to me December 10, 1889." The patentee says he employs the above-described form of thermostat, preferably, and adds:

"But a different form of thermostat may be used for maintaining a fluid pressure proportional to the temperature, and, instead of the mercury device, any other suitable fluid pressure motor may be used for moving the dampers."

The patentee, as a witness, testifies that:

"The patent in suit describes only a typical arrangement where all the parts are of the simplest possible form, thus making clear the essential elements of the combination, viz., a direct acting thermostat."

It will be seen that the thermostat of the patent acts as the engine, furnishing power to the motor. The two dampers of the patent controlling the two, i. e., the hot and cold air passages, are preferably mounted separately and adjustably connected by a rigid arm. The same result, it is alleged in the specification, may be attained by the proper arrangement of a single damper. The dampers are set obliquely to the walls of the ducts, and the planes of the frames of the dampers intersect each other at substantially right angles. "The object of placing the dampers at oblique angles with reference to the line of the ducts," it is explained, "is to secure quicker action when either damper opens or closes, and to secure the full action of said dampers with the shortest movement—such movement being one-eighth of a revolution, when the damper frame is placed at an angle of 45 degrees to the longitudinal axis of the duct line; while if the damper were set at right angles to such axis, as in the common manner, a full quarter turn would be required to secure the same opening. This feature is highly important, where, as in my present improvements, it is desired to secure the full range of movement of the dampers with a slight action of the thermostat and pressure device controlled thereby." The

dampers are so placed with reference to each other that they present at all times the same amount of opening for the admission of air, i. e., when the hot air duct is open the cold duct will be closed, and vice versa, and any variation of one damper from its closed position effects a corresponding adjustment of the other damper. Some attempt is made by the defendant to show that complainant's device requires the oblique-set dampers to make it operative. That the old right-angle dampers require more power than those of the patent seems to be conceded; but, inasmuch as the question is only one of degree of power, there can hardly be claimed to be any difference between the two in principle. The specifications close with the following clause:

"It is obvious that the construction and arrangement of parts herein shown and described may be varied as to details, and that my invention may be embodied in heating and ventilating systems widely varying as to such structural details from the form herein presented."

Defendant's construction employs a thermostatic device which operates to release a column of compressed air, which in turn operates the motor in connection with a right-angle damper. Neither of them is new. As above stated, the only reason why the patent in suit employs obliquely set dampers is that of greater efficiency. Any damper can be successfully operated by the device of the patent. There remains, then, only to inquire whether, in view of the prior art, complainant is limited to the particular means described in the patent for securing gradual opening and closing of the dampers.

From the domain of the prior art, defendant, by its answer, summons to its aid more than three score patents, and also recites a like number of prior uses and two prior publications. Very considerately, only 54 patents were introduced in evidence. The great bulk of these cover minor parts employed in heating systems, so that defendant's expert was able to select five patents as most nearly anticipating the patent in suit. These are patents: (1) No. 543,929, granted to S. A. Ekehorn, on August 6, 1895; (2) No. 544,015, granted to Underhill & Glantzberg, on August 6, 1895; (3) No. 236,520, granted to Westinghouse, Jr., on January 11, 1881; (4) No. 412,280, granted October 8, 1889, to Merrill; and (5) No. 416,947, granted to W. P. Powers, on December 10, 1889—all issued for improvements in automatic regulation of valves or dampers. Of these the Ekehorn and Underhill & Glantzberg patents are selected by defendant as meeting the terms of claims 1 and 2 in suit, while the others are introduced with reference to claim 3. The Ekehorn patent relates to an electric temperature-controlling device, used in connection with a thermostat, wherein the thermostat, located in the chamber in which the temperature is to be regulated, sets in operation an electric motor which is adapted to open and close the valve or damper, thus substituting electricity for compressed air of defendant's structure.

The patentee says he provides, among other things, for:

"A hot air heating system in which the air-supply pipe leading to the chamber communicates with both a hot air and a cool air supply, the motor operating to turn both valves or dampers between the air pipe and both the said supplies simultaneously, whereby the air flowing through the pipe to the chamber may be properly tempered without varying its volume."

The dampers in this device are made to move over a definite space or from one definite position to another, so that the dampers move by jerks. They must pass clear through the spaces between these definite positions without stopping. They approximate the action of the patent in suit just to the extent that the graded spaces are less than the whole sweep of the dampers. Conceivably, the spaces might be made so short that the action might become to all intents and purposes, at least theoretically, gradual, as in the patent before the court. On the other hand, the delays of the needle upon the thermostatic bar at the contacts or stops may become so prolonged as to make the movements somewhat unresponsive and inexact. The patent makes these spaces cover 45 degrees each, but says the device may be adapted to an increase or decrease of contacts. The movements of the dampers are graded, but not gradual. The idea of a readily responsive swinging obedience at all points of the half circle of movement, and at all times to the indications of the thermostat, is wanting. The operating element is electricity; whereas, the patent and alleged infringing device deal with pneumatic operations of the motor. However, if that were the only difference, it would seem as though, in considering claims involving the securing of gradual movement in the regulation of dampers, as an original question the freeing of compressed air and the closing of an electric current to do the same work would be practical equivalents.

The Ekehorn patent was pending in the Patent Office when the patent in suit was applied for. The construction thus impliedly given to the patent in suit by the examiner, as well as counsel for Ekehorn, is of weight in determining the scope of the two patents.

The Underhill & Glantzberg patent "is designed to obviate the constant fluctuation in temperature, and to this end it consists in causing the movement of the valve, damper or other controlling device to take place gradually, a little by little, opening or closing only so much as may be necessary to bring the temperature to the required degree and there leaving it at rest." Specification, p. 1, lines 59–66. This device, like the foregoing, includes the employment of a thermostat to set in motion an electric current as the motive force in adjusting dampers and valves. The circuit is momentarily closed at stated intervals, whereby, in connection with appropriate assisting media, the damper is moved "one short step in the range of its movements." It differs from the Ekehorn patent in the method of operation, rather than in the results attained. It nowhere discloses the free swinging of the dampers without periodical dead stops, over the whole range thereof, at the slightest suggestion of the thermostat. It is jerky and positive in the movements, and sweeps abruptly from one contact to another. It has no gradual movement across the space between the stops. When the thermostat makes contact with either of its stops during closure of the circuit, the circuit will be completed long enough to momentarily withdraw a detent and permit a weight motor or other device to move the valve or damper as above stated one short step in the range of its movement. Lines 74 to 78, p. 1, Specification. These

steps are referred to in lines 113 to 117, p. 3, Specification, as follows, viz.:

"It will be found convenient also to have contact made by the periodic circuit closer at intervals of about ten minutes, though the length of these intervals may be made greater or less, as deemed expedient."

There are no steps in complainant's device.

A further defense to the claim of defendant that these two last-named patents anticipate the patent in suit is found in the fact that the date of the invention of the latter is fairly established by the record to have been prior to the date of the invention by them set out.

The Merrill patent presents a device for regulating heat by regulating the supply of fuel gas, though the patentee claims it may be applied "wholly or in part to heaters of different kinds." The apparatus acts "solely by the pressure of the fluid force, without other agency—such as compressed air or electricity—to economize the fuel and to insure steadiness and uniformity in its supply. To accomplish this latter object requires apparatus which responds almost instantly to slight fluctuations in temperature, so that the changes in pressure, in the main, are slight and gradual, and not suddenly changed from one extreme to the other." Specification, p. 1, lines 24–29. The device is, as complainant's expert, Carter, says (page 59, C. R.), "undoubtedly gradually operating." It is confined, however, to the control of fuel supply, and does not cover complainant's combination.

The Westinghouse patent, No. 236,520, covers heating and generating devices, automatically set in motion by the temperature of the room to be heated, acting upon the thermostat. It was among the first, if not itself the pioneer, in attempting to accomplish that end. It seems to be gradually acting, though no mention is made of that feature nor of the resistance spring. The patentee makes use of water under pressure in operating his motor primarily, but says steam and compressed air may be substituted. The movements of the piston vary the position of the damper or valve, register or other device, "so as correspondingly to lessen the heat-generating or heat-delivery power or capacity of the heating apparatus; and by a still further connection of like character, the same motion may be employed to open ventilating flues or openings for the admission of cold air." Specification, p. 2, lines 41–47. At the date of this invention, present methods of heating were not in use. Even had they been, it seems doubtful, from the opinion of complainant's expert, whether this device could have been adapted to the manipulation of the hot and cold air ducts and their double dampers of the patent in suit. At any rate, it was not so applied until after complainant blazed the way. Assuming that it could have been so adjusted, there yet remained the adaptation to modern heating methods, and especially to the double ducts and dampers for simultaneous admission and mixing of hot and cold air before delivery to the apartment. From the year 1881 to 1896, the device was before the public, but seems to have suggested nothing practicable in the heating and ventilating art.

Of the five patents alleged to more closely anticipate the patent in suit, there yet remains to be considered the Powers patent, num-

bered 416,947, issued December 10, 1889. The patentee claims to have invented certain new and useful improvements in thermostats, with the object of automatically controlling the temperature of various rooms in a building. The thermostat of the patent in suit is practically that of this patent. "It is obvious," says the specification, "that this device may be applied to open or close a transom or operate other ventilators; the only change necessary to adapt it to operate a transom being to connect the lever, R, with the operating rod of the transom." The patent does not disclose the two hot and cold air ducts, or the double dampers, or the other means for heating the air of one of them, or for forcing the air through them, or any mixing means so as to proportion the two currents to the demands of the space to be heated; nor does it show any pneumatically-operated pressure device, "operating against a gradually increasing resistance," although the patentee, upon the stand, speaks of "the gradual-action thermostat of patent No. 416,947," and adds: "This was the only gradually acting thermostat on the market at that time." In May, 1892, he writes: "* * * It will keep the damper at such a position as will deliver a mixed current of air of the proper temperature to give the desired result." Defendant asserts that this increasing resistance is supplied in the 1889 Powers patent by the resiliency of the motor and the thermostat diaphragms. The difference between the two devices does not consist in the working apparatus of the thermostatic element, but in the whole combination.

A general inspection of the other patents in the prior art, disclosed in the record, justifies the defendant's expert in selecting the foregoing five patents as fairly expressing the condition of the art at the date of the patent in suit. The attempt to establish prior use and publication cannot be said to be satisfactory. It lacks the certainty which is required in such a case. The burden was on defendant, and it has not been sustained. As a result of the comparison with the prior art, it is evident that the invention of the patent in suit must be limited to double dampers, controlling separate ducts for hot and cold air, held in mixing position by a gradually-acting thermostatically-controlled motor. This combination is nowhere previously shown. The general principles governing the operation do appear, and it had been theretofore stated in general terms that gradually-acting thermostatic devices might be applied to other uses than those described in the prior patents, but it had never been done, notwithstanding the demand for improvements in the art had been great. Prof. Johnson, one of the leading inventors in the heating and ventilating arts, insisted that such a device could not be made practical. It is shown by the record that the patent in suit does accomplish this supposed impossible result. The device has gone into such general use that government specifications provide that: "The temperature of the air delivered into the building by the fan is to be regulated by means of the Powers or equal system of automatic temperature control." With some modifications, which do not affect the patentable features of the patent in suit, it appears to

have gone into very general use in public school buildings in the large cities of the United States.

In view of what has been said, the patent must be held valid, and so far a pioneer in its particular line as to entitle complainant to claim the use of any of the well-known gradually-acting thermostatic devices in the same combinations, as equivalents. The form of the dampers is unimportant, so long as they are adapted to close one of the ducts in proportion to the extent to which the other is opened, in response to gradual thermostatic action. If this be true, then defendant's device must be and is held to infringe each of the claims in suit construed in connection with the drawings and specifications.

Complainant may prepare a decree accordingly.

GEORGIA R. & BANKING CO. v. ATLANTIC POSTAL TELEGRAPH CABLE CO.

(Circuit Court, S. D. Georgia, N. E. D. April 20, 1907.)

1. REMOVAL OF CAUSES—CAUSES REMOVABLE—CONDEMNATION PROCEEDINGS.
   A suit by a railroad company in a state court to restrain a telegraph company of different citizenship from maintaining proceedings to condemn a right of way for a telegraph line along the railroad's right of way, in which the railroad claimed that the proposed structure would menace the safety of the railroad company's trains and obstruct its business, presented a justiciable issue which was removable to the federal court.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 11, 23, 85.

   Proceedings under power of eminent domain as civil suits under laws relating to removal of causes to federal courts, see note to South Dakota C. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 73 C. C. A. 183.]

2. EMINENT DOMAIN—APPRAISERS—POWERS—TELEGRAPHS—RIGHT OF WAY.
   Under the laws of Georgia appraisers appointed in proceedings by a telegraph company to condemn a right of way along the right of way of a railroad have no authority except to assess the value of the property and consequent damages.

3. CONTRACTS—LEGALITY—RESTRAINING COMPETITION—TELEGRAPH LINES—RIGHT OF WAY—EXCLUSIVE CONTRACT—VALIDITY.
   A contract between a railroad company and a telegraph company by which the latter is granted the exclusive right of occupancy of the railroad's right of way for the maintenance of a telegraph line is void.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 551.]

4. EMINENT DOMAIN—DEFENSES—TELEGRAPHS—RIGHT OF WAY—INJUNCTION.
   Where a telegraph company sought to condemn a right of way along the right of way of a railroad, and in its proposition stated that the height of its poles above the ground would not exceed the distance from the poles to the end of the nearest cross-ties, the railroad company was not entitled to an injunction restraining the prosecution of such condemnation proceedings because its right of way was already encumbered by a rival telegraph line and that the effect of complainant's line would be to seriously interfere with the railroad's business and would constitute a menace to the safety of its tracks and trains.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 770.]

In Equity.

Joseph B. & Bryan Cumming, for complainant.
C. E. Dunbar and Felder, Rountree & Wilson, for defendant.

SPEER, District Judge. The complainant, a corporation of this state, is the owner of certain lines of railroad. The main line extends from Augusta to Atlanta. Important branch lines extend from Barnett, on the main line, to Washington, from Union Point to Athens, and from Camak to Macon. Although the property is leased to other companies, it is highly valuable. The title of the corporation is the "Georgia Railroad & Banking Company," but for convenience will be here termed the "Georgia Railroad." The public along its lines, and probably the railroad itself, are already served with telegraphic facilities by the Western Union Telegraph Company. The defendant, the Atlantic Postal Telegraph Cable Company, is a corporation of the state of New York. It has attempted to acquire a portion of the right of way, for the purpose of erecting and conducting its business with the various towns and cities, on the line of the Georgia Railroad. The Postal Company, as we will term it, finding its overtures rejected, instituted condemnation proceedings under sections 5263–5269, inclusive, of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 3579–3590], and under sections 4657–4686, inclusive, of the state Civil Code of 1895. The object of this proceeding is to condemn such parts of the complainant's right of way along the line stretching from the city of Augusta to the city of Atlanta, and from Camak to the city of Macon, for the purposes of the Postal Company's telegraphic business. The notification of the Postal Company, as amended, which is the basis of the proceeding under the state laws, is as follows:

"To the Georgia Railroad & Banking Company, and to the Louisville & Nashville Railroad Company, and the Atlantic Coast Line Railroad Company, lessees:

"The Atlantic Postal Telegraph Cable Company (hereinafter called the 'Telegraph Company') a corporation organized under the laws of the state of New York, and engaged in the telegraph business with connecting telegraph lines throughout the United States of America and the Dominion of Canada, and with cable connections throughout the world, is desirous of constructing, maintaining, and operating a line of telegraph poles and wires along, upon, over, and across certain lands, property, and right of way of the Georgia Railroad & Banking Company (hereinafter called the 'Georgia Railroad') from and to the points, and through the counties, in the state of Georgia, hereinafter set forth.

"The said Telegraph Company, preferring to secure, by contract, the right and privilege of constructing, maintaining, and operating its telegraph lines along, upon, over, and across said lands, property, and right of way of said Georgia Railroad, heretofore made an earnest effort to agree with said Georgia Railroad for said right and privilege, and to agree upon the compensation to be paid by it to said Georgia Railroad, but the said Georgia Railroad failed and refused to give its consent to it for such right and privilege, and failed and refused to agree upon the compensation to be paid by it therefor.

"The said Telegraph Company, therefore, proposes under and by virtue of the authority of an act of Congress of the United States of America, sections 5263 to 5269, inclusive, of the Revised Statutes of the United States, and subsequent amendments thereof by said Congress, the provisions of which have been accepted by said Telegraph Company, as well as by authority of the stat-

utes of the state of Georgia providing for the condemnation of private property and for the condemnation by a telegraph company of a portion of the right of way of a railroad for the purpose of constructing, maintaining, and operating its telegraph line along and upon such right of way (Civ. Code 1895, §§ 4657 to 4686, inclusive, and the act of the Legislature approved December 20, 1898, p. 54), to condemn and acquire an easement or privilege along, upon, and over the right of way of the said Georgia Railroad, its poles to be erected as near the outer edge of said right of way as circumstances will permit, and in such position as not to interfere with the operation or safety of trains, or with the use of the right of way by said Georgia Railroad, or by the Louisville & Nashville Railroad Company, and the Atlantic Coast Line Railroad Company, lessees, for its or their own purposes, and on the side of the right of way other than that upon which is now erected the line of the Western Union Telegraph Company, from a point where the Georgia Railroad right of way crosses Gwinnett street in the city of Augusta, Ga., westwardly through the counties of Richmond, Columbia, McDuffie, Warren, Taliaferro, Green, Morgan, Walton, Newton, Rockdale, and De Kalb, to the county line between the counties of Fulton and De Kalb, at a point near the city of Atlanta, in the state of Georgia, and also through and from Camak, Warren county, Ga., through the counties of Warren, Hancock, Baldwin, Jones, and Bibb, to a point in Bibb county 74 miles from Camak, and 4 miles from Macon, and known as 'Central Railroad Junction,' being the place where the Georgia Railroad trains go onto the tracks of the Central of Georgia Railway Company.

"The said Telegraph Company proposes by said condemnation proceeding to condemn so much of the right of way of said Georgia Railroad between the points and through the counties mentioned as may be necessary for its use for the purpose of constructing, maintaining, and operating its telegraph line along, upon, and over said right of way, which said telegraph line it will construct as follows:

"Said line will be constructed with the best material and in accordance with the established and well-recognized rules governing safe and proper construction and maintenance.

"The poles will be about 12 inches in diameter at the base, and will be carefully and firmly planted from 4 to 8 feet in the ground, according to the length of the pole.

"All poles not on a straight line, all terminal poles, and all crossing poles will be firmly braced or supported by guy wires and anchors.

"The distance from each pole to the end of the nearest cross-tie of the main track shall not be less than 20 feet, and the height of each of the poles above ground shall not be more than 20 feet, excepting only where a railroad, a highway, or another line of poles and wires crosses said right of way, or there are buildings or other improvements upon said right of way which necessitate higher poles for safe and proper construction and for clearance. The poles will be placed so as not to interfere with the ordinary travel or use of said railroad, and about 150 feet apart, making about 35 poles to the mile, with cross-arms about 10 feet long at or near the tops of the poles and fastened about the middle of the cross-arms to the poles. Along and upon these cross-arms or poles, or upon said cross-arms and poles, will be strung a sufficient number of wires to transact such business as will be given said Telegraph Company by the United States government and the public, so that the ordinary travel upon and use of said railroad will not be interfered with by reason thereof, which telegraph line the Telegraph Company intends in good faith to construct, maintain, and operate in the manner set out in this notice.

"The Telegraph Company says that the only land that will be actually taken or occupied by it by virtue of this proceeding will be about one square foot for each pole; that the space between the poles and under the wires can be used by the Georgia Railroad, or its said lessees, for all the purposes for which it has heretofore been used, and whenever it becomes necessary, if it does at all, to cross said right of way, said crossing will be made by having its poles at such crossings so erected, and its wires so insulated and strung so high above said railroad track, as to prevent any injury to or interference with the employés or property of the Georgia Railroad.

"The Telegraph Company further stipulates that it will not interfere with any other telegraph or telephone lines upon said right of way, and furthermore, if at any time the said Georgia Railroad, or its successors, or its said lessees, shall desire, for railroad purposes, the immediate use of any land occupied by it, then, in such event, upon reasonable notice in writing, the Telegraph Company will, at its own expense, remove its line to some other place adjacent thereto on such right of way, so as not to interfere with the use of said right of way for railroad purposes, and that its line will not be erected on any embankment or slope, or in any cut on said right of way, and if, at any time, said railroad company, or its said lessees, shall require for railroad purposes its entire right of way at any point where the Telegraph Company's line may be constructed on said right of way, the Telegraph Company will, at such point or points, remove its line entirely off of said right of way, thereby recognizing the prior rights of the Georgia Railroad, its successors, or its said lessees to its entire right of way for railroad purposes, and that the construction, maintenance, and operation of said telegraph line, as aforesaid, will be of no actual damage to said Georgia Railroad, or its said lessees, in any sum whatever, and will not cause its right of way to be diminished in value for railroad purposes, and that the just compensation or damage to which the Georgia Railroad, or its said lessees, may be entitled from the Telegraph Company for the right and privilege herein sought, is merely nominal.

"The Telegraph Company proposes, by this one condemnation proceeding to be had in Richmond county, to condemn and acquire an easement in and to said railroad right of way throughout the several counties hereinbefore named for the purpose of constructing and maintaining and operating its telegraph line thereon, and the assessors shall make their findings for the damage to which said Georgia Railroad, and the said Louisville & Nashville Railroad Company, and the Atlantic Coast Line Railroad Company, lessees thereof, may jointly or severally be entitled by reason of the construction, maintenance, and operation of said telegraph line in the manner hereinbefore set out, and that the whole right and controversy may be determined by this proceeding in Richmond county, into and through which the right of way extends, and in which county the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, lessees as aforesaid, each has an office, but not the main and principal office of either of said last-named companies, and said Louisville & Nashville Railroad Company being a foreign corporation, created and existing under the laws of the state of Kentucky, and having its main or principal office in the city of Louisville, said state, and the said Atlantic Coast Line Railroad Company being a foreign corporation, created and existing under the laws of the state of Virginia, and having its main or principal office in the city of Richmond, said state, but each of said last-named corporations has an agent in Richmond county on whom service can be made as provided by the laws of the state of Georgia.

"The Telegraph Company, through its board of directors, by resolution selected and declared the right of way of the Georgia Railroad, which is hereby sought to be condemned, as the most safe and practicable post road for the construction, maintenance, and operation of its telegraph line to be constructed from and to the points herein named, wherein it will connect with its other lines, constructed or to be constructed, leading all over the United States and connecting with its cable lines across the Atlantic and Pacific Oceans, and, furthermore, authorized and directed its counsel, Felder & Rountree, to negotiate with the said Georgia Railroad for the right and privilege herein sought, and failing therein, to proceed by proper legal proceedings in the name of said Telegraph Company to acquire a right of way for said telegraph line on the right of way of the said Georgia Railroad as herein set out, and its president and treasurer were directed to pay such compensation therefor as may be finally adjudged and directed to be paid by the company in said proceeding.

"The said Georgia Railroad and the said Louisville & Nashville Railroad Company and the said Atlantic Coast Line Railroad Company, lessees as aforesaid, are hereby notified that the said Telegraph Company named Mr. William E. Bush as the assessor selected by it, and the said Georgia Railroad, and the said Louisville & Nashville Railroad Company, and the said Atlantic

Coast Line Railroad Company, lessees as aforesaid, are requested to select an assessor, and that the 29th day of January, 1906, is fixed as the time when the hearing will be had in the office of the ordinary of the county of Richmond, or at such place as the assessors may fix, at which time the said assessors will proceed to hear evidence and take such proceedings as contemplated by the statutes in such cases made and provided."

Pursuant to this purpose, the defendant company had served the railroad company with the notification above set forth, and had nominated an appraiser to act with two other persons in assessing the damages to the complainant's property and business, as provided by law. The Georgia Railroad at once resisted this proceeding. It filed in the superior court of Richmond county the situs of its principal office, the bill in equity now before us. Under the state law this may be done in any one county on the railroad right of way, and the proceeding there will suffice to make it effective along the whole line. The bill prays that the Postal Company be perpetually enjoined from erecting poles, cross-arms, and wires on all parts of its right of way, because such structures would be an obstruction to the business of petitioner, or a menace to the safety of its tracks and trains. Inasmuch as it contends that by the statutes for the condemnation of private property the issues presented in the petition can be adjudicated, it prays that the court may determine the same, and decree whether and at what localities the telegraph company can legally condemn a right of way. It also prays that an injunction may be granted against the further action of the appraisers, one of whom, conformably to the statute, has been named by the Postal Company, and the other by the ordinary of Richmond county (the third not having been selected). There is also a prayer for general relief. The Postal Company, by reason of diversity of citizenship, has removed the entire cause to this court. We esteem that the bill and its various defenses present the justiciable issue, and that the controversy is removable.

In its notification to the Georgia Railroad, which was the beginning of the proceeding, the Postal Company states that its line of poles will be so constructed that "the ordinary travel upon and use of said railroad will not be interfered with by reason thereof." This conforms with the Revised Statutes of the United States, § 5263. Under the laws of Georgia the appraisers have no other authority save to assess the value of the property and consequent damages. The Georgia Railroad contends that the right of the Postal Company to condemn this right of way is merely conditional, and is subordinate to its own prior right to the land and to protect the same from noninterference and nonimpairment of its facilities to perform its duties as common carrier. The railroad further insists that the installation of a line of poles will seriously interfere with "ordinary travel." This is denied by the Telegraph Company, and the issue thus made is supported on either hand by copious expert testimony presented in the form of affidavits. There was no insistent application for a temporary injunction, and while the case is pending upon affidavits, these are so comprehensive, and counsel on both sides—since the record has been completed—having submitted their briefs, and failing to offer oral argument, the present status of the controversy may be perhaps treated as a consent submission on the

proofs for final decree. Whether this is true or not, it is evident that the application is for final hearing for injunction. It is probably optional, however, to either party to take the proofs conformably with the rules in equity, and to insist upon further hearing for the settlement of the terms of the decree, although in view of the character of the record this would seem superfluous.

Most of the proof is expert testimony submitted in the form of voluminous affidavits. Of these, the complainant presents 19. The affiants are mainly civil engineers, railroad men, and other experts in the service of the parties. There is much similarity and, indeed, uniformity in the style and phraseology of these affidavits. They are substantially as follows:

"Deponent is informed that there are stretches of various lengths, aggregating 18 miles of the right of way of the Georgia Railroad, where the width of the right of way from the center of the main track to the outer edge of the right of way is not exceeding 20 feet; other stretches aggregating upward of two miles, where the width, measured as above, does not exceed 15 feet; and other stretches aggregating 9,100 feet, where said railroad has no right of way, except that covered by the superstructure of a single track. Predicating it on the facts above stated, deponent gives it as his opinion that the poles, cross-arms, and wires of a telegraph company could not be established on the parts of the right of way indicated without interfering with the proper operation and functions of the railroad, for the following reasons. * * *"

The court is then supplied with the affidavit literature of which the complainant attempts to avail itself to justify the technical or professional opinion of the expert. Much of this is cumulative, and the court does not regard it as justifying an inexorable rule, which in this day and time will prevent a telegraph company from properly, and with all due caution, establishing a new and secure line on a right of way, originally given by grant or eminent domain, and where a previous telegraph line has long been in use.

For instance, a Mr. Morton Riddle, a civil engineer in the employ of the Atlantic Coast Line Railroad, one of the lessee companies, testifies that there is always danger of telegraph and telephone poles blowing down, or being broken by sleet, and that no line of poles should be permitted to be nearer the track than the length of the pole above ground; that the poles should not be nearer than 8 feet from the center of the track to prevent injury to trainmen. He says that a second track is often necessary, and should not be less than 13 feet from its center to the center of the main line, and therefore a pole nearer than 21 feet from the center of the main line would be a source of danger. This is in effect the testimony of J. M. Stephens, formerly superintendent of the Western Union Telegraph Company in Atlanta. He testifies that the proximity of the poles would endanger their falling across the track as the result of decay, wind storms, heavy sleet, or other causes.

Mr. Charles A. Wickersham, president and general manager of the Atlanta & West Point Railroad Company, makes affidavit that telegraph poles and wires are more or less a menace when placed in close proximity to a railroad track, on account of fires burning the poles and causing them to fall. He states that during a sleet storm of 1905 several hundred telegraph poles were strewn across the tracks of the

various lines in his section, causing delay to the trains; and that the more poles and wires there are on the right of way, the more danger of accidents. These conditions, while obviously distressing, would in this day scarcely embarrass the wonderful profession of engineering, which has woven the gigantic suspension bridge, constructed the transcontinental railway, conducts mighty steamships over the shallows where Israel escaped and Pharaoh perished, and even now is rushing to completion that Isthmian canal, which for more than 400 years has quickened the imagination of the discoverer, the geographer, and the statesman.

Testimony of this general character might be cited ad libitum. Many of the witnesses are in the employ of the lessee, or of dominant, or connecting companies. But their testimony is obvious and undeniable. It is also undeniable that there is danger in the erection of all telegraphic facilities in close proximity to railway lines on curves, or elsewhere. Nevertheless, they are constantly erected, and many of them bear so many lines of wire that to the naked or inexpert eye they are practically countless. Communication by telegraph is perhaps of all others the most speedy and reliable method of intercourse in that vast domain of commerce which is under the control of the general government, and because one telegraph company has secured a prior occupancy for its lines, it is quite impossible for the courts to hold that other companies may not, with due regard and precaution for the safety of the general public and the employés of the railroad company, institute additional lines. Certainly in many cases, perhaps in a majority of cases, where the country is thickly populated, and the use of the telegraph is continuous, it is indispensable that there should be competing lines along the same right of way to accomplish fair service to the public. To secure such facilities in which the public is deeply concerned is one of the most important and vital duties of modern government.

To extend the argument drawn from these affidavits to its logical conclusion, it might be made to appear impossible, not only to maintain with safety a second line, but the first line also. It is obvious that there may be danger in either of them. Nay, more, since a cross-tie may become rotten, a steel rail wear out or warp, or a spike work loose from the cross-tie, the possibilities enumerated by the complainant would forbid the construction of so portentous and threatening an instrumentality of commerce as the railway itself. Defects in construction and inspection may appear anywhere. That they appear every day we know, but the utilization for the service of mankind of those marvelous powers of steam and electricity is not to be forbidden on that account.

We are not at liberty to ignore altogether the testimony of the defendant's witnesses. There is the testimony of Mr. Benjamin S. Price who is the defendant's superintendent of construction. He has had an experience of 20 years in the construction of telegraph lines on railroad rights of way. He states that the maintenance of such a line is no menace to the safety of trains, where the poles are not placed nearer than 8 feet from the nearest rail, if properly constructed. They should be, he testifies, 12 inches in diameter, and set 4 to 8 feet in the

ground. All of the poles are not in a straight line, and all terminal and crossing poles are uniformly anchored, braced, or supported by guy wires. This witness testifies that he has constructed lines on the Illinois Central, Chicago, Indianapolis & Louisville, Lake Shore & Michigan Southern, and other railroads. He says that there were two, and sometimes three, lines on many of these roads, and that thousands of poles were placed and maintained within 8 to 10 feet from the nearest rail. He testifies that he is familiar with telegraph lines throughout the country, and states that these poles are so erected that they will withstand storm, cyclone, or tornado, as successfully as trees or houses, and are as safe within 8 feet of the rail as warehouses and other buildings the same distance. He has never known an instance of damage to a railroad or its trains caused by the falling of a telegraph pole, although he has extensively traveled throughout the United States in all kinds of weather. The line constructed as proposed in this case would in his opinion in no way interfere with the operation of the railroad company's trains. Mr. Charles M. Baker, superintendent of construction for the Postal Company in the west, testifies to substantially the same facts. Mr. J. E. Nix, general foreman of construction for the defendant, in his affidavit gives a table of distances of poles of the Western Union Telegraph Company along the same lines now sought to be used by the defendant from Augusta to Atlanta. The heights of these poles vary from 25 to 40 feet, and the distances from the main track from 10 to 24 feet. In many places, he states, the heights of the poles exceed the distance from the nearest rail of the track. He further testifies that wire lines cross the tracks of the complainant more than 100 times, and are supported by ordinary poles sufficiently high for clearance—that is, to clear the trains—and that it is safe to erect and maintain a telegraph line within 8 feet of the nearest rail.

Besides, the court is not without valuable assistance from the rulings of the state Supreme Court. In Savannah, Florida & Western Railway Company v. Postal Telegraph Company, 112 Ga. 941, 38 S. E. 353, it was stated by the Supreme Court of Georgia:

"Whether or not the manner in which the telegraph company proposes to construct its lines and the location of the telegraph poles, wires, etc., upon the railroad company's right of way, as indicated in the notice served by the telegraph company upon the railway company in the condemnation proceeding, would so essentially injure or interfere with the necessary use by the railway company of its right of way for railroad purposes as to render the grant of an interlocutory injunction proper is a question to be determined by the trial judge, under the facts and circumstances submitted for his consideration."

It does not, however, follow, we think, that the conclusion of the trial judge is irrevocable. He is entitled to the corrective assistance which may be afforded by the distinguished judges of the appellate courts of that judicial system of which he is a member.

It is true that it is the obvious policy of the government of the United States to bring about and maintain a fair competition in telegraph rates. For instance, a contract between a railroad company and a telegraph company, granting exclusive right of occupancy on the railroad right of way, has been repeatedly declared to be void. United

States v. Union Pacific Railroad Company, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319; Western Union Telegraph Company v. American Union Telegraph Company, 65 Ga. 160, 38 Am. Rep. 781. In Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1, 24 L. Ed. 708, Chief Justice Waite for the court declared:

The statute "substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege."

This language is reiterated in Western Union Telegraph Company v. Pennsylvania Railroad et al., 195 U. S. 562, 25 Sup. Ct. 133, 49 L. Ed. 312. It is then the policy of the law, so far as that is practicable with equal justice to all, to permit the use of the rights of way of railroad companies for telegraph lines. Nor are the state courts less backward in permitting this great public convenience. In the case of the Atlantic Railroad Company v. Postal Telegraph Company, 120 Ga. 269, 48 S. E. 20, Mr. Justice Evans for the court observes:

"The railway company insists that the erection of the poles is a menace to the safe operation of its road. We are unable to see how a telegraph pole of less height than the distance from its location to the track can be considered a menace to the operation of the road. It is possible that as the result of a violent storm the poles may be blown down and across the track, but the possibility of such a result is so contingent that it is not a proper element in the assessment of damages. * * * Should an injury of this character result in damage to the railway company by reason of the defective or faulty construction of the telegraph line, it has an ample remedy for reimbursement; but it will not be presumed that such an injury may result in the ordinary course of affairs."

And in the same case, on page 280 of 120 Ga., page 20 of 48 S. E., the same learned justice declares:

"Instead of being damaged, it would seem that the railroad company, having the advantage of two lines, one on either side of its right of way, would be benefited, because of probable competition."

There are numerous cases sustaining these principles. One very much in point is that of the St. Louis & Cairo Railroad Company v. Postal Telegraph-Cable Company, 173 Ill. 508, 51 N. E. 382, where the telegraph company proposed to condemn a right of way of a railroad company, and to install poles not less than 25 feet long, 1 foot in diameter at the base, set in the ground at a depth of not less than 5 feet, and not less than 25 feet from the outer edge of the railroad track. The court there held:

"The location of the line, as indicated in the petition, shows that the public use of the railroad will not be seriously incommoded."

It is clear under the laws of Georgia that the Postal Company will not acquire the fee, but only an easement on the railroad's right of way. This will embrace the land actually occupied and the right of entry for construction and repair. Atlantic Railroad Company v. Postal Telegraph Company, 120 Ga. 276, 48 S. E. 15. It does not appear that

there will be any unjustifiable or unlawful interference with the complainant's right of way, or with its "ordinary travel," or that the railroad itself will be irreparably damaged. Under the laws of the state, if one person owned the entire right of way, which the Postal Company seeks to condemn for the purposes of its telegraph lines, the court, upon a proper case made, would permit the condemnation. Much more should it be granted against a corporation, which has been permitted to exercise the right of eminent domain over the same line as against the lands of private persons, and for its own purposes. In other words, the same principle which justifies the condemnation of the Georgia Railroad's right of way in the first instance, as against the landowners, will justify the use of an easement now on the same land against the railroad itself.

It would be difficult perhaps to set out a proposition more liberally and carefully drawn than that presented by the Postal Company in its notification, which was the basis of this case. The height of the poles above ground will not exceed the distance from the poles to the end of the nearest cross-ties. This will be 20 feet. In case a pole should fall under ordinary circumstances this will leave a margin of about two feet beyond the length of the pole and the distance from its base to the track. But the Georgia Railroad says that its right of way at certain points is too narrow for the telegraph company to execute its proposition. The proposition is, however, made, and at those attenuated points on the Georgia line where it seems to enjoy nothing but the roadbed, contiguous territory upon which a pole may rest will probably be found in the neighborhood. It is said, however, that the Georgia Railroad has certain curves where there might be a tendency of the wires to draw the poles upon the track. In railroad construction and maintenance curves are not novel, and it would seem easy enough by proper bracing to protect the roadbed and track. The Postal Company expressly agrees to do this. Besides, the Western Union Company for many years has maintained its lines, following, we may presume, the sinuosities of all those impracticable curves, and there is no proof in the record which justifies the belief that the wires of the Western Union have inflicted any injury upon the Georgia Railroad. It is difficult to perceive how the propinquity of the Postal will be more alarming. The case then is not one which justifies injunctive action against the proceeding in the state court.

The injunction sought, therefore, will be denied. It is moreover true that the Georgia Railroad is a post road, and in that sense at least is under the control of the judicial power of the United States. By virtue of the statutes before quoted, the telegraph company is not only bound to establish its lines as proposed, so as not to interfere with "ordinary travel," and in accordance with its amendments in the proceeding under the state laws, but it must in obedience to the statutes quoted maintain those lines. The Georgia Railroad is likewise obliged not to interfere with them. It follows that it is proper to maintain the bill for the purpose of compelling obedience to the promises and agreements the Postal has made, and the corresponding obligations of the Georgia. In case a final decree is not deemed appropriate at this time, the case will proceed as usual in equity.

THE H. B. RAWSON.

THE PRINZ ADALBERT.

(District Court, S. D. New York. March 26, 1907.)

COLLISION—STEAMER AND MEETING TOW—ABSENCE OF PROPER LOOKOUT.

A steamer coming in from the sea to her dock at Hoboken *held* in fault for a collision with the second of two meeting scows in tow on a hawser in the lower Hudson in the evening, on the ground that she had no lookout properly stationed in front to make reports of the tow, in consequence of which she was navigated by the pilot without knowledge of the tug's movements, and did not heed or answer the tug's signals, and also because she did not sooner stop and reverse. The tug exonerated, although she might have stopped sooner, on the ground that the fault of the steamer was sufficient to account for the collision, and her contributory fault was not clear. There being but one light on each of the scows *held* unimportant in view of the steamer's fault and the fact that the tug carried proper towing lights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 120, 142, 172.]

In Admiralty. Suit for collision.

Carpenter, Park & Symmers, for libelant.

Wing, Putnam & Burlingham, for the Rawson.

Wheeler, Cortis & Haight and John W. Griffin, for the Prinz Adalbert.

ADAMS, District Judge. This was a cause of collision happening in the North River in the vicinity of the Battery about 7 o'clock P. M. on the 5th day of September, 1905, between the Steamship Prinz Adalbert, bound from sea to her pier at Hoboken, and the Scow Orleans, belonging to the Bouker Contracting Company, being towed on a hawser, in company with another scow, No. 32, just ahead of her, by the Tug H. B. Rawson, from the foot of Canal Street, New York City, to Barren Island. The tide was ebb and the weather clear. The steamer struck the scow on the bow near her port side, cutting into her and causing her to careen and dump part of her cargo.

The libel alleges that the lights of the tow were burning brightly and when it reached a point a little below the New Jersey Central Railroad Ferry on the New Jersey side of the river, a steamer was encountered, which subsequently proved to be the Prinz Adalbert, coming up the bay about half a mile distant, showing her green light; that a signal of two blasts was given by the tug to the steamer but no answer was made thereto by the steamer and shortly afterwards she changed her course shutting in her green and showing her red light, whereupon the tug blew to her a signal of one blast and ported her helm; that the steamer gave no answer to this signal, whereupon the tug blew alarm whistles and again gave a signal of one blast to the steamer; that the steamer paid no attention to these signals and kept on, passing close to the tug on the latter's port side, and notwithstanding alarm signals and shouts from the tug the collision happened as stated above. It is charged that the steamer was in fault in not navigating on the easterly side of the channel; in not answering or

heeding the signals of the tug; and in not slackening her speed or stopping and reversing in time to avoid the collision. It is also charged that the tug was in fault in that receiving no answer to her signal she did not slacken her speed or stop and reverse, and in not sufficiently changing her course to the starboard after blowing her signal of one whistle.

The answer of the steamer alleged that she arrived in port on the day in question and, after stopping at Quarantine, proceeded up the bay and river towards her dock in Hoboken against the tide at slow speed and after passing Bedloe's Island, a tug was sighted about half a mile away showing her red light and heading down the river; that signals of one whistle were exchanged between the vessels and the steamer's helm was ported and her engines reversed until she was dead in the water; that the tug kept her speed and headed the tow across the bow of the steamer in such a way that the tide swept the tow against the steamer; that the first of the barges carried one faint light aft which did not show ahead; that the second barge carried no light. It is charged that the tug was in fault in not porting her helm or porting it sufficiently upon exchanging signals of one whistle with the steamer; in not slackening her speed or stopping and reversing in time; that her speed was excessive; that she did not give the steamer a wider berth; that she had not sufficient power to control her tow; that she headed her tow across the steamer's bow and allowed it to drift down upon her. As to the tow, it is charged, among other things, that it did not show proper lights.

The tug alleged that the collision was due to the fault and negligence of the steamer in not keeping to the starboard side of the channel; in proceeding at too great a rate of speed; in not having a competent master; in not having a competent lookout; in not giving the tug and tow a wider berth; in not answering the tug's signals and in giving no signals whatsoever; in not stopping or doing anything to avoid collision.

A great deal of the testimony was given to establish the respective contentions of the parties with regard to the place in the channel the vessels were navigating in under the narrow channel rule (article 25, [U. S. Comp. St. 1901, p. 2870]), but that has become unimportant in view of the recent decision of the circuit court of appeals in the case of The Islander and The Philadelphia, not yet reported, where it was held that so much of the North River as extends from 23rd street to the Upper Bay is not subject to the rule. This collision happened not very far from the center of the river and depends for its solution upon the care given by the respective vessels involved to their own and the other's movements.

The principal contention against the steamer is that she had no lookout. It appears that there was no one attending to that duty forward. It is claimed that there was one in the crow's nest on the foremast, about 75 feet from the stem and 35 feet above the deck. This man was not produced but there is testimony from the third officer, who was stationed on the bridge, that he reported the red light of the tug but no lights on the scows. The pilot, however, who was in charge

of the navigation said, in a general way, that the lookout was stationed on the forecastle head but does not claim to have received any reports from him there or from the crow's nest. In fact there was no lookout forward and it is to be considered whether that caused or contributed to the collision. It is urged by the steamer that if there had been any number of lookouts, the result would have been the same and the absence of one, if it be determined that there was none, is immaterial. The pilot said on cross-examination that he would not have been aided by reports from a lookout, using this language:

"Q. You don't, when you are navigating great ships 200 feet from the bows of the ship, you don't undertake to do the duties of pilot and lookout at the same time? A. I have to do it because you are up higher than they are and you have your glasses and facilities to look out, and that is all you have to do; there are so many vessels and scows going across each way it would annoy you if they sang out every time they saw a light."

The pilot did not see any lights on the tug or tow but the three towing lights. Others on the bridge of the steamer, however, saw the tug's red light when they first observed her but said nothing to the pilot about it and he navigated the ship on the supposition that a vessel was approaching him bound in an opposite direction. He said he intended to go to the westward of such vessel and pass her starboard to starboard. This necessitated crossing the bow of a vessel on his starboard hand. It can not be supposed that if he knew of the red light, such a dangerous manœuvre would have been attempted and it would have been the duty of a lookout to report the light so the report could have been heard by the pilot on the bridge. The pilot said he knew a vessel was above him in the river bound down but evidently was not aware of her movements. I think the steamer was clearly in fault in this respect, as well as for not stopping and reversing in time. She did operate her engines to achieve that purpose but she did not succeed in overcoming her forward motion and the collision resulted.

The tug master's account of the collision was that the tow was about abreast of the New Jersey Central Ferry when he first saw the steamer, showing a green light ahead, and he blew a signal of two whistles; that he thought the steamer at that time should have seen his green light; that he received no answer to his signal and when the vessels had covered half the distance between them, the steamer showed her red light, also right ahead, and he blew a signal of one long whistle to which he received no answer and then blew an alarm signal, then blew another long single blast; that at this time the vessels were within 700 or 800 feet of each other and he ported his wheel and tried to pull away from the steamer, changing his heading about 4 points; that each scow had a light on a pole on her stern forward of the cabin, the stern scow, the Orleans, having a light in the same position, towards the stern but none forward; that the steamer passed the tug about 200 feet away, grazed along the port side of No. 32, then struck the Orleans on the port side of her bow and caused the damage. This account is corroborated in a general way by other witnesses from the tug, and I think may be regarded as true.

With respect to the steamer's charges of fault, mentioned above,

those regarding the speed of the tug are of no importance. She was probably not going more than 2 knots faster than the current, so that her total speed over the ground did not exceed about 4 knots and no fault can be found with her in that respect, and having her tow on a hawser, she could not reverse. She could, however, have stopped sooner, and in view of the absence of signals on the steamer's part, such a course would have been more prudent and perhaps effective in avoiding the collision, but the case is similar in principle to The Teaser (D. C.) 118 Fed. 81, where a tug towing a vessel on a hawser failed to keep her tow out of collision by stopping, was held in half damages in this court because she failed to stop in time, but such finding was reversed on appeal (127 Fed. 305, 62 C. C. A. 223), because the primary fault being attributable to the other vessel, there was not such clear proof of contributory negligence as would justify an apportionment of the damages. I think such is the case here and the tug should not be held.

The tow is also charged with fault in not maintaining proper lights. It is contended that each scow should have had two instead of one. The steamer knew by the towing lights she saw on the tug that there was a tow several hundred feet astern. It does not seem to have made any difference that there was but one light on each scow instead of two.

The libel against the tug will be dismissed. There will be a decree for the libelant against the steamer, with an order of reference.

Ex parte DESJEIRO.

Ex parte FURIA.

(Circuit Court, D. Oregon. April 15, 1907.)

Nos. 3,084, 3,085.

FISH—PROTECTION—BOUNDARY WATERS—CONCURRENT LEGISLATION.

Under their respective Constitutions and the acts of Congress admitting them into the Union, the states of Oregon and Washington, although their common boundary is the middle channel of the Columbia river, are each accorded and have concurrent jurisdiction over the entire river. *Held*, that B. & C. Comp. § 4092, as amended by Sess. Laws Or. 1903, p. 218, declaring that it shall be unlawful for any person to take salmon in the waters of the state unless such person is a citizen of the United States or has declared his intention to become such, and has been a bona fide resident of the state of Oregon or the states of Washington or Idaho for a period of six months, etc., not having been concurred in by the Legislature of the state of Washington, is void as to all persons fishing for salmon in the Columbia river, regardless of their citizenship or residence.

G. C. Fulton, for petitioners.
Harrison Allen, for defendants.

WOLVERTON, District Judge. The above cases have been, by stipulation of counsel, consolidated, and were heard together. Each of the petitioners was convicted in the justice's court in and for the precinct of Astoria, Clatsop county, state of Oregon, upon a complaint charging as follows:

"The said defendant [Desjeiro on the 6th day of July and Furia on the 8th day of August, A. D. 1906], in the county of Clatsop and state of Oregon, then and there being, did then and there willfully and unlawfully take and fish for salmon fish in the waters of this state, to wit, in the waters of the Columbia river, without first having been a bona fide resident of the state of Oregon, Idaho, or Washington for the period of six months prior thereto."

And both are now held for imprisonment.

The facts as developed at the trial before the justice, and certified here under writ of certiorari, are that Desjeiro fished for and caught six salmon fish in the waters of the Columbia river by means of a floating salmon gill net at a point in said river south of the middle channel thereof, and opposite the county of Clatsop in the state of Oregon; that in taking the fish he placed the net in the waters of the river at a point within the boundary of the state of Oregon for the purpose of fishing and taking salmon fish thereby; that the net drifted with the current across the boundary into Washington, where he also fished for and caught six other salmon fish; that he delivered his catch to the cannery of the Columbia River Packers' Association at Astoria, in Clatsop county, Or. Desjeiro was at the time a resident neither of the state of Oregon, of Idaho, or of Washington, but was an actual resident and inhabitant of the state of California, and a subject of the King of Italy, never having been naturalized in this country. The same facts appear as it relates to Furia, except it is shown that he was a naturalized citizen, and caught fish on the Oregon side of the ship's channel in the Columbia river; but in all other respects he was engaged in catching fish in violation of the statute of Oregon.

The section of the statute which Desjeiro and Furia are alleged to have violated is as follows:

"It shall be unlawful for any person to take or fish for salmon fish or sturgeon in any waters of this state, unless such person be a citizen of the United States, or has declared his intention to become such, and has been a bona fide resident of the state of Oregon, or the states of Washington or Idaho, for the period of six months: Provided, that a license issued by the state of Washington, such state having concurrent jurisdiction on the Columbia river with this state, shall be deemed valid as to gill nets, and as to gill net fishermen, for use on the Columbia River, as though issued by the fish warden of this state." Section 4092, B. & C. Comp. as amended by Sess. Laws Or. 1903, p. 218.

In order to a clear understanding and solution of the question presented for determination, certain other provisions of the statute, as well as certain provisions of the statute of the state of Washington, should be noted in this connection. Section 4093, B. & C. Comp., as amended by Sess. Laws Or. 1905, p. 116, provides that:

"Any person who is a citizen of the United States, or who has declared his intention to become such, and is a resident of the state of Oregon, or the states of Washington or Idaho, desiring to engage in the business of operating a fish trap, wier, pound net, set net, gill net, fish wheel, or seine, or other fishing appliance not prohibited by law, for the purpose of catching fish in any of the waters of this state, or over which the state of Oregon has concurrent jurisdiction, shall make application in writing to the fish warden of said state, specifying with convenient certainty the character of the appliance that the applicant desires to obtain license for, and the location, if for a stationary appliance, and upon payment of a license fee as hereinafter provided, said

fish warden shall issue to such applicant a license to operate the character of appliance desired in said application."

Section 4113, B. & C. Comp., as amended by Sess. Laws Or. 1903, p. 237, prescribes that:

"Any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished" as in said section designated.

By section 2 of an act providing for the protection and propagation of the food fishes in the waters of the state of Washington, etc., Sess. Laws Wash. 1899, pp. 194–206, c. 117, it is enacted that:

"The use of set nets and gill or drift nets, subject to said license and regulation (as thereinafter provided) for said purpose, is authorized in all the waters of this state, except as otherwise provided by law: Provided, however, that * * * a separate license shall be required for each trap * * * gill net, drift net or set net, which license shall be numbered and dated," etc.

And that:

"No license shall be issued to any person who is not a citizen of the United States, unless such person has declared his intention to become such one year prior thereto, and is and has been for one year immediately prior to the time of the application for license an actual resident of the state of Washington: * * * Provided, licenses issued by the state of Oregon shall be deemed valid as to gill nets for use on the Columbia River as though issued by the fish commissioner of this state."

Section 20 prescribes a penalty for a violation of any of the provisions of the act.

Under their respective Constitutions and the acts of Congress admitting them into the Union the states of Oregon and Washington, although their common boundary is the middle channel of the Columbia river, are each accorded and have concurrent jurisdiction over the entire river. In re Mattson (C. C.) 69 Fed. 535. And the vital and pivotal question involved is whether the statute under which the petitioners were convicted is invalid and inoperative by reason of nonconcurrence therein by the Legislature of the state of Washington. Almost the identical question was decided in the case just cited. There the defendant, an inhabitant of the state of Washington, was arrested and imprisoned for fishing on Sunday, an act of the legislative assembly of the state of Oregon inhibiting the conduct (Sess. Laws Or. 1891, p. 33), which was a general law applying to all the waters of the state. It was insisted that as the Legislature of the state of Washington had not concurred in the enactment, or had not a similar statute of its own, the act was void, and insufficient by which to constitute the offense. In his determination of the cause Judge Bellinger says:

"It is no reason for this assumption of legislative control by Oregon within the boundaries of Washington that the latter state has the right to legislate similarly with reference to the river. Washington is precluded, by the legislation of Oregon over the river, from legislating otherwise. What is thus accorded to Washington is not a right, but the necessity of acquiescence to avoid a conflict of jurisdiction. How can this state, more than Washington, determine the right of the citizens of Washington to fish in the waters of that state, or prescribe the days for such fishing? Washington is wholly foreclosed in the premises by the action of Oregon in determining the question for both states. How can this be called the exercise of a concurrent jurisdic-

tion? The word 'concurrent,' in its legal and generally accepted definition, means acting in conjunction, and, when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river, it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction."

The opinion was concurred in by Judge Hanford of the District of Washington.

True, in that case a citizen of Washington was the defendant, but it does not seem to me that that fact can make any difference. The law, as appears from a reading of the act, was general in its operation, as it is here, and designed to apply alike in all parts of the state, and concurrently with Washington over the waters of the Columbia river. If the act was void as it respects a citizen of the state of Washington, being general, it is void as to every other citizen, whether of the state of Washington or California, or elsewhere. It is the act of concurrence between the two states, in the exercise of legislative authority, that validates the act and gives it the force of law, and, unless there is a concurrence or assent by both states to the enactment, it cannot have that force. This is the doctrine of the Mattson Case, and it has direct application to the case at bar.

Now, section 4092, as amended, makes it a misdemeanor for any person not a resident of the state for the period of six months preceding to take or fish for salmon fish in any of the waters of the state. This is a specific offense within itself. An examination of the laws of the state of Washington will disclose the fact that there is no such offense established within that state, and hence there is no concurrence in the laws of the two states as to the offense. In each state, however, it is required that parties desiring to fish with gill nets shall take out a license, and in each a violation of any of the provisions touching the occupation of fishing within the waters thereof is made a misdemeanor; so that it may be said, perhaps, that the states have legislated concurrently upon that subject. By the Washington act a person must be a resident of the state for one year next preceding before a license can be issued to him; in Oregon the time is fixed at six months; but this is a matter of minor importance, and it may be said that the laws in that regard are in all material respects concurrent. But it is not the offense of fishing without a license that is complained against. It is the offense of fishing without being a resident of the state; and, the state of Washington not having concurred in this legislation, the act is void as to all persons, whether they be citizens of Washington or California, and is within the doctrine of the Mattson Case.

Other questions were presented and argued with much force, but they do not appear to me to be comprehended by the issues involved, and it is therefore not essential that they be determined at this time.

The order will be that the defendants be discharged.

LADD METALS CO. v. AMERICAN MINING CO., Limited.

(Circuit Court, D. Oregon. April 22, 1907.)

No. 3,064.

1. CORPORATIONS—FOREIGN CORPORATIONS—SERVICE OF PROCESS ON.
That a corporation may be servable with process in a state other than that in which it is incorporated, it must have engaged in business to the extent that it may be said in a legal sense to be doing business therein, and the agent served therein must be its authorized representative for the transaction of such business or such as will be deemed generally to represent the company in its corporate capacity.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2611.
Service of process on foreign corporations, see note to 45 C. C. A. 3; 78 C. C. A. 473.]

2. SAME—DOING BUSINESS IN ANOTHER STATE.
The transaction of a single act of business in a state by a foreign corporation does not constitute the doing or carrying on of business therein.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2520.]

3. SAME—PRESENCE OF OFFICER IN STATE.
That the secretary of a corporation went into another state for the purpose of attending to the taking of depositions in a suit to which the corporation was a party does not constitute the doing of business by the corporation in such state, nor render it amenable to suit in a federal court therein by service upon such secretary while there.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2613.]

4. SAME—OBJECTION TO JURISDICTION—WAIVER.
A motion to quash the service of process construed, and *held* to be based on the ground that the defendant, a foreign corporation, was not doing business in the state of the suit, and was not subject to service therein, and therefore not to be a waiver of such objection.

On Motion to Quash Service.

The complaint herein exhibits an action based upon a contract, entered into in the state of Idaho, between W. C. Jones of the one part, and the defendant company of the other, whereby the latter sold and agreed to deliver to the former certain copper ore then at the Seven Devils Mines in the state of Idaho. Among other things, an advance payment of $3,000 was agreed upon. Jones subsequently assigned the contract to the plaintiff corporation, and the present action is for a breach thereof. Plaintiff is an Oregon, and defendant a Montana corporation. Action was instituted in this district, and service of summons, as shown by the return of the marshal, was had within the district "by delivering to R. H. Kleinschmidt, who is the secretary and treasurer of said company, personally, a true copy of said summons," etc. In due time a motion was interposed, as follows: "Comes now the defendant above named by John H. Hall, its attorney, appearing specially and for the purposes of this motion only, and without submitting itself to the jurisdiction of this court, and for no other purpose, moves the court that the alleged service of summons upon this defendant in the above-entitled action be quashed, annulled, set aside, and held for naught, for the reason that this defendant is organized under and by virtue of the laws of the state of Montana. That it has no property within the state of Oregon of any description. That it never has and does not now transact any corporate or other business within the state of Oregon, and does not maintain any agent, officer, or other person in this state upon whom service of summons can be made. That said alleged service in this action was attempted to be made by serving a copy of the original thereof upon R. H.

Kleinschmidt, the secretary and treasurer of this defendant, while he was temporarily within the city of Portland." From affidavits filed in support of and against the motion, it appears that Jones entered into the contract in question with the defendant corporation with a view to assigning the same to the plaintiff; but it was understood between the parties thereto that, if arrangements could not be made with the plaintiff to take the assignment, then Jones might assign to any other person or corporation satisfactory to the defendant company; it being further understood that Jones was not to be held personally to a performance of the contract or fulfillment of its conditions. Subsequently Jones came to Portland at the request, as he avers, of Kleinschmidt, who was the secretary and treasurer of the defendant company, and there negotiated for an assignment of the contract to plaintiff, which assignment was then and there made. In anticipation of such assignment, Kleinschmidt drew upon Jones for the $3,000 advance payment to be made, and when the assignment was closed the plaintiff honored and paid the draft.

It further appears that an action is pending between these parties in Idaho; that certain depositions were required to be taken in Portland; that Kleinschmidt came to Portland to represent and protect the interests of the defendant while such depositions were being taken; that while here he presented two claims against the plaintiff to the president of that company for settlement and collection; and that it was during his stay that he was served with summons in manner as previously indicated.

Snow & McCamant, for plaintiff.

John H. Hall and G. A. Brown, for defendant.

WOLVERTON, District Judge. The action is by an Oregon corporation against a Montana corporation, and, there being no other ground upon which to base federal jurisdiction than diversity of citizenship, it was properly instituted in the district of the residence of the plaintiff; the statute in such cases granting the authority to sue in the district of the residence of either party. Act Cong. March 3, 1875, c. 137, § 1, 18 Stat. 470, amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]; 4 Fed. Stat. Ann. p. 265; In re Keasbey & Mattison Co., 160 U. S. 221, 228, 229, 16 Sup. Ct. 273, 40 L. Ed. 402.

Two questions are therefore presented for determination, namely: First, whether proper service has been had upon the defendant; and, second, whether defendant has, by the form of motion adopted to quash, waived its right to object to the insufficiency of such service. Of these in their order.

A corporation is regarded as a citizen and resident only of a state in which it is incorporated, and has its principal place of business. Shaw v. Quincy Mining Co., 145 U. S. 444, 452, 453, 12 Sup. Ct. 935, 36 L. Ed. 768. By a comity existing between the states, however, corporations in one state are allowed and permitted to do business in states other than those of their citizenship and residence. Usually there exist statutory provisions prescribing the conditions upon which corporations foreign to the state may come into it, and carry on and transact business therein. But it frequently occurs that corporations intrude themselves upon the territory of other states, and transact business therein, regardless of the local rules and regulations, and in evasion of the laws intended for their observance. It is but compensatory justice that, wherever and whenever a corporation of for-

eign persuasion enters into another state, and therein engages in and carries on its business, whether as its principal pursuit or auxiliary thereto, and depends upon, looks to, and expects the protection of the local government in maintaining its contractual and legal relations, it should at the same time be subjected to the local tribunals of judicatory for the determination and enforcement of all reciprocal relations, whether arising out of the same or other transactions. License and protection in governmental affairs means subjection and obedience on the part of those reaping the benefits, whether they be individuals or corporations. That a corporation may be servable in a state other than that in which it is organized and incorporated, it must have engaged in business to the extent that it may be said in legal parlance to be doing business therein, and the agent served therein must be its authorized representative for the transaction of such business, or such as will be deemed generally to represent the company in its corporate capacity. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. Says the court, in Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98, 106, 11 Sup. Ct. 36, 39, 34 L. Ed. 608:

"Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it."

The palpable meaning of the court being, as will find further support by other authorities to which I shall allude, that the doing business within the state must be coupled with the further fact that there is an officer of the corporation therein also transacting such business for and representing such corporation. The two things must combine to render it legally possible to make service of summons in that state upon the corporation. It is always a matter for the federal courts to determine, says Thayer, Circuit Judge, in St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co. (C. C.) 32 Fed. 802, 804, "whether such corporation has transacted business to such an extent within the district, and has such a representative or agent therein, that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent."

A single transaction of business within the state is not tantamount to doing or carrying on business therein. I quote from the headnote in Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137:

"A corporation organized under the laws of one state does not, by doing a single act of business in another state, with no purpose of doing any other acts there, come within the provisions of a statute of the latter forbidding foreign corporations to carry on business within it, except upon filing certificates showing their place or places of business, their agents, and other matters required by the statute."

To the same purpose is Commercial Bank v. Sherman, 28 Or. 573, 43 Pac. 658, 52 Am. St. Rep. 811. In the case of Good Hope Co. v. Railway Barb Fencing Co. (C. C.) 22 Fed. 635, it appears that the

president of the defendant company came into the state where sued to adjust a controversy between the defendant and the plaintiff growing out of a purchase made by the former company. In determining the cause, the court says:

"In this case, the president of the defendant was here in his representative character, but the corporation had never been practically engaged in business here. It had made purchases here occasionally, but it could have made them by correspondence as well as by the presence of its agents here. If the purchases had been made by correspondence it could be as logically urged that the corporation was engaged in business here as it can be now. Instead of writing, its agent came here in person. As it has never kept an office here, or carried on any part of its business operations here, or been engaged in any business here, which required it to invoke the comity of the laws of the state, it was not 'found' here for the purpose of being sued."

See St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co., supra.

I may say in this connection that, for the purpose of determining whether a defendant corporation is properly servable in the state where the action is begun, the law is the same now, in effect, as it was before the amendment; that is, as prescribed by section 739 of the Revised Statutes [U. S. Comp. St. 1901, p. 587]. The language of Swan, District Judge, in United States Graphite Co. v. Pacific Graphite Co. (C. C.) 68 Fed. 442, 444, is expressive of the same doctrine. This case, and the one I shall subsequently cite, were decided after the amendment of section 739. The court says:

"James O. Roundtree, the president of the defendant company in this cause, was not a resident agent of the corporation, for it had none such in Michigan; and, if it be conceded that, while temporarily here, at the time of the service made upon him, he was engaged in negotiations concerning the business of the company, this is not sufficient to subject the defendant to the jurisdiction of any court in this state by reason of service made upon him."

But, as covering the entire ground, Buffalo Glass Co. v. Manufacturers' Glass Co. (C. C.) 142 Fed. 273, is pertinent and conclusive. Hazel, District Judge, says:

"The single question is whether the said defendant is engaged in business in this state, and whether it is found here within the meaning of the statute for the service of process. Affidavits were presented, showing that the defendant's principal place of business is in Cleveland, Ohio; that it is engaged in the manufacture of glass; and that within the past year the defendant has sold in this state large quantities of glass, and has also entered into contracts for the sale of glass to various firms and corporations engaged in business in this state. In short, the defendant has solicited trade in New York by correspondence and by an agent, and sells its commodity to customers located here. This, however, the contracts of sale not being made in this state, is not, within the meaning of the federal judiciary acts, doing business in the state to authorize the service of process on an agent or officer of a foreign corporation temporarily in the state. To authorize such service of process, the foreign corporation must actually and substantially be engaged in business in this state or district, its business must have been transacted by some agent or manager representing such corporation, and it must also appear that the local statute provides for suit against such foreign corporation which has been permitted to transact business within the state."

These cases cover quite fully the conditions presented by the present controversy. It is clear that the defendant company was not carrying on business within the state of Oregon. The contract upon which the

action is based was entered into and executed in the state of Idaho, between parties neither of whom was a resident or citizen of this state, so far as the record shows. Subsequently Jones, who was purchasing the ore, came to Portland, and there negotiated the assignment of the contract to the plaintiff. True, the secretary of the defendant company requested that Jones make the assignment, and was cognizant, no doubt, of the fact that the transaction was about to take place, and, in order to aid him in closing it up, he sent to Portland a draft upon Jones for the amount of the consideration for the sale of ore to be advanced, and the plaintiff, on taking over the assignment, honored the draft and paid the consideration. But that transaction cannot be considered as doing business in this state. The transaction was single, and the defendant had no such officer or agent representing it here as could be said to be carrying on the business of the company in this state, and undoubtedly no service made upon Jones could avail to bring the defendant into court.

The next feature upon which it is sought to maintain that the defendant was servable here with summons is that the secretary of the company came to Portland on business connected with the company. That business was to attend the taking of certain depositions, in a cause pending between the same parties to this suit, and to subserve the interests of the defendant company at such examination. But this cannot be considered as doing business here, any more than if the defendant had waived the matter of jurisdiction, and come into this court to make a defense to the present suit. This also is only a single transaction within itself, and it has nothing to do with the ordinary business of the company. Such a transaction lacks all the features of what is legally denominated doing business with a view of carrying on the business for which the corporation was organized and incorporated. Nor is the situation aided by the fact that while here Kleinschmidt presented two claims to the president of the plaintiff corporation for settlement and collection. Such was not the ordinary business of the defendant company, in which it was engaged anywhere, and could not suffice to render it amenable to the jurisdiction of the Circuit Court in this district. Upon the whole, I conclude that the defendant was not servable in this state in the manner in which service was attempted to be made.

As respects the second question, the appearance of the defendant is special, and for the one purpose; that is, to quash the service of summons. A careful reading of the motion, which is set out in the statement, will show that it was not the intention of the pleader to question the jurisdiction of the court, because the action was not brought in the state where the defendant was incorporated and resides. It may be true that, if objection be taken to a proceeding upon one ground only, it will constitute a waiver of other grounds not insisted upon; and it is legally true also that, where there is a general appearance, there is a waiver of all jurisdictional questions as to the person. But in this case the defendant has specified so particularly and so pertinently the ground upon which it relies for quashing the service that there can be no question as to the true purpose of the motion; and,

having appeared specially, for the purpose of the motion only, there is no waiver of jurisdiction.

For the reasons here assigned, the motion to quash the service of summons will be allowed, and such will be the order of the court.

KUHN v. FAIRMONT COAL CO.

(Circuit Court, N. D. West Virginia. April 16, 1907.)

COURTS—FEDERAL COURTS—FOLLOWING STATE DECISION—RULES OF PROPERTY.

Where the highest court of a state decided that a deed to coal underlying certain land did not contain an implied covenant obligating the grantee to sustain the surface, such decision became a rule of property, which would be followed by the federal courts as to land located in such state when called on to determine the effect of a similar deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 958, 959.

Conclusiveness of judgment between federal and state courts, see note to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

Trespass on the Case. Upon demurrer.

H. W. Williams and Harvey W. Harmer, for plaintiff.

John Bassel, Z. T Vinson, and C. Powell, for defendant.

DAYTON, District Judge. Barton W. Kuhn, a citizen of Ohio, has brought this original action of trespass on the case against the Fairmont Coal Company, a West Virginia corporation, alleging himself to be the owner of a certain tract of land in Marion county, this state, containing 91 acres, the coal underlying which he on November 1, 1899, sold and conveyed to Johnson N Camden, "with right to enter upon and under said land, and to mine, excavate, and remove all of said coal, and remove upon and under the said land the coal from and under adjacent, coterminous, and neighboring lands, and also the right to enter upon and under the tract and make all necessary structures, roads, ways, excavations, airshafts, drains, drainways, and openings necessary or convenient for the mining and removal of the said coal and the coal from coterminous and neighboring lands to market"; that this right to the coal, by various conveyances, has vested in the defendant, Fairmont Coal Company, which has so mined it and removed the supporting pillars as to cause the surface to break, crack, rend, and sink so as to damage the value thereof, for farming and other purposes, to the extent of $10,000. To this declaration the defendant company has appeared, craved oyer of the deed set forth in the declaration, and, when read to it, has demurred and alleged that such declaration presents in law no cause of action against it.

It is this demurrer that I am to pass upon. It seems from the records and reports of the Supreme Court of Appeals of West Virginia that, prior to the institution of this suit, one Leander Griffin in the circuit court of Harrison county, this state, instituted a like action of trespass on the case, upon a contract or deed containing precisely the same covenants as to the removal of the coal that are presented here, claiming similar damages for injury to the overlying surface. This

action was heard by the state court, and it was by the judge thereof decided that, under the grant of the deed to the company of all the coal underlying the land and the right to remove the same, there was no implied reservation that the grantee must leave enough coal to support the overlying surface, and that no cause of action therefore existed in the plaintiff owner of such surface for damages done it by the mining out of the coal. To this judgment of the lower court a writ of error was sued out to the Supreme Court of Appeals of the state, where the question was most elaborately considered after argument twice had, upon the original and rehearing, and that court, with but one dissenting voice, affirmed the holding of the lower court. Three very elaborate and able opinions are filed, two in affirmance and one for dissent, which cover some 50 pages—53 S. E. 24–75 (59 W. Va. 480, 2 L. R. A. [N. S.] 1115)—and in which the authorities, pro and con, are given and fully discussed.

The first question for me to determine is whether I should follow the construction of this contract thus given by the court of last resort of the state; for, if it is my duty so to do, under that construction, the plaintiff here will have no cause of action, and the demurrer must be sustained. It cannot be gainsaid that by the deed in controversy the plaintiff parted with his title to the coal underlying his land, and that, through this deed and subsequent conveyances, title to the same has become vested in the defendant company. This coal in its natural state is as much real estate as is the surface. This decision of the Supreme Court of Appeals of the state in the Griffith Case, containing precisely the same words of grant and covenant, must therefore be held to be one relating to the property right and title of the parties to real estate in West Virginia, and to establish the local law as to real estate so held. Without attempting to discuss the broad question of just when and to what extent federal courts will follow the decisions of state courts, which question has given rise to so much and to a considerable extent diverse opinion, it is sufficient to say that it is now settled beyond peradventure that the federal courts will in all actions at law follow and be governed by such decisions of the state courts of last resort which relate to and define the property rights and title to real estate within the confines of such states. In Jackson v. Chew, 12 Wheat. 153, 167 (6 L. Ed. 583), it is said:

"It has been urged, however, at the bar that this court applies this principle only to state constructions of their own statutes. It is true that many of the cases in which this court has deemed itself bound to conform to state decisions have arisen on the construction of statutes; but the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This court adopts the state decisions because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute law of the state when applied to the title to lands. And such a course is indispensable, in order to preserve uniformity; otherwise, the peculiar Constitution of the judicial tribunals of the states and of the United States would be productive of the greatest mischief and confusion."

In Bucher v. Cheshire R. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795, the Supreme Court has held:

"The courts of the United States adopt and follow the decisions of the highest court of a state in questions which concern merely the Constitution or laws of that state; also where a course of those decisions, whether founded on statutes or not, have become rules of property within the state; also in regard to rules of evidence in actions at law; and also in reference to the common law of the state, and its laws and customs of a local character, when established by repeated decisions."

At page 583 of 125 U. S., page 974 of 8 Sup. Ct. (31 L. Ed. 795), in the opinion in this case, Mr. Justice Miller defines "the rules of property" referred to above to be those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto. See, also, Hinde v. Vattier, 5 Pet. 398, 8 L. Ed. 168; Van Rensselaer v. Kearney, 11 How. 297, 13 L. Ed. 703; Christy v. Pridgeon, 4 Wall. 196, 18 L. Ed. 322; Williamson v. Suydam, 6 Wall. 723, 18 L. Ed. 967; Williams v. Kirtland, 13 Wall. 306, 20 L. Ed. 683; Walker v. Commissioners, 17 Wall. 648, 21 L. Ed. 744; Townsend v. Todd, 91 U. S. 452, 23 L. Ed. 413; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; Barrett v. Holmes, 102 U. S. 655, 26 L. Ed. 291; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; De Vaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827; Traction Co. v. Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462.

But, in addition to all these authorities, I think the question decisively settled by the case of Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178, 32 C. C. A. 560, arising in this state and decided by the Circuit Court of Appeals for this circuit, where it is held:

"The decisions of the courts of a state as to the construction and effect of mining leases therein establish a rule of property which will be recognized and followed by the federal courts."

No better case, it seems to me, could be found to illustrate the wisdom of this rule so uniformly upheld by federal decisions than the one at bar. Suppose this court should not follow the ruling made by the state court, but, on the contrary, should hold the opposite. In such case, the right, title, and interest of this coal company in and to the coal held by it under these contracts with identical terms would be wholly dependent upon the residence of the several vendors. So long as such vendor remained a citizen of West Virginia, he would be bound by the decisions of the courts of the state holding the company to have the unrestricted right to mine out and remove its coal in its entirety, regardless of damage done to the overlying surface. The moment he became a nonresident he could appeal to this court, holding that the company's right, title, and interest to its coal was limited by an enforceable implied liability to remove only so much thereof as could be safely done without danger to the overlying surface. The misfortune, not to say absurdity, of such a situation, makes uniformity of decision a necessity, and the Supreme Court has wisely held that, whether federal courts in such cases may approve or disapprove of the judgment of the state court, they will nevertheless follow them. A striking illustration of this consistent course on the part of the Supreme Court appears when we remember that, in 1819, Chief Justice

Marshall rendered the opinion in Baptist Association v. Hart, 4 Wheat. 1, 4 L. Ed. 499, a Virginia case, wherein he held a devise to this religious body void, both as a conveyance to a voluntary association and as a charity, ruling that courts of equity had no power to administer such charities. This doctrine was reaffirmed in Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813, another Virginia case, in 1879, although in Russell v. Allen, 107 U. S. 163, Mr. Justice Gray, at page 167, 2 Sup. Ct. 327, 27 L. Ed. 397, says the original case was decided upon an imperfect survey of the early English authorities, and upon the theory that the English law of charitable uses, which, it was admitted, would sustain the bequest, had its origin in the statute of Elizabeth which had been repealed in Virginia. That theory has since, upon a more thorough examination of the precedents, been clearly shown to be erroneous. Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. Ed. 205; Perin v. Cary, 24 How. 465, 16 L. Ed. 701; Ould v. Washington Hospital, 95 U. S. 303, 24 L. Ed. 450. And the only cases in which this court has followed the decision in Baptist Association v. Hart have, like it, arisen in the state of Virginia, by the decisions of whose highest court charities, except in certain cases specified by statute, are not upheld to any greater extent than other trusts. Wheeler v. Smith, 9 How. 55, 13 L. Ed. 44; Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813.

The demurrer to this declaration must therefore be sustained, as presenting in law no cause of action.

THE C. VAN COTT.

(District Court, S. D. New York. February 19, 1907.)

1. TOWAGE—LEAVING TOW AT END OF PIER IN EAST RIVER—LIABILITY OF TUG FOR INJURY OF TOW IN COLLISION.

A tug was chartered to tow a canal boat to a certain pier in East river, where she was to be shortly picked up by another tow and taken to her place of loading. On reaching the pier she was placed at the end of the same outside of three other boats also waiting for the same tow, where she remained in violation of the state statute until she was injured in a collision with another vessel. The evidence tended to show that the position was a convenient one from which to be picked up by the other tow, and that the master made no objection to the place, and the master of the tug testified that if objection had been made he would have placed her elsewhere. *Held*, that the tug was not in fault and could not be charged with liability for the damages resulting from the collision.

In Admiralty.

James J. Macklin and La Roy S. Gove, for libellant.
Alexander & Ash, for claimant.

ADAMS, District Judge. This action was brought by Thomas A Quigley, the owner of the canal boat William S. Deyo, to recover half of the damages sustained in consequence of a collision between the Deyo and a boat in tow of the steamtug Chauncey M. Depew on the 15th of May, 1903. In the first instance all of the damages were sought to be recovered from the Depew and this court allowed a full

recovery. The Chauncey M. Depew (D. C.) 130 Fed. 59. On appeal, the recovery was reduced to one half on account of the Deyo lying at the end of the pier in contravention of the Laws of New York prohibiting vessels from so lying, 139 Fed. 236, 71 C. C. A. 362. The Van Cott towed the Deyo to the pier where she was injured and left her there.

The principal allegations of the libel are:

"Third: That on or about the 15th day of May, 1903, the said Propeller C. Van Cott for a valuable consideration took the said Canal boat William S. Deyo in charge to be towed to a place of safety to wait for the towing tug of the Port Reading tow; that the said Propeller C. Van Cott took the said canal boat in tow on the afternoon of that day and illegally and unlawfully left her at the end of the pier at 91st Street East River outside of three other boats which were lying at the said pier contrary to the provisions of the Statutes of the State of New York; that said canal boat was permitted to lie at the end of said pier till the evening of said day when the said canal boat was struck and seriously injured by a barge in tow of the Steamtug Chauncey M. Depew.

Fourth: That by reason of being left to lie at the end of said pier illegally and unlawfully by the said Propeller C. Van Cott the libellant was able to recover only one-half of his damages as aforesaid against the said Steamtug Chauncey M. Depew and the same was so decided by the United States Circuit Court of Appeals in an action by the libellant against the said Steamtug Chauncey M. Depew to recover the damages aforesaid."

The principal allegations in the answer are:

"Third: Claimant, upon information and belief, answering the third article of said libel admits that on the 15th day of May, 1903, the steamtug 'C. Van Cott' left the canal boat 'William S. Deyo' at the end of the pier at the foot of 91st Street, East River, outside of three other canal boats. That the master of said canal boat carelessly and negligently permitted her to remain there during the succeeding night until she was struck by a boat in tow of the tug 'Chauncey M. Depew'; and denies each and every other allegation contained in said article.

Seventh: On the afternoon of the 15th day of May, 1903, the steamtug 'C. Van Cott' was hired by the libellant to tow the canal boat 'William S. Deyo' from Astoria to the end of the pier at foot of Ninety-first Street, East River and leave her there for the Port Reading tow. Said canal boat at said time was light and was bound for a loading berth in the State of New Jersey. The northerly side of said pier is occupied by an ice company and vessels are not permitted to land there. On the southerly side the water is shallow, so it is not safe for tugs to enter the slip on that side of the dock. It is usual and customary for vessels bound for the Port Reading tow to be left temporarily at the end of the wharf, so that they can be readily taken in tow and brought to their destination by the tugs of said towing company. The Van Cott reached said place with said canal boat at about 6 P. M. The tide at the time was low water ebb and the weather clear. On her arrival she found three vessels were made fast abreast of each other at the outer end of the pier also waiting for the Port Reading tow, and the steamtug Van Cott, at the request of the master of said canal boat, made the Deyo fast outside of said vessels, and left her there in safety. It was the expectation at the time that she would be shortly picked up by the said Port Reading tow and taken thence to her loading berth. Said tug performed her said services carefully and properly in accordance with its contract with the master of said canal boat, and her bill for services was approved and paid.

Eighth: The damages complained of in the libel were not caused by or through any fault or act of negligence of said steamtug, but were caused by the fault and negligence of said canal boat in remaining during the night in her berth and in not hauling alongside of the southerly side of the pier which she could readily have done."

Considerable evidence has been adduced in the matter and it tends to support the respective claims. There is more than the usual conflict.

The only writings which would afford any aid in the solution were a towing bill and a book of the charterer of the Deyo. The bill, which was signed by the master of the Deyo, purported to show a charge due the Van Cott for towing the Deyo from Astoria to 96th Street, but the "6" showed indications of having been altered from some other figure and the bill taken altogether is not of much use. The entries in the book of the charterer were so much mixed up, without any adequate explanation, that they are of the same character and entitled to little credence. The master of the Deyo testified that he engaged the Van Cott in Astoria to tow him to 96th Street but was taken to 91st Street and that he objected to having his boat left on the outside of the other boats at 91st Street, nevertheless the Van Cott did so leave her. It does not appear that the master of the Deyo interposed any objection to the place.

The witnesses on behalf of the Van Cott were principally her master and deck hand, who were at the time of the trial in other employ. They said in substance that the Deyo was taken in tow at Astoria and left at the end of the pier pursuant to instructions received from the tug's office; they found three other boats waiting for the same tow at the end and placed the Deyo outside of them. The man in charge of the office said that the order to tow came there from the charterer by telephone to take the Deyo to the foot of 91st Street. The tug's witnesses said that they left her where they did without objection and it was a proper and convenient place for the boat to be picked up by the Port Reading tow, which the boat desired, but they would have placed her elsewhere if the master had asked.

The case has been warmly contested throughout. The burden of proof was of course upon the libellant and it has not sustained it. On the contrary, the testimony shows that the tug was not in fault in any respect.

The libel will be dismissed.

WEST PUB. CO. v. EDWARD THOMPSON CO.

(Circuit Court, E. D. New York. April 9, 1907.)

1. EQUITY — TAKING PROOFS — DEPOSITIONS — SUPPRESSION — ADMISSIBILITY IN PART.

A motion to suppress depositions taken in rebuttal, on the ground that the testimony therein is also in chief, must be overruled if any part of such testimony is proper in rebuttal and if the rebuttal testimony cannot be separated from that which is not rebuttal.

2. SAME — EVIDENCE IN CHIEF TAKEN IN REBUTTAL.

Where depositions taken in rebuttal, in a suit in equity in a federal court, contain testimony properly in rebuttal, and also additional evidence in support of the main case, the defendant is entitled, on a proper showing to an extension of time, to take testimony to meet such new evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 734.]

On Motion to Strike Out Depositions.

William B. Hale (Edmund Wetmore, of counsel), for complainant.

Walter Large (John L. Hill and Charles Porterfield, of counsel), for defendant.

CHATFIELD, District Judge. In this action in equity the complainant's time for the taking of testimony has expired, as has also that of the defendant; the situation being set forth in an opinion filed herein on a prior motion (151 Fed. 138), on the 23d day of February, 1907. In rebuttal, the complainant has offered certain depositions, consisting of testimony and printed volumes, or excerpts from printed volumes, arranged in parallel columns. These depositions in considerable number, and many pages in length, contain the testimony of certain witnesses, some of whom were not available at the time of the taking of testimony by the complainant, and some perhaps available, but whose testimony would have been purely negative until the defendant's case was in. Questions asked by the defendant in its case furnished a ground for the calling of these witnesses in rebuttal, and the depositions to which objection is now made were taken as a part of that rebuttal. The defendant now moves to strike out the depositions as a whole, or, in the alternative, if any part of the depositions be allowed to stand as rebuttal, that the defendant have time to produce evidence in its own behalf to answer such portions of the depositions objected to as may properly be considered not only rebuttal, but examination in chief.

In First Nat. Bank v. Rush, 85 Fed. 539, 29 C. C. A. 333, the Circuit Court of Appeals said:

"General objections to a deposition must be overruled, if any part of the deposition appears to be admissible in evidence, or if the proponent calls attention to any part which is admissible in any view of the case. Such objections raise the issues whether or not the proposed evidence is admissible under any circumstances or for any purpose, but they raise no other issue. If a court overrules them, its ruling must be sustained, unless it clearly appears

that none of the evidence admitted could be lawfully received under the pleading and evidence in the case. If it sustains such objections, its ruling must be reversed, if any part of the evidence rejected was admissible upon any issue before the court."

Also, Bamford v. Lehigh Zinc and Iron Co. (C. C.) 33 Fed. 677; American Exp. Co. et al. v. Lankford, 93 Fed. 380, 35 C. C. A. 353.

Numerous authorities show the scope of rebuttal testimony, from which cases a few quotations are as follows:

"Rebutting evidence is that which is given by a party in a cause to explain, repel, contradict, or disprove the facts given in evidence by the other side. Directness in the technical sense is not essential to give the evidence that character, nor is it necessary that the contradiction should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testimony offered should have a tendency to explain, repel, counteract, or disprove the opposite statement, in order to render it admissible." United States v. Holmes, 1 Cliff. (U. S.) 98, 26 Fed. Cas. No. 15,382.

"Rebutting evidence is that which repels or counteracts the effect of evidence which has preceded it. Evidence which shows that the evidence of the opposite party was not entitled to the force and effect which the law imputes to it prima facie must in its strictest sense be rebutting." Davis v. Hamblin, 51 Md. 525, 529.

"Rebutting testimony is addressed to evidence produced by the opposite party, and not to his pleading." Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, 767.

"The rule is that evidence in reply must bear directly or indirectly upon the subject matter of defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it." United States v. Gardiner, Fed. Cas. No. 15,186a.

In Chadbourne v. Franklin, 5 Gray (Mass.) 312, Chief Justice Shaw held that it was no objection to testimony offered by plaintiff in rebuttal, which tends to contradict the defendant's witnesses in a material point that it also tends to corroborate the case made by the plaintiff's evidence in chief.

The defendant, while not disagreeing with the complainant as to what is testimony in rebuttal, takes the position that the depositions objected to are in reality the testimony of witnesses newly discovered, afterthoughts, and portions of the complainant's case which were made desirable by the testimony produced on behalf of the defendant. The court is of necessity compelled to pass upon the question, and not leave the parties to objections upon the final hearing upon any testimony which either side may see fit to produce before the special examiner. The time for taking testimony having totally elapsed, unless some order is made, the case must be heard upon the record as it stands at present. To strike out the depositions without deciding whether any of the questions and answers are proper rebuttal, would result in making these depositions a part of the record on appeal, while the defendant would be entirely prevented from the further taking of testimony. If any of the testimony were properly rebuttal, the Circuit Court of Appeals would then have the complainant's entire record, but would be compelled to send the case back for further hearing, or leave the defendant without opportunity to answer new evidence of the complainant in the particular depositions. On the other hand, to deny the motion to strike

out the depositions necessitates considering whether the defendant should have an opportunity to put in further evidence as a part of its defense. From such examination of the depositions as may hastily be made, it would seem that a portion of each deposition is within the limits of rebuttal testimony, and, if this situation arose in the trial of a case with a jury, a portion of each deposition would be allowed in rebuttal. But each deposition also contains matter which, while meeting the requirements of rebuttal testimony, is additional evidence for the complainant in support of its case, and it is impossible on this motion to go through and strike out, question by question and clause by clause, the testimony which is not strictly rebuttal. The only other course seems to be to give the defendant a chance to take such testimony as may be required by the present condition of the case, with the depositions objected to in evidence.

The defendant, however, has not, in making the alternative motion, indicated what testimony it wishes to introduce, nor how much time it will require. Again, referring to the situation upon a trial before a jury, if the defendant should wish to call witnesses after testimony has been given in rebuttal, the court would certainly require the defendant to say who the witnesses were, and to indicate what it was desired to prove, and would rule accordingly. The defendant will therefore be given time to take the testimony it desires, if it can satisfy the court that it has any witnesses who can give testimony that is competent and material to the present condition of the issues; but it must, either by affidavit or by statement upon a further hearing, indicate who the witnesses will be, what their testimony in a general way will prove, and how much time will be needed in its opinion for the purpose.

A further hearing will be had at 4 o'clock upon the afternoon of April 12th.

MEMORANDUM DECISIONS.

THE ANN J. TRAINER. THE BAY PORT. (Circuit Court of Appeals, Fourth Circuit. April 9, 1907.) No. 692. Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. Edward R. Baird, Jr., for appellant. Floyd Hughes and Stephen R. Jones (Carver & Blodgett, on the brief), for appellee. Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. The opinion of the trial court is reported in 144 Fed. 896, 899. After careful study of the record we are of opinion that the trial court decided this case properly. The opinion below accords so entirely with our views that it is hereby adopted as the opinion of this court. Affirmed.

DILLINGHAM v. BAKLEY et ux. (Circuit Court of Appeals, Fourth Circuit. May 7, 1907.) No. 701. Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. L. L. Lewis, U. S. Atty. (Ro. H. Talley, Asst. U. S. Atty., on the brief), for appellant. Mary Philbrook, for appellees. Before PRITCHARD, Circuit Judge, and McDOWELL, District Judge.

PER CURIAM. We have carefully considered the questions involved in this case, and we find no error in the rulings of the learned judge who tried the case below. Therefore we affirm the judgment of the court below, fully concurring in the opinion, which is to be found in 148 Fed. 56.

HOPKINS et al. v. HEBARD. (Circuit Court of Appeals, Sixth Circuit. May 17, 1907.) No. 1,651. Petition for Leave to File Bill of Review. C. B. Matthews and E. P. McQueen, for petitioners. T. E. H. McCroskey, for respondent. Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This is an application for leave to apply to the Circuit Court for the Eastern District of Tennessee for permission to file in that court a bill to review a final decree of that court, which, upon appeal, was affirmed by this court, in a cause styled David W. Belding et al. v. Charles Hebard, 103 Fed. 532, 43 C. C. A. 296. Without deciding any question which may be involved in the application for leave to file such a bill, this court, for reasons satisfactory, now consent that the petitioners may apply directly to said Circuit Court, which court will grant or refuse permission as it may be advised. Board of Councilmen of City of Frankfort v. Deposit Bank, 124 Fed. 18, 59 C. C. A. 538.

KEAN v. DICKINSON. (Circuit Court of Appeals, Fourth Circuit. April 9, 1907.) No. 699. Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. Legh R. Page (W. J. Leake, on the brief), for appellant. G. A. Hanson, for appellee. Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. The opinion of the trial court (In re Bolling, [D. C.] 147 Fed. 786) is entirely in consonance with our views, and it is hereby adopted as the opinion of this court. Affirmed.

In re NORTHERN S. S. CO. (Circuit Court of Appeals, Second Circuit. April 8, 1907.) On Petition for a Writ of Mandamus. See 140 Fed. 263. John C. Shaw and Herbert K. Oakes, for petitioner. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The decree below awarded interest upon the amount of damages "until the same shall be paid." As modified by this court, the award of interest is undisturbed, except as to the item of demurrage. The court below has correctly interpreted the mandate. The application of the petition is denied.

TOY GAUP v. UNITED STATES. LOY TOO v. SAME. (Circuit Court of Appeals, Second Circuit. April 12, 1907.) Nos. 292, 293. Appeals from the District Court of the United States for the Northern District of New York. R. M. Moore, for appellant. H. E. Owens, for the United States. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Orders affirmed. (147 Fed. 750).

WEEMS STEAMBOAT CO. OF BALTIMORE CITY v. PEOPLE'S STEAMBOAT CO. et al. (Circuit Court of Appeals, Fourth Circuit. May 7, 1907.) No. 662. Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond. St. George R. Fitzhugh and George W. Williams, for appellant. William D. Carter, for appellees. Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PER CURIAM. A careful examination of the record impels us to an affirmance of the decree appealed from. The opinion of the court below, reported in 141 Fed. 454, has our approval.

COUCH PATENTS CO. v. NEW YORK WOVEN WIRE MATTRESS CO. (Circuit Court, S. D. New York. May 23, 1907.) Action in equity to restrain alleged infringement of claims 1 to 8, inclusive, and claim 12, of United States letters patent No. 712,718, to Adrian de Piniec-Mallet, dated November 4, 1902, for extensible bedstead or couch. Charles Neave and Linzee Blagden, for complainant. Roberts & Mitchell and Charles C. Gill (Odin Roberts, of counsel), for defendant.

RAY, District Judge. On the whole, and in view of the prior art, I am satisfied of the validity of the claims of the patent in suit, and that defendant infringes. Anticipation is not established. There will be a decree for complainant, with costs.

LOONEN v. DEITSCH et al. (Circuit Court, S. D. New York. April 10, 1907.) In Equity. On demurrer to bill. Goepel & Goepel, for complainant. Joseph H. Levy, for defendants.

HAZEL, District Judge. The demurrer to the bill on the grounds that it does not affirmatively allege that the complainant complied with the requirements of Act Feb. 20, 1905, c. 592, 33 Stat. 724 [U. S. Comp. St. Supp. 1905, p. 667], relating to registration of trade-marks, and that it does not allege any date of adoption and use of the trade-mark in suit in the United States, is overruled, with costs. Defendants may answer within 20 days.

END OF CASES IN VOL. 152.